No. 2011-2013

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 10-96138

LARRY HEWITT,
Plaintiff-Appellee,

v.

THE L.E. MYERS COMPANY.,
Defendant-Appellant.

MERIT BRIEF OF APPELLANT THE L.E. MYERS COMPANY

Paul W. Flowers (0046625)
(COUNSEL OF RECORD)
PAUL W. FLOWERS CO., L.P.A.
50 Public Square, Suite 3500
Cleveland, Ohio 44113
Tel: 216.344.9393
Fax: 216.344.9395
E-mail: pwf@pwfco.com

Attorney for Plaintiff-Appellee
Larry Hewitt

Benjamin C. Sassé (0072856)
(COUNSEL OF RECORD)
Mark F. McCarthy (0013139)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: mark.mccarthy@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Defendant-Appellant
The L.E. Myers Co.

Frank L. Gallucci, III (0072680)
Michael D. Shroge (0072667)
David E. Gray, II (0071114)
PLEVIN & GALLUCCI CO., L.P.A.
55 Public Square, Suite 2222
Cleveland, OH 44113
Tel: 216.861.0804
Fax: 216.861.5322
E-mail: fgallucci@pglawyer.com
mshroge@pglawyer.com
dgray@pglawyer.com

Additional Counsel for Plaintiff-Appellee Larry Hewitt

Preston J. Garvin (0018641)
(COUNSEL OF RECORD)
Michael Hickey (0021410)
GARVIN & HICKEY, LLC
181 E. Livingston Ave.
Columbus, OH 43215
Tel: 614.225.9000
Fax: 614.225.9080
E-mail: wclaw@garvin-hickey.com

Attorneys for Amicus Curiae Ohio Chamber of Commerce

Denise M. Hasbrook (0004798)
(COUNSEL OF RECORD)
Emily Ciecka Wilcheck (0077895)
One SeaGate, Suite 1700
Toledo, OH 43604
Tel: 419.242.7985
Fax 419.242.0316
E-mail: dhasbrook@ralaw.com
ewilcheck@ralaw.com

Attorneys for Amicus Curiae FirstEnergy Corp.

Elizabeth A. Crosby (0041433)
(COUNSEL OF RECORD)
LICATA & TOEREK
6480 Rockside Woods Blvd., South
Suite 180
Independence, OH 44131
Tel: 216.573.6000
Fax: 216.573.6333
E-mail: eac@completecounsel.com

Attorney for Amicus Curiae Cleveland Partnership, Council of Smaller Enterprises (COSE)

Robert A. Minor (0018371)
(COUNSEL OF RECORD)
VORYS, SATER, SEYMOUR
AND PEASE LLP
42 E. Gay St.
P.O. Box 1008
Columbus, OH 43216-1008
Tel: 614.464.6410
Fax: 614.719.4874
E-mail: raminor@vorys.com

Attorney for Amicus Curiae Ohio Self-Insurers Association

Thomas R. Sant (0023057)
(COUNSEL OF RECORD)
BRICKER & ECKLER, LLP
100 S. Third St.
Columbus, OH 43215-4291
Tel: 614.227.2331
Fax: 614.227.2790
E-mail: tsant@bricker.com

Attorney for Amicus Curiae Ohio Chapter of the National Federation of Independent Business

Brian D. Sullivan (0063536)
(COUNSEL OF RECORD)
REMINGER CO., L.P.A.
101 West Prospect Ave., Suite 1400
Cleveland, OH 44115-1093
Tel: 216.687.1311
Fax: 216.687.1841
E-mail: bsullivan@reminger.com

Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys (OACTA)

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Page

Constitutional Provisions

Statutes

Page

Regulations

Legislative Materials

Other Authorities

I. INTRODUCTION

This appeal addresses when an employee who receives meaningful workers' compensation remedies may pursue another bite at the apple by suing his employer for an intentional tort under a theory of presumed intent-to-injure.[1] This Court created a common law workplace intentional tort claim in *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608 (1982), and held in *Jones v. VIP Development Co.*, 15 Ohio St.3d 90 (1984), that the receipt of workers' compensation benefits does not bar an employee from pursuing such a claim. Enacted by the General Assembly to limit this intentional tort liability and resulting double recovery, R.C. 2745.01 contains a deliberate intent standard with a rebuttable presumption of intent to injure that applies when an employer "deliberately removes" "an equipment safety guard" and "injury * * * occurs as a direct result." R.C. 2745.01(C).

In this case, the employee — injured while working on a deenergized power line when he turned in response to a safety warning yelled from the ground and accidentally contacted a live power line with a tie wire held in his hand — did not allege that his employer deliberately intended to harm him. Rather, the employee claimed, and the Eighth District held, that a coworker's alleged statement that the employee "shouldn't need" personal rubber gloves and sleeves which were available on-site "amounted to" the

---

[1] Appellee Larry Hewitt ("Hewitt") received compensation from the Bureau of Workers' Compensation. He also filed an application with the Industrial Commission for an additional payment for an alleged violation of a specific safety requirement ("VSSR"). The parties settled the VSSR filing with a direct payment to Hewitt from the employer outside the state fund.

"deliberate removal" of an "equipment safety guard," triggering a presumption of intent to injure. (App. Op. at 18, Appx. 24.) On that basis, the court below affirmed the Trial Court's denial of Appellant The L.E. Myers Company's ("L.E. Myers") motion for directed verdict and judgment notwithstanding the verdict, upholding the $597,785 verdict in the employee's favor.

The Eighth District's judgment conflicts with the plain text of the statute, its legislative history, the structure of the workers' compensation system created under Section 35, Article II of the Ohio Constitution, the compensation law policies supporting that system, and the holdings of every other Ohio appellate district to address the scope of R.C. 2745.01(C). The holding below rests on a policy judgment that the presumption of intent should be interpreted broadly to apply to every employee using any "equipment" that may shield against "exposure" to any workplace "danger." (App. Op. at 10, 17, Appx. 16, 23.) That policy judgment conflicts with a statutory standard focused on the removal of "*an equipment safety guard*," which plainly refers to a safety device on a machine. It also conflicts with the legislative history and structure of Ohio's workers' compensation system, which reveal repeated attempts by the General Assembly to eliminate judicial incursions on workers' compensation exclusivity, subject to narrow and limited exceptions. Finally, the panel's policy judgment conflicts with the General Assembly's prerogative to follow sound compensation law policy by adopting a narrow intentional tort liability.

In all events, the broad presumed intent theory adopted by the Eighth District panel is incompatible with the narrow role played by R.C. 2745.01(C) in Ohio's workers'

compensation scheme. The judgment below should be reversed and judgment entered in L.E. Myers' favor as a matter of law.

II. STATEMENT OF THE FACTS

A. Hewitt's Accident.

1. Local Union 71 sends Hewitt to L.E. Myers to work on a project for Firelands Electrical Cooperative.

Sometime in the spring of 2006, The International Brotherhood of Electrical Workers' Local Union 71 (IBEW) assigned Hewitt to work for L.E. Myers, an electrical utility construction contractor, on a project for Firelands Electrical Cooperative that involved replacing old electrical power lines along Route 60 in New London, Ohio with new lines. (Tr. 136-37, 166, Supp. 48-49, 59.) At the time, Hewitt was a "second-step apprentice" — meaning he had completed coursework for the first and second steps in the seven-step American Line Builders Apprenticeship Training (ALBAT) program and "was working in the field." (*Id.* at 91, 166-67, Supp. 22, 59-60.) As part of his union training, he learned to use rubber gloves and sleeves when working near energized power lines. (*Id.* at 168, 188-89, Supp. 61, 73-74.)

On June 14, 2006, Hewitt and several other union workers assigned by IBEW to L.E. Myers reported to the Route 60 worksite. (Tr. 91, 137, 139, 221, Supp. 22, 49, 51, 85.) Those workers included Foreman Steve Dowdy, Foreman Jeff Erman, Journeyman Lineman Dennis Law ("Law"), and Journeyman Lineman Julian Cromity ("Cromity"). (*Id.* at 54, 64, 90-94, 221-23, Supp. 13, 15, 21-25, 85-87.) Some had never worked together before IBEW assigned them to L.E. Myers; each worker received rubber gloves

and sleeves from L.E. Myers for their personal use. (*Id.* at 92, 101-102, 114-15, 221, Supp. 23, 29-30, 38-39, 85.)

2. The June 14, 2006 Daily Job Briefing.

Before beginning work, workers gather for a 15-20 minute daily job briefing. (Tr. 110, 227, Supp. 34, 91.) The purpose of this briefing is to discuss the job for that particular day, and workers who attend sign a "Daily Job Briefing Log." (Def.'s Exh. J, Supp. 137-38.) While the details of the June 14, 2006 briefing remain unclear, what is clear is that: a) L.E. Myers' corporate policy required all linemen to wear rubber gloves and sleeves even while working on a deenergized line, if that line was not grounded; and b) the rubber gloves and sleeves provided by L.E. Myers to Hewitt were available that day, if Hewitt chose to use them.

On June 14, the job was to "tie-in" the new power line, which was still deenergized. (Tr. at 96, 118-19, 137, 185, 225, Supp. 27, 42-43, 49, 70, 89.) The 6/14/06 Daily Job Briefing Log shows that the use of rubber gloves and sleeves was required that day: the box for "rubber gloves and sleeves" in "Safety-Hazards Assessment" is checked, and the "Safety-Notes" on the back of the log expressly reference "gloves and sleeves" under "Personal Protective Equipment." (Def.'s Exh. J, Supp. 137-38; Tr. 112, 179, Supp. 36, 67.) This requirement is consistent with L.E. Myers' policy, which requires the use of rubber gloves and sleeves when, as here, the deenergized line is not "grounded." (Tr. 66-67, Supp. 17-18.) As L.E. Myers District Superintendent Jack Ehle ("Superintendent Ehle") explained, the reason for this policy is to protect against the unlikely possibility that deenergized lines "could become energized" — either as a result

of "static electricity," or an auto accident where "somebody hits a pole [and] the lines could come in contact with one another." (*Id.*)

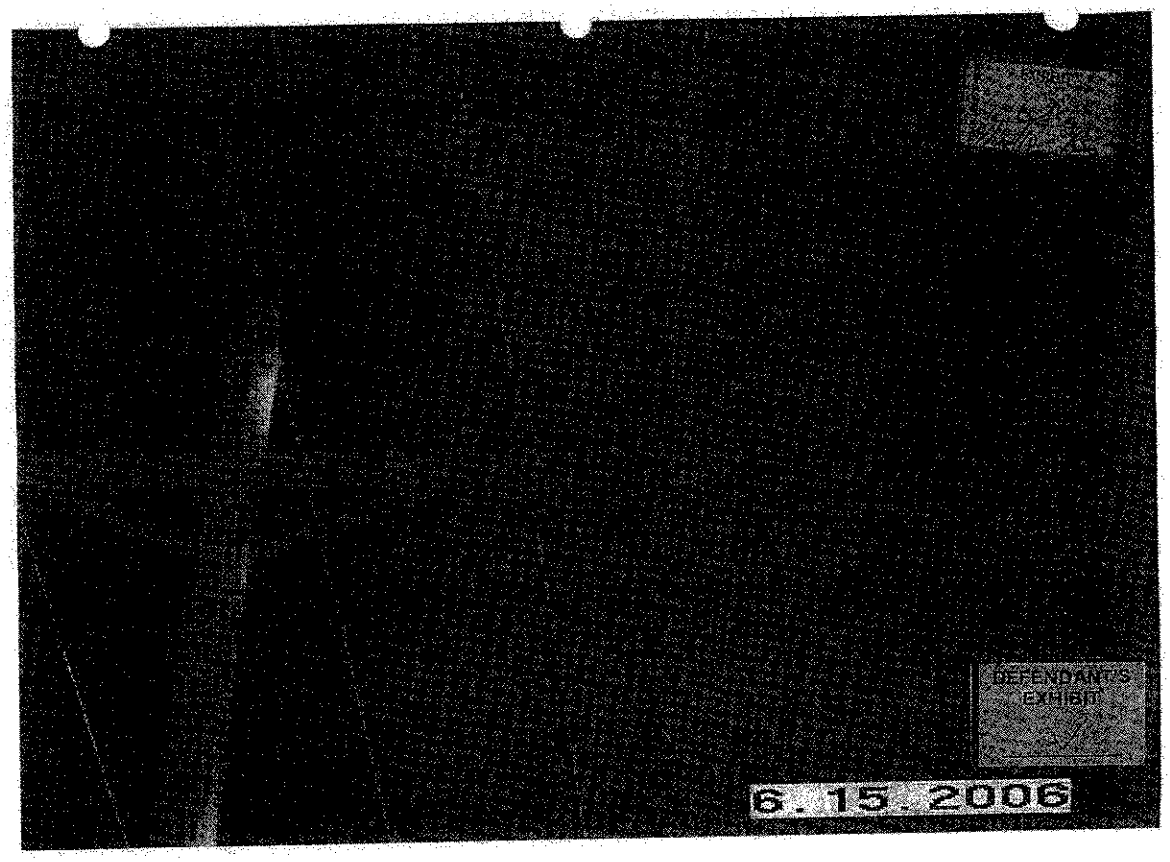
Journeyman Lineman Law confirmed the accuracy of the 6/14/06 Daily Job Briefing Log, testifying that Foreman Dowdy instructed the crew to wear rubber gloves and sleeves. (*Id.* at 112, Supp. 36.) Yet even though he never signed the 6/14/06 Daily Job Briefing Log, Journeyman Lineman Cromity claimed that, during the briefing, Foreman Dowdy and the other workers discussed that: 1) the apprentices (including Hewitt) would gain "good experience" by tying-in the deenergized line; and 2) the use of rubber gloves and sleeves was unnecessary, since the line was deenergized. (*Id.* at 229, 242, 245-46, Supp. 93, 99, 102-03.) Cromity supported this supposed decision not to require the use of rubber gloves and sleeves by emphasizing that "[t]here was no reason for [Hewitt] to get near [the energized] lines" (*id.* at 248, Supp. 105), which were located on a "hot arm" more than 40 inches away from the deenergized line (*id.* at 186-87, Supp. 71-72). According to Cromity, under the circumstances, his personal "preference would have been not to wear my gloves and sleeves to tie" in the deenergized line. (*Id.* at 250, Supp. 107.)

Hewitt, however, has no recollection of being told by either Dowdy or Cromity that he did not need his rubber gloves and sleeves on June 14, 2006. (Tr. 180, Supp. 68.) Indeed, although Hewitt signed the 6/14/06 Daily Job Briefing Log (Def.'s Exh. J, Supp. 137-38), he claims he actually missed the briefing. (*Id.* at 172, 178, Supp. 65, 66.) According to Hewitt, he was told he "shouldn't need" his rubber gloves and sleeves by Law in a separate conversation — an allegation Law disputes. (*Id.* at 180-81, 185, Supp.

68-69, 70.) Even if that conversation occurred, however, there was no evidence that Law prohibited Hewitt from wearing his rubber gloves and sleeves, and no evidence that anyone took Hewitt's rubber gloves and sleeves from him. To the contrary, the record is clear that rubber gloves and sleeves were available that day and Hewitt could have used them. (*Id.* at 170, 251, Supp. 63, 108.) Indeed, other linemen working on adjacent poles alongside Hewitt elected to wear their rubber gloves and sleeves that day. (Erman Dep. Tr. 23, Supp. 135.)

3. Hewitt starts to tie in a deenergized line.

Because the crew was short a worker, Hewitt went up alone in an insulated bucket to tie in the deenergized line. (Tr. 97, Supp. 28.) He elected not to wear his rubber gloves and sleeves. (*Id.* 137, 144-48, Supp. 49, 52-56.) The following picture illustrates the location of the deenergized line (Field Phase #1) and the two lines on the "hot arm" (including Field Phase #2) that day:



(Def.'s Exh. V, Supp. 139-40; Tr. 116, 118-19, 123, 185-87, 189, Supp. 40, 42-43, 47, 70-72, 74.)

Law supervised Hewitt's work from the ground while directing traffic. (Tr. 116, Supp. 40.) Hewitt approached the deenergized line from the lower left-hand corner of the picture, facing the energized lines on the "hot" arm. (*Id.* at 193-94, Supp. 78-79.) His first task was to "drop" the neutral line (marked in the lower left-hand corner of the picture above) to clear a path for the bucket. (*Id.* at 145-46, Supp. 53-54.) After dropping the neutral, Hewitt moved the bucket under the deenergized line (Field Phase #1), used the bucket to lift that line out of a "roller" (which does not appear in the

picture), and placed the line in the "saddle" (circled in the picture) so it could be "tied-in." (*Id.* at 147-50, 188-90, Supp. 55-58, 73-75.) From his position, Hewitt could not touch the energized lines on the "hot" arm with his hands:

> Q. All right. Do you know — your [right] hand didn't hit those field phases that were on the hot arm, did it?
>
> A. No.
>
> Q. No. And your left hand didn't hit the field phases?
>
> A. Turned, my left hand couldn't have hit it.
>
> Q. So neither your right hand nor your left hand could have hit these field phases out here, right?
>
> A. Right.

(*Id.* at 198, Supp. 83.)

4. Hewitt Accidentally Injures Himself When He Reacts to a Safety Warning.

As Superintendent Ehle approached the worksite in his truck, Law noticed Hewitt was not wearing his rubber gloves and sleeves. (Tr. 104-05, 120, 239, Supp. 32-33, 44, 96.) He yelled to Hewitt from the ground in an attempt to warn Hewitt to put them on. (*Id.* at 63, 104-05, 120-21, 237-39, Supp. 14, 32-33, 44-45, 94-96.) The warning was intended to keep Hewitt safe. (*Id.* at 121, 237-39, Supp. 45, 94-96.) Unfortunately, when Hewitt turned in the direction of Law's warning, the tie wire he held in his right hand contacted an energized line (Field Phase #2) on the "hot" arm. (*Id.* at 120, 123, 196-99, Supp. 44, 47, 81-84.) The contact sent an electric charge through Hewitt. (*Id.* at 237-39, Supp. 94-96.)

The parties agree this contact and the resulting injuries were an accident. (Tr. 465, Supp. 131.) Superintendent Ehle investigated the accident, terminating the employment of both Foremen — Dowdy and Erman — as well as Law. (*Id.* at 50, 86, Supp. 9, 20.) There was no evidence that an accident of this sort had ever happened before at L.E. Myers.

B. Hewitt Receives Workers' Compensation Benefits and a VSSR Settlement.

After accepting workers' compensation benefits, and filing a VSSR claim, Hewitt sued L.E. Myers for an employment intentional tort in the Cuyahoga County Court of Common Pleas. He voluntarily dismissed that action without prejudice, settled the VSSR claim, and refiled the instant action on December 2, 2009, which was reassigned to Judge Nancy Margaret Russo.

C. The Proceedings Below.

1. Hewitt claims L.E. Myers "deliberately removed" an "equipment safety guard."

Hewitt's intentional tort claim never alleged that L.E. Myers acted with a specific intent to harm him. Rather, the crux of Hewitt's claim was his assertion that Law told Hewitt he "shouldn't need" rubber gloves and sleeves, items Hewitt claimed were "important safety guards which created a barrier between the worker and the electrical current." (R. 21, 1st Am. Compl., at ¶ 5.) L.E. Myers attempted on multiple occasions to

challenge the sufficiency of these allegations, but the Trial Court rebuffed each challenge — typically within days of the filing of an opposition brief.[2]

2. The Trial Court sends that liability theory to the jury based on an error in Hewitt's Trial Brief.

The case was assigned to Visiting Judge Pokorny for trial. During trial, no witness testified that L.E. Myers acted with a specific intent to harm Hewitt. Rather, Hewitt based his case on the alleged removal of three "safety guards," which he also described as "elements" of safety, including: rubber gloves and sleeves; being set up in a bucket by himself; and not having proper supervision. (Tr. 21, 383, Supp. 8, 127.) Accordingly, at the close of Hewitt's evidence, L.E. Myers moved for directed verdict — asserting that L.E. Myers was entitled to judgment as a matter of law because Hewitt had not introduced evidence sufficient to show that L.E. Myers specifically intended to harm him, or that "an equipment safety guard" had been "deliberately removed." (*Id.* at 353-70, Supp. 109-26.)

The Trial Court granted L.E. Myers' motion to the extent that Hewitt claimed L.E. Myers acted with a specific intent to harm him, but denied the balance of the motion on Hewitt's presumed intent theory. (Tr. 394-96, Supp. 128-29.) Hewitt's Trial Brief

---

[2] L.E. Myers' motion for judgment on the pleadings (R. 18) was denied (R. 20, 4/14/10 JE) just two days after the filing of Hewitt's opposition (R. 19). Its subsequent motion to dismiss the first amended complaint or, in the alternative, for leave to file a motion for summary judgment (R. 22) was denied (R. 24, 5/21/10 JE) the day after the filing of Hewitt's opposition (R. 23). L.E. Myers' subsequent request for leave to file a summary judgment motion was denied on the grounds of "insufficient time * * * before trial." (R. 31, 7/12/10 JE.) Finally, although the Trial Court reconsidered that denial (R. 33, 7/15/10 JE), it later struck L.E. Myers' summary judgment motion *sua sponte* for perceived violations of unspecified "discovery orders." (R. 42, 8/3/10 JE.)

erroneously split the phrase "an equipment safety guard" in two — "equipment," and "safety guard." (*See* R. 59, Pl.'s Trial Br. at 2.) The Trial Court relied on this error and found sufficient evidence to send Hewitt's claim to the jury solely on the issue of whether L.E. Myers "deliberately removed" either "equipment" or a "safety guard":

> Then the issue becomes does this constitute deliberate removal of an equipment safety guard. The specific way that the statute under 2745.01(C) is worded * * * *quote, comma deliberate removal by an employer of equipment, comma, safety guard,* and then it goes on to discuss other things that aren't relevant to our issue here. * * *
>
> I'm not going to say as the Judge in this case that the statute doesn't mean that. I'm going to — so therefore, under subsection C, I'm overruling the motion for a directed verdict. * * * [S]o with their theory of recovery is limited to subsection C.

(Tr. 395, Supp. 129, emphasis added.) The jury returned a verdict for Hewitt in the amount of $597,785, and L.E. Myers' motion for judgment notwithstanding the verdict was overruled. (R. 111.)

3. The Eighth District panel affirms based on a policy determination that the presumed intent theory must be available in every profession.

L.E. Myers timely appealed the denial of its motions for directed verdict and judgment notwithstanding the verdict and the Eighth District Court of Appeals affirmed, holding that the presumption of intent in R.C. 2745.01(C) applies to Hewitt's claim. The panel concluded that, "[b]y virtue of Hewitt's profession," his rubber gloves and sleeves were "the equipment safety guards he has to protect himself while working on energized

lines."[3] (App. Op. at 17, Appx. 23.) According to the panel, a broad construction of "an equipment safety guard" was necessary — otherwise employees who did not, by the "nature of their profession," work with a machine or press "would be barred from recovery under R.C. 2745.01(C)." (*Id.* at 10, Appx. 16.) The panel acknowledged that an ordinary meaning of "guard" is "a device for protecting a machine part or the operator of a machine" (*id.* at 14, Appx. 20), but declined to apply that meaning: the panel rejected the Sixth Appellate District's holding that "an equipment safety guard" includes only "those devices that prevent the worker from physical contact with the 'danger zone' of the machine and its operation." (*Id.* at 15, Appx. 21.) L.E. Myers' motion to certify a conflict with the Sixth District's opinion in *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, was denied. This appeal followed.

III. ARGUMENT

Proposition of Law No. 1

An "equipment safety guard" under R.C. 2745.01(C) includes only those devices on a machine that shield an employee from injury by guarding the point of operation of that machine.

In departing from *Fickle*'s well-reasoned conclusion that "equipment safety guards" include only devices that prevent an employee from contacting the point of operation of a machine (2011-Ohio-2960, at ¶ 50), the Eighth District proposed a test that appears to make any item shielding an employee from "exposure" to some "danger" an "equipment safety guard." (App. Op. at 17, Appx. 23.) This test is not rooted in, and

[3] The record is clear that Hewitt was not working on energized lines and could not even have touched the energized lines with his hands. (Tr. 198, 248, Supp. 83, 105.)

cannot be reconciled with, the plain language of R.C. 2745.01(C). Rather, it appears to rest on a policy judgment that a presumed intent theory must be available to employees in every profession. (App. Op. at 10, Appx. 16.)

In resting its conclusion on such a policy judgment, the panel inappropriately substituted its own policy preferences for those of the General Assembly, which has been attempting to enact legislation limiting this Court's common law intentional tort jurisprudence for three decades.[4] This Court should follow *Fickle*'s careful analysis and hold that only safety devices attached to machines are "equipment safety guards." Because there is no evidence of the removal of any such device in this case, the judgment below should be reversed and judgment entered in L.E. Myers' favor as a matter of law.

A. The Plain Text of R.C. 2745.01(C) Establishes that "an Equipment Safety Guard" Is a Safety Device Attached to a Machine.

R.C. 2745.01(C) establishes a rebuttable presumption of intent applicable to certain acts that do not demonstrate a deliberate intent to harm the plaintiff:

---

[4] As this Court previously recognized, *Blankenship* "devised" an exception to the workers' compensation exclusivity mandated by Section 35, Article II of the Ohio Constitution. *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 21. That exception rested on the theory that "[a]n intentional tort * * * is clearly not an 'injury' arising out of the course of employment," 69 Ohio St.2d at fn. 8, which is "[t]he most fictitious theory of all" for creating intentional tort liability. *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 15, fn. 4, quoting 6 Larson, *Larson's Workers' Compensation Law*, Section 103.01, at 103-4 (2007). In response to *Blankenship*, the General Assembly has attempted on multiple occasions to restore workers' compensation exclusivity by passing legislation limiting the liability *Blankenship* created. *See* pp. 18-20, *infra*.

> Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

Thus, absent evidence of a deliberate intent to injure (not present here, Tr. 395-96, Supp. 129-30), or an allegation that the employer misrepresented the toxicity of a chemical in the workplace (which does not exist here), the question becomes whether the employer "deliberately removed" "an equipment safety guard."

With respect to that question, the plain and ordinary meaning of "an equipment safety guard" is a safety device attached to a machine. The use of the indefinite article "an" signals that the entire phrase that follows, "equipment safety guard," is the object of "remove." Because both "equipment" and "safety" modify "guard," the natural starting point to determine the meaning of "equipment safety guard" is the ordinary meaning of "guard." As the court below recognized, "guard" ordinarily means "a protective or safety device; *specif*: *a device for protecting a machine part or the operator of a machine*." App. Op. at 14, Appx. 20, quoting *Fickle*, 2011-Ohio-2960, at ¶ 38 (emphasis added), quoting Merriam-Webster's Collegiate Dictionary, 516 (10th Ed.2000).

Context reveals that R.C. 2745.01(C) uses "guard" in the latter, more specific sense as referring to a device on a machine that protects the operator. Since the statute links "guard" to "equipment," the General Assembly could not have intended to refer to "safety devices" in the abstract: construing "guard" to mean any "safety device" without regard to whether it is part of a machine would impermissibly read "equipment" out of

the statute. *See, e.g., In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, at ¶ 13 ("A statute's wording "'may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.'"). Accordingly, the plain text of R.C. 2745.01(C) compels the conclusion that only the "deliberate removal" of a safety device on a machine triggers the rebuttable presumption of intent to injure.

Fickle, and every other Ohio appellate panel outside the Eighth District to consider the issue, reached this conclusion. In *Fickle*, the Sixth Appellate District held that "'equipment safety guard' would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of *the equipment*." 2011-Ohio-2960, at ¶ 43 (emphasis added). As Judge Singer's concurring opinion in *Fickle* explained, this definition applies only to "those devices that *prevent the worker from physical contact with the 'danger zone' of the machine and its operation.*" *Id.* at ¶ 50 (emphasis added). And the Fifth, Ninth and Twelfth Appellate Districts have adopted the Sixth District's analysis. *See Beary v. Larry Murphy Dump Truck Serv., Inc.*, 5th Dist. No. 2011-CA-00048, 2011-Ohio-4977, at ¶¶ 21-22 (an "equipment safety guard" is "a device designed to shield the operator of the equipment from exposure to or injury by a dangerous aspect of the equipment"), *appeal allowed*, 131 Ohio St.3d 1456 (2012); *Barton v. G.E. Baker Construction*, 9th Dist. No. 10CA009929, 2011-Ohio-5704, at ¶ 11 ("trench box" is not an "equipment safety guard" because "[a] trench is not a piece of equipment and the trench box is not designed to protect the operator of any piece of equipment"), *appeal not accepted*, 131 Ohio St.3d 1511 (2012); *Roberts v. RMB*

Enterprises, Inc., 12th Dist. No. CA2011-03-060, 2011-Ohio-6223, at ¶ 24 ("equipment safety guard" is "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment"), *appeal not accepted*, 131 Ohio St.3d 1499 (2012).

Nevertheless, the Eighth District rejected this interpretation by placing undue weight on the General Assembly's failure to alter the language of R.C. 2745.01(C) to incorporate expressly this Court's prior construction of that same language. (App. Op. at 9-10, Appx. 15-16.) In *Fyffe v. Jeno's, Inc.*, this Court analyzed an identical rebuttable presumption in former R.C. 4121.80(G)(1), and held that "equipment safety guard" means a safety device affixed to a machine. 59 Ohio St.3d 115, 119-20 (1991) (incorporating the "public policy" of R.C. 4121.80(G)(1) and finding evidence that an "employer has deliberately removed *a safety guard from equipment* which employees are required to operate" relevant to the issue of intent) (emphasis added). According to the court below, the General Assembly's failure to specify in R.C. 2745.01(C) that the presumption of intent is limited to safety guards "attached to machinery 'which employees are required to operate'" renders *Fyffe*'s guidance irrelevant. (App. Op. at 10, Appx. 16.) That gets matters precisely backwards.

When the General Assembly reenacts identical language, this Court presumes the legislature did so with full knowledge of this Court's prior interpretation of that language and intended to adopt it. *Cf. Spitzer v. Stillings*, 109 Ohio St. 297 (1924), paragraph four of the syllabus (where statutory language "is construed by a court of last resort having jurisdiction" and remains unaltered in subsequent amendments, "it will be presumed that

the legislature was familiar with such interpretation" and intended to adopt it "unless express provision is made for a different construction"). Thus, far from supplying a reason to *depart* from *Fyffe*, the General Assembly's decision to reenact an identical rebuttable presumption of intent is actually a reason to *follow Fyffe*.

In all events, the term "equipment safety guard" has always meant and can only mean one thing — a safety device on a machine. *Fickle*, 2011-Ohio-2960, at ¶ 50; *Fyffe*, 59 Ohio St.3d at 119-20. Hewitt's rubber gloves and sleeves are personal items that an employee can put on or remove, not a safety device attached to a machine. Because those personal items are not a part of any machine, they are not an "equipment safety guard" under R.C. 2745.01. Therefore, even if those items were "deliberately removed" (and they were not, see pp. 28-31, *infra*), any such removal is, as a matter of law, insufficient to trigger the rebuttable presumption of intent to injure. Accordingly, L.E. Myers is entitled to judgment as a matter of law.

B. Legislative History and the Structure of Ohio's Workers' Compensation System Confirm this Interpretation Is Correct.

The common sense interpretation of "an equipment safety guard" in *Fickle* is bolstered by legislative history and the structure of Ohio's workers' compensation scheme. A limited exception to a specific intent standard, likely adopted to address the removal-of-a-machine-guard scenario that animated this Court's common law jurisprudence, cannot reasonably be read to create an amorphous liability for the alleged removal of any "equipment" shielding from "exposure" to any "danger."

Legislative history confirms that the removal of safety devices attached to machines likely is what the General Assembly had in mind. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, teaches that this Court's construction of R.C. 2745.01 must reflect "the history of employer intentional tort law in Ohio and the dynamic between the General Assembly's attempts to legislate in this area and this Court's decisions reacting to those attempts." 2010-Ohio-1029, at ¶ 27. Here, the development of this Court's common law jurisprudence provides a key insight into the scope of R.C. 2745.01(C).

Two factual scenarios lay at the center of this Court's opinions in *Blankenship* and *Jones*, which created and defined Ohio's common law intentional tort. The first is deliberate misrepresentations by an employer concerning the toxicity of workplace chemicals. *See Blankenship*, 69 Ohio St.2d at 608-09 (plaintiffs alleged that factory workers were exposed to toxic chemicals and the employer deliberately concealed the dangers of that exposure); *Jones*, 15 Ohio St.3d at 91-92, 97-98 (alleging employer was aware employees were exposed to toxic chemicals, but misrepresented that the exposure was not dangerous). The second is the employer's deliberate removal of a safety guard from a machine. *Jones*, 15 Ohio St.3d at 91, 96-97 (intentional tort claim arising out of death of employee following the employer's removal of a metal safety cover from a conveyor by blowtorch). *Accord Fyffe*, 59 Ohio St.3d 115 (Plexiglas safety guard removed from conveyor).

The presumed intent theory for the "deliberate removal" of "an equipment safety guard" first appeared in legislation passed "in the wake of *Blankenship* and *Jones*" that

resembled in certain respects current R.C. 2745.01. *Kaminski*, 2010-Ohio-1027, at ¶ 27. Specifically, Senate Bill 307 included: 1) the same definition of "substantially certain" that now appears in R.C. 2745.01(B); and 2) the same rebuttable presumptions of intent for a) the "deliberate removal" of an "equipment safety guard," and b) the "deliberate misrepresentation" of a "toxic * * * substance." *See* 1986 Am.Sub. S.B. No. 307, Appx. 42-43 (enacting former R.C. 4121.80(G)(1)). Thus, the inclusion of a presumed intent theory, then and now, appears to be part of a compromise that addresses the facts of *Blankenship* and *Jones*, while heightening the intentional tort standard to one of specific intent. *See Stetter*, 2010-Ohio-1029, at ¶ 57 (citing R.C. 2745.01(A) and (B) and stating that the statute allows recovery "for injuries that result from a deliberate intent to injure").

Once it is understood that the presumed intent theory is part of a legislative compromise that addresses the removal of a machine guard in *Jones* while heightening the standard to a specific intent tort, there are powerful reasons not to read R.C. 2745.01(C) as creating a presumption that applies to any "equipment" shielding an employee from "exposure" to some "danger." The General Assembly has repeatedly "reinforced its commitment to the exclusivity-of-remedy rule." *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 111 (1988). Accordingly, each legislative effort to pass an intentional tort statute reflected an attempt to *restrict* that liability. *Id.* at 108 (explaining that "R.C. 4121.80(G)(1) would * * * impos[e] a new, more difficult statutory restriction upon" intentional tort claim); *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 310 (1999) (Cook, J., dissenting) ("By enacting [former] R.C. 2745.01, the

General Assembly sought to statutorily narrow [the] common law definition [of workplace intentional torts] to 'direct intent' torts only."); *Stetter*, 2010-Ohio-1029, at ¶ 28 (current R.C. 2745.01 "significantly limits lawsuits for employer workplace intentional torts"). In light of the General Assembly's repeated attempts to *limit* intentional tort lawsuits, it would be unreasonable to infer from an exception to a specific intent rule that the General Assembly inadvertently *expanded* that liability to encompass the removal of any "equipment" shielding any employee from "exposure" to a "danger."

The structure of Ohio's workers' compensation system and the place of R.C. 2745.01(C) within that system reinforce this point. The Ohio Constitution puts employee compensation and the punishment of employers within the exclusive jurisdiction of the workers' compensation system. That system "'operates as a balance of mutual compromises' between the interests of the employer and the employee whereby employees *relinquish their common law remedy* and accept lower benefits coupled with the greater assurance of recovery and *employers give up their common law defenses and are protected from unlimited liability*." *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, at ¶ 34 (emphasis added), quoting *Bickers v. W&S Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, at ¶ 19. Thus, the constitutional compromise that established VSSR proceedings also, on its face, eliminated all employer civil tort liability. *Kaminski*, 2010-Ohio-1027, at ¶ 19.

The premium that the Ohio Constitution places on workers' compensation exclusivity requires a narrow construction of any exception to that exclusivity. Even in states that do not have a constitutional provision mandating workers' compensation

exclusivity, statutory exceptions to that exclusivity typically are "strictly construed" to avoid "thwart[ing] the basic purposes of the statutory scheme by eroding the exclusivity of both the liability and the recovery provided by workers' compensation." *Van Fossen*, 36 Ohio St.3d at 104. Because the exclusivity-of-remedy rule is a "fundamental pillar[] supporting Section 35, Article II" of the Ohio Constitution that "underscores the importance the Constitution places on avoiding litigation over workplace injuries," strict construction is particularly appropriate under Ohio law. *Stetter*, 2010-Ohio-1029, at ¶ 76.

Indeed, the need for strict construction is even more acute in this case, which addresses an exception-to-the-exception to workers' compensation exclusivity. Since the presumed intent theory functions as an exception to a specific intent rule, a narrow construction is critical to prevent undue erosion of the specific intent standard established by R.C. 2745.01(A) and (B). *E.g., State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923), syllabus ("Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction."). Therefore, even if it were possible to construe "an equipment safety guard" as including any "equipment" that shields against "exposure" to some "danger" (and it is not), legislative history and the limited function of R.C. 2745.01(C) in Ohio's compensation law scheme require a narrow interpretation that limits "an equipment safety guard" to a safety device on a machine.

C. Limiting "An Equipment Safety Guard" to Safety Devices Attached to Machines Furthers Important Compensation Law Policies.

In rejecting *Fickle*'s common sense conclusion that "an equipment safety guard" is a safety device on a machine, the court below did not consider either legislative history or the place of R.C. 2745.01(C) in Ohio's workers' compensation scheme. Instead, the panel's opinion rested primarily on the policy concern that, if R.C. 2745.01(C) applied only to safety devices on machines, then employees who, by the nature of their profession, do not work with machines "would be barred from recovery under R.C. 2745.01(C)." (App. Op. at 10, Appx. 16.) Yet policy considerations cannot trump the plain text of a statute. *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, ¶ 27 (where "the meaning of the statute is evident from the plain language," "it is unnecessary to resort to * * * public policy"). Because "[i]t is not the role of the courts 'to establish legislative policies or to second-guess the General Assembly's policy choices,'" *Stetter*, 2010-Ohio-1029, at ¶ 35, this Court should follow *Fickle* and *Fyffe* and apply R.C. 2745.01(C) as written regardless of the policy implications of limiting "equipment safety guards" to safety devices on machines.

In any event, the panel's policy concerns are misplaced. By focusing solely on the rebuttable presumption in R.C. 2745.01(C), the panel's opinion misses the fundamental point that *every* employee in *each* profession may bring a claim for deliberate intent torts under R.C. 2745.01(A) and (B). That point is critical, because "workers' compensation recovery is a meaningful remedy for workers whose injuries result from conduct with an intent less than deliberate intent[.]" *Stetter*, 2010-Ohio-1029, ¶ 59. Indeed, by limiting

recovery to deliberate intent torts, R.C. 2745.01(A) and (B) "harmonize the law of this state with the law that governs a clear majority of jurisdictions." *Kaminski*, 2010-Ohio-1027, at ¶ 99. Thus, to the extent that policy considerations have any relevance, the appropriate question is whether any sound policy supports offering another bite at the apple to all employees in every profession who claim they were not required to use "equipment" shielding against "exposure" to some "danger." Because the panel's opinion does not address that question, the opinion cannot answer it.

The correct answer is "no." As this Court has recognized, R.C. 2745.01 furthers two important considerations underpinning workers' compensation exclusivity: "'first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even of undoubted merit.'" *Stetter*, 2010-Ohio-1029, at ¶ 74, quoting 6 Larson, *Larson's Workers' Compensation Law*, Section 103.03. Both considerations support the common sense interpretation of R.C. 2745.01(C) adopted in *Fickle*, not the interpretive approach adopted below.

First, the expansive test adopted by the panel further erodes the balance of sacrifices between employer and employee struck in Ohio's workers' compensation system. Since "awards are routinely made to employees injured as a result of their own misconduct," "it is not incongruous to likewise provide, as the General Assembly has in R.C. 2745.01, that an employer's liability for most injuries is limited to the claimant's recovery of workers' compensation benefits." *Stetter*, 2010-Ohio-1029, at ¶ 75. Yet the panel's test, as a practical matter, shifts the burden to the employer to introduce evidence

that it did not intend to harm the employee in every case involving the alleged removal of "equipment" shielding against "exposure" to some "danger." Such a shift in the burden of persuasion destroys the balance of sacrifices between employer and employee embodied in Ohio's workers compensation system by requiring employers to introduce evidence disproving intent in a broad category of cases where the employee has already received a meaningful workers' compensation recovery. This destruction is significant because, as commentators recognize, the lesser recovery available under a workers' compensation system "helps keep down the overall costs" of that system and "will induce employers to continue to hire labor." Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga.L.Rev. 775, 800 (1982).

Second, since it has the effect of shifting the burden of production to the employer in a broad class of cases, and adopts a standard that is unclear (*see* pp. 24-26, *infra*), the panel's test will greatly expand litigation, not "minimize" it. The upshot is a much greater "imposition of the complexities and uncertainties of tort litigation on the compensation process." *Stetter*, 2010-Ohio-1029, at ¶ 76, quoting 6 Larson, Section 103.03. Such "an incipient development * * * [would] pose[] a great[] threat to the viability of workers' compensation." Epstein, 16 Ga.L.Rev. at 809.

D. Limiting "Equipment Safety Guards" to Devices Attached to Machines Results in a Clear and Administrable Rule, While the Panel's Approach Does Not.

Finally, adopting the interpretation of "equipment safety guard" endorsed by *Fickle* results in a workable rule of law. A chief goal of the General Assembly in enacting current R.C. 2745.01(C) was to "clarify the definition of an intentional tort."

Ohio Capitol Connection, Minutes of House Labor and Commerce Committee, p. 1 (Aug. 25, 2004). Clarity is critical, because uncertainties in the available remedies inevitably undermine a workers' compensation system:

> The goal of the compensation statutes was that uncertain remedies should be replaced by certain ones, so as to prevent litigation from becoming a grotesque imitation of global war. Those gains to compensation can be obtained only if the temptation is resisted to look behind the veil in individual cases.

Epstein, 16 Ga.L.Rev. at 818. Moreover, establishing clear rules for the presumed intent theory at issue here is especially important to give employers the requisite notice of the types of conduct that imply intent to injure an employee.

The test adopted in *Fickle* clarifies when employers are presumed to have intended an injury. The focus on "devices that prevent the worker from physical contact with the 'danger zone' of the machine and its operation" (2011-Ohio-2960, at ¶ 50) mirrors established Occupational Health and Safety Act (OSHA) regulations concerning "point of operation" machine guarding. *See* 29 C.F.R. 1910.212(a)(3)(i), Appx. 67. These regulations teach that the "[p]oint of operation is the area on a machine where work is actually performed upon the material being processed," and point of operation guards "prevent the operator from having any part of his body in the danger zone during the operating cycle." 29 C.F.R. 1910.212(a)(3)(i)-(ii), Appx. 67. Since employers are already required to provide point of operation machine guarding under federal law, employers will have clear notice under the Sixth District's test of the type of guards

which — once installed — are deemed "equipment safety guards" if deliberately removed.

On the other hand, the panel's test, which appears to turn on the "nature of [the employee's] profession" (App. Op. at 10, 17, Appx. 16, 23), creates unknown and unknowable intentional tort liability for Ohio employers. No source provides ready guidance concerning the kinds of "equipment" used in each "profession" which may shield an employee from "exposure" to a "danger." Suppose a construction worker fails to wear steel-toed boots and, after being told by a coworker not to worry, injures his foot while jackhammering. May the employer be sued for failing to require the use of steel-toed boots? What about a worker who fails to wear a safety harness while working on a roof or an elevated platform and, as a result, experiences severe injuries when he falls? Both items — the steel-toed boots and safety harness — prevent "exposure" to some "danger" an employee might face in some "profession." The only limit to the list is the imagination of a plaintiff who views his or her meaningful workers' compensation remedy as insufficient.

In short, this Court should follow the Sixth Appellate District's lead and adopt the sensible and administrable rule that "equipment safety guards" include only those devices on a machine that guard the point of operation. *See Fickle*, 2011-Ohio-2960, at ¶ 50. Since no such device was removed in this case, L.E. Myers is entitled to judgment as a matter of law.

Proposition of Law No. 2

> **The "deliberate removal" of such an "equipment safety guard" occurs when an employer makes a deliberate decision to lift, push aside, take off or otherwise eliminate that guard from a machine.**

The Eighth District concluded that a journeyman lineman's alleged decision to 1) send Hewitt "alone and unsupervised" up in an insulated bucket to "work with excessive amounts of electricity" while 2) advising Hewitt that he "shouldn't need" his rubber gloves and sleeves "amounted to" the "deliberate removal" of those items. (App. Op. at 17-18, Appx. 23-24.) Even if the panel were correct in concluding that Hewitt's personal rubber gloves and sleeves are "equipment safety guards" (and it is not), the judgment below must be reversed because 1) is irrelevant and, as a matter of law, 2) is not the "deliberate removal" of that item.

A. The Text, Structure and History of R.C. 2745.01 Confirm that "Deliberate Removal" Means a Deliberate Decision to Eliminate An Equipment Safety Guard.

The plain and ordinary meaning of "deliberate removal" is a deliberate decision by an employer to eliminate an equipment safety guard. As the court below recognized, the plain and ordinary meaning of "removal" is "to move by lifting, pushing aside, or taking away or off; also to get rid of; ELIMINATE." App. Op. at 12, Appx. 14, quoting *Fickle*, 2011-Ohio-2960, at ¶ 13, quoting Merriam-Webster's Collegiate Dictionary 987 (10th ed. 2000). And the plain and ordinary meaning of "deliberate" is "characterized by or resulting from careful and thorough consideration — a deliberate decision." *Id.* at ¶ 30. The synthesis of these definitions is a "deliberate decision" to "eliminate" "an equipment

safety guard," and no Ohio appellate court has identified any other ordinary meaning for this statutory phrase.

Limiting "deliberate removal" to a deliberate decision to eliminate an equipment safety guard is consistent with the structure of R.C. 2745.01(C) and its history. As explained at pp. 20-21 above, the place of R.C. 2745.01(C) in Ohio's workers' compensation scheme requires a strict construction of its terms — counseling against any interpretation that equates acts which do not involve a deliberate decision to eliminate an equipment safety guard as "amounting to" "deliberate removal." Limiting "deliberate removal" to a deliberate decision to eliminate an equipment safety guard is also consistent with the legislative history. Neither the prior iterations of intentional tort legislation nor this Court's common law jurisprudence reflects a concern with actions that do not amount to the actual elimination of an equipment safety guard. Rather, as explained above, the presumed intent theory echoes the facts of *Jones*, which involved a metal safety guard removed from a conveyor by blowtorch. 15 Ohio St.3d at 91; *see also Fyffe*, 59 Ohio St.3d at 120 (Plexiglas safety guard physically removed from conveyor). In short, nothing in the text, structure, or history of R.C. 2745.01(C) supports the panel's finding that a coworker's opinion that an employee "shouldn't need" certain items "amounts to" the "deliberate removal" of those items.

B. L.E. Myers Did Not "Deliberately Remove" an "Equipment Safety Guard."

Indeed, the court below did not base its holding on the text, structure or history of R.C. 2745.01(C). Rather, the panel claimed to draw support for its holding from

McKinney v. CSP of Ohio LLC, 6th Dist. No. WD-10-070, 2011-Ohio-3116. Yet a close inspection of *McKinney* illustrates just how far the Eighth District's analysis strays from the statutory text.

In *McKinney*, an employee was injured when "ejectors" on a press came down on her hand as she attempted to remove a part from a mold. An incident report concluded that two safety measures normally available on the press — a T-stand button and a light curtain — were inoperable that day because "none of the right people were present to ensure the proper setup of the ejection system." 2011-Ohio-3116, at ¶ 26. The court of appeals' analysis in *McKinney* proceeded in two steps. First, *McKinney* concluded "removal" includes not only the "physical separation [of a guard] from the machine," but also "the act of * * * rendering inoperable." *Id.* at ¶ 17, citing *Harris v. Gill*, 585 So.2d 831, 836-37 (Ala. 1991). That conclusion, however, rested on a policy choice, as the citation to *Gill* reveals; *Gill* expressly based its broad construction on public policy grounds. *Id.* at 837 (limiting "removal" to actual removal of a safety guard would "contravene public policy"). Second, *McKinney* concluded that a supervisor's failure to appreciate the seriousness of a complaint about a problem with the press, when combined with testimony that "none of the right people were present," "established a rebuttable presumption that the removal was committed with intent to injure." *Id.*, at ¶ 28.

Both steps in the analysis in *McKinney* are fatally flawed. Because the court of appeals identified no ambiguity in the phrase "deliberate removal," policy concerns were irrelevant — particularly policy concerns expressed by a court in a different state construing a different statute under a different workers' compensation system. Indeed,

the policy considerations that motivated the Supreme Court of Alabama's opinion in *Harris* were unique to Alabama law. Unlike R.C. 2745.01, the statute at issue in *Harris* did not supply a remedy against the *employer*; it only permitted an injured employee to sue his *coworker*. *See* Ala. Code 25-5-11(b)-(c). Whatever policies may support a broad remedy against a coworker plainly do not apply to lawsuits filed against the employer itself in derogation of the exclusivity-of-remedy rule.

But even if *McKinney* were correct in extending the concept of "deliberate removal" to acts short of actual removal that render an equipment safety guard "inoperable," it erred in concluding that the employer made a deliberate decision to render the guards inoperable. Failing to appreciate the seriousness of a complaint about a problem with a guard may be negligent, but such a lack of appreciation in no way amounts to a deliberate decision to eliminate the guard. Nor does the absence of certain personnel make the inoperable status of the guards any more deliberate.

Instead of correcting these flaws in *McKinney*'s analysis, however, the court below compounded them. Unlike *McKinney*, Hewitt's rubber gloves and sleeves were never eliminated or rendered inoperable: they remained on the worksite at all times for him to use, if he chose to do so. (Tr. 170, 251, Supp. 63, 108.) And, unlike *McKinney*, no permanent employee of L.E. Myers was involved in the alleged decision to tell Hewitt he "shouldn't need" his rubber gloves and sleeves. Rather, at best for Hewitt, a union worker hired out of IBEW Local 71 to work on the Firelands Electrical Cooperative project disregarded their own training and L.E. Myers' corporate policy by telling Hewitt he "shouldn't need" his rubber gloves and sleeves. (Tr. 66-67, 105, 168, 180-81, 185,

188-89, Supp. 17-18, 33, 61, 68-69, 70, 73-74.) Far from ratifying such conduct, L.E. Myers terminated the worker as a result. (*Id.* at 86, Supp. 20.) Thus, even *McKinney*'s flawed analysis does not support the Eighth District's judgment.

Because the text, structure, and history of R.C. 2745.01(C) do not support the Eighth District's holding that the alleged statement to Hewitt that he "shouldn't need" his rubber gloves and sleeves "amounted to" the "deliberate removal" of those items (App. Op. at 17-18, Appx. 23-24), the Eighth District's judgment should be reversed and judgment entered as a matter of law in L.E. Myers' favor.

IV. CONCLUSION

For all of the above reasons, this Court should reverse the judgment of the Eighth District and enter judgment as a matter of law in L.E. Myers' favor.

Respectfully submitted,

Benjamin C. Sassé (0072856)
(COUNSEL OF RECORD)
Mark F. McCarthy (0013139)
TUCKER ELLIS LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: mark.mccarthy@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Defendant-Appellant
The L.E. Myers Co.

CERTIFICATE OF SERVICE

A copy of the foregoing **Merit Brief of Appellant The L.E. Myers Co.** has been served this 10th day of May, 2012, by U.S. Mail, postage prepaid, upon the following:

Paul W. Flowers
PAUL W. FLOWERS CO., L.P.A.
50 Public Square, Suite 3500
Cleveland, Ohio 44113

Attorney for Plaintiff-Appellee Larry Hewitt

Frank L. Gallucci, III
Michael D. Shroge
David E. Gray, II
PLEVIN & GALLUCCI CO., L.P.A.
55 Public Sq., Ste. 2222
Cleveland, OH 44113

Attorneys for Plaintiff-Appellee Larry Hewitt

Elizabeth A. Crosby
LICATA & TOEREK
6480 Rockside Woods Blvd. S., Ste. 180
Independence, OH 44131

Attorney for Amicus Curiae Cleveland Partnership, Council of Smaller Enterprises (COSE)

Robert A. Minor
VORYS, SATER, SEYMOUR AND PEASE LLP
42 E. Gay St.
P.O. Box 1008
Columbus, OH 43216-1008

Attorney for Amicus Curiae Ohio Self-Insurers Association

Preston J. Garvin
Michael Hickey
GARVIN & HICKEY, LLC
181 E. Livingston Ave.
Columbus, OH 43215

Attorneys for Amicus Curiae Ohio Chamber of Commerce

Thomas R. Sant
BRICKER & ECKLER, LLP
100 S. Third St.
Columbus, OH 43215-4291

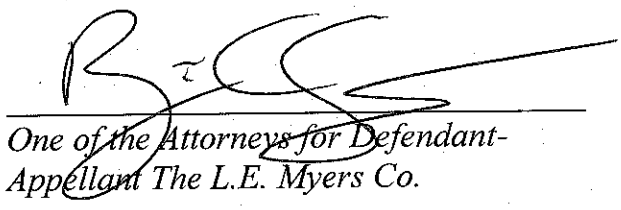
Attorney for Amicus Curiae Ohio Chapter of the National Federation of Independent Business

Denise M. Hasbrook
Emily Ciecka Wilcheck
One SeaGate, Suite 1700
Toledo, OH 43604

Attorneys for Amicus Curiae FirstEnergy Corp.

Brian D. Sullivan
REMINGER CO., L.P.A.
101 West Prospect Ave., Suite 1400
Cleveland, OH 44115-1093

Attorney for Amicus Curiae Ohio Association of Civil Trial Attorneys (OACTA)



One of the Attorneys for Defendant-Appellant The L.E. Myers Co.

011986.000001 1434350.1

APPENDIX

ORIGINAL

No. 11-2013

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 10-96138

LARRY HEWITT,
Plaintiff-Appellee,

v.

THE L.E. MYERS COMPANY,
Defendant-Appellant.

NOTICE OF APPEAL OF APPELLANT THE L.E. MYERS COMPANY

Paul W. Flowers (0046625)
PAUL W. FLOWERS CO., L.P.A.
50 Public Square, Suite 3500
Cleveland, Ohio 44113
Tel: 216.344.9393
Fax: 216.344.9395
E-mail: pwf@pwfco.com

Attorney for Plaintiff-Appellee
Larry Hewitt

Benjamin C. Sassé (0072856)
(COUNSEL OF RECORD)
Mark F. McCarthy (0013139)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: mark.mccarthy@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Defendant-Appellant
The L.E. Myers Co.

Frank L. Gallucci, III (0072680)
Michael D. Shroge (0072667)
David E. Gray, II (0071114)
PLEVIN & GALLUCCI CO., L.P.A.
55 Public Square, Suite 2222
Cleveland, OH 44113
Tel: 216.861.0804
Fax: 216.861.5322
E-mail: fgallucci@pglawyer.com
mshroge@pglawyer.com
dgray@pglawyer.com

Additional Counsel for Plaintiff-Appellee
Larry Hewitt

NOTICE OF APPEAL OF APPELLANT

Appellant The L.E. Myers Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Court of Appeals Case No. 96138 on October 20, 2011.

This case is one of public or great general interest.

Respectfully submitted,

Benjamin C. Sassé (0072856)
(COUNSEL OF RECORD)
Mark F. McCarthy (0013139)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
Tel: 216.592.5000
Fax: 216.592.5009
E-mail: mark.mccarthy@tuckerellis.com
benjamin.sasse@tuckerellis.com

Attorneys for Defendant-Appellant
The L.E. Myers Co.

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 1st day of December, 2011, by U.S. Mail, postage prepaid, upon the following:

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
50 Public Square, Suite 3500
Cleveland, Ohio 44113

Frank L. Gallucci, III
Michael D. Shroge
David E. Gray, II
Plevin & Gallucci Co., L.P.A.
55 Public Square, Suite 2222
Cleveland, OH 44113

Attorneys for Plaintiff-Appellee Larry Hewitt

One of the Attorneys for Defendant-Appellant The L.E. Myers Co.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96138

LARRY HEWITT

PLAINTIFF-APPELLEE

vs.

THE L.E. MYERS CO., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-711717

BEFORE: Kilbane, A.J., Blackmon, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 20, 2011

ATTORNEYS FOR APPELLANT

Benjamin C. Sassé
Mark F. McCarthy
Tucker Ellis & West L.L.P.
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEES

For Larry Hewitt

Frank Gallucci III
David E. Gray II
Michael D. Schroge
Plevin & Gallucci Co., L.P.A.
55 Public Square - Suite 2222
Cleveland, Ohio 44113

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
Terminal Tower - 35th Floor
50 Public Square
Cleveland, Ohio 44113

For Bureau of Workers' Compensation and Ohio Attorney General

Adam J. Bennett
Andrew Cooke & Associates, L.L.C.
243 North Fifth Street - Third Floor
Columbus, Ohio 43215

MARY EILEEN KILBANE, A.J.:

Defendant-appellant, The L.E. Myers Co. (L.E. Myers), appeals from the trial court's judgment denying its motion for directed verdict and motion for judgment notwithstanding the verdict. Finding no merit to the appeal, we affirm.

The instant appeal arises from a workplace intentional tort action filed by Larry Hewitt (Hewitt) against L.E. Myers; the Administrator, Bureau of Workers' Compensation (BWC); and the former Ohio Attorney General, Richard Cordray (OAG).[1] Hewitt filed his complaint in December 2009, and was granted leave to amend on April 14, 2010.[2]

The amended complaint alleges that in June 2006, Hewitt, a second-step apprentice lineman for L.E. Myers, was electrically shocked after he was instructed by his supervisor to work alone in an elevated lift machine (bucket) with energized high-voltage power equipment and without wearing his protective safety equipment. He alleges his superiors told him that he did not have to wear his protective rubber gloves and sleeves while replacing the high-

---

[1]The BWC was included in the lawsuit as a result of subrogation rights it asserted and the OAG was included because of constitutional issues relating to R.C. 2721.12.

[2]Hewitt previously filed his workplace intentional tort claim against L.E. Myers in June 2008, but then dismissed the case without prejudice in December 2008.

voltage electrical line with a new line. Hewitt claims that unbeknownst to him, the lines were not all de-energized and he inadvertently contacted an energized wire. Hewitt alleges L.E. Myers knew with a substantial certainty that he would be injured when working alone in an elevated lift machine with live high-voltage power transmission equipment and without proper safety equipment or training. Hewitt claims that as a result of this incident, he sustained multiple and permanent injuries, emotional distress, pain and suffering, and other damages.[3]

L.E. Myers moved to dismiss the first amended complaint, or in the alternative, leave to file a motion for summary judgment. The trial court denied the motion to dismiss and leave to file a motion for summary judgment. L.E. Myers asked the trial court to reconsider the denial of its motion for leave to file for summary judgment. The trial court granted L.E. Myers' request and L.E. Myers filed its motion for summary judgment in July 2010. However, L.E. Myers' motion for summary judgment was subsequently stricken from the record for failing to comply with the court's discovery orders. The matter proceeded to a jury trial, at which the following evidence was adduced.

---

[3]In Count 2, which has not been appealed, Hewitt sought a declaration that R.C. 2745.01 is unconstitutional.

In early 2005, Hewitt enrolled in the American Line Builders Apprenticeship Training Program (ALBAT). When he completed this program, Hewitt became certified as an apprentice and began working with L.E. Myers. L.E. Myers hired Hewitt, through a local union, to assist with the installation of new electrical wires along Route 60 in New London, Ohio.

At the time of the incident, Hewitt was a second-step apprentice, which meant that he was in the early stages of his apprenticeship. At the second step, a person learns the trade and how to climb utility poles under a journeyman lineman's supervision. A second-step apprentice is not certified to work around any voltage greater than 500 volts. There are seven steps in the ALBAT program before an apprentice completes the apprenticeship program and becomes a lineman.

On June 14, 2006, Hewitt reported to the New London worksite with his coworkers. Journeyman lineman Dennis Law (Law) supervised Hewitt that day and informed Hewitt that he would be replacing the wiring on the poles alone in the bucket above, while Law directed traffic below. Law testified the crew was short-staffed, so he was instructed to direct traffic in addition to supervising Hewitt. Law asked Hewitt if he had a problem working alone in the bucket. Hewitt was nervous and replied, "yeah, I never been up by myself." Law told him that he "would be okay." Hewitt testified Law then told him that he

"shouldn't need no rubbers [protective gloves] going up to work on the line" because he would not be working with energized wires. Thus, Hewitt believed that he was not going to be working with any energized lines that day.

Hewitt maneuvered his bucket near the wires and removed the neutral wire wearing his leather gloves. Law was flagging traffic while simultaneously attempting to supervise Hewitt alone in the bucket 35 feet above. He yelled "hey" to Hewitt, which caused Hewitt to look over his shoulder. Law intended to tell Hewitt to put on his rubber gloves. As Hewitt looked back, the tie wire he held in his right hand touched an energized wire, causing him to be electrically shocked. Hewitt then maneuvered himself to the ground. He tried to pull up his sleeve, but his shirt was stuck to his arm. Hewitt testified that his arm looked like a burnt cigarette. Hewitt's burns cover his entire arm, underneath his underarm, around his shoulder, and onto his back.

Foreman Julian Cromity (Cromity) testified that on that morning he had a discussion with crew foreman Steve Dowdy (Dowdy) that it would be good experience for the apprentices to clip in the wire without wearing their rubber gloves and sleeves because it was hot that day and the primary line was de-energized. However, Law testified that he told Hewitt to wear rubber gloves and sleeves and Dowdy told everyone to wear rubber gloves and sleeves. L.E. Myers District Superintendent Jack Ehle investigated the incident. Following

his investigation, L.E. Myers terminated three employees: Law, Dowdy, and foreman Jeff Erman (Erman).

Hewitt filed a workers' compensation claim that was allowed for a number of conditions, including secondary burns to the right: forearm, axilla, thumb, and wrist, third degree burns to the right hand and arm, right median nerve injury, major depression, moderate posttraumatic stress disorder, and Reflex Sympathetic Dystrophy (RSD) of the right upper limb.

At the conclusion of Hewitt's case, L.E. Myers moved for directed verdict, raising four issues. L.E. Myers argued it was entitled to judgment as a matter of law with respect to: (1) liability under R.C. 2745.01; (2) future injury; (3) past non-economic damages; and (4) punitive damages. The trial court denied L.E. Myers' motion with respect to future injury, past non-economic damages, and punitive damages. However, the trial court found that Hewitt failed to prove his case with respect to R.C. 2745.01(A) and (B). As a result, this limited Hewitt's theory of recovery to R.C. 2745.01(C). L.E. Myers did not present any witnesses, and its renewed motion for directed verdict was denied by the trial court. The jury returned a verdict in Hewitt's favor, awarding him $597,785 in compensatory damages. L.E. Myers then moved for judgment notwithstanding the verdict (JNOV), which the trial court denied.

L.E. Myers now appeals, raising the following two assignments of error for review.

ASSIGNMENT OF ERROR ONE

"The trial court erred in denying [L.E. Myers'] motion for directed verdict and JNOV."

ASSIGNMENT OF ERROR TWO

"In the alternative, L.E. Myers was entitled to partial JNOV on Hewitt's claim for future damages."

Standard of Review

We employ a de novo standard of review when reviewing a motion for directed verdict and a JNOV because these motions present questions of law and not factual issues. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, 652 N.E.2d 684; *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

Directed Verdict and Judgment Notwithstanding the Verdict

Civ.R. 50 sets forth the standard for granting a motion for a directed verdict and a motion for JNOV:

> **"When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to**

> **each party, the court shall sustain the motion and direct a verdict for the moving party as to that issue. Id. at (A)(4).[4]**
>
> **"Whether or not a motion to direct a verdict has been made or overruled * * * a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned, such party, * * * may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative." Id. at (B).**

In *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334, the Ohio Supreme Court stated:

> **"The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions. *McNees v. Cincinnati Street Ry. Co.* (1949), 152 Ohio St. 269, 89 N.E.2d 138; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 140 N.E.2d 401; Civ.R. 50(A) and (B)."**

---

[4]"The 'reasonable minds' test of Civ.R. 50(A)(4) calls upon the court only to determine whether there exists any evidence of substantial probative value in support of that party's claim." *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935, citing *Hamden Lodge v. Ohio Fuel Gas Co.* (1934), 127 Ohio St. 469, 189 N.E. 246.

Employer Intentional Tort Statute

R.C. 2745.01, the employer intentional tort statute, provides in pertinent part:

> **"(A) In an action brought against an employer by an employee * * * for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.**
>
> **"(B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.**
>
> **"(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result."**

L.E. Myers states that "[t]he sole liability issue in this appeal is whether Hewitt presented sufficient evidence to trigger the rebuttable presumption of intent to injure associated with the '[d]eliberate removal by an employer of an equipment safety guard' where 'an injury * * * occurs as a direct result.'" However, L.E. Myers had the opportunity to present evidence to rebut this presumption, but instead rested its case without presenting any witnesses.

L.E. Myers argues the trial court erred when it found that R.C. 2745.01(C) "'doesn't mean' that L.E. Myers is entitled to judgment as a matter of law where 'people in a supervisory capacity' instructed Hewitt 'that the use of rubber gloves and sleeves was not necessary * * * on that morning." L.E. Myers claims that the trial court's construction is inconsistent with the plain text of the statute. L.E. Myers contends the phrase "equipment safety guard" applies to items that not only have as their object the safety of the employee, but are also a part of a piece of equipment. As a result, it claims that R.C. 2745.01(C) is limited to cases involving the deliberate removal of a safety guard from equipment.

L.E. Myers further claims that its interpretation of R.C. 2745.01(C) is supported by the Ohio Supreme Court's ruling in *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. In *Fyffe*, the court interpreted similar language in former employer intentional tort statute, R.C. 4121.80(G)(1), which provided that: "'[d]eliberate removal by the employer of an equipment safety guard * * * is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another * * *.'" Id. at 119.[5] The *Fyffe* court stated that the "deliberate removal by the employer of an equipment safety

---

[5]R.C. 4121.80 was declared unconstitutional by the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722.

guard" means "that the employer has deliberately removed a safety guard from equipment which employees are required to operate[.]" Id.

We note that the General Assembly has not provided a definition of "equipment safety guard" or "deliberate removal" for the purposes of R.C. 2745.01(C). L.E. Myers would have us construe R.C. 2745.01(C) in a way that limits recovery to situations only where employees are injured while working with equipment, such as a machine or press. We decline to do so.

Had the General Assembly envisioned that the presumption would be limited to injuries attributable to a "safety guard" that should have been attached to machinery "which employees are required to operate," then such terms would have been included in R.C. 2745.01(C). A reading reveals that these terms are absent from the statute. If we accept L.E. Myers' interpretation, then employees who, by the very nature of their profession, work with equipment other than a machine or press would be barred from recovery under R.C. 2745.01(C). Hewitt points out this court's recent decision in *Houdek v. ThyssenKrupp Materials N.A., Inc.*, Cuyahoga App. No. 95399, 2011-Ohio-1694, where we stated that the "employer tort has not been abolished, but rather constrained. Whether an employer tort occurs in the workplace depends on the facts and circumstances of each case." Id. ¶11. For the following

reasons, we find that there was substantial evidence that L.E. Myers deliberately removed an equipment safety guard.

When interpreting a statute, "a court's paramount concern is the legislative intent in enacting the statute. In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal, or customary meaning. It is the duty of the court to give effect to the words used and not to insert words not used. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation." (Internal citations and quotations omitted.) *State ex rel. Richard v. Bd. of Trustees of the Police & Firemen's Disability & Pension Fund*, 69 Ohio St.3d 409, 411-412, 1994-Ohio-126, 632 N.E.2d 1292.

Furthermore, "[t]he presumption always is, that every word in a statute is designed to have some effect, and hence the rule that, 'in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it.*'" *Turley v. Turley* (1860), 11 Ohio St. 173, 179, citing *Commonwealth v. Alger* (Mass.1851), 61 Mass. 53, 7 Cush. 53, 89. (Emphasis in original.) See, also, R.C. 1.47(B),

which provides that: "[i]n enacting a statute, it is presumed that * * * [t]he entire statute is intended to be effective."

We find the recent interpretation of the phrases "deliberate removal" and "equipment safety guard" by the Sixth District Court of appeals in *Fickle v. Conversion Technologies Intl., Inc.*, Williams App. No. WM-10-016, 2011-Ohio-2960, instructive. In *Fickle*, the plaintiff was injured "when her left hand and arm became caught in the pinch point of a roller at the rewind end of a Gravure Line adhesive coating machine[, which is equipped with a 'jog/continuous' switch]." Id. at ¶2. The *Fickle* court relied on the plain and ordinary meaning of the undefined terms in R.C. 2745.01(C) and found that:

> **"'[D]eliberate' as used in the statute means '"characterized by or resulting from careful and thorough consideration – a deliberate decision."' [*Forwerck v. Principle Business Ents., Inc.*, Williams App. No. WD-10-040, 2011-Ohio-489], quoting Merriam-Webster's Collegiate Dictionary (10 Ed.1996) 305.**
>
> **"* * *
>
> "'[R]emove' is defined in Merriam-Webster's Collegiate Dictionary (10 Ed.2000) 987 as 'to move by lifting, pushing aside, or taking away or off'; also 'to get rid of: ELIMINATE.'" Contrary to the assertions of [the employer], however, this does not mean that a guard must 'be taken off of the equipment and made unavailable for use for there to be a rebuttable presumption of intent [to injure].' Removal of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable.**

> **"Combining the above definitions, and considering the context in which the phrase is used in the statute, we find that 'deliberate removal' for purposes of R.C. 2745.01(C) means a considered decision to take away or off, disable, bypass, or eliminate, or to render inoperable or unavailable for use. Id. at ¶30-32.[6]**

"* * *

> **"With respect to 'equipment safety guard,' * * * [t]he General Assembly has not manifested any intent to give 'equipment safety guard' or its component terms a technical meaning. There is nothing in the statute or the case law that suggests the General Assembly intended to incorporate any of the various equipment-specific or industry-specific definitions of guard appearing throughout the administrative or OSHA regulations, or for any agency or regulatory measure to be considered a definitional source.**
>
> **"In some cases, courts have given a technical meaning to an undefined term where the statute regulates a specialized industry or field of practice and the term has acquired a technical or particular meaning in that industry or field. See *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St.3d 376, 865 N.E.2d 1259, 2007-Ohio-2201, ¶26; *State v. Rentex, Inc.* (1977), 51 Ohio App.2d 57, 365 N.E.2d 1274, paragraph one of the syllabus. But R.C. 2745.01 is not regulatory in nature and is not directed at the removal of an equipment safety guard in any particular industry or from any particular type of machine. Moreover, the term 'guard' has not acquired a particular meaning as a 'barrier' under the**

---

[6]In footnote 2, the *Fickle* court noted "that R.C. 2745.01(C) does not require proof that the employer removed an equipment safety guard with the intent to injure in order for the presumption to arise. The whole point of division (C) is to presume the injurious intent required under divisions (A) and (B). It would be quite anomalous to interpret R.C. 2745.01(C) as requiring proof that the employer acted with the intent to injure in order create a presumption that the employer acted with the intent to injure. Such an interpretation would render division (C) a nullity."

> **regulations. Depending on the type of equipment and industry, acceptable methods of 'guarding' under the regulations include various devices and mechanisms that do not constitute a physical barrier erected between the employee and the danger, such as two-hand controls, pull-back guards, hold-back guards, inch controls, and electronic eye safety circuits. See, e.g., Ohio Adm.Code 4123:1-5-11(E) and 4123:1-5-10(C); Section 1910.255(b)(4), Title 29, C.F.R.**
>
> **"In *Bishop v. Dayton* (Feb. 5, 1990), 2d Dist. No. 11634, Grady, J., concurring, explained that the principle of construing undefined statutory terms according to their generally accepted meaning should be applied in defining "equipment safety guard" under former R.C. 4121.80(G)(1) * * *:**
>
> **'The General Assembly has not provided a definition of "equipment safety guard" as that term is used in the statute. A review of the legislative history, staff notes, and Committee Reports, also fail [sic] to provide any guidance or understanding of the meaning of that term. Therefore, it can only be defined according to the common understanding of the meaning of the words used.'**
>
> **'"Guard' is defined as 'a protective or safety device; specif: a device for protecting a machine part or the operator of a machine.' Merriam-Webster's Collegiate Dictionary, supra, at 516. 'Safety' means 'the condition of being safe from undergoing or causing hurt, injury, or loss.' Id. at 1027, 365 N.E.2d 1274. And 'equipment' is defined as 'the implements used in an operation or activity: APPARATUS.' Id. at 392, 365 N.E.2d 1274." Id. at ¶33-38.**

The appellants in *Fickle* argued that the term equipment safety guard is "'any device designed to prevent injury or to reduce the seriousness of injury.'" The court stated it agreed with appellants that a "safety guard" encompasses

something more than an actual physical structure or barrier erected between the employee and the danger, but did not agree with appellants' definition. Id. The *Fickle* court concluded that "as used in R.C. 2745.01(C), an 'equipment safety guard' would be commonly understood to mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." Id. at ¶43.

In applying its interpretation of deliberate removal of an equipment safety guard to the facts of the case, the *Fickle* court found that under R.C. 2745.01(C), "[t]he jog control and emergency stop cable * * * were not designed to prevent an operator from encountering the pinch point on the rewind roller and, therefore, are not equipment safety guards[.]" Id. at ¶44.

While we do not agree with the limitation the *Fickle* court placed on the definitions to those devices that prevent the worker from physical contact with the "danger zone" of the machine and its operation, we find the definitions persuasive.

We note the Sixth District Court of Appeals examined another employer intentional tort case under R.C. 2745.01(C) in *McKinney v. CSP of Ohio, LLC*, Wood App. No. WD-10-070, 2011-Ohio-3116, and found that the appellant, McKinney, established a rebuttable presumption that the employer removed an equipment safety guard with the intent to injure. Id. at ¶28.

In *McKinney*, a coworker of McKinney's, with over 25 years of experience, advised her supervisor that the machine press she was assigned to was not working properly. The supervisor advised the coworker to continue working the press and that he would call maintenance. However, maintenance never came to check on the machine press. When her shift ended, the coworker forgot to tell McKinney that the press was not working properly. McKinney, who recently started working at CSP, was injured shortly after she began working on the press. Relying on *Forwerck* and *Fickle*, the *McKinney* court stated that:

> **"It is undisputed that the press at issue was improperly programmed at the time of [McKinney's] injury. It is also undisputed that had the press been properly programmed, certain safety devices would have been in place and [McKinney] would not have been injured. To that end, we agree with [McKinney] that the improper programming amounted to the removal of a safety device in that the result was to render the T-stand button and the safety curtains inoperable.**
>
> **"Given the deposition testimony in this case that a supervisor was notified there was a problem with the press, a complaint he either ignored or did not appreciate the seriousness of, and, given the testimony that the workers were told to keep running the press after the complaint, and given the testimony from [the employer's] supervisor that 'none of the right people were present' to ensure that the two safety measures were on press 5 the night of [McKinney's] accident, we find that [McKinney] has established a rebuttable presumption that the removal was committed with intent to injure." Id. at ¶27-28.**

Turning to the instant case, we find that the trial court properly denied L.E. Myers' motion for directed verdict and motion for JNOV. Given the definitions above, we find that the protective rubber gloves and sleeves are equipment safety guards under R.C. 2745.01(C). The protective rubber gloves and sleeves are equipment designed to be a physical barrier, shielding the operator from exposure to or injury by electrocution (the danger). By virtue of Hewitt's profession, these are the equipment safety guards he has to protect himself while working on energized lines.

Hewitt, a second-step apprentice, was injured after his supervisor instructed him to work alone and unsupervised in the bucket, without his safety equipment. Hewitt did not wear his equipment safety guards because Law told him that he "shouldn't need no rubbers going up to work on the line." Hewitt expressed his concern about working alone in the bucket, but Law assured him that he would be okay. Cromity confirmed that he and crew foreman Dowdy discussed that the weather was expected to be hot that day and made the decision to instruct the apprentices not to wear their rubber gloves and sleeves since the primary line was de-energized. As a result of this incident, L.E. Myers terminated three employees, Law, Dowdy, and Erman.

Moreover, according to ALBAT safety regulations, a second-step apprentice lineman should not work with greater than 500 volts of electricity

and should not work alone in a bucket. The energized line that Hewitt touched carried approximately 7,200 volts. Ehle testified the work that Hewitt had been assigned required him to wear his rubber gloves and sleeves, regardless of the fact that he was working on de-energized lines because it was possible that the lines could become energized. He acknowledged that working on primary lines without rubber gloves "would be like committing suicide."

In addition, OSHA regulations require "[e]mployees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed." 29 C.F.R. 1910.335(a)(1)(i).

Just as in *McKinney*, in the instant case, L.E. Myers' actions cannot be described as reckless. Rather, after thorough consideration, L.E. Myers' supervisors made a deliberate decision to place Hewitt in close proximity to energized wires without wearing protective rubber gloves or sleeves. Their actions amounted to the deliberate removal of an equipment safety guard when they instructed Hewitt, a second-step apprentice lineman, not to wear his protective gloves and sleeves and by sending him alone and unsupervised up in the bucket to work with excessive amounts of electricity, despite the known safety measures and risks.

Finally, L.E. Myers had the opportunity to rebut the presumption in R.C. 2745.01(C), but instead chose not to present any witnesses. When a rebuttable presumption exists, such presumption prevails until rebutted by evidence to the contrary. See *Biery v. Pennsylvania RR. Co.* (1951), 156 Ohio St. 75, 99 N.E.2d 895, paragraph two of the syllabus ("In an action based on negligence, the presumption exists that each party was in the exercise of ordinary care and such presumption prevails until rebutted by evidence to the contrary). See, also, *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, ¶ 91 (In cases where the insured breaches the subrogation clause in an underinsured motorist policy, "a presumption of prejudice to the insurer arises, which the insured party bears the burden of presenting evidence to rebut"). Likewise, under R.C. 2745.01(C), a presumption exists that the deliberate removal by an employer of an equipment safety guard was committed with intent to injure another if an injury occurs as a direct result. In the instant case, L.E. Myers failed to sustain its burden and present evidence to the contrary. Thus, the trial court did not err when it denied L.E. Myers' motion for directed verdict and motion for JNOV.

Accordingly, the first assignment of error is overruled.

Future Damages

In the alternative, L.E. Myers argues in its second assignment of error that the trial court erred when it denied its motion for JNOV with respect to Hewitt's claim for future damages. L.E. Myers argues the trial court erred when it failed to sever and deduct from the $597,785 judgment those portions of Hewitt's award that represented future economic ($283,500) and non-economic ($15,000) loss. It further argues there was insufficient evidence as to the permanency of Hewitt's injuries to send that issue to the jury. L.E. Myers cites *Day v. Gulley* (1963), 175 Ohio St. 83, 191 N.E.2d 732, in support of its argument.

In *Day*, the Ohio Supreme Court reviewed the judgment in a personal injury action and held that:

> **"[W]here the plaintiff's injuries are subjective in character and there is no expert medical evidence as to future pain, suffering, permanency of injuries or lasting impairment of health, it is prejudicial error for the trial court to charge the jury in its general instructions that, 'in determining the amount of damages, the jury should consider the nature and extent of the injuries, whether or not the injuries are in all probability permanent or temporary only; the pain and suffering plaintiff has endured and with reasonable certainty will endure in the future.'" Id. at syllabus.**

The *Day* court further stated:

> **"'[I]f the injury is of an objective nature (such as the loss of an arm, leg, or other member) the jury may draw their**

> **conclusions as to future pain and suffering from that fact alone (the permanency of such injury being obvious); whereas there must be expert evidence as to future pain and suffering or permanency where the injury is subjective in character.'" Id. at 86, quoting 115 A.L.R. 1149, 1150.**

In *Powell v. Montgomery* (1971), 27 Ohio App.2d 112, 119, 272 N.E.2d 906, the Fourth District Court of Appeals interpreted the *Day* decision to mean that "an injury is 'objective' when, without more, it will provide an evidentiary basis for a jury to conclude with reasonable certainty that future damages, such as medical expenses will probably result." Id., citing *Spargur v. Dayton Power & Light Co.* [1959], 109 Ohio App. 37, 163 N.E.2d 786; see, also, *Hammerschmidt v. Mignogna* (1996), 115 Ohio App.3d 276, 281-282, 685 N.E.2d 281 (where this court held "[a]n award of future damages is limited to damages reasonably certain to occur from the injuries").

L.E. Myers contends the injury due to RSD was subjective in nature and there was no expert medical testimony establishing that the pain experienced by Hewitt was permanent in nature or would continue in the future. We disagree.

In the instant case, Hewitt submitted evidence that RSD is an "objective" injury. Doctor Kevin Trangle, M.D. (Dr. Trangle) testified that he is board certified in internal, occupational, environmental, and preventative medicine. The majority of his practice is focused on work-related injuries. We note that

L.E. Myers initially retained Dr. Trangle to examine Hewitt, but later he testified as an expert witness for Hewitt. He confirmed that the BWC allowed claims for: secondary burns to the right forearm, axilla, thumb, and wrist, third degree burns to the right hand and arm, right median nerve injury, major depression, moderate posttraumatic stress disorder, and RSD.

Dr. Trangle examined Hewitt in September 2008. He testified that he based his diagnosis on his examination of Hewitt and several medical criteria, in conjunction with the 32 records and reports he reviewed for the evaluation, which included injury reports, BWC records, medical records, psychological records, occupational therapy records, and work ability reports.

Dr. Trangle testified that Hewitt had very dark, thick skin covering his entire right arm, from his wrist to his underarm. The coloration of Hewitt's skin resulted from the burn scarring. Dr. Trangle determined with an objective degree of medical certainty that Hewitt suffers from RSD as a result of touching the energized wire. He testified that RSD is caused by a break in the "feedback loop" from the nerves at the injury to the spinal cord causing people to stop using their extremity. Over time, people with RSD suffer from changes in skin color, definition, and elasticity, swelling, and atrophy. In addition, the victim can suffer intractable pain, which "doesn't respond easily to medication or other methods of treatment."

Hewitt suffered injuries to his right hand, wrist, arm, and underarm in the form of burn scarring and limited mobility, with the permanency of those injuries being obvious. Furthermore, expert testimony from Dr. Trangle established the objective nature of Hewitt's injuries. Thus, Hewitt provided an evidentiary basis for a jury to conclude with reasonable certainty that future damages will probably result.

Based on the foregoing, we are unpersuaded that the trial court erred in allowing Hewitt's claim for future damages to go to the jury and in refusing to grant a JNOV on the issue of future damages.

Thus, the second assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

CASE NO. 711717 ASSIGNED JUDGE Pokorny

Hewitt VS The L.E. Myers Co.

☐ 02 REASSIGNED	DISPOSITION	☐ 81 JURY TRIAL		☐ 89 DIS. W/PREJ.	
☐ 03 REINSTATED (C/A)		☐ 82 ADR DECREE		☐ 91 COGNOVITS	
☐ 04 REINSTATED		☐ 83 COURT TRIAL		☐ 92 DEFAULT	
☐ 20 MAGISTRATE		☐ 85 PRETRIAL		☐ 93 TRANS TO COURT	
☐ 40 ADR		☐ 86 FOREIGN JUDGMENT		☐ 95 TRANS TO JUDGE	
☐ 65 STAY		☐ 87 DIS. W/O PREJ			
☐ 69 SUBMITTED		☐ 88 BANKRUPTCY/APPEAL STAY		☐ 96 OTHER	

NO. JURORS _____
START DATE ___/___/___
END DATE ___/___/___

COURT REPORTER _____
START DATE ___/___/___
END DATE ___/___/___

☐ PARTIAL
☑ FINAL
☑ POST CARD

CLERK OF COUR

65933238
CV09711717

JOURNAL

DATE 11/8/10 (NUNC PRO TUNC ENTRY AS OF & FOR ___/___/___)

With regard to the Declaratory Judgment action, the Court finds ORC 2745.01 is constitutional and that the same is applicable to the instant action and facts.

Motion for Judgment Notwithstanding Verdict is overruled. Parties stipulated to submission of motion on briefs.

Stay of Execution on the judgment is granted upon the posting of a valid supersedeas bond in the amount of $597,785.00 with 1½ years of statutory interest at 4%.

All claims resolved.

Thomas J. Pokorny
JUDGE

FOR

RECEIVED FOR FILING
NOV 10 2010
GERALD E. FUERST, CLERK
BY _____ DEP.

CPC 43-2

CASE NO. CV 09 711717 ASSIGNED JUDGE Thomas J. Pokorny, by asssignment

Larry Hewitt VS The L.E.Myers Company, et al

CIVIL CASE STATUS FORM

	DISPOSITION		
☐ 02 REASSIGNED		☒ 81 JURY TRIAL	☐ 81 DIS. W/PREJ
☐ 03 REINSTATED (C/A)		☐ 82 ARBITRATION DECREE	☐ 91 COGNOVITS
☐ 04 REINSTATED		☐ 83 COURT TRIAL	☐ 92 DEFAULT
☐ 20 MAGISTRATE		☐ 85 PRETRIAL	☐ 93 TRANS TO COURT
☐ 40 ARBITRATION		☐ 86 FOREIGN JUDGMENT	☐ 95 TRANS TO JUDGE
☐ 65 STAY		☐ 87 DIS. W/O PREJ	☐ 96 OTHER
☐ 69 SUBMITTED		☐ 88 BANKRUPTCY/APPEAL STAY	

F

NO. JURORS ____
START DATE ____/____/____
END DATE ____/____/____

COURT REPORTER ____
START DATE ____/____/____
END DATE ____/____/____

☐ PARTIAL
☒ FINAL
☒ POST CARD

JOURNAL

DATE 09/24/2010 (NUNC PRO TUNC ENTRY AS OF & FOR ____/____/____)

CLERK OF COURTS

Jury continues to deliberate. Jury returns a verdict in favor of the Plaintiff and against the Defendant for a total of $597,785.00.

Jury further found for the Defendant on issue of Punitive Damages.

Judgment entered for Plaintiff, Larry Hewitt, and against the Defendant The L. E. Myers Company in the amount of $597,785.00.

Costs to Defendant.

Final.

T. J. Pokorny
JUDGE

RECEIVED FOR FILING
OCT 0 1 2010
GERALD E. FUERST, CLERK
BY ____ DEP.

CPC 43-2

(NUNC)

CV09711717 65321398

08/15/2005 - 1051448.3

Professors, Cent. State Univ. Chapter v. Cent. State Univ., 87 Ohio St. 3d 55, 717 N.E.2d 286 (1999).

Labor contracts

Revised Code § 3319.08.6 is a valid regulation enacted pursuant to the authority of the constitution of Ohio, as well as pursuant to the general police powers of the state, and its enforcement does not impair the obligations of labor contracts in existence at the time of its effective date within the scope of the Constitution, either federal or state: Vincent v. Elyria Board of Education, 7 Ohio App. 2d 58, 36 Ohio Op. 2d 151, 218 N.E.2d 764 (1966).

Laws, construed

The word "laws" does not embrace municipal ordinances, and therefore this provision defines the legislative power of the general assembly of Ohio only: Cincinnati v. Correll, 141 Ohio St. 535, 26 Ohio Op. 116, 49 N.E.2d 412 (1943).

Minimum Fair Wage Standards Act

Revised Code § 4111.03 of the Minimum Fair Wage Standards Act, relating to overtime compensation, preempts any conflicting local ordinance: Wray v. Urbana, 2 Ohio App. 3d 172, 2 Ohio B. 188, 440 N.E.2d 1382 (1982).

Minimum wage act

The minimum wage act of Ohio, comprising GC §§ 154-45d to 154-45t (RC § 4111.01 et seq), is a welfare measure passed by the general assembly pursuant to the authority conferred by OConst art II, § 34. It sets forth the policy motivating its enactment, outlines standards to be observed in the determination of a "fair wage," prescribes the procedure to be followed by the governmental agency designated to carry the law into execution and does not represent a delegation of legislative power: Strain v. Southerton, 148 Ohio St. 153, 35 Ohio Op. 167, 74 N.E.2d 69 (1947).

Ohio civil service statutes

Because OConst art XV, § 10 specifically provides for civil service legislation, we presume that when the general assembly enacted the civil service statutes, including RC § 124.44, it did so pursuant to OConst art XV, § 10, not pursuant to OConst art II, § 34; therefore, the final clause in OConst art II, § 34 would have no application where the Ohio civil service statutes are concerned. Consequently, a conflict between a home-rule charter provision and a civil service statute is distinguishable from a conflict between a home-rule charter provision and the Public Employees' Collective Bargaining Act: Springfield Command Officers Ass'n v. City Comm'n, 62 Ohio App. 3d 301, 575 N.E.2d 499 (1990).

Ohio Public Employees' Collective Bargaining Act

The Ohio Public Employees' Collective Bargaining Act, RC Chapter 4117., and specifically RC § 4117.14(I), are constitutional as they fall within the general assembly's authority to enact employee welfare legislation pursuant to OConst art II, § 34. OConst art XVIII, § 3, the home-rule provision, may not be interposed to impair, limit or negate the act: Rocky River v. State Emp. Relations Bd., 43 Ohio St. 3d 1, 539 N.E.2d 103 (1989).

Police and fireman's pension fund

The creation and the administration, management, and the control of a state police and firemen's disability and pension fund, as provided in RC §§ 742.01 to 742.49, inclusive, is a valid enactment of the general assembly by virtue of the provisions of OConst art II, § 34: State ex rel. Board of Trustees v. Board of Trustees, 12 Ohio St. 2d 105, 41 Ohio Op. 2d 410, 233 N.E.2d 135 (1967).

Unused sick leave

An ordinance providing that employees may not receive any compensation for unused sick leave upon retirement is in unconstitutional conflict with RC § 124.39 under both OConst art II, § 34 and art XVIII, § 3: Fraternal Order of Police, Lodge 39 v. East Cleveland, 64 Ohio App. 3d 421, 581 N.E.2d 1131 (1989).

Wage formula

In the absence of conflict with general law, OConst art II, § 34, has no application to a wage formula established by municipal charter and carried out annually by ordinance of counsel: Fuldauer v. Cleveland, 32 Ohio St. 2d 114, 61 Ohio Op. 2d 374, 290 N.E.2d 546 (1972).

Wage law

Ohio's prevailing wage law, RC §§ 4115.03 through 4115.15, which: (1) manifests a genuine statewide concern for the integrity of the collective bargaining process in the building and construction trades through a comprehensive statutory plan of worker rights and remedies, and (2) has significant extraterritorial effects, beyond the scope of any municipality's local self-government or police powers, preempts any conflicting local ordinance: State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 23 Ohio Op. 3d 145, 431 N.E.2d 311 (1982).

§ 35 Workmen's [Workers'] compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such

failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

HISTORY: (As amended November 6, 1923. To take effect January 1, 1924.)

Cross-References to Related Sections

Bureau of Workers' Compensation, RC § 4121.12 et seq.
Expenditures by bureau for prevention of industrial accidents and diseases, RC § 4121.37.
Order to correct violation, imposition of civil penalty by industrial commission on employer in re claim for additional award, RC § 4121.47.
Staff hearing officers' jurisdiction in certain matters, RC § 4121.35.
Workers' compensation, RC § 4123.01 et seq.
Paid compensation defined, RC § 4123.35.
Public fund; private fund; contributions; disbursements, RC § 4123.30.

Ohio Administrative Code

Bureau of workers' compensation. OWCH: OAC ch. 4123-1 et seq.
Industrial commission. OWCH: OAC ch. 4121-1 et seq.
Division of safety and hygiene. OAC ch. 4121:1-1 et seq.

Text Discussion

Background of the occupational disease statute. **Ohio Workers' Comp. § 8.1**
Death benefits. **Ohio Workers' Comp. § 11.3**
Definition of intentional tort. **Ohio Workers' Comp. § 6.28**
Functions of the agencies. **6 Ohio Civ. Prac. § 310.02**
Generally. **Ohio Workers' Comp. § 1.1**
Lawful requirement exception. **Ohio Workers' Comp. § 13.1**
1913 compulsory compensation law. **Ohio Workers' Comp. § 2.11**
Operation of compensation statutes. **Ohio Workers' Comp. § 1.8**
Products liability defenses; employer-employee relationships. **Prod. Liab. § 17.12**
Rules of the administrative agencies. **Ohio Workers' Comp. § 3.11**
Sources of procedural authority for administrative agencies. **6 Ohio Civ. Prac. § 310.03**
State insurance fund. **Ohio Workers' Comp. § 14.1**
Workers' compensation. **3 Ohio Civ. Prac. § 144C.01**

Research Aids

Workers' compensation:
O-Jur3d: Bus & Occ § 21; Death § 29; Gov Tort Liab § 89; Pub F § 68; Workers' Comp §§ 4, 5, 7, 19, 33, 38, 103, 215, 219, 269, 373-375
Am-Jur2d: Const L §§ 83, 573, 632, 769; Workm C §§ 10-26

ALR

Employer's tort liability to worker for concealing work place hazard or nature or extent of injury. 9 ALR4th 778.
Mental disorder as compensable under workmen's compensation acts. 108 ALR5th 1.
Right of employee to maintain common-law action for negligence against workmen's compensation insurance carrier. 93 ALR2d 598.
Right to workers' compensation for injuries suffered after termination of employment. 10 ALR5th 245, 108 ALR5th 1.
Workmen's compensation, use of medical books or treatises as independent evidence. 17 ALR3d 983.
Workmen's compensation act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer. 9 ALR4th 873.

Law Review

Achieving safer workplaces by expanding employers' tort liability under workers' compensation laws. Kenneth Matheny. 19 NoKyLRev 457 (1992).
Availability of common law remedies for noncompensable occupational diseases. Casenote. 5 OSLJ 436 (1939).
Blankenship v. Cincinnati Milacron Chemicals, Inc. [69 OS2d 608 (1982)]: some fairness for Ohio workers and some uncertainty for Ohio employers. Note. 15 ToledoLRev 403 (1983).
Blankenship v. Cinti. Milacron Chemical Co.: workers' compensation and the intentional tort: a new direction for Ohio. Case note. 12 CapitalULRev 287 (1982).
Brady v. Safety-Kleen Corp.: intentional tort actions in workers' compensation cases — back to a common law cause of action. Note. 19 NoKyLRev 545 (1992).
Brady v. Safety-Kleen Corp.: tipping Ohio's workers' compensation scale in favor of the employee. Case comment. 54 OSLJ 837 (1993).
The compensability of a physical injury as a result of mental stimulus in workers' compensation — the dark ages in Ohio. Carole C. Butler. 13 CapitalULRev 1 (1983).
The constitutionality of off setting collateral benefits under Ohio Revised Code section 2317.45. Note. 53 OSLJ 587 (1992).
The crumbling tower of architectural immunity: evolution and expansion of the liability to third parties. Note. 45 OSLJ 217 (1984).
Injury suffered as a result of violation of hours of labor statute. Casenote. 7 OBar (No.51) 718, 1 OSLJ 144 (1925).
Intentional torts in the workplace — Further erosion of the workers' compensation act exclusive remedy bar to tort actions — Blankenship v. Cincinnati Milacron Chemicals, Inc. Note. 10 NoKyLRev 355 (1983).
The need for workers' compensation reform in Ohio's definition of injury: Szymanski v. Hallie's Department Store. Note. 31 ClevStLRev 145 (1982).
The Ohio compensation system. James L. Young. 19 OSLJ 541 (1958).
Ohio's attempt to circumvent the concept of intentional tort: enactment of Revised Code Section 4121.80. Comment. 16 CapitalULRev 279 (1986).
Ohio's "employment intentional tort": a workers' compensation exception, or the creation of an entirely new cause of action? Note. 44 ClevStLRev 331 (1996).
Ohio's last word on comparative negligence? — Revised Code Section 2315.19. Jeffrey A. Hennemuth. 9 Ohio N.U.L. Rev. 31 (1982).
Safety requirements of the industrial commission. Norman Hovey. 23 OBar (No.21) 461 (1950).
Some comments on workmen's compensation. Thomas Donnelly. 15 OBar (No.14) 183 (1942).
State ex rel. Berry v. Industrial Commission: [illegible] specificity requirement in light of the abro[illegible] same evidence test. Note. 13 CapitalULR[illegible]

Chapter 2745: EMPLOYMENT INTENTIONAL TORT

2745.01 Liability of employer for intentional tort - intent to injure required - exceptions.

(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

(B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

Effective Date: 04-07-2005

payer has taken a deduction for federal income tax purposes as reportable on the taxpayer's form 2106, and against which a like deduction has not been allowed by the municipal corporation, the municipal corporation shall deduct from the taxpayer's taxable income an amount equal to the deduction shown on such form allowable against such income, to the extent not otherwise so allowed as a deduction by the municipal corporation. In the case of a taxpayer who has a net profit from a business or profession that is operated as a sole proprietorship, no municipal corporation may tax or use as the base for determining the amount of the net profit that shall be considered as having a taxable situs in the municipal corporation, a greater amount than the net profit reported by the taxpayer on schedule C filed in reference to the year in question as taxable income from such sole proprietorship, except as otherwise specifically provided by ordinance or regulation.

No municipal corporation shall tax the ANY OF THE FOLLOWING:

(A) THE military pay or allowances of members of the armed forces of the United States, or the;

(B) THE income of religious, fraternal, charitable, scientific, literary, or educational institutions to the extent that such income is derived from tax exempt real estate, tax exempt tangible or intangible property or tax exempt activities;

(C) INTANGIBLE INCOME.

Nothing in this section or section 718.02 of the Revised Code, shall authorize the levy of any tax on income which a municipal corporation is not authorized to levy under existing laws or shall require a municipal corporation to allow a deduction from taxable income for losses incurred from a sole proprietorship or partnership.

SECTION 2. That existing sections 133.23, 709.16, and 718.01 of the Revised Code are hereby repealed.

SECTION 3. Notwithstanding section 718.01 of the Revised Code, as amended by this act, a municipal corporation that was permitted by virtue of its local ordinances to tax any type of intangible income on or before April 1, 1986, may continue to tax such intangible income received by a taxpayer through 1988, or in the case of a taxpayer whose municipal income tax liability is based on a fiscal year, intangible income received through the taxpayer's fiscal year ending in 1988.

SECTION 4. Notwithstanding any provision of Chapter 133. of the Revised Code to the contrary, on and after the effective date of this act and until January 1, 1987, if bonds and notes issued under Chapter 133. of the Revised Code are rejected by the officers mentioned in section 133.34 of the Revised Code, then those bonds and notes may be sold at private sale for not less than ninety-seven per cent of their face value with accrued interest.

SECTION 5. If any provision of this act or the application of any provision of this act to any person is declared invalid by a court of this state, the invalidity does not affect other provisions of this act, or applications of other provisions of this act, that can be given effect without the invalid provision or application, and to this end the provisions are severable.

SECTION 6. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate action is required in order to prevent the proliferation of taxation of intangible income by municipalities and to permit political subdivisions to take advantage of current economic conditions and issue bonds prior to the effective date of tax proposals currently pending before Congress that may adversely affect such bonds. Therefore, this act shall go into immediate effect.

AMENDED SUBSTITUTE SENATE BILL NO. 307

Act Effective Date:	8-22-86
Date Passed:	5-15-86
Date Approved by Governor:	5-23-86
Date Filed:	5-23-86
File Number:	213
Chief Sponsor:	FINAN

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Editor's Note: An LSC Analysis is printed at the end of this bill.

To amend sections 126.30, 4121.02, 4121.30, 4121.32, 4121.35, 4121.38, 4121.40, 4121.63, 4121.67, 4121.69, 4123.01, 4123.28, 4123.29, 4123.34, 4123.343, 4123.35, 4123.411, 4123.413, 4123.414, 4123.512, 4123.515, 4123.516, 4123.519, 4123.54, 4123.56, 4123.57, 4123.58, 4123.62, 4123.651, 4123.66, 4123.68, 4123.74, and 4123.80 and to enact sections 4121.47, 4121.48, 4121.70, 4121.80, 4123.351, and 4123.352 of the Revised Code to authorize employees to bring intentional tort suits against employers under certain circumstances, to establish an Intentional Tort Fund to pay damages to employees for intentional torts of employers, to revise the definition of "injury" for the purposes of workers' compensation, to change the circumstances under which a disabled employee remains entitled to temporary, total compensation if the employer offers the employee work, to replace temporary, partial compensation with another form of compensation, to revise the criteria for self-insurers, to establish a surety bond program for self-insurers, to increase the levels of certain types of compensation payments to employees, and to make other administrative changes in the workers' compensation program.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 126.30, 4121.02, 4121.30, 4121.32, 4121.35, 4121.38, 4121.40, 4121.63, 4121.67, 4121.69, 4123.01, 4123.28, 4123.29, 4123.34, 4123.343, 4123.35, 4123.411, 4123.413, 4123.414, 4123.512, 4123.515, 4123.516, 4123.519, 4123.54, 4123.56, 4123.57, 4123.58, 4123.62, 4123.651, 4123.66, 4123.68, 4123.74, and 4123.80 be amended and sections 4121.47, 4121.48, 4121.70, 4121.80, 4123.351, and 4123.352 of the Revised Code be enacted to read as follows:

126.30 State agencies to pay interest on past-due obligations; conditions; payment date for invoices submitted to workers' compensation bureau; defective invoices; reports [Eff. 8-22-86]

(A) Any state agency that purchases, leases, or otherwise acquires any equipment, materials, goods, supplies, or services from any person and fails to make payment for the equipment, materials, goods, supplies, or services by the required payment date shall pay an interest charge to the person in accordance with division (E) of this section. Except as otherwise provided in division (B), (C), or (D) of this section, the required payment date shall be the date on

which payment is due under the terms of a written agreement between the state agency and the person or, if a specific payment date is not established by such a written agreement, the required payment date shall be thirty days after the state agency receives a proper invoice for the amount of the payment due.

(B) If the invoice submitted to the state agency contains a defect or impropriety, the agency shall send written notification to the person within fifteen days after receipt of the invoice. The notice shall contain a description of the defect or impropriety and any additional information necessary to correct the defect or impropriety. If the agency sends such written notification to the person, the required payment date shall be thirty days after the state agency receives a proper invoice.

(C) In applying this section to claims submitted to the department of human services by providers of equipment, materials, goods, supplies, or services, the required payment date shall be the date on which payment is due under the terms of a written agreement between the department and the provider. If a specific payment date is not established by a written agreement, the required payment date shall be thirty days after the department receives a proper claim. If the department determines that the claim is improperly executed or that additional evidence of the validity of the claim is required, the department shall notify the claimant in writing or by telephone within fifteen days after receipt of the claim, except that during the period beginning on July 1, 1985, and ending on December 31, 1985, the department shall notify the claimant in writing or by telephone within thirty days after receipt of the claim. The notice shall state that the claim is improperly executed and needs correction or that additional information is necessary to establish the validity of the claim. If the department makes such notification to the provider, the required payment date shall be thirty days after the department receives the corrected claim or such additional information as may be necessary to establish the validity of the claim.

(D) ~~The provisions of divisions (A) and (B) of this section shall not apply to billings filed pursuant to the provisions of Chapter 4121., 4123., 4127., or 4131. of the Revised Code, and payment thereof shall be governed by the provisions of such chapters~~ IN APPLYING THIS SECTION TO INVOICES SUBMITTED TO THE BUREAU OF WORKERS' COMPENSATION FOR EQUIPMENT, MATERIALS, GOODS, SUPPLIES, OR SERVICES PROVIDED TO EMPLOYEES IN CONNECTION WITH AN EMPLOYEE'S CLAIM AGAINST THE STATE INSURANCE FUND, THE PUBLIC WORK-RELIEF EMPLOYEES' COMPENSATION FUND, THE COAL-WORKERS PNEUMOCONIOSIS FUND, OR THE MARINE INDUSTRY FUND AS COMPENSATION FOR INJURIES OR OCCUPATIONAL DISEASE PURSUANT TO CHAPTER 4123., 4127., OR 4131. OF THE REVISED CODE, THE REQUIRED PAYMENT DATE SHALL BE THE DATE ON WHICH PAYMENT IS DUE UNDER THE TERMS OF A WRITTEN AGREEMENT BETWEEN THE BUREAU AND THE PROVIDER. IF A SPECIFIC PAYMENT DATE IS NOT ESTABLISHED BY A WRITTEN AGREEMENT, THE REQUIRED PAYMENT DATE SHALL BE THIRTY DAYS AFTER THE BUREAU RECEIVES A PROPER INVOICE FOR THE AMOUNT OF THE PAYMENT DUE OR THIRTY DAYS AFTER THE FINAL ADJUDICATION ALLOWING PAYMENT OF AN AWARD TO THE EMPLOYEE, WHICHEVER IS LATER. NOTHING IN THIS SECTION SHALL SUPERSEDE ANY FASTER TIMETABLE FOR PAYMENTS TO HEALTH CARE PROVIDERS CONTAINED IN SECTIONS 4121.44, 4123.513, 4123.514, AND 4123.515 OF THE REVISED CODE.

FOR PURPOSES OF THIS DIVISION, A "PROPER INVOICE" INCLUDES THE CLAIMANT'S NAME, CLAIM NUMBER AND DATE OF INJURY, EMPLOYER'S NAME, THE PROVIDER'S NAME AND ADDRESS, THE PROVIDER'S ASSIGNED PAYEE NUMBER, A DESCRIPTION OF THE EQUIPMENT, MATERIALS, GOODS, SUPPLIES, OR SERVICES PROVIDED BY THE PROVIDER TO THE CLAIMANT, THE DATE PROVIDED, AND THE AMOUNT OF THE CHARGE. IF MORE THAN ONE ITEM OF EQUIPMENT, MATERIALS, GOODS, SUPPLIES, OR SERVICES IS LISTED BY A PROVIDER ON A SINGLE APPLICATION FOR PAYMENT, EACH ITEM SHALL BE CONSIDERED SEPARATELY IN DETERMINING IF IT IS A PROPER INVOICE.

IF PRIOR TO A FINAL ADJUDICATION THE BUREAU DETERMINES THAT THE INVOICE CONTAINS A DEFECT, THE BUREAU SHALL NOTIFY THE PROVIDER IN WRITING AT LEAST FIFTEEN DAYS PRIOR TO WHAT WOULD BE THE REQUIRED PAYMENT DATE IF THE INVOICE DID NOT CONTAIN A DEFECT. THE NOTICE SHALL CONTAIN A DESCRIPTION OF THE DEFECT AND ANY ADDITIONAL INFORMATION NECESSARY TO CORRECT THE DEFECT. IF THE BUREAU SENDS A NOTIFICATION TO THE PROVIDER, THE REQUIRED PAYMENT DATE SHALL BE REDETERMINED IN ACCORDANCE WITH THIS DIVISION AFTER THE BUREAU RECEIVES A PROPER INVOICE.

FOR PURPOSES OF THIS DIVISION, "FINAL ADJUDICATION" MEANS THE LATER OF THE DATE OF THE DECISION OR OTHER ACTION BY THE BUREAU, THE INDUSTRIAL COMMISSION, OR A COURT ALLOWING PAYMENT OF THE AWARD TO THE EMPLOYEE FROM WHICH THERE IS NO FURTHER RIGHT TO RECONSIDERATION OR APPEAL THAT WOULD REQUIRE THE BUREAU TO WITHHOLD COMPENSATION AND BENEFITS, OR THE DATE ON WHICH THE RIGHTS TO RECONSIDERATION OR APPEAL HAVE EXPIRED WITHOUT AN APPLICATION THEREFOR HAVING BEEN FILED OR, IF LATER, THE DATE ON WHICH AN APPLICATION FOR RECONSIDERATION OR APPEAL IS WITHDRAWN. IF AFTER FINAL ADJUDICATION, THE ADMINISTRATOR OF THE BUREAU OF WORKERS' COMPENSATION OR THE INDUSTRIAL COMMISSION MAKES A MODIFICATION WITH RESPECT TO FORMER FINDINGS OR ORDERS, PURSUANT TO CHAPTER 4123., 4127., OR 4131. OF THE REVISED CODE OR PURSUANT TO COURT ORDER, THE ADJUDICATION PROCESS SHALL NO LONGER BE CONSIDERED FINAL FOR PURPOSES OF DETERMINING THE REQUIRED PAYMENT DATE FOR INVOICES FOR EQUIPMENT, MATERIALS, GOODS, SUPPLIES, OR SERVICES PROVIDED AFTER THE DATE OF THE MODIFICATION WHEN THE PROPRIETY OF THE INVOICES IS AFFECTED BY THE MODIFICATION.

(E) The interest charge on amounts due shall be paid to the person for the period beginning on the day after the required payment date and ending on the day that payment of the amount due is made, except that during the period beginning on July 1, 1985, and ending on June 30, 1986, the interest charge on amounts due shall be paid to the person for the period beginning on the sixteenth day after the required payment date and ending on the day that payment of the amount due is made. The amount of the interest charge that remains unpaid at the end of any thirty-day period after the required payment date shall be added to the ~~principal beginning on the day after the required payment date and ending on the day that payment of the amount due is made, except that during the period beginning on July 1, 1985, and ending on June 30, 1986, the interest charge on amounts due shall be paid to the person for the period beginning on the sixteenth day after the required payment date and ending on the day that payment of the amount due is made. The amount of the interest charge that remains unpaid at the end of the thirty-day period after the required payment date shall be added to the~~ principal amount of the debt and thereafter the interest charge shall accrue on the principal amount of the debt plus the added interest charge. The interest charge shall be at the rate per calendar month that equals one-twelfth of the rate per

annum prescribed by section 5703.47 of the Revised Code for the calendar year that includes the month for which the interest charge accrues.

(F) No appropriations shall be made for the payment of any interest charges required by this section. Any state agency required to pay interest charges under this section shall make the payments from moneys available for the administration of agency programs.

If a state agency pays interest charges under this section, but determines that all or part of the interest charges should have been paid by another state agency, the state agency that paid the interest charges may request the attorney general to determine the amount of the interest charges that each state agency should have paid under this section. If the attorney general determines that the state agency that paid the interest charges should have paid none or only a part of the interest charges, the attorney general shall notify the state agency that paid the interest charges, any other state agency that should have paid all or part of the interest charges, and the director of budget and management of its HIS decision, stating the amount of interest charges that each state agency should have paid. The director shall transfer from the appropriate funds of any other state agency that should have paid all or part of the interest charges to the appropriate funds of the state agency that paid the interest charges an amount necessary to implement the attorney general's decision.

(G) Not later than forty-five days after the end of each fiscal year, each state agency shall file with the director of budget and management a detailed report concerning the interest charges the agency paid under this section during the previous fiscal year. The report shall include the number, amounts, and frequency of interest charges the agency incurred during the previous fiscal year and the reasons why the interest charges were not avoided by payment prior to the required payment date. The director shall compile a summary of all the reports submitted under this division and shall submit a copy of the summary to the president and minority leader of the senate and to the speaker and minority leader of the house of representatives no later than the thirtieth day of September of each year.

4121.02 Composition of industrial commission; terms of office [Eff. 8-22-86]

The industrial commission shall be composed of five members to be appointed by the governor with the advice and consent of the senate. Persons so appointed shall be individuals possessing a recognized expertise in the field of workers' compensation. Terms of office shall be for six years, commencing on the first day of July and ending on the thirtieth day of June. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Any member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Two of the appointees to the commission shall be persons who, on account of their previous vocation, employment, or affiliations, can be classed as representatives of employers, and two of such appointees shall be persons who, on account of their previous vocation, employment, or affiliations can be classed as representatives of employees. One of the appointees shall be a person who, on account of his previous vocation, employment, or affiliation can be classed as a representative of the public. Not more than three of the members of the commission shall belong to or be affiliated with the same political party.

The governor shall not appoint any person to more than two full terms of office on the commission. This restriction does not prevent the governor from appointing a person to fill a vacancy caused by the death, resignation, or removal of a commission member and also appointing that person twice to full terms on the commission, or from appointing a person previously appointed to fill less than a full term twice to full terms on the commission. A EXCEPT FOR THE PUBLIC MEMBER'S TENURE AS A MEMBER OF THE SELF-INSURING EMPLOYER'S EVALUATION BOARD, A member of the industrial commission shall hold no other public office and shall devote his full time to his duties as a member of the commission.

4121.30 Adoption, publication, and proposal of rules [Eff. 8-22-86]

(A) All rules governing the operating procedure of the bureau of workers' compensation, regional boards of review, and the industrial commission shall be adopted pursuant to Chapter 119. of the Revised Code, except that determinations of the bureau, district hearing officers, a regional board of review, a staff hearing officer, or the commission, with respect to an individual employee's claim to participate in the state insurance fund are governed only by Chapter 4123. of the Revised Code.

THE BUREAU AND COMMISSION SHALL PROCEED JOINTLY, PURSUANT TO CHAPTER 119. OF THE REVISED CODE, INCLUDING A JOINT HEARING, TO ADOPT JOINT RULES GOVERNING THE OPERATING PROCEDURES OF THE BUREAU, REGIONAL BOARDS OF REVIEW, AND COMMISSION. THE BUREAU IS RESPONSIBLE FOR THE PUBLICATION OF THE JOINT RULES IN A SINGLE PUBLICATION.

(B) Upon submission to the bureau or the industrial commission of a petition containing not less than fifteen hundred signatures of adult residents of the state, any individual may propose a rule for adoption, amendment, or rescission by the bureau or the commission. If, upon investigation, the bureau or commission is satisfied that the signatures upon the petition are valid, it shall proceed, pursuant to Chapter 119. of the Revised Code, to consider adoption, amendment, or rescission of the rule.

(C) The bureau and commission shall make available in a timely manner and at cost copies of all rules currently in force and for that purpose shall maintain a mailing list of all persons requesting copies of the rules.

4121.32 Operating manuals [Eff. 8-22-86]

(A) The rules covering operating procedure and criteria for decision-making that the administrator of the bureau of workers' compensation and the industrial commission are required to adopt pursuant to section 4121.31 of the Revised Code shall be supplemented with operating manuals setting forth the procedural steps in detail for performing each of the assigned tasks of each section of the bureau and commission. No employee may deviate from manual procedures without authorization of the section chief. Manuals shall set forth the procedure for assignment and transfer of claims within sections, and shall require the impartial, random assignment of claims so as to prevent special handling or undue influence on claims handling and claims decision-making.

(B) Manuals shall be designed to provide performance objectives, and may require employees to record sufficient data to reasonably measure the efficiency of functions in all sections. The division of research and statistics shall perform periodic cost effectiveness analyses which shall be made available to the general assembly, the governor, and to the public during normal working hours.

(C) Under the overall policy direction of the commission, the bureau and commission each shall develop, adopt, and use a policy manual setting forth the guidelines and bases for decision-making for any decision which is the responsibility of the bureau, district hearing officers, regional boards of review, staff hearing officers, or the commission. Guidelines shall be set forth in the policy manual by the bureau and commission to the extent of their respective jurisdictions for deciding at least the following specific matters:

(1) Reasonable medical charges;
(2) Reasonable drug charges;
(3) Reasonable hospital charges;
(4) Reasonable nursing charges;
(5) Reasonable ambulance services;

(6) Relationship of drugs to injury;
(7) Awarding lump sum advances for creditors;
(8) Awarding lump sum advances for attorney fees;
(9) Placing a claimant into rehabilitation;
(10) Transferring costs of a claim from employer costs to the statutory surplus fund pursuant to section 4123.343 of the Revised Code;
(11) Utilization of physician specialist reports;
(12) Determining percentage of permanent partial disability, temporary partial disability, temporary total disability, violations of specific safety requirements, award under division ~~(C)~~(B) of section 4123.57 of the Revised Code, and permanent total disability.

(D) With respect to any determination of disability under Chapter 4123. of the Revised Code, when the physician makes a determination based upon statements or information furnished by the claimant or upon subjective evidence, he shall clearly indicate this fact in his report.

(E) The bureau and commission shall make copies of all manuals available to interested parties at cost.

4121.35 Staff hearing officers; hearings; petition for transfer; chief hearing officer [Eff. 8-22-86]

(A) The industrial commission may appoint staff hearing officers to consider and decide on behalf of the commission all matters over which the commission has jurisdiction. All staff hearing officers shall be full-time employees of the commission and be admitted to the practice of law or possess prior experience and training sufficient to make them knowledgeable in workers' compensation law and practice. Staff hearing officers shall not engage in any other activity that interferes with their full-time employment by the commission during normal working hours.

(B) Staff hearing officers of the commission may hear and decide the following matters:
(1) Applications for permanent, total disability awards pursuant to section 4123.58 of the Revised Code;
(2) Lump sum awards pursuant to section 4123.64 of the Revised Code;
(3) Final settlements pursuant to section 4123.65 of the Revised Code;
(4) Applications for additional awards for violation of a specific safety rule of the commission pursuant to Section 35 of Article II of the Ohio Constitution;
(5) Applications for reconsideration pursuant to division ~~(B)~~(A) of section 4123.57 of the Revised Code. Decisions of the staff hearing officers on reconsideration pursuant to division ~~(B)~~(A) of section 4123.57 of the Revised Code shall be final.
(6) Appeals to the commission taken pursuant to section 4123.516 of the Revised Code. The decision of a staff hearing officer shall be the decision of the commission for the purposes of section 4123.519 of the Revised Code.

(C) Staff hearing officers shall hold hearings on all matters referred to them for hearing. Hearing procedures shall conform to the rules of the commission as to notice, records, and the form of the decision. Any person adversely affected by a decision of a staff hearing officer on a matter of original jurisdiction under divisions (B)(1) to (4) of this section may of right appeal that decision directly to the industrial commission.

(D) The commission shall adopt rules requiring the regular rotation of staff hearing officers with respect to the types of matters under consideration and that prevent the consideration of a workers' compensation claim unless all interested and affected parties have the opportunity to be present and to present evidence and arguments in support or in rebuttal to the evidence or arguments of other parties.

(E) No person may seek transfer of a matter assigned to a staff hearing officer except upon written petition to the commission. The commission shall only allow the motion upon filing of an agreement of both parties or if the chief hearing officer indicates his approval.

(F) The commission shall appoint a chief hearing officer who shall have direct supervision of the activities of all staff hearing officers and all district hearing officers. The chief shall assign all matters for hearing pursuant to division (B) of this section to a staff hearing officer and for that purpose shall maintain a docket listing the assignment to and any transfer of assignment of any matter under consideration by a staff hearing officer.

(G) The commission may adopt a rule providing that any employer who makes his semiannual premium payment at least one month prior to the last day on which the payment may be made without penalty shall be entitled to such a discount as may from time to time be fixed by the commission.

4121.38 Medical section [Eff. 8-22-86]

(A) The industrial commission shall maintain a medical section under direct commission control to serve both the industrial commission and the bureau of workers' compensation and shall provide for its management.

(B) The medical section shall:
(1) Implement a program of impairment evaluation training for its staff physicians;
(2) Issue a manual of commission policy as to impairment evaluation so as to increase consistency of medical reports. This manual shall be available to the public at cost but shall be provided FREE to all physicians who treat claimants or to whom claimants are referred for evaluation. THE COMMISSION SHALL TAKE STEPS TO ENSURE THAT THE MANUAL RECEIVES THE WIDEST POSSIBLE DISTRIBUTION TO PHYSICIANS.
(3) Develop a method of peer review of medical reports prepared by the commission referral doctors;
(4) Assist the administrator to determine eligibility and reasonableness of the compensation payments for medical, hospital, drug, and nursing services. The administrator shall assign sufficient investigators to the medical section to provide control over such expenditure.
(5) Issue a policy manual as to the basis upon which referrals to other than commission specialists will be made;
(6) Secure the services of a pharmacist on a full or part-time basis to assist the claims section of the bureau in the review of drug bills.

(C) The commission shall designate two hearing examiners and two medical staff members who shall be specially trained in medical-legal analysis. The specialists shall write evaluations of medical-legal problems upon assignment by other hearing examiners or the commission. The director of administrative services upon commission advice shall assign such employees to a salary schedule commensurate with expertise required of them.

(D) The commission shall require that prior to any examination, a physician to whom a claimant is referred for examination receives all necessary medical information in the claim file about the claimant and a complete statement as to the purpose of the examination.

4121.40 Directors of district offices; investigators [Eff. 8-22-86]

(A) The administrator of the bureau of workers' compensation shall appoint a district director for each district office. Bureau district directors shall have the following duties:
(1) Provide each claimant and employer fair, impartial, and equal treatment;
(2) Recommend any needed improvements for changes in staff size and accessibility to district offices;
(3) Recommend to the administrator appropriate action concerning any allegations of misconduct, abuse of authority, or fraud committed in his district office;
(4) Ensure that all current bureau rules and operating procedures are carried out by all employees under his direction;
(5) Assist claimants and employers who contact the district office for information or assistance with respect to claims processing and coverage.

(B) The administrator shall assign to each district office an adequate number of investigators and field auditors.

District directors shall make investigators available to district hearing officers as needed.

IN ADDITION TO OTHER DUTIES THE ADMINISTRATOR MAY ASSIGN TO INVESTIGATORS, THEY SHALL, AT THE DISTRICT DIRECTORS' DIRECTION, INVESTIGATE ALLEGED INSTANCES OF PERSONS RECEIVING COMPENSATION PURSUANT TO SECTION 4123.58 OF THE REVISED CODE AND ENGAGING IN REMUNERATIVE EMPLOYMENT THAT IS INCOMPATIBLE WITH THE TERMS OF THAT SECTION.

4121.47 Violation of specific safety rule; order to correct; employer's appeal; deposit of penalties [Eff. 8-22-86]

(A) NO EMPLOYER SHALL VIOLATE A SPECIFIC SAFETY RULE OF THE INDUSTRIAL COMMISSION OR ACT OF THE GENERAL ASSEMBLY ADOPTED PURSUANT TO SECTION 4121.13 OR 4121.131 OF THE REVISED CODE.

(B) WHERE THE COMMISSION, IN THE COURSE OF ITS DETERMINATION OF A CLAIM FOR AN ADDITIONAL AWARD UNDER SECTION 35 OF ARTICLE II, OHIO CONSTITUTION, FINDS THE EMPLOYER GUILTY OF VIOLATING DIVISION (A) OF THIS SECTION, IT SHALL, IN ADDITION TO ANY AWARD PAID TO THE CLAIMANT, ISSUE AN ORDER TO CORRECT THE VIOLATION WITHIN SUCH PERIOD OF TIME AS THE COMMISSION FIXES. FOR ANY VIOLATION OCCURRING WITHIN TWENTY-FOUR MONTHS OF THE LAST VIOLATION, THE COMMISSION SHALL ASSESS AGAINST THE EMPLOYER A CIVIL PENALTY IN AN AMOUNT THE COMMISSION DETERMINES UP TO A MAXIMUM OF FIFTY THOUSAND DOLLARS FOR EACH VIOLATION. IN FIXING THE EXACT PENALTY, THE COMMISSION SHALL BASE ITS DECISION UPON THE SIZE OF THE EMPLOYER AS MEASURED BY THE NUMBER OF EMPLOYEES, ASSETS, AND EARNINGS OF THE EMPLOYER.

(C) AN EMPLOYER DISSATISFIED WITH THE IMPOSITION OF A CIVIL PENALTY PURSUANT TO DIVISION (B) OF THIS SECTION MAY APPEAL THE COMMISSION'S DECISION TO A COURT OF COMMON PLEAS PURSUANT TO THE RULES OF CIVIL PROCEDURE. AN APPEAL OPERATES TO STAY THE PAYMENT OF THE FINE PENDING THE APPEAL.

(D) THE COMMISSION SHALL DEPOSIT ALL PENALTIES COLLECTED PURSUANT TO THIS SECTION IN THE OCCUPATIONAL SAFETY LOAN PROGRAM FUND ESTABLISHED PURSUANT TO SECTION 4121.48 OF THE REVISED CODE.

4121.48 Occupational safety loan program; limitations; occupational safety loan fund [Eff. 8-22-86]

(A) BEGINNING ONE YEAR AFTER THE EFFECTIVE DATE OF THIS SECTION, THE INDUSTRIAL COMMISSION SHALL OPERATE AN OCCUPATIONAL SAFETY LOAN PROGRAM. THE COMMISSION MAY ADOPT RULES, EMPLOY PERSONNEL, AND DO ALL THINGS NECESSARY FOR THAT PURPOSE.

(B) THE OCCUPATIONAL SAFETY LOAN PROGRAM SHALL MAKE LOANS TO EMPLOYERS AT RATES FIXED BY THE COMMISSION AND THAT ARE BELOW THE RATES THE EMPLOYER WOULD OTHERWISE BE ABLE TO OBTAIN FROM ANY OTHER SOURCE FOR THE PURPOSE OF ALLOWING THE EMPLOYER TO IMPROVE, INSTALL, OR ERECT EQUIPMENT THAT REDUCES HAZARDS IN THE EMPLOYER'S WORKPLACE AND THAT PROMOTES THE HEALTH AND SAFETY OF WORKERS.

THE COMMISSION MAY NOT LOAN TO ANY EMPLOYER MORE THAN FIFTEEN THOUSAND DOLLARS PER FISCAL YEAR WITH REPAYMENT OF PRINCIPAL AND INTEREST UPON SUCH TERMS AS THE COMMISSION FIXES.

(C) THERE IS HEREBY ESTABLISHED THE OCCUPATIONAL SAFETY LOAN FUND, WHICH SHALL BE IN THE CUSTODY OF THE TREASURER OF STATE. THE FUND SHALL CONSIST OF ALL PENALTIES COLLECTED PURSUANT TO SECTION 4121.47 OF THE REVISED CODE AND SHALL BE USED BY THE COMMISSION SOLELY FOR THE PURPOSES IDENTIFIED IN THIS SECTION.

4121.63 Living maintenance payments [Eff. 8-22-86]

Claimants who the industrial commission determines could probably be rehabilitated to achieve the goals established by section 4121.61 of the Revised Code and who agree to undergo rehabilitation shall be paid living maintenance payments for a period or periods which do not exceed six months in the aggregate, unless review by the commission or its designee reveals that the claimant will be benefitted by an extension of such payments.

Living maintenance payments shall be paid in weekly amounts, not to exceed the amount the claimant would receive if the claimant were being compensated for temporary total disability, but not less than fifty per cent of the current state average weekly wage.

A claimant receiving such living maintenance payments shall be deemed to be temporarily totally disabled and shall receive no payment of any type of compensation except as provided by division ~~(C)~~(B) of section 4123.57 of the Revised Code for the periods during which the claimant is receiving living maintenance payments.

4121.67 Reemployment to be encouraged; payment for wage losses of rehabilitated employee [Eff. 8-22-86]

The industrial commission shall adopt rules for:

(A) FOR the encouragement of reemployment of claimants who have successfully completed prescribed rehabilitation programs by payment from the surplus fund established by section 4123.34 of the Revised Code to employers who employ or reemploy the claimants. The period or periods of payments shall not exceed six months in the aggregate, unless the industrial commission or its designee determines that the claimant will be benefited by an extension of payments.

(B) REQUIRING PAYMENT, IN THE SAME MANNER AS LIVING MAINTENANCE PAYMENTS ARE MADE PURSUANT TO SECTION 4121.63 OF THE REVISED CODE, TO THE CLAIMANT WHO COMPLETES A REHABILITATION TRAINING PROGRAM AND RETURNS TO EMPLOYMENT, BUT WHO SUFFERS A WAGE LOSS COMPARED TO THE WAGE THE CLAIMANT WAS RECEIVING AT THE TIME OF INJURY. PAYMENTS PER WEEK SHALL BE SIXTY-SIX AND TWO-THIRDS PER CENT OF THE DIFFERENCE, IF ANY, BETWEEN THE CLAIMANT'S WEEKLY WAGE AT THE TIME OF INJURY AND THE WEEKLY WAGE RECEIVED WHILE EMPLOYED, UP TO A MAXIMUM PAYMENT PER WEEK EQUAL TO THE STATEWIDE AVERAGE WEEKLY WAGE. THE PAYMENTS MAY CONTINUE FOR UP TO A MAXIMUM OF TWO HUNDRED WEEKS BUT SHALL BE REDUCED BY THE CORRESPONDING NUMBER OF WEEKS IN WHICH THE CLAIMANT RECEIVES PAYMENTS PURSUANT TO DIVISION (B) OF SECTION 4123.56 OF THE REVISED CODE.

4121.69 Compensation plans for commission employees not included in collective bargaining units; cooperation from other agencies; referrals to rehabilitation services commission [Eff. 8-22-86]

(A) THE INDUSTRIAL COMMISSION, WITH THE APPROVAL OF THE STATE EMPLOYEE COMPENSATION BOARD, MAY ESTABLISH COMPENSATION PLANS,

INCLUDING SCHEDULES OF HOURLY RATES, FOR THE COMPENSATION OF PROFESSIONAL, ADMINISTRATIVE, AND MANAGERIAL EMPLOYEES WHO ARE EMPLOYED TO FULFILL THE DUTIES PLACED UPON THE COMMISSION PURSUANT TO SECTIONS 4121.61 TO 4121.69 OF THE REVISED CODE. THE COMMISSION MAY ESTABLISH RULES OR POLICIES FOR THE ADMINISTRATION OF THE RESPECTIVE COMPENSATION PLANS.

THIS DIVISION DOES NOT APPLY TO EMPLOYEES FOR WHOM THE STATE EMPLOYMENT RELATIONS BOARD ESTABLISHES APPROPRIATE BARGAINING UNITS PURSUANT TO SECTION 4117.06 OF THE REVISED CODE.

(B) The industrial commission may employ the services and resources of any public entity or private person, business, or association in fulfilling the duties placed upon the industrial commission by sections 4121.61 to 4121.69 of the Revised Code. The rehabilitation services commission, the bureau of employment services, and any other public officer, employee, or agency shall give to the industrial commission full cooperation and shall at the request of the industrial commission enter into a written agreement stating the procedures and criteria for referring, accepting, and providing services to claimants in the job placement and rehabilitation efforts of the industrial commission on behalf of a claimant when referred by the industrial commission.

~~(B)~~(C) In appropriate cases, the industrial commission may refer a candidate to the rehabilitation services commission for participation in a program of the rehabilitation services commission. For that purpose, the industrial commission shall compensate the rehabilitation services commission for the nonfederal portion of its services.

4121.70 Labor-management government advisory committee [Eff. 8-22-86]

(A) THERE IS HEREBY CREATED THE LABOR-MANAGEMENT GOVERNMENT ADVISORY COMMITTEE CONSISTING OF FOURTEEN MEMBERS APPOINTED AS FOLLOWS:

(1) THE GOVERNOR, WITH THE ADVICE AND CONSENT OF THE SENATE, SHALL APPOINT FOUR MEMBERS WHO, BY TRAINING AND VOCATION, ARE REPRESENTATIVE OF LABOR AND FOUR MEMBERS WHO, BY TRAINING AND VOCATION, ARE REPRESENTATIVE OF EMPLOYERS.

(2) EX OFFICIO, THE CHAIRMEN OF THE STANDING COMMITTEES OF THE HOUSE OF REPRESENTATIVES AND THE SENATE TO WHICH LEGISLATION CONCERNED WITH WORKERS' COMPENSATION IS CUSTOMARILY REFERRED. A CHAIRMAN MAY DESIGNATE THE VICE-CHAIRMAN OF THE COMMITTEE TO SERVE IN HIS PLACE.

(3) ONE PERSON WHO BY TRAINING AND VOCATION REPRESENTS LABOR AND ONE PERSON WHO BY TRAINING AND VOCATION REPRESENTS EMPLOYERS OF DIFFERING POLITICAL PARTIES APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

(4) ONE PERSON WHO BY TRAINING AND VOCATION REPRESENTS LABOR AND ONE PERSON WHO BY TRAINING AND VOCATION REPRESENTS EMPLOYERS OF DIFFERING POLITICAL PARTIES APPOINTED BY THE PRESIDENT OF THE SENATE.

(B) MEMBERS APPOINTED BY THE GOVERNOR SHALL SERVE FOR A TERM OF SIX YEARS WITH EACH TERM ENDING ON THE SAME DAY OF THE YEAR IN WHICH THE MEMBER WAS FIRST APPOINTED, EXCEPT THAT EACH MEMBER SHALL SERVE FOR A PERIOD OF SIXTY ADDITIONAL DAYS AT THE END OF HIS TERM OR UNTIL HIS SUCCESSOR IS APPOINTED AND QUALIFIES, WHICHEVER DATE OCCURS FIRST. OF THE MEMBERS FIRST APPOINTED TO THE COMMISSION BY THE GOVERNOR, ONE MEMBER EACH REPRESENTING LABOR AND MANAGEMENT SHALL SERVE AN INITIAL TERM OF TWO YEARS, ONE MEMBER EACH REPRESENTING LABOR AND MANAGEMENT SHALL SERVE A TERM OF FOUR YEARS, AND THE REMAINING TWO MEMBERS SHALL SERVE FULL SIX-YEAR TERMS. THE MEMBERS INITIALLY APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE PRESIDENT OF THE SENATE SHALL SERVE A TERM OF SIX YEARS. THEREAFTER, MEMBERS SHALL BE APPOINTED TO AND SERVE FULL SIX-YEAR TERMS. MEMBERS ARE ELIGIBLE FOR REAPPOINTMENT TO ANY NUMBER OF ADDITIONAL TERMS.

LEGISLATIVE MEMBERS SHALL SERVE A TERM THAT COINCIDES WITH THE TWO-YEAR LEGISLATIVE SESSION IN WHICH THEY ARE FIRST APPOINTED WITH EACH TERM ENDING ON THE THIRTY-FIRST DAY OF DECEMBER OF THE EVEN-NUMBERED YEAR. LEGISLATIVE MEMBERS ARE ELIGIBLE FOR REAPPOINTMENT.

VACANCIES ON THE COMMITTEE SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT. ALL MEMBERS OF THE COMMITTEE SHALL SERVE WITHOUT ADDITIONAL COMPENSATION BUT SHALL BE REIMBURSED BY THE INDUSTRIAL COMMISSION FOR ACTUAL AND NECESSARY EXPENSES.

THE COMMITTEE SHALL ADVISE THE INDUSTRIAL COMMISSION ON THE QUALITY AND EFFECTIVENESS OF REHABILITATION SERVICES AND MAKE RECOMMENDATIONS PERTAINING TO THE COMMISSION'S REHABILITATION PROGRAM, INCLUDING THE OPERATION OF THAT PROGRAM.

THE LABOR-MANAGEMENT GOVERNMENT ADVISORY COMMITTEE SHALL RECOMMEND TO THE COMMISSION THREE CANDIDATES FOR THE POSITION OF DIRECTOR OF REHABILITATION. THE CANDIDATES SHALL BE CHOSEN FOR THEIR ABILITY AND BACKGROUND IN THE FIELD OF REHABILITATION. THE COMMISSION SHALL SELECT A DIRECTOR FROM THE LIST OF CANDIDATES.

4121.80 Intentional tort; time limits; court to determine liability; commission to determine damages; intentional tort fund; attorney fees; definition of intentional tort; applicability [Eff. 8-22-86]

(A) IF INJURY, OCCUPATIONAL DISEASE, OR DEATH RESULTS TO ANY EMPLOYEE FROM THE INTENTIONAL TORT OF HIS EMPLOYER, THE EMPLOYEE OR THE DEPENDENTS OF A DECEASED EMPLOYEE HAVE THE RIGHT TO RECEIVE WORKERS' COMPENSATION BENEFITS UNDER CHAPTER 4123. OF THE REVISED CODE AND HAVE A CAUSE OF ACTION AGAINST THE EMPLOYER FOR AN EXCESS OF DAMAGES OVER THE AMOUNT RECEIVED OR RECEIVABLE UNDER CHAPTER 4123. OF THE REVISED CODE AND SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION OR ANY BENEFIT OR AMOUNT, THE COST OF WHICH HAS BEEN PROVIDED OR WHOLLY PAID FOR BY THE EMPLOYER. THE CAUSE OF ACTION SHALL BE BROUGHT IN THE COUNTY WHERE THE INJURY WAS SUSTAINED OR THE EXPOSURE PRIMARILY CAUSING THE DISEASE ALLEGED TO BE CONTRACTED OCCURRED. THE CLAIM ON BEHALF OF THE DEPENDENTS OF A DECEASED EMPLOYEE SHALL BE ASSERTED BY THE EMPLOYEE'S ESTATE. ALL DEFENSES ARE PRESERVED FOR AND SHALL BE AVAILABLE TO THE EMPLOYER IN DEFENDING AGAINST AN ACTION BROUGHT UNDER THIS SECTION. ANY ACTION PURSUANT TO THIS SECTION SHALL BE BROUGHT WITHIN ONE YEAR OF THE

EMPLOYEE'S DEATH OR THE DATE ON WHICH THE EMPLOYEE KNEW OR THROUGH THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE INJURY, DISEASE, OR CONDITION, WHICHEVER DATE OCCURS FIRST. IN NO EVENT SHALL ANY ACTION BE BROUGHT PURSUANT TO THIS SECTION MORE THAN TWO YEARS AFTER THE OCCURRENCE OF THE ACT CONSTITUTING THE ALLEGED INTENTIONAL TORT.

(B) IT IS DECLARED THAT ENACTMENT OF CHAPTER 4123. OF THE REVISED CODE AND THE ESTABLISHMENT OF THE WORKERS' COMPENSATION SYSTEM IS INTENDED TO REMOVE FROM THE COMMON LAW TORT SYSTEM ALL DISPUTES BETWEEN OR AMONG EMPLOYERS AND EMPLOYEES REGARDING THE COMPENSATION TO BE RECEIVED FOR INJURY OR DEATH TO AN EMPLOYEE EXCEPT AS HEREIN EXPRESSLY PROVIDED, AND TO ESTABLISH A SYSTEM WHICH COMPENSATES EVEN THOUGH THE INJURY OR DEATH OF AN EMPLOYEE MAY BE CAUSED BY HIS OWN FAULT OR THE FAULT OF A CO-EMPLOYEE; THAT THE IMMUNITY ESTABLISHED IN SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION AND SECTIONS 4123.74 AND 4123.741 OF THE REVISED CODE IS AN ESSENTIAL ASPECT OF OHIO'S WORKERS' COMPENSATION SYSTEM; THAT THE INTENT OF THE LEGISLATURE IN PROVIDING IMMUNITY FROM COMMON LAW SUIT IS TO PROTECT THOSE SO IMMUNIZED FROM LITIGATION OUTSIDE THE WORKERS' COMPENSATION SYSTEM EXCEPT AS HEREIN EXPRESSLY PROVIDED; AND THAT IT IS THE LEGISLATIVE INTENT TO PROMOTE PROMPT JUDICIAL RESOLUTION OF THE QUESTION OF WHETHER A SUIT BASED UPON A CLAIM OF AN INTENTIONAL TORT PROSECUTED UNDER THE ASSERTED AUTHORITY OF THIS SECTION IS OR IS NOT AN INTENTIONAL TORT AND THEREFORE IS OR IS NOT PROHIBITED BY THE IMMUNITY GRANTED UNDER SECTION 35, ARTICLE II OF THE OHIO CONSTITUTION AND CHAPTER 4123. OF THE REVISED CODE.

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW OR RULE TO THE CONTRARY, AND CONSISTENT WITH THE LEGISLATIVE FINDINGS OF INTENT TO PROMOTE PROMPT JUDICIAL RESOLUTION OF ISSUES OF IMMUNITY FROM LITIGATION UNDER CHAPTER 4123. OF THE REVISED CODE, THE COURT SHALL DISMISS THE ACTION:

(1) UPON MOTION FOR SUMMARY JUDGMENT, IF IT FINDS, PURSUANT TO RULE 56 OF THE RULES OF CIVIL PROCEDURE THE FACTS REQUIRED TO BE PROVED BY DIVISION (B) OF THIS SECTION DO NOT EXIST;

(2) UPON A TIMELY MOTION FOR A DIRECTED VERDICT AGAINST THE PLAINTIFF IF AFTER CONSIDERING ALL THE EVIDENCE AND EVERY INFERENCE LEGITIMATELY AND REASONABLY RAISED THEREBY MOST FAVORABLY TO THE PLAINTIFF, THE COURT DETERMINES THAT THERE IS NOT SUFFICIENT EVIDENCE TO FIND THE FACTS REQUIRED TO BE PROVEN.

(D) IN ANY ACTION BROUGHT PURSUANT TO THIS SECTION, THE COURT IS LIMITED TO A DETERMINATION AS TO WHETHER OR NOT THE EMPLOYER IS LIABLE FOR DAMAGES ON THE BASIS THAT THE EMPLOYER COMMITTED AN INTENTIONAL TORT. IF THE COURT DETERMINES THAT THE EMPLOYEE OR HIS ESTATE IS ENTITLED TO AN AWARD UNDER THIS SECTION AND THAT DETERMINATION HAS BECOME FINAL, THE INDUSTRIAL COMMISSION SHALL, AFTER HEARING, DETERMINE WHAT AMOUNT OF DAMAGES SHOULD BE AWARDED. FOR THAT PURPOSE, THE COMMISSION HAS ORIGINAL JURISDICTION. IN MAKING THAT DETERMINATION, THE COMMISSION SHALL CONSIDER THE COMPENSATION AND BENEFITS PAYABLE UNDER CHAPTER 4123. OF THE REVISED CODE AND THE NET FINANCIAL LOSS TO THE EMPLOYEE CAUSED BY THE EMPLOYER'S INTENTIONAL TORT. IN NO EVENT SHALL THE TOTAL AMOUNT TO BE RECEIVED BY THE EMPLOYEE OR HIS ESTATE FROM THE INTENTIONAL TORT AWARD BE LESS THAN FIFTY PER CENT OF NOR MORE THAN THREE TIMES THE TOTAL COMPENSATION RECEIVABLE PURSUANT TO CHAPTER 4123. OF THE REVISED CODE, BUT IN NO EVENT MAY AN AWARD UNDER THIS SECTION EXCEED ONE MILLION DOLLARS. PAYMENTS OF AN AWARD MADE PURSUANT TO THIS SECTION SHALL BE FROM THE INTENTIONAL TORT FUND. ALL LEGAL FEES, INCLUDING ATTORNEY FEES AS FIXED BY THE INDUSTRIAL COMMISSION, INCURRED BY AN EMPLOYER IN DEFENDING AN ACTION BROUGHT PURSUANT TO THIS SECTION SHALL BE PAID BY THE INTENTIONAL TORT FUND.

(E) THERE IS HEREBY ESTABLISHED AN INTENTIONAL TORT FUND, WHICH SHALL BE IN THE CUSTODY OF THE TREASURER OF STATE. EVERY PUBLIC AND PRIVATE EMPLOYER, INCLUDING SELF-INSURING EMPLOYERS, SHALL PAY INTO THE FUND ANNUALLY AN AMOUNT FIXED BY THE INDUSTRIAL COMMISSION AND BASED UPON THE MANNER OF RATE COMPUTATION ESTABLISHED BY SECTION 4123.29. OF THE REVISED CODE. THE FUND SHALL BE UNDER THE CONTROL OF THE COMMISSION AND THE COMMISSION SHALL ADOPT BY RULE PROCEDURES TO GOVERN THE RECEPTION OF CLAIMS AGAINST THE FUND PURSUANT TO THIS SECTION AND DISBURSEMENTS FROM THE FUND.

(F) THE COMMISSION SHALL MAKE RULES CONCERNING THE PAYMENT OF ATTORNEY FEES BY CLAIMANTS AND EMPLOYERS IN ACTIONS BROUGHT PURSUANT TO THIS SECTION AND SHALL PROTECT PARTIES AGAINST UNFAIR FEES. THE COMMISSION SHALL FIX THE AMOUNT OF FEES IN THE EVENT OF A CONTROVERSY IN RESPECT THERETO. THE COMMISSION AND THE BUREAU OF WORKERS' COMPENSATION SHALL PROMINENTLY DISPLAY IN ALL AREAS OF AN OFFICE WHICH CLAIMANTS FREQUENT A NOTICE TO THE EFFECT THAT THE COMMISSION HAS STATUTORY AUTHORITY TO RESOLVE FEE DISPUTES. THE COMMISSION SHALL MAKE RULES DESIGNED TO PREVENT THE SOLICITATION OF EMPLOYMENT IN THE PROSECUTION OR DEFENSE OF ACTIONS BROUGHT UNDER THIS SECTION AND MAY INQUIRE INTO THE AMOUNTS OF FEES CHARGED EMPLOYERS OR CLAIMANTS BY ATTORNEYS FOR SERVICES IN MATTERS RELATIVE TO ACTIONS BROUGHT UNDER THIS SECTION.

(G) AS USED IN THIS SECTION:

(1) "INTENTIONAL TORT" IS AN ACT COMMITTED WITH THE INTENT TO INJURE ANOTHER OR COMMITTED WITH THE BELIEF THAT THE INJURY IS SUBSTANTIALLY CERTAIN TO OCCUR.

DELIBERATE REMOVAL BY THE EMPLOYER OF AN EQUIPMENT SAFETY GUARD OR DELIBERATE MISREPRESENTATION OF A TOXIC OR HAZARDOUS SUBSTANCE IS EVIDENCE, THE PRESUMPTION OF WHICH MAY BE REBUTTED, OF AN ACT COMMITTED WITH THE INTENT TO INJURE ANOTHER IF INJURY OR AN OCCUPATIONAL DISEASE OR CONDITION OCCURS AS A DIRECT RESULT.

"SUBSTANTIALLY CERTAIN" MEANS THAT AN EMPLOYER ACTS WITH DELIBERATE INTENT TO

CAUSE AN EMPLOYEE TO SUFFER INJURY, DISEASE, CONDITION, OR DEATH.

(2) "EMPLOYER," "EMPLOYEE," AND "INJURY" HAVE THE SAME MEANINGS GIVEN THOSE TERMS IN SECTION 4123.01 OF THE REVISED CODE.

(H) THIS SECTION APPLIES TO AND GOVERNS ANY ACTION BASED UPON A CLAIM THAT AN EMPLOYER COMMITTED AN INTENTIONAL TORT AGAINST AN EMPLOYEE PENDING IN ANY COURT ON THE EFFECTIVE DATE OF THIS SECTION AND ALL CLAIMS OR ACTIONS FILED ON OR AFTER THE EFFECTIVE DATE, NOTWITHSTANDING ANY PROVISIONS OF ANY PRIOR STATUTE OR RULE OF LAW OF THIS STATE.

4123.01 Definitions [Eff. 8-22-86]

As used in Chapter 4123. of the Revised Code:

(A)(1) "Employee," "workman," or "operative" means:

~~(1)~~(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education;

~~(2)~~(b) Every person in the service of any person, firm, or private corporation, including any public service corporation, that ~~(a)~~ (i) employs one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, ~~but not including any officer of a family farm corporation,~~ or ~~(b)~~ (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by Chapter 4123. of the Revised Code.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission for his employment or occupation or to elect to pay compensation directly to his injured and to the dependents of his killed employees, as provided in section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

~~(3)~~(2) "EMPLOYEE," "WORKMAN," OR "OPERATIVE" DOES NOT MEAN:

(a) A DULY ORDAINED, COMMISSIONED, OR LICENSED MINISTER OR ASSISTANT OR ASSOCIATE MINISTER OF A CHURCH IN THE EXERCISE OF HIS MINISTRY; OR

(b) ANY OFFICER OF A FAMILY FARM CORPORATION.

If an employer is a partnership, sole proprietorship, or family farm corporation, such employer may elect to include as an "employee" within this chapter, any member of such partnership, the owner of the sole proprietorship, or the officers of the family farm corporation. In the event of such election, the employer shall serve upon the commission written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no such proprietor, or partner shall be deemed an employee within this division until such notice has been served.

For informational purposes only, the bureau of workers' compensation shall prescribe such language as it considers appropriate, on such of its forms as it considers appropriate, to advise employers of their right ~~of election~~ TO ELECT TO INCLUDE AS AN "EMPLOYEE" WITHIN THIS CHAPTER A SOLE PROPRIETOR, ANY MEMBER OF A PARTNERSHIP, OR THE OFFICERS OF A FAMILY FARM CORPORATION under ~~division (A)(3)~~ of this section and that they should check any health and disability insurance policy, or other form of health and disability plan or contract, presently covering them, or the purchase of which they may be considering, to determine whether such policy, plan, or contract excludes benefits for illness or injury that they might have elected to have covered by workers' compensation.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by Chapter 4123. of the Revised Code.

All such employers are subject to Chapter 4123. of the Revised Code. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered a workman or operative in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more workmen and the income derived from such labor shall be reported to the industrial commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "INJURY" DOES NOT INCLUDE:

(1) PSYCHIATRIC CONDITIONS EXCEPT WHERE THE CONDITIONS HAVE ARISEN FROM AN INJURY OR OCCUPATIONAL DISEASE;

(2) INJURY OR DISABILITY CAUSED PRIMARILY BY THE NATURAL DETERIORATION OF TISSUE, AN ORGAN, OR PART OF THE BODY;

(3) INJURY OR DISABILITY INCURRED IN VOLUNTARY PARTICIPATION IN AN EMPLOYER-SPONSORED RECREATION OR FITNESS ACTIVITY IF THE EMPLOYEE SIGNS A WAIVER OF HIS RIGHT TO COMPENSATION OR BENEFITS UNDER CHAPTER 4123. OF THE REVISED CODE PRIOR TO ENGAGING IN THE RECREATION OR FITNESS ACTIVITY.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

(E) "Family farm corporation" means a corporation founded for the purpose of farming agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons or the spouse of persons related to each other within the fourth degree of kinship, according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are a corporation. A family farm corporation does not cease to qualify under this division where, by reason of any devise, bequest, or the operation of the laws of descent or distribution, the ownership of shares of voting stock is transferred to another person, as long as that person is within the degree of kinship stipulated in this division.

4123.28 Record of injuries and occupational diseases; report; failure to file report [Eff. 8-22-86]

Every employer in this state shall keep a record of all injuries and occupational diseases, fatal or otherwise, received or contracted

by his employees in the course of their employment and resulting in seven days or more of total disability. Within a week after the ~~occurrence~~ ACQUIRING KNOWLEDGE of such an injury or death therefrom, and in the event of occupational disease or death therefrom, within one week after ~~the occurrence~~ ACQUIRING KNOWLEDGE of or diagnosis of or death from said occupational disease or of a report to such employer of such occupational disease or death, a report thereof shall be made in writing to the industrial commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address, nature and duration of occupation of the injured, disabled, or deceased employee and, the time, the nature, and the cause of injury, occupational disease, or death, and such other information as is required by the commission.

The employer shall give a copy of each such report to the employee it concerns or his surviving dependents.

No employer shall refuse or neglect to make any report required by this section.

EACH DAY THAT AN EMPLOYER FAILS TO FILE A REPORT REQUIRED BY THIS SECTION CONSTITUTES AN ADDITIONAL DAY WITHIN THE TIME PERIOD GIVEN TO A CLAIMANT BY THE APPLICABLE STATUTE OF LIMITATIONS FOR THE FILING OF A CLAIM BASED ON THE INJURY OR OCCUPATIONAL DISEASE, PROVIDED THAT A FAILURE TO FILE A REPORT SHALL NOT EXTEND THE APPLICABLE STATUTE OF LIMITATIONS FOR MORE THAN TWO ADDITIONAL YEARS.

4123.29 Rates of premium; state insurance fund; alternative premium plans; duty to disseminate information [Eff. 8-22-86]

(A) The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123. of the Revised Code, and to maintain a state insurance fund from year to year. The rates shall be set at a level that assures the solvency of the fund. Where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in such sections reference is made to payroll or expenditure of wages with reference to fixing premiums, such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may determine under this section.

The commission in setting or revising rates shall furnish to employers an adequate explanation of the basis for the rates set.

(B) THE COMMISSION, IN CONJUNCTION WITH THE BUREAU OF WORKERS' COMPENSATION, SHALL DEVELOP AND MAKE AVAILABLE TO EMPLOYERS WHO ARE PAYING PREMIUMS TO THE STATE INSURANCE FUND ALTERNATIVE PREMIUM PLANS. ALTERNATIVE PREMIUM PLANS SHALL INCLUDE RETROSPECTIVE RATING PLANS. THE COMMISSION MAY MAKE AVAILABLE PLANS UNDER WHICH AN ADVANCED DEPOSIT MAY BE APPLIED AGAINST A SPECIFIED DEDUCTIBLE AMOUNT PER CLAIM, AND A PLAN THAT GROUPS, FOR RATING PURPOSES, EMPLOYERS OF SIMILAR SIZE AND RISK, AND POOLS THE RISK OF THE EMPLOYERS WITHIN THE GROUP. IN NO EVENT SHALL THIS BE CONSTRUED AS GRANTING TO AN EMPLOYER THE PRIVILEGE TO PAY COMPENSATION OR BENEFITS DIRECTLY.

THE COMMISSION, IN CONJUNCTION WITH THE BUREAU, SHALL DEVELOP CLASSIFICATIONS OF OCCUPATIONS OR INDUSTRIES THAT ARE SUFFICIENTLY DISTINCT SO AS NOT TO GROUP EMPLOYERS IN CLASSIFICATIONS THAT UNFAIRLY REPRESENT THE RISKS OF EMPLOYMENT WITH THE EMPLOYER.

(C) THE ADMINISTRATOR SHALL GENERALLY PROMOTE EMPLOYER PARTICIPATION IN THE STATE INSURANCE FUND THROUGH THE REGULAR DISSEMINATION OF INFORMATION TO ALL CLASSES OF EMPLOYERS DESCRIBING THE ADVANTAGES AND BENEFITS OF OPTING TO MAKE PREMIUM PAYMENTS TO THE FUND. TO THAT END, THE ADMINISTRATOR SHALL REGULARLY MAKE EMPLOYERS AWARE OF THE VARIOUS WORKERS' COMPENSATION PREMIUM PACKAGES DEVELOPED AND OFFERED PURSUANT TO THIS SECTION.

4123.34 Premium rates fixed and maintained; accounting; surplus; revisions of rates; premium payment security fund; discounts [Eff. 8-22-86]

The industrial commission, in the exercise of the powers and discretion conferred upon it in section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims for injury, occupational disease, and death that it may authorize to be paid from the state insurance fund for the benefit of injured, diseased, and the dependents of killed employees. In establishing rates, the commission shall take into account the necessity of ensuring sufficient money is set aside in the premium payment security fund to cover any defaults in premium obligations. The commission shall observe the following requirements in classifying occupations or industries and fixing the rates of premium for the risks of the same:

(A) It shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the losses on account of injuries, occupational disease, and death of employees thereof, and it shall also keep an account of the money received from each individual employer and the amount of losses incurred against the state insurance fund on account of injuries, occupational disease, and death of the employees of such employer.

(B) Ten per cent of the money paid into the state insurance fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, after which time, whenever necessary in the judgment of the commission to guarantee a solvent state insurance fund, a sum not exceeding five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund. A revision of basic rates shall be made annually on the first day of July.

Revisions of basic rates shall be in accordance with the oldest four of the last five calendar years of the combined accident and occupational disease experience of the commission in the administration of sections 4123.01 to 4123.94 of the Revised Code, as shown by the accounts kept as provided in this section; and the commission shall adopt rules governing said rates revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application.

(C) The commission may apply that form of rating system which it finds is best calculated to merit rate or individually rate the risk more equitably, predicated upon the basis of its individual industrial accident and occupational disease experience, and may encourage and stimulate accident prevention. The commission shall develop fixed and equitable rules controlling the rating system, which rules shall conserve to each risk the basic principles of workers' compensation insurance.

(D) The commission, from the money paid into the state insurance fund, shall set aside into an account of the state insurance fund titled a premium payment security fund sufficient money to

pay for any premiums due from an employer and uncollected which are in excess of the employer's premium security deposit.

(E) THE COMMISSION MAY GRANT DISCOUNTS ON PREMIUM RATES FOR EMPLOYERS WHO HAVE NOT INCURRED A COMPENSABLE INJURY FOR ONE YEAR OR MORE AND WHO:

(1) MAINTAIN AN EMPLOYEE SAFETY COMMITTEE OR SIMILAR ORGANIZATION; OR

(2) MAKE PERIODIC SAFETY INSPECTIONS OF THE WORKPLACE.

The fund shall be in the custody of the treasurer of state and disbursements therefrom shall be made by the bureau of workers' compensation upon order of the industrial commission to the state insurance fund. The use of the moneys held by the premium payment security fund shall be restricted to reimbursement to the state insurance fund of premiums due and uncollected in excess of an employer's premium security deposit. The moneys constituting the premium payment security fund shall be maintained without regard to or reliance upon any other fund. This section does not prevent the deposit or investment of the premium payment security fund with any other fund created by Chapter 4123. of the Revised Code, but the premium payment security fund shall be separate and distinct for every other purpose and a strict accounting thereof shall be maintained.

4123.343 Compensation for handicapped employees; statutory surplus fund; hearings; direct payments to employee or dependents [Eff. 8-22-86]

This section shall be construed liberally to the end that employers shall be encouraged to employ and retain in their employment handicapped employees as defined in this section.

(A) As used in this section, "handicapped employee" means an employee who is afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character that the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and whose handicap is due to any of the following diseases or conditions:

(1) Epilepsy;
(2) Diabetes;
(3) Cardiac disease;
(4) Arthritis;
(5) Amputated foot, leg, arm or hand;
(6) Loss of sight of one or both eyes or a partial loss of uncorrected vision of more than seventy-five per cent bilaterally;
(7) Residual disability from poliomyelitis;
(8) Cerebral palsy;
(9) Multiple sclerosis;
(10) Parkinson's disease;
(11) Cerebral vascular accident;
(12) Tuberculosis;
(13) Silicosis;
(14) Psycho-neurotic disability following treatment in a recognized medical or mental institution;
(15) Hemophilia;
(16) Chronic osteomyelitis;
(17) Ankylosis of joints;
(18) Hyper insulinism;
(19) Muscular dystrophies;
(20) Arterio-sclerosis;
(21) Thrombo-phlebitis;
(22) Varicose veins;
(23) Cardiovascular ~~and~~, pulmonary, OR RESPIRATORY diseases of a fire fighter OR POLICE OFFICER employed by a municipal corporation or township as a regular member of a lawfully constituted POLICE DEPARTMENT OR fire department;
(24) Coal miners' pneumoconiosis, commonly referred to as "black lung disease";
(25) Disability with respect to which an individual has completed a rehabilitation program conducted pursuant to sections 4121.61 to 4121.69 of the Revised Code.

(B) Under the circumstances set forth in this section all or such portion as the commission shall determine of the compensation and benefits paid in any claim arising hereafter shall be charged to and paid from the statutory surplus fund created under section 4123.34 of the Revised Code and only the portion remaining shall be merit-rated or otherwise treated as part of the accident or occupational disease experience of the employer. If the employer is a self-insurer, the proportion of such costs whether charged to such statutory surplus fund in whole or in part shall be by way of direct payment to such employee or his dependents or by way of reimbursement to the self-insurer as the circumstances shall indicate. The provisions of this section are applicable only in cases of death, total disability, whether temporary or permanent, and all disabilities compensated under division ~~(C)~~(B) of section 4123.57 of the Revised Code. The commission shall adopt rules specifying the grounds upon which charges to the statutory surplus fund are to be made. The rules shall prohibit as a grounds any agreement between employer and claimant as to the merits of a claim and the amount of the charge.

(C) Any employer who advises the industrial commission prior to the occurrence of an injury or occupational disease that it has in its employ a handicapped employee as defined in this section shall be entitled, in the event such a person is injured, to a determination hereunder. Any employer who fails to so notify the commission but makes application for a determination hereunder shall be entitled to a determination if the commission finds that there was good cause for the failure to give notice of the employment of such a handicapped employee. The commission shall, annually require employers to file an inventory of current handicapped employees.

Application for such determination shall only be made in cases where a handicapped employee as defined in this section or his dependents claims or is receiving an award of compensation as a result of an injury or occupational disease occurring or contracted on or after the date on which division (A) of this section first included the handicap of such employee.

Upon the filing of such an application a staff hearing officer of the industrial commission shall hold a hearing in accordance with rules promulgated by the commission and render a determination in the commission's name. The administrator of the bureau of workers' compensation shall be notified of all applications, and he or a designated assistant, shall represent the interest of the statutory surplus fund and may appear at the hearing on the application. The administrator may appeal to the commission the transfer as a representative of the surplus fund.

(D) The circumstances under and the manner in which such apportionment shall be made are:

(1) Whenever a handicapped employee as defined in this section is injured or disabled or dies as the result of an injury or occupational disease sustained in the course of and arising out of his employment in this state and the industrial commission awards compensation therefor and when it appears to the satisfaction of the industrial commission that the injury or occupational disease or the death resulting therefrom would not have occurred but for the pre-existing physical or mental impairment of such handicapped employee, all compensation and benefits payable on account of such disability or death shall be paid from such surplus fund.

(2) Whenever a handicapped employee as defined in this section is injured or disabled or dies as a result of an injury or occupational disease and the commission finds that said injury or occupational disease would have been sustained or suffered without regard to the employee's pre-existing impairment but that the resulting disability or death was caused at least in part through aggravation of such employee's pre-existing disability, the commission shall determine in a manner which is equitable and reasonable and based upon medical evidence the amount of disability or proportion of the cost of the death award which is attributable to the employee's pre-existing disability and the amount so found shall be charged to such statutory surplus fund.

(E) The benefits and provisions of this section shall apply only to employers who have complied with the workers' compensation act either through insurance with the state fund or by obtaining permission to pay compensation directly under section 4123.35 of the Revised Code.

(F) NO EMPLOYER SHALL IN ANY YEAR RECEIVE CREDIT UNDER THIS SECTION IN AN AMOUNT GREATER THAN THE PREMIUM HE PAID IF A STATE FUND EMPLOYER OR GREATER THAN HIS ASSESSMENTS IF A SELF-INSURING EMPLOYER.

(G) EMPLOYERS GRANTED PERMISSION TO PAY COMPENSATION DIRECTLY UNDER SECTION 4123.35 OF THE REVISED CODE MAY, FOR ALL CLAIMS MADE AFTER JANUARY 1, 1987, FOR COMPENSATION AND BENEFITS UNDER THIS SECTION, PAY THE COMPENSATION AND BENEFITS DIRECTLY TO THE EMPLOYEE OR THE EMPLOYEE'S DEPENDENTS. IF AN EMPLOYER CHOOSES TO PAY COMPENSATION AND BENEFITS DIRECTLY, HE SHALL RECEIVE NO MONEY OR CREDIT FROM THE SURPLUS FUND FOR THE PAYMENT UNDER THIS SECTION, NOR SHALL HE BE REQUIRED TO PAY ANY AMOUNTS INTO THE SURPLUS FUND THAT OTHERWISE WOULD BE ASSESSED FOR HANDICAPPED REIMBURSEMENTS FOR CLAIMS MADE AFTER JANUARY 1, 1987. WHERE AN EMPLOYER ELECTS TO PAY FOR COMPENSATION AND BENEFITS PURSUANT TO THIS SECTION, HE SHALL ASSUME RESPONSIBILITY FOR COMPENSATION AND BENEFITS ARISING OUT OF CLAIMS MADE PRIOR TO JANUARY 1, 1987, AND SHALL NOT BE REQUIRED TO PAY ANY AMOUNTS INTO THE SURPLUS FUND AND MAY NOT RECEIVE ANY MONEY OR CREDIT FROM THAT FUND ON ACCOUNT OF THIS SECTION.

4123.35 Payments to state insurance fund; standards, surety bonds, applications, and rules for self-insurers [Eff. 8-22-86]

(A) Except as provided in this section, every employer mentioned in division (B) (2) of section 4123.01 of the Revised Code, and every publicly owned utility shall semiannually in the months of January and July pay into the state insurance fund the amount of premium fixed by the industrial commission for the employment or occupation of such employer, the amount of which premium to be so paid by each such employer to be determined by the classifications, rules, and rates made and published by said commission. Such employer shall semiannually pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the commission, which receipt or certificate, attested by the seal of said commission, is prima-facie evidence of the payment of such premium.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor shall be liable for the unpaid premium due from any such subcontractor with respect to that part of the payroll of the subcontractor which is for work performed pursuant to the contract with such employer.

Provided, that as to all employers who were subscribers to the state insurance fund prior to January 1, 1914, or who may first become subscribers to said fund in any other month than January or July, ~~the first paragraph of this section~~ THIS DIVISION providing for the payment of such premiums semiannually do DOES not apply, but such semiannual premiums shall be paid by such employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them.

(B) Provided, that such employers and publicly owned utilities who will abide by the rules of the commission and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such facts by the commission, be granted the privilege to pay individually such compensation, and furnish such medical, surgical, nursing, and hospital services and attention and funeral expenses directly to such injured employees or the dependents of such killed employees. The commission may charge employers or publicly owned utilities who apply for the privilege of paying compensation directly a reasonable application fee to cover the commission's costs in connection with processing and making a determination with respect to an application. ALL EMPLOYERS GRANTED THE PRIVILEGE TO PAY COMPENSATION DIRECTLY SHALL DEMONSTRATE SUFFICIENT FINANCIAL AND ADMINISTRATIVE ABILITY TO ASSURE THAT ALL OBLIGATIONS UNDER THIS SECTION ARE PROMPTLY MET. THE COMMISSION SHALL DENY THE PRIVILEGE WHERE THE EMPLOYER IS UNABLE TO DEMONSTRATE HIS ABILITY TO PROMPTLY MEET ALL THE OBLIGATIONS IMPOSED ON HIM BY THIS SECTION. THE COMMISSION SHALL CONSIDER, BUT IS NOT LIMITED TO, THE FOLLOWING FACTORS, WHERE APPLICABLE, IN DETERMINING THE EMPLOYER'S ABILITY TO MEET ALL OF THE OBLIGATIONS IMPOSED ON HIM BY THIS SECTION:

(1) THE EMPLOYER EMPLOYS A MINIMUM OF FIVE HUNDRED EMPLOYEES IN THIS STATE;

(2) THE EMPLOYER HAS OPERATED IN THIS STATE FOR A MINIMUM OF TWO YEARS, PROVIDED THAT AN EMPLOYER WHO HAS PURCHASED, ACQUIRED, OR OTHERWISE SUCCEEDED TO THE OPERATION OF A BUSINESS, OR ANY PART THEREOF, SITUATED IN THIS STATE THAT HAS OPERATED FOR AT LEAST TWO YEARS IN THIS STATE, SHALL ALSO QUALIFY;

(3) WHERE THE EMPLOYER PREVIOUSLY CONTRIBUTED TO THE STATE INSURANCE FUND OR IS A SUCCESSOR EMPLOYER AS DEFINED BY COMMISSION RULES, THE AMOUNT OF THE BUY-OUT, AS DEFINED BY COMMISSION RULES;

(4) THE SUFFICIENCY OF THE EMPLOYER'S ASSETS LOCATED IN THIS STATE TO INSURE THE EMPLOYER'S SOLVENCY IN PAYING COMPENSATION DIRECTLY;

(5) THE FINANCIAL RECORDS, DOCUMENTS, AND DATA, CERTIFIED BY A CERTIFIED PUBLIC ACCOUNTANT, NECESSARY TO PROVIDE THE EMPLOYER'S FULL FINANCIAL DISCLOSURE. THE RECORDS, DOCUMENTS, AND DATA INCLUDE, BUT ARE NOT LIMITED TO, BALANCE SHEETS AND PROFIT AND LOSS HISTORY FOR THE CURRENT YEAR AND PREVIOUS FOUR YEARS.

(6) THE EMPLOYER'S ORGANIZATIONAL PLAN FOR THE ADMINISTRATION OF THE WORKERS' COMPENSATION LAW;

(7) THE EMPLOYER'S PROPOSED PLAN TO INFORM EMPLOYEES OF THE CHANGE FROM A STATE FUND INSURER TO A SELF-INSURER, THE PROCEDURES THE EMPLOYER WILL FOLLOW AS A SELF-INSURER, AND THE EMPLOYEES' RIGHTS TO COMPENSATION AND BENEFITS; AND

(8) THE EMPLOYER HAS EITHER AN ACCOUNT IN A FINANCIAL INSTITUTION IN THIS STATE, OR IF THE EMPLOYER MAINTAINS AN ACCOUNT WITH A FINANCIAL INSTITUTION OUTSIDE THIS STATE, ENSURES

THAT WORKERS' COMPENSATION CHECKS ARE DRAWN FROM THE SAME ACCOUNT AS PAYROLL CHECKS OR THE EMPLOYER CLEARLY INDICATES THAT PAYMENT WILL BE HONORED BY A FINANCIAL INSTITUTION IN THIS STATE.

THE COMMISSION MAY WAIVE THE REQUIREMENTS OF DIVISIONS (B)(1) AND (2) OF THIS SECTION. THE COMMISSION SHALL NOT GRANT THE PRIVILEGE TO PAY COMPENSATION DIRECTLY TO ANY PUBLIC EMPLOYER, OTHER THAN PUBLICLY OWNED UTILITIES.

(C) The commission ~~may~~ SHALL require ~~such security or~~ A SURETY bond from ~~said~~ employers and publicly owned utilities as ~~it deems proper, adequate, and~~ WHO ARE GRANTED THE PRIVILEGE TO PAY COMPENSATION DIRECTLY, ISSUED PURSUANT TO SECTION 4123.351 OF THE REVISED CODE, THAT IS sufficient to compel, or secure to ~~such~~ injured employees, or to the dependents of ~~such~~ employees as may be killed, the payment of such compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases to injured employees or to dependents of killed employees whose employers contribute to said fund, except when an employee of such employer, who has suffered the loss of a hand, arm, foot, leg, or eye prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of said members as the result of any injury sustained in the course of and arising out of his employment, the compensation to be paid by such employer and publicly owned utility shall be limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the commission out of the surplus created by section 4123.34 of the Revised Code. ~~Should municipal or other bonds be accepted by said commission as security for said payments, such bonds shall be deposited with the treasurer of state who shall have custody thereof and retain the same in his possession according to the conditions prescribed by the order of said commission accepting the same as security, and the treasurer of state shall retain possession of said bonds until such time as he is directed by said commission as to the manner of his disposition of the same. The~~

(D) IN ADDITION TO THE REQUIREMENTS OF THIS SECTION, THE commission shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission as to granting the privilege to such employers and publicly owned utilities, which rules shall be general in their application, one of which rules shall provide that all employers, including publicly owned utilities, granted the privilege to compensate directly their injured employees and the dependents of their killed employees, shall pay into the state insurance fund such amounts as are required to be credited to the surplus in division (B) of section 4123.34 of the Revised Code. EMPLOYERS SHALL SECURE DIRECTLY FROM THE COMMISSION AND BUREAU CENTRAL OFFICES APPLICATION FORMS UPON WHICH THE BUREAU SHALL STAMP A DESIGNATING NUMBER. PRIOR TO SUBMISSION OF AN APPLICATION, AN EMPLOYER SHALL MAKE AVAILABLE TO THE BUREAU, AND THE BUREAU SHALL REVIEW, THE INFORMATION DESCRIBED IN DIVISIONS (B)(1) TO (8) OF THIS SECTION. AN EMPLOYER SHALL FILE THE COMPLETED APPLICATION FORMS WITH AN APPLICATION FEE, WHICH SHALL COVER THE COSTS OF PROCESSING THE APPLICATION, AS ESTABLISHED BY THE COMMISSION, BY RULE, WITH THE BUREAU AND THE COMMISSION AT LEAST NINETY DAYS PRIOR TO THE EFFECTIVE DATE OF THE EMPLOYER'S NEW STATUS AS A SELF-INSURER. THE APPLICATION FORM SHALL NOT BE DEEMED COMPLETE UNTIL ALL THE REQUIRED INFORMATION IS ATTACHED THERETO. THE COMMISSION AND BUREAU SHALL ONLY ACCEPT APPLICATIONS WHICH CONTAIN THE REQUIRED INFORMATION.

(E) THE COMMISSION SHALL REVIEW COMPLETED APPLICATIONS WITHIN A REASONABLE TIME. IF THE COMMISSION DETERMINES TO GRANT THE PRIVILEGE OF SELF-INSURANCE, THE BUREAU SHALL ISSUE A STATEMENT, CONTAINING THE COMMISSION'S FINDINGS OF FACT, THAT IS PREPARED BY BOTH THE COMMISSION AND THE BUREAU AND SIGNED BY THE CHAIRMAN AND SECRETARY OF THE COMMISSION. IF THE COMMISSION DETERMINES NOT TO GRANT THE PRIVILEGE OF SELF-INSURANCE, THE BUREAU SHALL NOTIFY THE EMPLOYER OF THE DETERMINATION AND REQUIRE THE EMPLOYER TO CONTINUE TO PAY ITS FULL PREMIUM INTO THE STATE INSURANCE FUND. The commission also shall adopt rules: establishing a minimum level of performance as a criterion for granting AND MAINTAINING the privilege to pay compensation directly; AND fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examinations and evaluations may not delay a decision on a claim; ~~establishing the grounds upon which the commission will hold a public hearing to evaluate the program for self-insuring employers and set forth the procedures for revocation of self-insurer status which shall include continued failure to file medical reports bearing upon the injury of the claimant and failure to pay compensation or benefits in accordance with law in a timely manner. The commission may change or modify its findings of fact, or revoke the privilege of such employer or publicly owned utility to pay compensation direct, if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all the provisions of Chapter 4123. of the Revised Code, referring to the payment of compensation and the furnishing of medical, nurse, and hospital services and medicines and funeral expenses to injured employees and the dependents of killed employees.~~

(F) The commission shall adopt rules setting forth procedures for auditing the program of employers that are granted the privilege to pay compensation directly. Audits shall be conducted by the bureau of workers' compensation upon a random basis or whenever the bureau has grounds for believing that an employer is not in full compliance with commission rules or Chapter 4123. of the Revised Code. The bureau shall report its findings to the commission.

The administrator of the bureau of workers' compensation shall monitor the programs conducted by self-insuring employers, to ensure compliance with commission requirements and for that purpose, shall develop and issue to employers who pay compensation directly standardized forms for use by the employer in all aspects of the employers' direct compensation program and for reporting of information to the bureau.

The bureau shall receive and transmit to the commission and to the employer all complaints concerning any employer engaged in paying compensation directly to employees. IN THE CASE OF A COMPLAINT AGAINST A SELF-INSURING EMPLOYER, THE ADMINISTRATOR SHALL HANDLE THE COMPLAINT THROUGH THE SELF-INSURANCE SECTION OF THE BUREAU. The commission shall maintain a file by employer of all complaints received that relate to the employer. The commission shall evaluate each complaint and take appropriate action.

The commission shall adopt as a rule a prohibition against any employer who is granted the privilege to pay compensation directly from harrassing, dismissing, or otherwise disciplining any employee making a complaint which rule shall provide for a financial penalty to be levied by the commission payable by the offending employer.

(G) For the purpose of making determinations as to whether to grant self-insuring status to an employer or publicly owned utility, the commission may subscribe to and pay for a credit reporting service that offers financial and other business information about individual employers. The costs in connection with the commission's subscription or individual reports from the service about an

applicant may be included in the application fee charged employers under this section.

(H) THE COMMISSION MAY, NOTWITHSTANDING OTHER PROVISIONS OF CHAPTER 4123. OF THE REVISED CODE, PERMIT AN EMPLOYER WHO HAS BEEN GRANTED THE PRIVILEGE OF PAYING COMPENSATION DIRECTLY TO RESUME PAYMENT OF PREMIUMS TO THE STATE INSURANCE FUND WITH APPROPRIATE CREDIT MODIFICATIONS TO THE EMPLOYER'S BASIC PREMIUM RATE AS SUCH RATE IS DETERMINED PURSUANT TO SECTION 4123.29 OF THE REVISED CODE.

4123.351 Surety bond program for self-insuring employers; default by employer; self-insuring employers' surety bond fund; reinsurance; rules; state's liability [Eff. 8-22-86]

(A) EVERY EMPLOYER AND PUBLICLY OWNED UTILITY WHO IS GRANTED THE PRIVILEGE OF PAYING COMPENSATION DIRECTLY SHALL OBTAIN FROM THE INDUSTRIAL COMMISSION A SURETY BOND ISSUED PURSUANT TO THIS SECTION. THE BOND SHALL PROVIDE FOR PAYMENT FROM THE SELF-INSURING EMPLOYERS' SURETY BOND FUND TO THE COMMISSION OF ANY AMOUNTS PAID BY THE COMMISSION IN COMPENSATION OR BENEFITS TO EMPLOYEES OF THE EMPLOYER IN ORDER TO COVER ANY DEFAULT IN PAYMENT BY THE EMPLOYER. THE BOND ISSUED TO EACH EMPLOYER SHALL BE FOR A FACE AMOUNT SUFFICIENT TO COVER THE ESTIMATED POTENTIAL LIABILITY OF THAT EMPLOYER.

(B) THE COMMISSION SHALL OPERATE A SURETY BOND PROGRAM FOR SELF-INSURING EMPLOYERS. THE PROGRAM SHALL MAKE AVAILABLE TO EMPLOYERS AND PUBLICLY OWNED UTILITIES WHO ARE GRANTED THE PRIVILEGE OF PAYING COMPENSATION DIRECTLY SURETY BONDS AT RATES WHICH ARE COMPETITIVE WITH RATES OFFERED BY COMPANIES MENTIONED IN SECTION 3929.10 OF THE REVISED CODE. THE RATES ESTABLISHED EACH YEAR SHALL BE AS LOW AS POSSIBLE BUT SUCH AS WILL ASSURE SUFFICIENT RESERVES TO GUARANTEE THE PAYMENT OF ANY CLAIMS AGAINST A BOND THE COMMISSION REASONABLY ANTICIPATES WILL OCCUR. THE COMMISSION'S PROGRAM SHALL IN ALL PRACTICAL RESPECTS FUNCTION AS A SURETY BOND COMPANY BUT IS NOT SUBJECT TO SECTIONS 3929.10 TO 3929.18 OF THE REVISED CODE OR TO REGULATION BY THE SUPERINTENDENT OF INSURANCE.

(C) IF A SELF-INSURING EMPLOYER DEFAULTS, THE COMMISSION SHALL RECOVER PAYMENTS OF COMPENSATION OR BENEFITS FROM THE SELF-INSURING EMPLOYER'S SURETY BOND. PAYMENT FROM THE BOND RELIEVES THE EMPLOYER OF ANY LIABILITY FOR DAMAGES AT COMMON LAW OR BY STATUTE THAT ARISES OUT OF THE INJURY OR OCCUPATIONAL DISEASE THAT FORMS THE BASIS OF THE WORKERS' COMPENSATION CLAIM TO THE EXTENT OF THE PAYMENT.

(D)(1) THERE IS HEREBY ESTABLISHED A SELF-INSURING EMPLOYERS' SURETY BOND FUND, WHICH SHALL BE IN THE CUSTODY OF THE TREASURER OF STATE AND WHICH SHALL BE SEPARATE FROM THE OTHER FUNDS ESTABLISHED AND ADMINISTERED PURSUANT TO THIS CHAPTER. THE FUND SHALL CONSIST OF CONTRIBUTIONS AND OTHER PAYMENTS THERETO BY SELF-INSURING EMPLOYERS WHO PURCHASE A BOND TO SECURE THE PAYMENT OF COMPENSATION AND BENEFITS REQUIRED BY SECTION 4123.35 OF THE REVISED CODE. DISBURSEMENTS FROM THE FUND SHALL BE MADE BY THE INDUSTRIAL COMMISSION PURSUANT TO THIS SECTION.

(2) THE ADMINISTRATOR OF THE BUREAU OF WORKERS' COMPENSATION, SUBJECT TO THE APPROVAL OF THE COMMISSION, HAS THE SAME POWERS TO INVEST ANY OF THE SURPLUS OR RESERVE BELONGING TO THE FUND AS ARE DELEGATED TO THE ADMINISTRATOR AND THE COMMISSION UNDER SECTION 4123.44 OF THE REVISED CODE WITH RESPECT TO THE STATE INSURANCE FUND. THE COMMISSION SHALL APPLY INTEREST EARNED SOLELY TO THE REDUCTION OF PREMIUMS CHARGED TO EMPLOYERS AND TO THE PAYMENTS REQUIRED ON BONDS DUE TO DEFAULTS.

(3) IF THE COMMISSION DETERMINES THAT REINSURANCE OF THE RISKS OF THE FUND IS NECESSARY TO ASSURE SOLVENCY OF THE FUND, THE COMMISSION MAY:

(a) ENTER INTO CONTRACTS FOR THE PURCHASE OF REINSURANCE COVERAGE OF THE RISKS OF THE FUND WITH ANY COMPANY OR AGENCY AUTHORIZED BY LAW TO ISSUE CONTRACTS OF REINSURANCE;

(b) PAY THE COST OF REINSURANCE FROM THE FUND;

(c) INCLUDE THE COSTS OF REINSURANCE AS A LIABILITY AND ESTIMATED LIABILITY OF THE FUND.

(E) THE INDUSTRIAL COMMISSION MAY MAKE RULES PURSUANT TO CHAPTER 119. OF THE REVISED CODE FOR THE IMPLEMENTATION OF THIS SECTION.

(F) THE PURCHASE OF COVERAGE UNDER THIS SECTION BY SELF-INSURING EMPLOYERS IS VALID NOTWITHSTANDING THE PROHIBITIONS CONTAINED IN DIVISION (A) OF SECTION 4123.82 OF THE REVISED CODE AND IS IN ADDITION TO THE INDEMNITY CONTRACTS THAT SELF-INSURING EMPLOYERS ARE PERMITTED TO PURCHASE PURSUANT TO DIVISION (B) OF SECTION 4123.82 OF THE REVISED CODE.

(G) THE COLLECTION OF PREMIUMS, THE ADMINISTRATION OF THE PROGRAM, THE INVESTMENT OF THE MONEY IN THE SELF-INSURING EMPLOYERS' SURETY BOND FUND, AND THE PAYMENT OF LIABILITIES INCURRED BY THE SELF-INSURING EMPLOYERS' SURETY BOND FUND DO NOT CREATE ANY LIABILITY UPON THE STATE.

EXCEPT FOR A GROSS ABUSE OF DISCRETION, NEITHER THE INDUSTRIAL COMMISSION, NOR THE INDIVIDUAL MEMBERS THEREOF, NOR THE ADMINISTRATOR OF THE BUREAU OF WORKERS' COMPENSATION SHALL INCUR ANY OBLIGATION OR LIABILITY RESPECTING THE COLLECTION OF PREMIUMS, THE ADMINISTRATION OF THE PROGRAM, THE INVESTMENT OF THE FUND, OR THE PAYMENT OF LIABILITIES THEREFROM.

4123.352 Self-insuring employers evaluation board; revocation or refusal of privilege to be self-insurer; complaints against self-insurers [Eff. 8-22-86]

(A) THERE IS HEREBY CREATED THE SELF-INSURING EMPLOYERS EVALUATION BOARD CONSISTING OF THREE MEMBERS. THE MEMBER OF THE INDUSTRIAL COMMISSION REPRESENTING THE PUBLIC SHALL BE A MEMBER OF THE SELF-INSURING EMPLOYERS EVALUATION BOARD AND SHALL SERVE, EX OFFICIO, AS CHAIRMAN. THE GOVERNOR SHALL APPOINT THE REMAINING TWO MEMBERS WITH THE ADVICE AND CONSENT OF THE SENATE. ONE MEMBER SHALL BE APPOINTED WHO IS A MEMBER OF THE OHIO SELF-INSURANCE ASSOCIATION. THE REMAINING MEMBER SHALL BE REPRESENTATIVE OF LABOR.

NOT MORE THAN TWO OF THE THREE MEMBERS OF THE BOARD MAY BE OF THE SAME POLITICAL PARTY.

OF THE TWO MEMBERS ORIGINALLY APPOINTED BY THE GOVERNOR PURSUANT TO THIS SECTION, ONE SHALL BE APPOINTED FOR AN INITIAL TERM OF TWO YEARS AND ONE FOR AN INITIAL TERM OF FOUR YEARS. THEREAFTER, TERMS OF OFFICE OF THE TWO MEMBERS SHALL BE FOR FOUR YEARS, EACH TERM ENDING ON THE SAME DATE AS THE ORIGINAL DATE OF APPOINTMENT. ANY MEMBER APPOINTED TO FILL A VACANCY OCCURRING PRIOR TO THE EXPIRATION OF THE TERM FOR WHICH HIS PREDECESSOR WAS APPOINTED SHALL HOLD OFFICE FOR THE REMAINDER OF SUCH TERM. ANY MEMBER SHALL CONTINUE IN OFFICE SUBSEQUENT TO THE EXPIRATION DATE OF HIS TERM UNTIL HIS SUCCESSOR TAKES OFFICE, OR UNTIL A PERIOD OF SIXTY DAYS HAS ELAPSED, WHICHEVER OCCURS FIRST. A VACANCY IN AN UNEXPIRED TERM SHALL BE FILLED IN THE SAME MANNER AS THE ORIGINAL APPOINTMENT. THE GOVERNOR MAY REMOVE ANY MEMBER PURSUANT TO SECTION 3.05 OF THE REVISED CODE.

THE COMMISSION MEMBER WHO IS ALSO A MEMBER OF THE INDUSTRIAL COMMISSION SHALL RECEIVE NO ADDITIONAL COMPENSATION BUT SHALL BE REIMBURSED FOR ACTUAL AND NECESSARY EXPENSES IN THE PERFORMANCE OF HIS DUTIES. THE TWO REMAINING MEMBERS OF THE COMMISSION SHALL RECEIVE PER DIEM COMPENSATON FIXED PURSUANT TO DIVISION (J) OF SECTION 124.15 OF THE REVISED CODE AND ACTUAL AND NECESSARY EXPENSES INCURRED IN THE PERFORMANCE OF THEIR DUTIES.

FOR ADMINISTRATIVE PURPOSES, THE BOARD IS A PART OF THE BUREAU OF WORKERS' COMPENSATION, AND THE BUREAU SHALL FURNISH THE BOARD WITH NECESSARY OFFICE SPACE, STAFF, AND SUPPLIES. THE BOARD SHALL MEET AS REQUIRED BY THE INDUSTRIAL COMMISSION.

(B) IN ADDITION TO THE GROUNDS LISTED IN SECTION 4123.35 OF THE REVISED CODE PERTAINING TO CRITERIA FOR BEING GRANTED THE PRIVILEGE OF SELF-INSURANCE, THE GROUNDS UPON WHICH THE INDUSTRIAL COMMISSION MAY REVOKE OR REFUSE TO RENEW THE PRIVILEGE SHALL INCLUDE FAILURE TO COMPLY WITH ANY RULES OR ORDERS OF THE COMMISSION OR TO PAY CONTRIBUTIONS FOR THE SELF-INSURING EMPLOYERS' SURETY BOND FUND PROGRAM ESTABLISHED BY SECTION 4123.351 OF THE REVISED CODE, CONTINUED FAILURE TO FILE MEDICAL REPORTS BEARING UPON THE INJURY OF THE CLAIMANT, AND FAILURE TO PAY COMPENSATION OR BENEFITS IN ACCORDANCE WITH LAW IN A TIMELY MANNER. A DEFICIENCY IN ANY OF THE GROUNDS LISTED IN THIS DIVISION IS SUFFICIENT TO JUSTIFY THE COMMISSION'S REVOCATION OR REFUSAL TO RENEW THE EMPLOYER'S SELF-INSURANCE STATUS. THE COMMISSION NEED NOT REVOKE OR REFUSE TO RENEW AN EMPLOYER'S SELF-INSURANCE STATUS IF ADEQUATE CORRECTIVE ACTION IS TAKEN BY THE EMPLOYER PURSUANT TO DIVISION (C) OF THIS SECTION.

(C) THE COMMISSION SHALL REFER TO THE BOARD ALL COMPLAINTS OR ALLEGATIONS OF MISCONDUCT AGAINST A SELF-INSURING EMPLOYER OR QUESTIONS AS TO WHETHER A SELF-INSURING EMPLOYER CONTINUES TO MEET MINIMUM STANDARDS. THE BOARD SHALL INVESTIGATE AND MAY ORDER THE EMPLOYER TO TAKE CORRECTIVE ACTION IN ACCORDANCE WITH SUCH SCHEDULE AS THE BOARD FIXES. THE BOARD'S DETERMINATION IN THIS REGARD NEED NOT BE MADE BY FORMAL HEARING BUT MUST BE ISSUED IN WRITTEN FORM AND CONTAIN THE SIGNATURE OF AT LEAST TWO BOARD MEMBERS. IF THE BOARD DETERMINES, AFTER HEARING CONDUCTED PURSUANT TO CHAPTER 119. OF THE REVISED CODE AND THE RULES OF THE COMMISSION, THAT THE EMPLOYER HAS FAILED TO CORRECT THE DEFICIENCIES WITHIN THE TIME FIXED BY THE BOARD OR IS OTHERWISE IN VIOLATION OF CHAPTER 4123. OF THE REVISED CODE, THE BOARD SHALL RECOMMEND TO THE COMMISSION REVOCATION OF AN EMPLOYER'S PRIVILEGE TO SELF-INSURE OR SUCH OTHER PENALTY WHICH MAY INCLUDE, BUT IS NOT LIMITED TO, PROBATION, OR A CIVIL PENALTY NOT TO EXCEED TEN THOUSAND DOLLARS FOR EACH FAILURE. A BOARD RECOMMENDATION TO REVOKE AN EMPLOYER'S PRIVILEGE TO SELF-INSURE MUST BE BY UNANIMOUS VOTE. A RECOMMENDATION FOR ANY OTHER PENALTY SHALL BE BY MAJORITY VOTE. WHERE THE SELF-INSURING EMPLOYERS EVALUATION BOARD MAKES RECOMMENDATIONS TO THE INDUSTRIAL COMMISSION FOR DISCIPLINING A SELF-INSURING EMPLOYER, THE COMMISSION SHALL PROMPTLY AND FULLY IMPLEMENT SUCH RECOMMENDATIONS.

4123.411 Assessments for disabled workers' relief fund [Eff. 8-22-86]

(A) For the purpose of carrying out sections 4123.412 to 4123.418 of the Revised Code, the industrial commission shall levy an assessment against all employers at a rate, of at least five but not to exceed ten cents per one hundred dollars of payroll, beginning July 1, 1980, such rate to be determined annually for each employer group listed in divisions (A)(1) to ~~(D)~~(3) of this section, which will produce an amount no greater than the amount estimated by the commission to be necessary to carry out such sections for the period for which the assessment is levied. In the event the amount produced by the assessment is not sufficient to carry out such sections the additional amount necessary shall be provided from the income produced as a result of investments made pursuant to section 4123.44 of the Revised Code.

Assessments shall be levied according to the following schedule:

~~(A)~~(1) Private fund employers, except self-insured employers—in January and July of each year upon gross payrolls of the preceding six months;

~~(B)~~(2) Counties and taxing district employers therein—in January of each year upon gross payrolls of the preceding twelve months;

~~(C)~~(3) The state as an employer—in January, April, July, and October of each year upon gross payrolls of the preceding three months;

~~(D) Self-insured employers—in January and July of each year upon gross payrolls of the preceding six months.~~

Amounts assessed in accordance with this section shall be collected from each employer as prescribed in rules adopted by the industrial commission pursuant to division (E) of section 4121.13 of the Revised Code.

The moneys derived from the assessment provided for in this section shall be credited to the disabled workers' relief fund created by section 4123.412 of the Revised Code. The commission shall establish by rule classifications of employers within divisions (A)(1) to ~~(D)~~(3) of this section and shall determine rates for each class so as to fairly apportion the costs of carrying out sections 4123.412 to 4123.418 of the Revised Code.

(B) FOR ALL INJURIES AND DISABILITIES OCCURRING ON OR AFTER JANUARY 1, 1987, THE INDUSTRIAL COMMISSION, FOR THE PURPOSES OF CARRYING OUT SECTIONS 4123.412 TO 4123.418 OF THE REVISED CODE, SHALL LEVY AN ASSESSMENT

AGAINST ALL EMPLOYERS AT A RATE PER ONE HUNDRED DOLLARS OF PAYROLL, SUCH RATE TO BE DETERMINED ANNUALLY FOR EACH CLASSIFICATION OF EMPLOYER IN EACH EMPLOYER GROUP LISTED IN DIVISIONS (A)(1) TO (3) OF THIS SECTION, WHICH WILL PRODUCE AN AMOUNT NO GREATER THAN THE AMOUNT ESTIMATED BY THE COMMISSION TO BE NECESSARY TO CARRY OUT SUCH SECTIONS FOR THE PERIOD FOR WHICH THE ASSESSMENT IS LEVIED.

AMOUNTS ASSESSED IN ACCORDANCE WITH THIS DIVISION SHALL BE BILLED AT THE SAME TIME PREMIUMS ARE BILLED AND CREDITED TO THE DISABLED WORKERS' RELIEF FUND CREATED BY SECTION 4123.412 OF THE REVISED CODE. THE COMMISSION SHALL DETERMINE THE RATES FOR EACH CLASS IN THE SAME MANNER AS IT FIXES THE RATES FOR PREMIUMS PURSUANT TO SECTION 4123.29 OF THE REVISED CODE.

(C) FOR AN EMPLOYER GRANTED THE PRIVILEGE TO PAY COMPENSATION DIRECTLY THE BUREAU OF WORKERS' COMPENSATION SHALL PAY TO EMPLOYEES WHO ARE PARTICIPANTS REGARDLESS OF THE DATE OF INJURY, ANY AMOUNTS DUE TO THE PARTICIPANTS UNDER SECTION 4123.414 OF THE REVISED CODE AND SHALL BILL THE EMPLOYER, SEMIANNUALLY, FOR ALL AMOUNTS PAID TO A PARTICIPANT.

4123.413 Requirements for participation in fund [Eff. 8-22-86]

~~In order~~ TO BE ELIGIBLE to participate in said fund, a participant must be permanently and totally disabled and be receiving workers' compensation payments, the total of which, when combined with disability benefits received pursuant to The Social Security Act is less than three hundred forty-two dollars per month adjusted annually as provided in division (B) of section 4123.62 of the Revised Code.

~~No person shall participate in said fund who is receiving pursuant to section 4123.58 of the Revised Code a minimum award as defined therein.~~

4123.414 Amount of payments [Eff. 8-22-86]

Each ~~participant, except those who are receiving pursuant to section 4122.58 of the Revised Code a weekly award equivalent to no more than fifty per cent of the statewide average weekly wage or a weekly award equivalent to the participant's average weekly wage,~~ PERSON DETERMINED ELIGIBLE, PURSUANT TO SECTION 4123.413 OF THE REVISED CODE, TO PARTICIPATE IN THE DISABLED WORKERS' RELIEF FUND is entitled to receive payments, without application, from the ~~disabled workers' relief~~ fund of a monthly amount equal to the LESSER OF THE difference between three hundred forty-two dollars, adjusted annually pursuant to division (B) of section 4123.62 of the Revised Code, and ~~such lesser~~:

(1) THE amount as he is receiving per month as THE disability MONTHLY benefits AWARD pursuant to The Social Security Act, ~~but payments from said fund shall not exceed the difference between three hundred forty-two dollars, adjusted annually pursuant to division (B) of section 4123.62 of the Revised Code, and such lesser sum as~~; OR

(2) THE AMOUNT he is receiving monthly under the workers' compensation laws for permanent and total disability; ~~provided that in~~. IN determining such difference, a participant shall be considered as receiving the amount of such participant's compensation which shall have been commuted under the provisions of section 4123.64 of the Revised Code. Such payments shall be made monthly during the period in which such participant is permanently and totally disabled.

4123.512 Notification of employer; information from other parties; handling of claims [Eff. 8-22-86]

(A) Upon receipt of any claim under Chapter 4123. of the Revised Code, the administrator of the bureau of workers' compensation shall forthwith notify the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the administrator shall receive from a person other than the claimant written information indicating that an injury or occupational disease has occurred or been contracted which may be compensable under Chapter 4123. of the Revised Code, the administrator shall notify the employee and the employer of such information. The receipt of such information and such notice by the administrator shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code. Upon receipt of a claim, the administrator shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. IF A CLAIM IS DETERMINED TO BE A COMPENSABLE LOST TIME CLAIM, THE CLAIMANT AND THE EMPLOYER SHALL BE NOTIFIED OF THE AVAILABILITY OF REHABILITATION SERVICES. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the administrator's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of his rights under the law.

The administrator shall assign all claims and investigations to the district office of the bureau of workers' compensation from which investigation and determination may be made most expeditiously and the deputy administrator who is in charge of such office shall be responsible for and shall supervise and direct the prompt disposition of all claims and investigations assigned to such office.

Investigation of the facts concerning an injury or occupational disease shall be ascertained in whatever manner may be most appropriate. Statements of the employee, employer, attending physician and witnesses may be obtained in writing or may be made to the investigator orally or by telephone or telegraph accordingly as the circumstances may justify.

(B) No person who is not an employee of the bureau or industrial commission or who is not by law given access to the contents of a claims file shall have a file in his possession.

4123.515 Disputed claims; hearings; reconsideration; payment of award; repaying incorrect awards [Eff. 8-22-86]

Where there is a disputed claim, the administrator of the bureau of workers' compensation or one of his deputies shall refer that claim to the appropriate district hearing officer. The district hearing officer shall afford to the claimant and the employer an opportunity to be heard upon reasonable notice and to present testimony and facts pertinent to the claim. The district hearing officer when he deems it appropriate may compel testimony or the production of evidence that is pertinent to a violation of a specific safety requirement, identifies the cause of injury or occupational disease, or presents the circumstances of the injury or occupational disease.

The district hearing officer in any hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but the district hearing officers and staff hearing officers shall follow the rules and guidelines established by the industrial commission.

The parties shall be required to proceed promptly and without continuances except in cases of hardship prejudicial to a party and due either to the lack of time afforded by the notice of the hearing or to other cause which the party could not be expected to foresee and provide against.

The district hearing officer shall present his decision and the reasons therefor in conformity with the requirements of division (B) of section 4121.36 of the Revised Code and shall date and forthwith mail copies thereof to the claimant and the employer and their representatives at their respective addresses.

Payment of an award made pursuant to a decision of the district hearing officer in a claim shall commence twenty days after the date of the decision except that, in all cases of a determination made under division ~~(B)~~(A) of section 4123.57 of the Revised Code, where an application for reconsideration pursuant to division ~~(B)~~(A) of section 4123.57 of the Revised Code has been filed, no payment shall be made to the claimant until a final decision on reconsideration allows compensation. In all other cases, if the decision of the district hearing officer is appealed by the employer or the administrator, the bureau shall withhold compensation and benefits during the course of the appeal to the regional board of review, but where the regional board rules in favor of the claimant, compensation and benefits shall be paid by the bureau or by the self-insuring employer whether or not further appeal is taken. If the claim is subsequently denied, payments shall be charged to the surplus fund created under division (B) of section 4123.34 of the Revised Code, and if the employer is a state risk such amount shall not be charged to the employer's experience and if the employer is a self-insurer such amount shall be paid to the self-insurer from said surplus fund.

4123.516 Appeal to regional board and industrial commission; reassignment of cases; limits on administrator's appeals [Eff. 8-22-86]

A claimant, an employer, or the administrator of the bureau of workers' compensation who is dissatisfied with a decision of the district hearing officer may appeal therefrom by filing a notice of appeal with the bureau, with a regional board of review, or with the industrial commission, within twenty days after the date of receipt of notice of the decision of the district hearing officer.

Such notice shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

Upon the filing of a notice of appeal the commission shall assign the appeal for hearing before a regional board of review accordingly as will be most convenient to the claimant and a prompt hearing and determination of the appeal and shall notify the administrator, the claimant, and the employer of such assignment. A regional board shall render a decision within two months of the filing of any appeal unless the board demonstrates to the commission adequate grounds for a reasonable delay.

WHERE THE COMMISSION DETERMINES THAT THE CURRENT CASELOAD OF A BOARD IS SUCH AS TO RESULT IN AN UNREASONABLE DELAY IN THE HEARING AND DETERMINATION OF ONE OR MORE CLAIMS, IT MAY RECALL THE CLAIMS WHICH IT HAS ASSIGNED TO THE BOARD AND ASSIGN THE CLAIMS TO ANOTHER BOARD. IN SUCH A CASE, THE COMMISSION SHALL REQUIRE THE SECOND BOARD TO MEET AT THE MEETING LOCATION OF THE FIRST BOARD.

The commission ALSO may at any ~~time~~ OTHER TIME recall any claim which it has assigned to a board and assign such claim to another board.

The decision of a regional board of review shall be the decision of the commission except where an appeal is allowed by the industrial commission under this section or by a court under section 4123.519 of the Revised Code. The administrator, the claimant, or the employer may file an appeal to the commission from a decision of a regional board within twenty days after the date of receipt of the decision.

Notice of the order of the industrial commission permitting or refusing to permit an appeal from a regional board of review shall be dated and on the same day mailed to the administrator, the claimant, and the employer.

No appeal shall be taken by the administrator in cases where the employer was represented at the hearing where the order was adopted unless the appeal is based upon questions of law or allegations of fraud. No appeal by the administrator shall be timely unless filed within twenty days following the date upon which the employer received the order from which the administrator seeks to appeal.

4123.519 Appeal to court of common pleas; venue; notice of appeal; petition; costs; repaying incorrect awards [Eff. 8-22-86]

The claimant or the employer may appeal a decision of the industrial commission or of its staff hearing officer made pursuant to division (B)(6) of section 4121.35 of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, OR IN WHICH THE CONTRACT OF EMPLOYMENT WAS MADE IF THE EXPOSURE OCCURRED OUTSIDE THE STATE. IN THE EVENT THAT A CLAIMANT OR EMPLOYER IS UNABLE TO PROPERLY VEST JURISDICTION IN A COURT FOR THE PURPOSES OF AN APPEAL BY THE USE OF THE JURISDICTIONAL REQUIREMENTS DESCRIBED IN THIS PARAGRAPH, THE APPELLANT THEN MAY RESORT TO THE VENUE PROVISIONS IN THE RULES OF CIVIL PROCEDURE TO VEST JURISDICTION IN A COURT. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from a decision of a regional board from which the commission or its staff hearing officer has refused to permit an appeal to the commission. Notice of such appeal shall be filed by the appellant with the court of common pleas within sixty days after the date of the receipt of the decision appealed from or the date of receipt of the order of the commission refusing to permit an appeal from a regional board of review. Such filings shall be the only act required to perfect the appeal and vest jurisdiction in the court.

Notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

The administrator of the bureau of workers' compensation, the claimant, and the employer shall be parties to such appeal and the commission shall be made a party if it makes application therefor.

The attorney general or one or more of his assistants or special counsel designated by him shall represent the administrator and the commission. In the event the attorney general or his designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as his or its attorney in such appeal. Any attorney so employed shall continue his representation during the entire period of the appeal and in all hearings thereof except where such continued representation becomes impractical.

Upon receipt of notice of appeal the clerk of courts shall cause notice to be given to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though such physician is a resident of or subject to service in the county in which the trial is had. The cost of the deposition filed in court and of copies of such deposition for each party shall be paid for by the industrial commission from the surplus fund and the costs thereof charged against the unsuccessful party if the claimant's right to participate

or continue to participate is finally sustained or established in such appeal. In the event such a deposition is taken and filed, the physician whose deposition is taken shall not be required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of such action.

The court shall certify its decision to the commission and such certificate shall be entered in the records of the court and appeal from such judgment shall be governed by the law applicable to the appeal of civil actions.

The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the industrial commission if the industrial commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. Such attorney's fee shall not exceed twenty per cent of an award up to three thousand dollars and ten per cent of all amounts in excess thereof, but in no event shall such fee exceed fifteen hundred dollars.

If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if such judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

An appeal from a decision of the commission or any action filed in a case in which an award of compensation has been made shall not stay the payment of compensation under such award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. In the event payments are made to a claimant which should not have been made under the decision of the appellate court, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, such amount shall not be charged to the employer's experience. In the event the employer is a self-insurer, such amount shall be paid to the self-insurer from said surplus fund. All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission, the administrator, or a regional board of review on November 2, 1959, and all claims filed thereafter shall be governed by sections 4123.512 to 4123.519 of the Revised Code.

Any action pending in common pleas court or any other court on ~~November 7, 1957~~ JANUARY 1, 1986 under this section shall be governed by sections 4123.514, 4123.515, 4123.516, 4123.519, and 4123.522 of the Revised Code.

4123.54 Compensation in case of injury, disease or death; agreement if work performed in another state; employers temporarily in Ohio; compensation not payable to prisoners [Eff. 8-22-86]

Every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not ~~purposely~~:

(A) PURPOSELY self-inflicted;; OR

(B) CAUSED BY THE EMPLOYEE BEING INTOXICATED OR UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN WHERE THE INTOXICATION OR BEING UNDER THE INFLUENCE OF THE CONTROLLED SUBSTANCE NOT PRESCRIBED BY A PHYSICIAN WAS THE PROXIMATE CAUSE OF THE INJURY,

is entitled to receive, either directly from his employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, such compensation for loss sustained on account of such injury, occupational disease or death, and such medical, nurse, and hospital services and medicines, and such amount of funeral expenses in case of death, as are provided by sections 4123.01 to 4123.94 of the Revised Code.

Whenever, with respect to an employee of an employer who is subject to and has complied with sections 4123.01 to 4123.94 of the Revised Code, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. Such agreement shall be in writing and shall be filed with the industrial commission within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with sections 4123.01 to 4123.94 of the Revised Code, then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted and the rights of the employee and his dependents under the laws of this state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of his employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and his dependents under the laws of that state shall be the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of his employment without regard to the place where the injury was sustained or the disease contracted.

If any employee or his dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state, the amount so awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or his dependents by the industrial commission.

If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, such employee and his dependents are not entitled to receive compensation or benefits under sections 4123.01 to 4123.94 of the Revised Code, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of such employee and his dependents under the laws of such other state shall be the exclusive remedy against the employer on account of such injury, disease, or death.

COMPENSATION OR BENEFITS SHALL NOT BE PAYABLE TO A CLAIMANT DURING THE PERIOD OF CONFINEMENT OF THE CLAIMANT IN A PENAL INSTITUTION IN THIS OR ANY OTHER STATE FOR CONVICTION OF VIOLATION OF THE CRIMINAL LAW OF THIS OR ANY OTHER STATE.

4123.56 Temporary disability compensation; termination of compensation; examination; compensation for wage losses of returning employee [Eff. 8-22-86]

(A) In the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of his average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less

than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event he shall receive compensation equal to his full wages; provided that for the first twelve weeks of total disability the employee shall receive compensation equal to his full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. In the case of an employer who has elected to pay compensation direct, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer. Payments shall continue pending the determination of the matter, however payment shall not be made for such period when any employee has returned to work or, when an employee's treating physician has made a written statement that the employee is capable of returning to his former position of employment, WHEN WORK WITHIN THE PHYSICAL CAPABILITIES OF THE EMPLOYEE IS MADE AVAILABLE BY THE EMPLOYER OR ANOTHER EMPLOYER, OR WHEN THE EMPLOYEE HAS REACHED THE MAXIMUM MEDICAL IMPROVEMENT. WHERE THE EMPLOYEE IS CAPABLE OF WORK ACTIVITY, BUT HIS EMPLOYER IS UNABLE TO OFFER HIM ANY EMPLOYMENT, THE EMPLOYEE SHALL REGISTER WITH THE BUREAU OF EMPLOYMENT SERVICES, WHICH SHALL ASSIST THE EMPLOYEE IN FINDING SUITABLE EMPLOYMENT. THE TERMINATION OF TEMPORARY TOTAL DISABILITY, WHETHER BY ORDER OR OTHERWISE, DOES NOT PRECLUDE THE COMMENCEMENT OR TEMPORARY TOTAL DISABILITY AT ANOTHER POINT IN TIME IF THE EMPLOYEE AGAIN BECOMES TEMPORARILY TOTALLY DISABLED.

After two hundred weeks of temporary total disability benefits, the claimant shall be scheduled for an examination by the industrial commission medical department for an evaluation to determine whether or not the temporary disability has become permanent. Where the employer has elected to pay compensation direct, the employer shall notify the medical section immediately after payment of two hundred weeks of temporary total disability and request that the claimant be scheduled for examination by the medical section.

When the employee is awarded compensation for temporary total disability for a period for which he has received benefits under sections 4141.01 to 4141.46 of the Revised Code, an amount equal to the amount so received shall be paid by the industrial commission from said award to the bureau of employment services and shall be credited by the administrator of the bureau of employment services to the accounts of the employers to whose accounts the payment of said benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation ~~for temporary total disability~~ UNDER THIS SECTION has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing such insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation ~~for total disability~~ PAID UNDER THIS SECTION for such period or periods shall be paid only to the extent by which such payment or payments exceeds the amount of such nonoccupational insurance or program paid or payable. Offset of such compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

(B) WHERE AN EMPLOYEE IN A CLAIM ALLOWED UNDER THIS CHAPTER SUFFERS A WAGE LOSS AS A RESULT OF RETURNING TO EMPLOYMENT OTHER THAN HIS FORMER POSITION OF EMPLOYMENT OR AS A RESULT OF BEING UNABLE TO FIND EMPLOYMENT CONSISTENT WITH THE CLAIMANT'S PHYSICAL CAPABILITIES, HE SHALL RECEIVE COMPENSATION AT SIXTY-SIX AND TWO-THIRDS OF HIS WEEKLY WAGE LOSS NOT TO EXCEED THE STATEWIDE AVERAGE WEEKLY WAGE FOR A PERIOD NOT TO EXCEED TWO HUNDRED WEEKS.

4123.57 Partial disability compensation [Eff. 8-22-86]

Partial disability compensation shall be paid as follows; ~~provided, that an employee may elect as between divisions (A) and (B) of this section as to the manner of receiving the compensation set forth in this section:~~

~~(A) In case of injury or occupational disease resulting in partial disability other than those exclusively provided for under division (C) of this section, the employee shall receive per week sixty-six and two-thirds per cent of the impairment of his earning capacity which results from the injury or occupational disease during the continuance thereof, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, but not in a greater sum in the aggregate than seventeen thousand five hundred dollars.~~

Not earlier than forty weeks after the date of termination of the latest period of ~~total disability following the injury or contraction of an occupational disease~~ PAYMENTS UNDER SECTION 4123.56 OF THE REVISED CODE, or not earlier than forty weeks after the date of the injury or contraction of an occupational disease in the absence of ~~total disability~~ PAYMENTS UNDER SECTION 4123.56 OF THE REVISED CODE, the employee may file an application with the industrial commission for the determination of the percentage of his permanent partial disability resulting from the injury or occupational disease.

Whenever such application is filed, the district hearing officer shall set the application for hearing with written notices to all interested persons. ~~After hearing and determination, the employee shall file his election to receive compensation for partial disability under either division (A) or (B) of this section, and such election may thereafter be changed upon approval of the district hearing officer for good cause shown.~~

~~(B)~~(A) The district hearing officer, upon such application, shall determine the percentage of the employee's permanent disability, except such as is subject to division ~~(C)~~(B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of his average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, per week regardless of the average weekly wage, for the number of weeks which equals such percentage of two hundred weeks. Except on application for reconsideration, review, or modification, which is filed within ten days after the date of receipt of the decision of the district hearing officer, in no instance shall the former award be modified unless it is found from such medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability. An application for reconsideration so filed shall be heard by a staff hearing officer and his decision shall be final. No application for subsequent percentage determinations on the same claim for injury or occupational disease shall be accepted for review by the district hearing officer unless supported by substantial evidence of new and changed circumstances developing since the time of the hearing on the original or last determination.

No award shall be made under this division based upon a percentage of disability which, when taken with all other percentages of permanent disability, exceeds one hundred per cent. If the percentage of such permanent disability of the employee equals or exceeds ninety per cent, compensation for permanent partial disability shall be paid for two hundred weeks.

Compensation payable under ~~divisions (A) and (B) of this section~~ DIVISION shall accrue and be payable to the employee from

the date of last payment of compensation, or, in cases where no previous compensation has been paid, from the date of the injury or the date of the diagnosis of the occupational disease.

When an award under this division has been made prior to the death of an employee, all unpaid installments accrued or to accrue under the provisions of the award are payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of such employee, and if there are no such children surviving, then to such other dependents as the commission may determine.

~~(C)~~(B) In cases included in the following schedule the compensation payable per week to the employee shall be sixty-six and two-thirds per cent of his average weekly wage, but not more than a maximum ~~of fifty per cent of~~ EQUAL TO the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code ~~per week~~ regardless of the average weekly wage, and not less than ~~twenty-five~~ FORTY per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall continue during the periods provided in the following schedule:

For the loss of a thumb, sixty weeks.

For the loss of a first finger, commonly called index finger, thirty-five weeks.

For the loss of a second finger, thirty weeks.

For the loss of a third finger, twenty weeks.

For the loss of a fourth finger, commonly known as the little finger, fifteen weeks.

The loss of a second, or distal, phalange of the thumb is considered equal to the loss of one half of such thumb; the loss of more than one half of such thumb is considered equal to the loss of the whole thumb.

The loss of the third, or distal, phalange of any finger is considered equal to the loss of one-third of such finger.

The loss of the middle, or second, phalange of any finger is considered equal to the loss of two-thirds of such finger.

The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger. In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

For the loss of the metacarpal bone (bones of the palm) for the corresponding thumb, or fingers, add ten weeks to the number of weeks under this division.

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to such members or parts thereof as given for the loss thereof.

If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of his employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from such loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting from such loss of fingers, or loss of use of fingers, the commission may take that fact into consideration and increase the award of compensation accordingly, but the award made in such case shall not exceed the amount of compensation for loss of a hand.

For the loss of a hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

For the lost of a great toe, thirty weeks.

For the loss of one of the toes other than the great toe, ten weeks.

The loss of more than two-thirds of any toe is considered equal to the loss of the whole toe.

The loss of less than two-thirds of any toe is considered no loss, except as to the great toe; the loss of the great toe up to the interphalangeal joint is co-equal to the loss of one-half of the great toe; the loss of the great toe beyond the interphalangeal joint is considered equal to the loss of the whole great toe.

For the loss of a foot, one hundred fifty weeks.

For the loss of a leg, two hundred weeks.

For the loss of the sight of an eye, one hundred twenty-five weeks.

For the permanent partial loss of sight of an eye, such portion of one hundred twenty-five weeks as the commission may in each case determine, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

For the permanent and total loss of hearing of one ear, twenty-five weeks; but in no case shall an award of compensation be made for less than permanent and total loss of hearing of one ear.

For the permanent and total loss of hearing, one hundred twenty-five weeks; but, except pursuant to the next preceding paragraph, in no case shall an award of compensation be made for less than permanent and total loss of hearing.

In case an injury or occupational disease results in serious facial or head disfigurement which either impairs or may in the future impair the opportunities to secure or retain employment, the commission shall make such award of compensation as it deems proper and equitable, in view of the nature of the disfigurement, and not to exceed the sum of five thousand dollars. For the purpose of making such award it shall not be material whether such employee is gainfully employed in any occupation or trade at the time of the commission's determination.

When an award under this division has been made prior to the death of an employee from a cause other than the injury or occupational disease on which the award is based, all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of such employee and if there are no such children, then to such dependents as the commission may determine.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to his death from a cause other than the injury or occupational disease which caused such severance, the commission shall make an award in accordance with this division for such loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of such employee and if there be no such children, then to such dependents as the commission may determine.

~~(D)~~(C) Compensation for partial disability under divisions (A), AND (B)~~, and (C)~~ of this section shall be in addition to the compensation paid the employee ~~for the periods of temporary total disability resulting from the injury or occupational disease, but the amount of compensation paid for partial disability under division (A) of this section is not in addition to the compensation paid for permanent partial disability under division (B) or (C) of this section and the amount of compensation paid for partial disability under division (A) of this section shall be deducted from the amount of compensation payable for permanent partial disability under division (B) or (C) of this section but only one deduction shall be made if payments are made under both divisions (B) and (C) of this section for permanent partial disability involved in the same claim~~ PURSUANT TO SECTION 4123.56 OF THE REVISED CODE. A CLAIMANT MAY RECEIVE COMPENSATION UNDER DIVISIONS (A) AND (B) OF THIS SECTION.

In all cases arising under division ~~(C)~~(B) of this section, if it is determined by any one of the following: (1) the amputee clinic at University hospital, Ohio state university; (2) the rehabilitation services commission; (3) an amputee clinic or prescribing physician approved by either the administrator of the bureau of workers' compensation, or his designee, or the industrial commission or the commission's designee, that an injured or disabled employee is in need of an artificial appliance, or in need of a repair thereof, regardless of whether such appliance or repair thereof will be serviceable in the vocational rehabilitation of the injured employee, and regardless of whether such employee has returned to or can

ever again return to any gainful employment, the industrial commission shall pay the cost of such artificial appliance or repair thereof out of the surplus created by division (B) of section 4123.34 of the Revised Code.

In those cases where a rehabilitation services commission recommendation that an injured or disabled employee is in need of an artificial appliance would conflict with their state plan, adopted pursuant to the "Rehabilitation Act of 1973," 87 Stat. 355, 29 U.S.C.A. 701, the administrator, bureau of workers' compensation, or his designee, or the industrial commission or the commission's designee, may obtain a recommendation from an amputee clinic or prescribing physician that they determine appropriate.

~~(E)~~(D) If an employee makes application for a finding and the commission finds that he has contracted silicosis as defined in division (X), or coal miners' pneumoconiosis as defined in division (Y), or asbestosis as defined in division (AA) of section 4123.68 of the Revised Code, and that a change of such employee's occupation is medically advisable in order to decrease substantially further exposure to silica dust, asbestos, or coal dust and if the employee, after such finding, has changed or shall change his occupation to an occupation in which the exposure to silica dust, asbestos, or coal dust is substantially decreased, the commission shall allow to such employee ~~forty-nine dollars~~ AN AMOUNT EQUAL TO FIFTY PER CENT OF THE STATEWIDE AVERAGE WEEKLY WAGE per week for a period of thirty weeks, commencing as of the date of such discontinuance or change, and for a period of one hundred weeks immediately following the expiration of such period of thirty weeks the commission shall allow such employee sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from such change of occupation but not to exceed a maximum of ~~forty-dollars-and-twenty-five-cents~~ AN AMOUNT EQUAL TO FIFTY PER CENT OF THE STATEWIDE AVERAGE WEEKLY WAGE per week. No such employee shall be entitled to receive more than one allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which such employee is employed in an occupation in which the exposure to silica dust, asbestos, or coal dust is not substantially less than the exposure in the occupation in which he was formerly employed or for any period during which such employee may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from silicosis, asbestosis, or coal miners' pneumoconiosis. An award for change of occupation for a coal miner who has contracted coal miners' pneumoconiosis may be granted under this division even though he continues his employment with the same employer, so long as his employment subsequent to the change is such that his exposure to coal dust is substantially decreased and a change of occupation is certified by the claimant as permanent. The commission may accord to such employee medical and other benefits in accordance with section 4123.66 of the Revised Code.

~~(F)~~(E) If a fire fighter or police officer makes application for a finding and the commission finds that he has contracted a cardiovascular and pulmonary disease as defined in division (W) of section 4123.68 of the Revised Code, and that a change of such fire fighter's or police officer's occupation is medically advisable in order to decrease substantially further exposure to smoke gases, chemical fumes, and other toxic vapors, and if such fire fighter, or police officer, after such finding, has changed or changes his occupation to an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is substantially decreased, the commission shall allow to such fire fighter or police officer ~~forty-nine-dollars~~ AN AMOUNT EQUAL TO FIFTY PER CENT OF THE STATEWIDE AVERAGE WEEKLY WAGE per week for a period of thirty weeks, commencing as of the date of such discontinuance or change, and for a period of seventy-five weeks immediately following the expiration of such period of thirty weeks the commission shall allow such fire fighter or police officer sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from such change of occupation but not to exceed a maximum of ~~forty-dollars-and-twenty-five-cents~~ AN AMOUNT EQUAL TO FIFTY PER CENT OF THE STATEWIDE AVERAGE WEEKLY WAGE per week. No such fire fighter or police officer shall be entitled to receive more than one allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which such fire fighter or police officer is employed in an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is not substantially less than the exposure in the occupation in which he was formerly employed or for any period during which such fire fighter or police officer may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from a cardiovascular and pulmonary disease. The commission may accord to such fire fighter or police officer medical and other benefits in accordance with section 4123.66 of the Revised Code.

4123.58 Compensation for permanent total disability [Eff. 8-22-86]

(A) In cases of permanent total disability, the employee shall receive an award to continue until his death in the amount of sixty-six and two-thirds per cent of his average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event he shall receive compensation in an amount equal to his average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to the Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division.

(C) The loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof, constitutes total and permanent disability, to be compensated according to this section. Compensation payable under this section for permanent total disability shall be in addition to benefits payable under division ~~(C)~~(B) of section 4123.57 of the Revised Code.

4123.62 Benefit computation; adjustment to consumer price index [Eff. 8-22-86]

(A) If it is established that an injured or disabled employee was of such age and experience when injured or disabled as that under natural conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wage.

(B) On each first day of January, the current maximum monthly benefit amounts provided in sections 4123.412, 4123.413, and 4123.414 of the Revised Code in injury cases shall be adjusted based on the United States department of labor's national consumer price index. The percentage increase in the cost of living using the index figure for the first day of September of the preceding year and the first day of September of the year preceding that year shall be applied to the maximums in effect on the preceding thirty-first day of December to obtain the increase in the cost of living during that year.

In determining the increase in the maximum benefits for any year after 1972, the base shall be the national consumer price index on the first day of September of the preceding year. The increase in the index for the applicable twelve-month period shall be determined and shall be divided by the base used. The resulting percent-

age shall be applied to the existing maximums to arrive at the new maximums.

(C) Effective January 1, 1974, and each first day of January thereafter, the current maximum weekly benefit amounts provided in sections 4123.56, 4123.58, and 4123.59, and ~~divisions (A) and (C)~~ DIVISION (B) of section 4123.57 of the Revised Code shall be adjusted based on the increase or decrease in the statewide average weekly wage.

"Statewide average weekly wage" means the average weekly earnings of all workers in Ohio employment subject to sections 4141.01 to 4141.46 of the Revised Code as determined as of the first day of September for the four full calendar quarters preceding the first day of July of each year, by the administrator of the bureau of employment services.

The statewide average weekly wage to be used for the determination of compensation for any employee who sustains an injury, or death, or who contracts an occupational disease during the subsequent calendar year beginning with the first day of January, shall be the statewide average weekly wage so determined as of the prior first day of September adjusted to the next higher even multiple of one dollar.

Any change in benefit amounts shall be effective with respect to injuries sustained, occupational diseases contracted, and deaths occurring during the calendar year for which adjustment is made.

In determining the change in the maximum benefits for any year after 1978, the base shall be the statewide average weekly wage on the first day of September of the preceding year.

4123.651 Selection of physicians by employee; payment by employer for medical services; examination of physician of employer's choice; medical information release form [Eff. 8-22-86]

(A) Any employee who is injured or disabled in the course of his employment shall have free choice to select such licensed physician as he may desire to have serve him, as well as medical, surgical, nursing, and hospital services and attention, regardless of whether or not his employer has elected under section 4123.35 of the Revised Code, to furnish medical attention to injured or disabled employees. In the event the employee of a self-insurer selects a physician or medical, surgical, nursing, or hospital services, rather than have them furnished directly by his employer, the costs of such services, subject to the approval of the commission, shall be the obligation of such employer.

(B) THE EMPLOYER OF A CLAIMANT WHO IS INJURED OR DISABLED IN THE COURSE OF HIS EMPLOYMENT MAY REQUIRE, WITHOUT COMMISSION APPROVAL, THAT THE CLAIMANT BE EXAMINED BY A PHYSICIAN OF THE EMPLOYER'S CHOICE ONE TIME UPON ANY ISSUE ASSERTED BY THE EMPLOYEE OR A PHYSICIAN OF THE EMPLOYEE'S CHOICE OR WHICH IS TO BE CONSIDERED BY THE COMMISSION. ANY FURTHER REQUESTS FOR MEDICAL EXAMINATIONS SHALL BE MADE TO THE COMMISSION WHICH SHALL CONSIDER AND RULE ON THE REQUEST. THE COST OF ANY EXAMINATIONS INITIATED BY THE EMPLOYER SHALL BE PAID BY THE EMPLOYER.

(C) THE COMMISSION SHALL PREPARE A FORM FOR THE RELEASE OF MEDICAL INFORMATION, RECORDS, AND REPORTS RELATIVE TO THE ISSUES NECESSARY FOR THE ADMINISTRATION OF A CLAIM UNDER THIS CHAPTER. THE CLAIMANT SHALL PROMPTLY PROVIDE A CURRENT SIGNED RELEASE OF SUCH INFORMATION, RECORDS, AND REPORTS WHEN REQUESTED BY THE EMPLOYER. THE EMPLOYER SHALL PROMPTLY PROVIDE COPIES OF ALL MEDICAL INFORMATION, RECORDS, AND REPORTS TO THE BUREAU OF WORKERS' COMPENSATION AND TO THE CLAIMANT OR HIS REPRESENTATIVE UPON REQUEST.

4123.66 Additional compensation [Eff. 8-22-86]

In addition to the compensation provided for in Chapter 4123. of the Revised Code, the industrial commission shall disburse and pay from the state insurance fund such amounts for medical, nurse, and hospital services and medicine as it deems proper and, in case death ensues from the injury or occupational disease, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed ~~twelve~~ THIRTY-TWO hundred dollars. The commission shall reimburse anyone, whether dependent, volunteer, or otherwise, who pays the funeral expenses of any workman whose death ensues from any injury or occupational disease as provided in this section. The commission may adopt rules with respect to furnishing medical, nurse, and hospital service and medicine to injured or disabled employees entitled thereto, and for the payment therefor. In case an injury or industrial accident which injures an employee also causes damage to the employee's eyeglasses, artificial teeth or other denture, or hearing aid, or in the event an injury or occupational disease makes it necessary or advisable to replace, repair, or adjust the same, the commission shall disburse and pay a reasonable amount to repair or replace the same.

4123.68 Schedule of compensable occupational diseases; statute of limitations; referees [Eff. 8-22-86]

AS USED IN THIS SECTION AND CHAPTER 4123. OF THE REVISED CODE, "OCCUPATIONAL DISEASE" MEANS A DISEASE CONTRACTED IN THE COURSE OF EMPLOYMENT, WHICH BY ITS CAUSES AND THE CHARACTERISTICS OF ITS MANIFESTATION OR THE CONDITION OF THE EMPLOYMENT RESULTS IN A HAZARD WHICH DISTINGUISHES THE EMPLOYMENT IN CHARACTER FROM EMPLOYMENT GENERALLY, AND THE EMPLOYMENT CREATES A RISK OF CONTRACTING THE DISEASE IN GREATER DEGREE AND IN A DIFFERENT MANNER THAN THE PUBLIC IN GENERAL.

Every employee who is disabled because of the contraction of an occupational disease ~~as defined in this section,~~ or the dependent of an employee whose death is caused by an occupational disease ~~as defined in this section,~~ is entitled to the compensation provided by sections 4123.55 to 4123.59 and 4123.66 of the Revised Code subject to the modifications relating to occupational diseases contained in Chapter 4123. of the Revised Code.

The following diseases shall be considered occupational diseases and compensable as such when contracted by an employee in the course of the employment in which such employee was engaged and due to the nature of any process described in this section. A DISEASE WHICH MEETS THE DEFINITION OF AN OCCUPATIONAL DISEASE IS COMPENSABLE PURSUANT TO CHAPTER 4123. OF THE REVISED CODE THOUGH IT IS NOT SPECIFICALLY LISTED IN THIS SECTION.

SCHEDULE

Description of disease or injury and description of process:

(A) Anthrax: Handling of wool, hair, bristles, hides, and skins.

(B) Glanders: Care of any equine animal suffering from glanders; handling carcass of such animal.

(C) Lead poisoning: Any industrial process involving the use of lead or its preparations or compounds.

(D) Mercury poisoning: Any industrial process involving the use of mercury or its preparations or compounds.

(E) Phosphorous poisoning: Any industrial process involving the use of phosphorous or its preparations or compounds.

(F) Arsenic poisoning: Any industrial process involving the use of arsenic or its preparations or compounds.

(G) Poisoning by benzol or by nitro-derivatives and amido-derivatives of benzol (dinitro-benzol, anilin, and others): Any industrial process involving the use of benzol or nitro-derivatives or amido-derivatives of benzol or its preparations or compounds.

(H) Poisoning by gasoline, benzine, naphtha, or other volatile petroleum products: Any industrial process involving the use of gasoline, benzine, naphtha, or other volatile petroleum products.

(I) Poisoning by carbon bisulphide: Any industrial process involving the use of carbon bisulphide or its preparations or compounds.

(J) Poisoning by wood alcohol: Any industrial process involving the use of wood alcohol or its preparations.

(K) Infection or inflammation of the skin on contact surfaces due to oils, cutting compounds or lubricants, dust, liquids, fumes, gases, or vapors: Any industrial process involving the handling or use of oils, cutting compounds or lubricants, or involving contact with dust, liquids, fumes, gases, or vapors.

(L) Epithelion cancer or ulceration of the skin or of the corneal surface of the eye due to carbon, pitch, tar, or tarry compounds: Handling or industrial use of carbon, pitch, or tarry compounds.

(M) Compressed air illness: Any industrial process carried on in compressed air.

(N) Carbon dioxide poisoning: Any process involving the evolution or resulting in the escape of carbon dioxide.

(O) Brass or zinc poisoning: Any process involving the manufacture, founding, or refining of brass or the melting or smelting of zinc.

(P) Manganese dioxide poisoning: Any process involving the grinding or milling of manganese dioxide or the escape of manganese dioxide dust.

(Q) Radium poisoning: Any industrial process involving the use of radium and other radioactive substances in luminous paint.

(R) Tenosynovitis and prepatellar bursitis: Primary tenosynovitis characterized by a passive effusion or crepitus into the tendon sheath of the flexor or extensor muscles of the hand, due to frequently repetitive motions or vibrations, or prepatellar bursitis due to continued pressure.

(S) Chrome ulceration of the skin or nasal passages: Any industrial process involving the use of or direct contact with chromic acid or bichromates of ammonium, potassium, or sodium or their preparations.

(T) Potassium cyanide poisoning: Any industrial process involving the use of or direct contact with potassium cyanide.

(U) Sulphur dioxide poisoning: Any industrial process in which sulphur dioxide gas is evolved by the expansion of liquid sulphur dioxide.

(V) Berylliosis: Berylliosis means a disease of the lungs caused by breathing beryllium in the form of dust or fumes, producing characteristic changes in the lungs and demonstrated by x-ray examination, by biopsy or by autopsy.

Chapter 4123. of the Revised Code does not entitle an employee or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from berylliosis unless the employee has been subjected to injurious exposure to beryllium dust or fumes in his employment in this state preceding his disablement and only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation shall not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

Before awarding compensation for partial or total disability or death due to berylliosis, the industrial commission shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of the disability, the nature of the disability, whether permanent or temporary, the cause of death, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and x-ray examinations, as the commission requires. In the event that an employee refuses to submit to examinations, including clinical and x-ray examinations, after notice from the commission, or in the event that a claimant for compensation for death due to berylliosis fails to produce necessary consents and permits, after notice from the commission, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of such specialist and the expenses of examinations and tests shall be paid, if the claim is allowed, as part of the expenses of the claim, otherwise they shall be paid from the surplus fund.

(W) Cardiovascular ~~and~~, pulmonary, OR RESPIRATORY diseases incurred by fire fighters or police officers following exposure to HEAT, smoke, toxic gases, chemical fumes and other toxic ~~vapors~~ SUBSTANCES: Any cardiovascular ~~and~~, pulmonary, OR RESPIRATORY disease of a fire fighter or police officer caused OR INDUCED by the cumulative effect of EXPOSURE TO HEAT, the inhalation of smoke, toxic gases, chemical fumes and other toxic ~~vapors~~ SUBSTANCES in the performance of his duty SHALL CONSTITUTE A PRESUMPTION, WHICH MAY BE REFUTED BY AFFIRMATIVE EVIDENCE, THAT SUCH OCCURRED IN THE COURSE OF AND ARISING OUT OF HIS EMPLOYMENT. For the purpose of this section, "fire fighter" means any regular member of a lawfully constituted fire department of a municipal corporation or township, whether paid or volunteer, and "police officer" means any regular member of a lawfully constituted police department of a municipal corporation, township or county, whether paid or volunteer.

Chapter 4123. of the Revised Code does not entitle a fire fighter, or police officer, or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from a cardiovascular ~~and~~, pulmonary, OR RESPIRATORY disease, unless the fire fighter or police officer has been subject to injurious exposure to HEAT, smoke, toxic gases, chemical fumes, and other toxic ~~vapors~~ SUBSTANCES in his employment in this state preceding his disablement, some portion of which has been after January 1, 1967, except as provided in the last paragraph of section 4123.57 of the Revised Code.

Compensation ~~and medical, hospital, and nursing expenses~~ on account of cardiovascular ~~and~~, pulmonary, OR RESPIRATORY diseases of fire fighters and police officers are payable only in the event of temporary total disability, permanent total disability, or death, in accordance with section 4123.56, 4123.58, or 4123.59 of the Revised Code~~, and~~. MEDICAL, HOSPITAL, AND NURSING EXPENSES ARE PAYABLE IN ACCORDANCE WITH CHAPTER 4123. OF THE REVISED CODE. COMPENSATION, MEDICAL, HOSPITAL, AND NURSING EXPENSES ARE PAYABLE only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation shall not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

Chapter 4123. of the Revised Code does not entitle a fire fighter or police officer, or his dependents, to compensation, medical, hospital, and nursing expenses, or payment of funeral expenses for disability or death due to a cardiovascular ~~and~~, pulmonary, OR RESPIRATORY disease in the event of failure or omission on the part of the fire fighter or police officer truthfully to state, when seeking employment, the place, duration, and nature of previous employment in answer to an inquiry made by the employer.

Before awarding compensation for disability or death under this division, the commission shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. A fire fighter or police officer shall submit to such examinations, including clinical and x-ray examinations, as the commission requires. In the event that a fire fighter or police officer refuses to submit to examinations, including clinical and x-ray examinations, after notice from the commission, or in the event that a claimant for compensation for death under this division fails to produce necessary consents and permits, after notice from the commission, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of such spe-

cialists and the expenses of examination and tests shall be be paid, if the claim is allowed, as part of the expenses of the claim, otherwise they shall be paid from the surplus fund.

(X) Silicosis: Silicosis means a disease of the lungs caused by breathing silica dust (silicon dioxide) producing fibrous nodules distributed through the lungs and demonstrated by x-ray examination, by biopsy or by autopsy.

(Y) Coal miners' pneumoconiosis: Coal miners' pneumoconiosis, commonly referred to as "black lung disease," resulting from working in the coal mine industry and due to exposure to the breathing of coal dust, and demonstrated by x-ray examination, biopsy, autopsy or other medical or clinical tests.

Chapter 4123. of the Revised Code does not entitle an employee or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from silicosis, asbestosis, or coal miners' pneumoconiosis unless the employee has been subject to injurious exposure to silica dust (silicon dioxide), asbestos, or coal dust in his employment in this state preceding his disablement, some portion of which has been after October 12, 1945, except as provided in the second to last paragraph of section 4123.57 of the Revised Code.

Compensation ~~and medical, hospital, and nursing expenses~~ on account of silicosis, asbestosis, or coal miners' pneumoconiosis are payable only in the event of temporary total disability, permanent total disability, or death, in accordance with sections 4123.56, 4123.58, and 4123.59 of the Revised Code~~, and~~. MEDICAL, HOSPITAL, AND NURSING EXPENSES ARE PAYABLE IN ACCORDANCE WITH CHAPTER 4123. OF THE REVISED CODE. COMPENSATION, MEDICAL, HOSPITAL, AND NURSING EXPENSES ARE PAYABLE only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation shall *not* apply to disability or death occurring after January 1, 1976, and further provided that such eight-year limitation shall not apply to any asbestosis cases. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

Chapter 4123. of the Revised Code does not entitle an employee or his dependents to compensation, medical, hospital and nursing expenses, or payment of funeral expenses for disability or death due to silicosis, asbestosis, or coal miners' pneumoconiosis in the event of the failure or omission on the part of the employee truthfully to state, when seeking employment, the place, duration, and nature of previous employment in answer to an inquiry made by the employer.

Before awarding compensation for disability or death due to silicosis, asbestosis, or coal miners' pneumoconiosis, the commission shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and x-ray examinations, as the commission requires. In the event that an employee refuses to submit to examinations, including clinical and x-ray examinations, after notice from the commission, or in the event that a claimant for compensation for death due to silicosis, asbestosis, or coal miners' pneumoconiosis fails to produce necessary consents and permits, after notice from the commission, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of such specialist and the expenses of examinations and tests shall be paid, if the claim is allowed, as a part of the expenses of the claim, otherwise they shall be paid from the surplus fund.

(Z) Radiation illness: Any industrial process involving the use of radioactive materials.

Claims for compensation and benefits due to radiation illness are payable only in the event death or disability occurred within eight years after the last injurious exposure provided that such eight-year limitation shall not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous disability which commenced within eight years of the last injurious exposure the requirement of death within eight years after the last injurious exposure does not apply.

(AA) Asbestosis: Asbestosis means a disease caused by inhalation or ingestion of asbestos, demonstrated by x-ray examination, biopsy, autopsy, or other objective medical or clinical tests.

~~(BB) All other occupational diseases: A disease peculiar to a particular industrial process, trade, or occupation and to which an employee is not ordinarily subjected or exposed outside of or away from his employment.~~

All conditions, restrictions, limitations, and other provisions of this section, with reference to the payment of compensation or benefits on account of silicosis or coal miners' pneumoconiosis shall be applicable to the payment of compensation or benefits on account of any other occupational disease of the respiratory tract resulting from injurious exposures to dust.

The refusal to produce the necessary consents and permits for autopsy examination and testing shall not result in forfeiture of compensation provided the commission finds that such refusal was the result of bona fide religious convictions or teachings to which the claimant for compensation adhered prior to the death of the decedent.

4123.74 Employer's liability in damages [Eff. 8-22-86]

~~Employers~~ EXCEPT AS AUTHORIZED IN SECTION 4121.80 OF THE REVISED CODE, EMPLOYERS who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his injured employees or the dependents of his killed employees, whether or not such injury, occupational disease, bodily condition, or death is compensable under sections 4123.01 to 4123.94~~, inclusive,~~ of the Revised Code.

4123.80 Agreement to waive rights [Eff. 8-22-86]

No agreement by an employee to waive his rights to compensation under sections 4123.01 to 4123.94~~, inclusive,~~ of the Revised Code, is valid, except that ~~an~~:

(A) AN employee who is blind may waive the compensation that may become due him for injury or disability in cases where such injury or disability may be directly caused by or due to his blindness. The industrial commission may adopt and enforce rules governing the employment of such persons and the inspection of their places of employment.

(B) AN EMPLOYEE MAY WAIVE HIS RIGHTS TO COMPENSATION OR BENEFITS AS AUTHORIZED PURSUANT TO DIVISION (C)(3) OF SECTION 4123.01 OF THE REVISED CODE.

No agreement by an employee to pay any portion of the premium paid by his employer into the state insurance fund is valid.

SECTION 2. That existing sections 126.30, 4121.02, 4121.30, 4121.32, 4121.35, 4121.38, 4121.40, 4121.63, 4121.67, 4121.69, 4123.01, 4123.28, 4123.29, 4123.34, 4123.343, 4123.35, 4123.411, 4123.413, 4123.414, 4123.512, 4123.515, 4123.516, 4123.519, 4123.54, 4123.56, 4123.57, 4123.58, 4123.62, 4123.651, 4123.66, 4123.68, 4123.74, and 4123.80 of the Revised Code are hereby repealed.

SECTION 3. There is hereby created a Select Commission on Workers' Compensation Administration. The Commission shall consist of ten members appointed by the Governor with the advice and consent of the Senate. Not more than five of the members shall be of the same political party. Five members shall represent labor interests and five members shall be representative of employers.

Members shall receive per diem compensation fixed pursuant to division (J) of section 124.15 of the Revised Code together with their actual and necessary expenses.

Within thirty days after the effective date of this section, the Governor shall make appointments to the Commission and shall fix a time and place for the Commission's first meeting. At the meeting, the Commission shall organize and elect a chairman and such other officers as it deems appropriate. Thereafter, the Commission shall determine the time and place of its meetings.

The Select Commission shall secure for itself office space, staff, and supplies as it deems necessary to the proper performance of its duties. It may request the Industrial Commission to furnish space and supplies. All expenses of the Select Commission shall be paid by the Industrial Commission from the State Insurance Fund upon presentation of proper vouchers signed by the Chairman of the Select Commission.

The Select Commission shall examine the administrative structure and duties of the Industrial Commission and the Bureau of Workers' Compensation to identify any overlap or duplication of structure or duties that may be eliminated or altered so as to improve the efficiency of administration of the workers' compensation program.

The Select Commission shall make its report together with any recommendations to the Governor and to the General Assembly by not later than July 1, 1987 and shall cease to exist at that time.

SECTION 4. Within the six-month period following the effective date of this act, the industrial commission shall implement the self-insuring employer surety bond program established pursuant to section 4123.351 of the Revised Code as enacted by this act. For that purpose, the self-insuring employer shall arrange to exchange any surety bond or other security given to the commission pursuant to section 4123.35 of the Revised Code as it existed immediately prior to this act for the surety bond required under section 4123.35 of the Revised Code as enacted by this act. Until the commission effects the exchange, the security given to the commission pursuant to section 4123.35 of the Revised Code as it existed immediately prior to the amendments made by this act shall be deemed sufficient security to guarantee the liability of the self-insuring employer provided any surety bond given continues to remain effective and obligates the surety to make any necessary payments of compensation and expenses.

SECTION 5. Not later than six months after the effective date of this act, the Bureau of Workers' Compensation and Industrial Commission shall submit budgets to the Office of Budget and Management, the Legislative Budget Office of the Legislative Service Commission, the Chairman of the Finance Committee of the Senate, and the Chairman of the Finance-Appropriations Committee of the House of Representatives. The budgets shall request funds adequate to implement the revisions and modifications required by this act and shall be presented in a manner that justifies the base spending of the Bureau and the Commission as well as the increase over current spending levels. Along with the budgets, the Bureau and Commission shall submit a detailed schedule for implementing the revisions and modifications required by this act.

SECTION 6. For the purpose of ensuring sufficient funds for the Intentional Tort Fund created pursuant to section 4121.80 of the Revised Code as enacted by this act, the Administrator of the Bureau of Workers' Compensation shall transfer five million dollars from the Surplus Fund created pursuant to section 4123.34 of the Revised Code to the Intentional Tort Fund. The money transferred shall be in the nature of a loan to the Intentional Tort Fund and is hereby declared to be a proper investment of the surplus or reserve of the State Insurance Fund.

The Industrial Commission shall repay the loan to the State Insurance Fund in five equal annual installments commencing with the first calendar year following the year in which the original transfer is made. The money shall be repaid with interest equivalent to the average yield of fixed income investments of the State Insurance Fund for the six-month period ended on the last day of the month preceding the month in which the original transfer occurs.

SECTION 7. Within ninety days after the effective date of this act, the Governor shall make the initial appointments to the Self-insuring Employers Evaluation Board as required pursuant to section 4123.35 of the Revised Code as amended by this act.

SECTION 8. The Industrial Commission shall, commencing with the calendar year in which this act takes effect, and for the next succeeding nine years, write off as a loss one-tenth of the unfunded liability of the Disabled Workers' Relief Fund in existence on the effective date of this act.

SECTION 9. If any section or provision of a section or the application thereof to any person or circumstance is held invalid or unconstitutional by a court, the invalidity or unconstitutionality does not affect other provisions of the section or other sections of this act or related sections of the Revised Code or applications thereof which can be given effect without the invalid or unconstitutional provision or section or application thereof, and to this end, the provisions and sections are severable.

SECTION 10. By not later than July 1, 1987, the Administrator of the Bureau of Workers' Compensation shall adopt rules that fully implement all provisions of section 4121.44 of the Revised Code.

SECTION 11. The prohibition against the Industrial Commission granting self-insurer status to public employers contained in section 4123.35 of the Revised Code as amended by this act shall not be construed to require the revocation and does not revoke the self-insurance status of public employers who are self-insurers on the effective date of this act. Nothing herein, however, prohibits the Commission from subsequently revoking the self-insurance status of the public employer or imposing any other penalty pursuant to section 4123.352 of the Revised Code as enacted by this act.

SECTION 12. Section 126.30 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. H.B. 201 and Am. H.B. 557 of the 116th General Assembly, with the new language of neither of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

LSC Analysis of S.B. 307[1]

(As Reported by H. Commerce & Labor)

Editor's Note: The following analysis, by the staff of Ohio's Legislative Service Commission, is printed to assist subscribers. CAUTION: because bills are subject to possible floor amendments and conference committee changes *following* preparation of the analyses, the text of an analysis may not reflect all of the provisions of the Bill as signed into law.

Summary:

Defines "intentional tort" for purposes of the workers' compensation law; establishes procedures for employees to sue for employers' intentional torts; and creates the Intentional Tort Fund to pay for intentional tort awards against employers.

---

[1]A journalized version of the bill was not available when this analysis was prepared.

Specifies legislative guidelines and criteria the Industrial Commission must use for granting to employers the privilege to self-insure their workers' compensation liability.

Creates the Self-Insuring Employers Evaluation Board to evaluate the eligibility of employers to self-insure and specifies procedures governing revocation of that privilege.

Establishes a Self-Insuring Employer's Surety Bond Fund, in lieu of current surety requirements imposed upon each self-insuring employer.

Requires the Administrator of the Bureau of Workers' Compensation to develop alternative premium programs, for state fund employers such as retrospective rating plans.

Alters the criteria governing the awarding of temporary, total disability compensation and increases the maximum "scheduled loss" compensation payments available.

Prohibits employers from violating specific safety requirements of the Industrial Commission or acts of the General Assembly and requires the Commission to assess civil penalties up to $50,000 for violations.

Establishes an Occupational Safety Loan Fund to finance low interest loans to employers to install or erect equipment that reduces workplace hazards and improves workers' health and safety.

Eliminates temporary partial disability compensation and replaces it, subject to certain conditions, with a type of wage loss compensation that reimburses injured workers who return to work with 66-⅔% of the difference between their pre-injury wages and the wages received from their new job up to a maximum equal to the statewide average weekly wage.

Removes ministers and assistant ministers from coverage under the Workers' Compensation Law.

Subjects the Industrial Commission and the Bureau of Workers' Compensation to the state Prompt Pay Law but establishes special prompt pay procedures for payments to health care providers related to workers' compensation claims.

Increases the change-of-occupation benefits available to persons suffering from cardiovascular and pulmonary diseases of police and firefighters, pneumoconiosis, silicosis, and asbestosis.

Redefines "injury" and defines "occupational disease" for purposes of workers' compensation.

Increases from $1,200 to $3,200 the federal expense payment available for deceased workers.

Creates the Select Commission on Workers' Compensation Administration to study and make recommendations regarding the duplication of the Bureau's and Commission's duties.

Requires the Industrial Commission to write off 1/10 of the unfunded liability of the Disabled Workers' Relief Fund in each of a period of ten years.

Makes numerous administrative changes and other changes in the Workers' Compensation Law.

CONTENT AND OPERATION

Workers' Compensation and Employee Suits Against Employer

Existing law confers upon employers who comply with the Workers' Compensation law immunity from civil suit by employees who sustain injury or occupational disease "in the course of or arising out of employment." Until recently, this provision was thought to bar virtually any type of civil damages suit by an employee against an employer.

Specifically, the Ohio Supreme Court has stated that:

> An employee is not precluded by Section 35, Article II of the Ohio Constitution, or by R.C. 4123.74 and 4123.741 from enforcing his common law remedies against his employer for an intentional tort ... [T]he protection afforded by the [Workers' Compensation] Act has always been for negligent acts and not for intentional tortious conduct. Indeed workers' compensation Acts were designed to improve the plight of the injured worker and to hold that intentional torts covered under the Act would be tantamount to encouraging such conduct ... *Blankenship v. Cincinnati Milacron Chemicals*, 60 Ohio St. 2d 608 (1982).

With respect to torts, the Court has stated:

> An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur .... The receipt of workers' compensation benefits does not preclude an employee or his representative from pursuing a common-law action for damages against his employer for an intentional tort. .... An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative. *Jones v. VIP Development Co.*, 15 Ohio St. 3d. 90 (1984).

The bill specifically declares that the enactment of the Workers' Compensation system is intended to remove from the common law tort system all disputes among employers and employees regarding compensable injuries or death and to establish a system which compensates for the injury or death of an employee whether such is the result of the fault of the employee or a co-employee. Further, the bill declares that the legislative intent in providing immunity from common law suit is intended to protect employers from litigation outside the workers' compensation system except as expressly provided.

The bill expressly provides that an employee or his dependents, who suffers an injury, occupational disease, or death resulting from the intentional tort of his employer, may receive workers' compensation benefits and maintain a cause of action against the employer for the excess of damages over the amount receivable under workers' compensation and the amount recoverable under the Ohio Constitution for violation of specific safety requirements. An "intentional tort" is defined as an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur. "Substantially certain to occur" is defined to mean that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death.

Any action for an intentional tort against an employer by an employee or his dependents must be brought within one year of the earlier of the employee's death or the date on which the employee knew or should have first known of, through the exercise of reasonable diligence, the injury, disease, or condition. In no event may any such action be brought more than two years after the occurrence of the act constituting the intentional tort. All such actions must be brought in the county where the injury was sustained or the injury primarily causing the contraction of the disease occurred. The bill specifically preserves all defenses for an employer in such an action.

The bill limits the court in an intentional tort action against an employer to the determination as to whether or not the employer is liable for damages based upon the commission of an intentional tort. Deliberate removal by the employer of safety guard equipment or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another. The bill requires the court to dismiss the action if upon a motion for summary judgment, the facts required to be proved do not exist, or if upon a motion for

a directed verdict against the plaintiff, the court determines, after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, there is not sufficient evidence to find the facts required to be proven. The decision will be made solely by a judge. The bill may be somewhat unclear at this point since it refers to "facts required to be proved by division (B) ...." That division, however, is primarily a statement of legislative intent. The only possible "fact" in it is the basic question of whether or not an act of an employer is an intentional tort or not.

Subsequently, in any trial of the action, if the court determines that the employee or his estate is entitled to an award, the Industrial Commission, after the court determination is final and after a hearing, determines the amount of damages to be awarded. In this determination, the Industrial Commission has original jurisdiction and must consider the benefits payable under workers' compensation and the net financial loss to the employee caused by the employer's intentional tort. The total award to the employee or his estate may not be less than 50% nor more than three times the total compensation receivable under workers' compensation and in no event may exceed $1 million.

Payments of awards ordered by the Industrial Commission for an employer's intentional tort as well as all legal fees incurred by an employer in defending such an action, are made from the Intentional Tort Fund, created by the bill. The Intentional Tort Fund consists of monies paid into the fund by every public and private employer. The Industrial Commission annually fixes the amount for each employer to contribute to such fund "Based upon the manner of rate computation established under [the rate-making section of the law]". Presumably, this means that the Commission is to establish a surcharge that will be at a flat rate (the language, however, is capable of interpretation to allow various different rates for different classifications of employer) per $100 of payroll. The bill places the control of the fund under the Commission and requires the Commission to adopt rules for procedures governing the reception of claims and disbursements of monies from the fund.

The Administrator of the Bureau must transfer, as a loan, $5 million from the Surplus Fund to the Intentional Tort Fund. The bill requires the Industrial Commission to repay these monies in five equal installments beginning with the calendar year following the year of transfer.

The Commission also must make rules concerning the payment of attorney fees by claimants and employers and must fix the amount of fees in the event of a controversy. The Commission and the Bureau of Workers' Compensation must post a notice in their offices stating that the Commission has the authority to fix fees in the event of a dispute. The bill further requires the Commission to make rules to prevent the solicitation of employment in the prosecution or defense of intentional tort cases and may inquire into the amounts of fees charged by attorneys in such cases.

The bill specifies that all of the changes enumerated above apply to any claim or action pending on the effective date of the bill. There could be constitutional questions surrounding this provision in that it attempts to affect court suits for intentional torts pending on the bill's effective date. The Ohio Constitution prohibits the passage of retroactive laws, Article II, Section 28. The Ohio Supreme Court has made a distinction between a law that is remedial in nature which the General Assembly can affect retroactively and one that is substantive which may not be affected retroactively. In *Weil v. Taxicabs of Cincinnati, Inc.*, 139 Ohio St. 199, (1942), the Supreme Court held that the right to sue at common law was a substantive right.

Self-Insurance

Background

Under current law, the Industrial Commission may grant the privilege of self-insurance to an employer who agrees to abide by Commission rules pertaining to self-insurance and who possesses sufficient "financial" ability to render payment of compensation and benefits. Present law does not require the employer to have a minimum number of employees in order to be a self-insurer.

Self-insurers do not make premium payments to the State Insurance Fund, but are required to pay directly to employees the same medical benefits and types of compensation specified in the law for employees of the State Fund employers. Self-insurers also must contribute to the Disabled Workers' Relief Fund (but see later section of analysis), pay their share of the administrative costs of the workers' compensation program, and pay into the Statutory Surplus Fund (used for such expenses as rehabilitation services, payments made under the handicapped provisions of the law, and certain medical examinations).

The Industrial Commission may revoke the privilege of self-insurance if the employer does not comply with the Commission rules or fails to pay compensation and benefits on time in the amounts required. Self-insurers must post a surety bond to secure payment of compensation or benefits and may also sue the employer for any additional amounts owed in compensation of benefits beyond the value of the surety bond.

The bill

The bill makes the following changes relating to self-insurance:

(1) Requires all employers who are granted the privilege to self-insure to demonstrate sufficient financial and administrative ability assuring that all obligations of self-insurance status are promptly met. The bill requires the Commission to consider the following listed factors, if applicable, in determining whether or not the employer has the ability to meet the obligations for self-insurance status:

—the employer employs a minimum of 500 employees in Ohio;

—the employer has operated in Ohio for at least two years;

—the amount of the buy-out where the employer is a succeeding employer or previously contributed to the state fund;

—sufficiency of employer's assets in Ohio to assure solvency in paying compensation directly;

—a review of the employer's records necessary to provide the employer's full financial disclosure;

—the employer's organizational plan for the administration of workers' compensation law and procedures, for informing employees of his change in status to a self-insurer, that he will follow in as a self-insurer, and that informs employees of the employees' rights to compensation and benefits; and

—that the employer has a financial account in Ohio or has the workers' compensation claim checks drawn from the same account as payroll checks or such checks clearly indicate that payment will be honored by an Ohio financial institution.

Although the Commission is not limited to considering only the above factors, it must at least consider all of them, where applicable, except that the Commission may waive the requirements that an employer employ at least 500 employees and that the employer has operated in Ohio for at least two years. The bill prohibits the Commission from granting self-insurance status to public employers other than public utilities. The bill "grandfathers" in any public employers that currently are self insurers, but subjects them to the new procedures which could result in revocation of the privilege should they ever be found deficient in their program.

(2) The bill establishes procedures for employers to obtain applications for self-insurance status. Employers must obtain applications from both the Bureau and the Commission upon which the Bureau has stamped a "designating number." Prior to applying for self-insurance status, the employer must make available to the Bureau all of the information listed in paragraph (1) above. The employer must file the application, with a fee sufficient to cover the costs of processing the application, as established by the Commission, with both the Bureau and the Commission at least 90 days prior to the effective date of the employer's new status. The Commission and Bureau may not accept any application that does not contain all of the required information. Applications are not complete until all of the required information is provided.

The bill requires the Commission to review completed applications within a reasonable time and if it decides to grant the privi-

lege, the Bureau must issue a statement with the Commission's findings of fact. The statement must be prepared by both the Commission and the Bureau and be signed by the Chairman and Secretary of the Commission. If the Commission determines not to grant the privilege, the Bureau must notify the employer of the determination and require him to continue to pay his full premium into the State Insurance Fund.

The bill specifically authorizes the Industrial Commission to allow a self-insuring employer to resume premium payments (i.e., give up his self-insurance status) "with appropriate credit modifications to the employer's basic premium rate . . ." Presumably this last implies that the employer, in such a case, could be merit-rated (based upon his self insurance experience) immediately.

(3) Replaces the general surety bond requirement for self-insurers with the Self-Insuring Employers' Surety Bond Fund. Under the bill, a self-insurer must obtain from the Commission a surety bond in a face amount sufficient to cover his potential liability. The bonds provide payment to the Commission for amounts paid by the Commission for compensation or benefits on an employer's default. The Commission must operate the surety bond program for self-insurers and make the surety bonds available at competitive rates. The rates fixed each year are to be as low as possible but that assure sufficient reserves to cover anticipated claims.

Should any self-insurer default on payments of compensation or benefits, the Commission is to make payments from the employer's surety bond. The defaulting employer is relieved of any liability for damages that arise from the injury or occupational disease at common law or by statute, to the extent of the payment by the Commission.

Subject to the approval of the Commission, the Administrator may invest any of the Fund's surplus or reserve as he may currently the funds of the State Insurance Fund. All interest earned from the investments must be applied solely to the reduction of employers' premiums and to payments required on bonds due to default.

If the Commission determines that the reinsurance of the risks of the Fund are necessary to assure its solvency, it may:

(a) contract, for the purchase of reinsurance, with any company or agency authorized by law to issue such contracts;

(b) pay the reinsurance costs from the Fund;

(c) include the reinsurance costs as a liability and estimated liability of the Fund.

Neither the Industrial Commission nor the Administrator of the Bureau of Workers' Compensation is liable with respect to the management of the Fund, except in cases of gross abuse of discretion, nor is the state liable for any of the liabilities of the Fund itself.

Within six months following the effective date of the bill, the Commission must implement the Self-Insuring Employer Surety Bond Program by exchanging surety bonds or other security given to the Commission under former law. The exchange of such is deemed sufficient security to guarantee the liability of a self-insuring employer provided the surety remains in force and will pay any necessary compensation and expenses found to be due.

(4) Requires the Administrator to handle complaints regarding self-insurers through the Self-Insurance section of the Division.

(5) Creates the Self-Insuring Employers Evaluation Board, administratively part of the Bureau of Workers' Compensation, consisting of three members as follows: (1) the public member of the Industrial Commission who serves as the chairman of the Board; (2) a member of the Ohio Self-Insurance Association; and (3) a representative of labor. The two latter members must be appointed by the Governor, within 90 days after the effective date of the bill, with the advice and consent of the Senate with one serving an initial term of two years and one serving a term of three years. Thereafter, terms of office of the two members are for four years each. The members of the Board, other than the public member, receive a per diem amount fixed in the manner as the compensation of members of other boards and commissions is fixed as well as reimbursement for their actual and necessary expenses incurred in the performance of their duties.

The bill requires the Commission to refer all complaints against a self-insuring employer or questions as to whether a self-insuring employer continues to meet the standards for self-insurance to the Board, which must investigate, and if it has reasonable grounds to believe the allegations, to investigate. The Board may order the employer to take corrective action as the Board specifies. The Board action need not be by formal hearing, but whatever is ordered, it must be signed at least by two of the Board members. If by formal hearing, the Board subsequently determines that the employer has failed to correct the problems, the Board must recommend to the Commission revocation of the employer's self-insurance privilege or such other penalty which may include probation or a civil penalty not to exceed $10,000 for each employer failure. Where the recommendations specifically are for revocation, that must be by unanimous vote of the Board. The Board must make its recommendations to the Commission, and the Commission must promptly act upon them.

(6) Specifies that failure to meet the criteria for establishing the ability to self-insure is grounds for the Commission (the Self-Insuring Employers' Evaluation Board would make the actual determination) to revoke or refuse to renew the privilege of self-insurance. In addition, failure to pay contributions to the Self-Insuring Employers' Surety Bond Fund, "continued" failure to file medical reports bearing upon a claimant's injury, and failure to pay compensation or benefits in accordance with law in a timely manner are listed as grounds for revocation or denial of renewal. If a self-insurer is deficient in any one of the above, the Commission (Board) may revoke or refuse to renew the self-insurance status of an employer.

Premium Rates

For purposes of establishing workers' compensation premium rates, existing law requires the Industrial Commission to classify occupations or industries with respect to their degree of hazard and to determine the risks and establish the premiums of such risks for the classes based upon the total payroll in each of the classes. Such premiums must be sufficiently large to provide a fund for workers' compensation payments as well as to maintain the solvency of the fund.

The bill also permits the Industrial Commission to grant premium rate discounts to any employer who: (1) has not incurred a compensable injury for one year or more; and (2) maintains an employee safety committee or similar organization or makes periodic safety inspections of the workplace.

Alternative Premium Programs

Current law requires all state fund employers to participate in one system of workers' compensation premium rating. The bill requires the Commission, in conjunction with the Bureau to develop alternative premium programs from which an employer may choose. Such programs must include retrospective plans and may include plans under which an advanced deposit may be applied against a specified deductible amount per claim and risk pool plans. In no event, however, may the pooled risk plans be construed as granting the privilege to self insure. As an illustration of how such plans operate, a retrospective rating plan adjusts an employer's accident fund premiums after a designated coverage period. The plan is based on claim costs incurred during that period and employers who hold down claim costs are able to save money.

The Commission must, with the Bureau, develop classes of occupations or industries sufficiently distinct so that employers are not classified in a manner unfairly representing the risks of employment in that class.

Rehabilitation

The bill makes several changes in the area of workers' compensation rehabilitation. First, the bill creates the Labor-Management Government Advisory Committee consisting of 14 members as follows: (1) four labor and four employee representatives appointed by the Governor on the basis of their vocation and training (such appointees are subject to Senate confirmation); (2) the chairmen (or if the chairman chooses, the vice-chairman of the committee) of

the House and Senate standing committees to which workers' compensation bills are referred; and (3) two persons, each of differing political parties, appointed by the Speaker of the House and the President of the Senate, respectively, one representing labor and one employers. The duties of the Committee are: (1) to advise the Industrial Commission on the quality and effectiveness of rehabilitation services; (2) make recommendations pertaining to the Industrial Commission's rehabilitation program, including its operation; and (3) recommend three candidates for the Director of Rehabilitation, based upon their ability and background in rehabilitation. The bill requires the Industrial Commission to select the Director from this list of candidates.

The Industrial Commission must adopt a rule requiring payment in the same manner as living maintenance payments, to a claimant who completes a rehabilitation training program and returns to employment but suffers a wage loss. The payments must be made at 66-⅔% of the difference between the claimant's wage at the time of the injury and the wage received from his new employment up to a maximum payment per week equal to the statewide average weekly wage and may continue for a maximum of 200 weeks, reduced by the number of weeks in which the claimant receives the new form of wage loss benefits set up under the bill (see below).

For compensable lost-time claims, the Administrator must notify both the claimant and the employer of the availability of rehabilitation services.

Compensation and Benefits

Temporary total disability

Existing law authorizes compensation to an injured worker who is temporarily and totally disabled. A temporarily totally disabled worker generally receives 100% of his average weekly wage for twelve weeks, and then 66-⅔% of his average weekly wage until he returns to work. Compensation may continue for a maximum of 200 weeks, but ceases when: (1) an employee has returned to work; or (2) an employee's treating physician has made a written statement that the employee is capable of returning to his former position of employment. In *State, ex rel. Ramirez v. Industrial Commission*, 69 Ohio St. 2d 630 (1982) the Ohio Supreme Court has interpreted this language as permitting the employee to continue to receive compensation unless the employer can offer the employee his exact former position of employment.

The bill appears to modify the *Ramirez* decision by adding two additional factors that cease the payment of temporary total disability benefits: (1) when work within the physical capabilities of the employee is made available by the employer or another employer; and (2) when the employee has reached the "maximum medical improvement." The bill also states that the termination of temporary total disability does not preclude its commencement at another time if the employee again becomes temporarily totally disabled.

Wage Loss Compensation

The bill creates a new type of compensation as follows. If an employee in an allowable claim suffers a wage loss as a result of: (1) returning to employment other than his former position of employment; or (2) being unable to find employment consistent with his physical capabilities; the bill provides for compensation to him at 66-⅔% of his weekly wage loss, not to exceed the statewide average weekly wage, for a period not exceeding 200 weeks. This new form of compensation appears to be a substitute for temporary, partial disability compensation which the bill eliminates (see below).

The bill requires that an employee who is capable of work activity, but his employer has no job for him, to register with the Bureau of Employment Services which must assist him in finding suitable employment.

Partial disability and scheduled loss benefits

For permanent partial disabilities, other than disabilities indicated on the statutory list of types of losses, current law permits an employee to elect to receive:

(1) 66-⅔% of the impairment of his earning capacity resulting from the injury or occupational disease, not to exceed the average statewide weekly wage or a total of $17,500 (commonly known as temporary, partial disability compensation); or

(2) 66-⅔% of his average weekly wage, not to exceed 33-⅓% of the statewide average weekly wage, for the number of weeks which equals such percentage of 200 weeks (commonly known as permanent, partial disability compensation).

The bill eliminates temporary, partial disability and the election by an employee and provides for permanent partial disability as in (2) above. As under current law, permanent disability could not begin earlier than 40 weeks after the end of temporary total disability, or the new form of loss of wages compensation or the onset of the injury or disease in the absence of any compensation. Under the bill, an employee may receive both this benefit and scheduled loss benefits (see below). Current law provides for a deduction of permanent partial disability benefits paid from the scheduled loss benefits paid.

Scheduled loss compensation is paid for loss (or loss of use) of specific parts of the body. Compensation is paid at 66-⅔% of the worker's average weekly wage for the number of weeks indicated on the statutory list of types of losses. However, current law specifies a maximum weekly payment of 50% of the statewide average weekly wage, a minimum weekly payment of 25% of the statewide average weekly wage. The bill retains the provision that the claimant receive 66-⅔% of his average weekly wage, but increases the maximum amount payable to an amount equal to the statewide average weekly wage and the minimum to 40% of the statewide average weekly wage.

Change of Occupation Benefits for Certain Listed Occupational Diseases

Under current law, employees who have contracted silicosis, coal miners' pneumoconiosis or asbestosis or a firefighter or police officer who contracts a cardiovascular or pulmonary disease and who change their occupation to an occupation in which exposure to the hazard is lessened, receive $49 per week for thirty weeks and then for a subsequent one hundred weeks 66-⅔% of the loss of wages resulting from the change in occupation not exceeding $40.25 per week (for firefighters and police officers, the time period is 75 weeks). The bill increases the maximum amount payable during the thirty-week period to an amount equal to 50% of the statewide average weekly wage and during the subsequent period to a new maximum of 50% of the statewide average weekly wage. During the subsequent period, the payment remains based on 66-⅔% of the employee's wage loss.

Employer Fines for Violation of Specific Safety Rules

The Ohio Constitution authorizes the Industrial Commission to add a penalty award payable to a claimant whose injury is caused by an employer's violation of a "specific safety requirement" of the Commission. This "additional" award may be anywhere from 15% to 50% of the maximum award fixed by law. By statute, the Commission is authorized to adopt rules fixing specific safety requirements applicable to all employers.

The bill specifically prohibits employers from violating specific safety requirements of the Commission or acts of the General Assembly. If, in making a determination as to whether to give a claimant an additional award, the Commission finds the employer has violated the prohibition, it must order the employer to correct the violation. For any violation occurring within 24 months of the last violation, the Commission must assess the employer a civil penalty in an amount the Commission fixes up to $50,000. The exact amount of the penalty is to be determined with reference to size of the employer as measured by number of employees, assets, and earnings.

An employer may appeal a penalty to a court which appeal operates to stay the payment of the penalty pending the appeal. All money paid is to be deposited in the Occupational Safety Loan Fund (see below).

Occupational Safety Loan Program

Commencing one year from the bill's effective date, the Industrial Commission must begin operating an Occupational Safety Loan Program. The program must provide loans to employers in amounts that cannot exceed more than $15,000 per fiscal year at interest rates below the rates the employer would otherwise be able to obtain from any other source.

The stated purpose of the loans is to allow employers to improve, install, or erect equipment that reduces hazards in the employer's workplace and to promote the health and safety of workers.

The bill establishes in the custody of the Treasurer of State an Occupational Loan Fund as the source of funding for the program.

Penal Institutions

The bill specifically prohibits the payment of compensation or benefits to any claimant during the period of his confinement in a penal institution for a violation of any state's criminal law.

Funeral Expenses

Current law provides a funeral expense not to exceed $1,200 for a death that ensues from an occupational disease or injury. The bill raises the maximum to $3,200.

Respiratory Diseases of Police and Firefighters

Existing law specifically identifies cardiovascular and pulmonary diseases of police and firefighters as occupational diseases. Compensation is payable only under certain conditions and subject to special statutes of limitations.

The bill expands the scope of the compensable occupational disease for such workers to include respiratory diseases.

Existing law requires that the disease to be contracted [occurs] following exposure to smoke, toxic gases, chemical fumes, and other toxic vapors. The bill changes the last to exposure to any toxic "substance" and adds "heat" as a factor to which if the policeman or firefighter is exposed, he may qualify for benefits.

The bill specifies that exposure to any of such agents constitutes "a presumption (which may be refuted by affirmative evidence), that such occurred in the course of and arising out of his employment."

Medical, Hospital, and Nursing Benefits for Certain Types of Occupational Diseases

Under existing law, compensation and benefits on account of cardiovascular and pulmonary diseases of firefighters, silicosis, asbestosis, and black lung are payable only in the event of total disability or death. The bill allows payments of medical, hospital, or nursing expenses in the event of partial disabilities.

Definition of "Injury," and "Occupational Disease"

Existing Workers' Compensation Law defines "injury" for the purpose of determining the situations that are subject to compensation. The definition specifically includes any injury whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.

In *Village v. General Motors Corporation*, 15 Ohio St. 3d. 129 (1984), the Ohio Supreme Court determined that "an injury which develops gradually over time as the result of the performance of the injured worker's job-related duties is compensable" under the Workers' Compensation Law. In this case the employee had sustained a back injury, apparently due to the repeated lifting, in the course of his employment and over a five day period, of 20 to 40 pound automobile batteries. In reaching this decision the Court specifically overruled *Bowman v. National Graphics Corp.*, 55 Ohio St. 2d. 407 (1978) and "any other case which suggests that an injury must be the result of a sudden mishap occurring at a particular time and place to be compensable." (*Village* at p. 131).

The bill specifically excludes from the scope of the definition of "injury":

(1) psychiatric conditions except where the conditions have arisen from an injury or occupational disease;

(2) an injury or disability caused primarily by the natural deterioration of a tissue, organ or part of the body;

(3) injuries or disabilities incurred in voluntary participation in an employer-sponsored recreation or fitness program, provided the employee signs a waiver of his rights to workers' compensation benefits prior to engaging in the activity.

The bill statutorily defines "occupational disease" for purposes of workers' compensation law as a disease contracted in the course of employment, which by its causes and the characteristics of its manifestations or the condition of the employment results in a hazard which distinguishes the employment from other employment and creates a risk of contracting the disease in greater degree and different manner than the public in general.

The bill also provides that any disease which fits within this definition of occupational disease is compensable under the workers' compensation law even though it is not listed as an occupational disease.

Exemptions from Coverage

The bill exempts from the current definition of "employee" a minister or assistant minister in the exercise of his ministry or duties required of him. In effect, these individuals do not have to be covered under the workers' compensation law, but an employer may elect to include them as an employee.

Existing law does not allow compensation or benefits to persons who purposely injure themselves. To this exclusion, the bill adds injuries or disabilities caused by an employee being under the influence of drugs not prescribed by a doctor or caused by alcohol.

Compensation Plans

The bill permits the Industrial Commission, with the approval of the State Employee Compensation Board, to establish compensation plans, including hourly rate schedules, for the compensation of all professional, administrative and managerial employees of the Rehabilitation Division of the Commission for whom the State Employment Relations Board has not established bargaining units under Ohio's Collective Bargaining Law.

Handicapped

Under current law, if an employer hires a person having one of 24 specific pre-existing diseases or medical conditions, his premium rate for workers' compensation is not affected to the extent that any new injury suffered by that person is the result of the pre-existing disease or condition. For such cases, the bill specifies that state fund employers may not receive a credit amount greater than premiums paid and self-insurers an amount no greater than assessments, made in any credit year.

The bill permits self-insured employers, for all claims made after January 1, 1987, to pay handicap reimbursement compensation and benefits directly to the employee or his dependents. The bill specifies that where an employer elects to self insure his liabilities under this section, he must also assume the costs of handicapped reimbursement claims attributable to him occurring prior to January 1, 1987. If such an employer chooses to pay such benefits directly, he is not assessed for handicap reimbursements nor may he receive any benefit from the Surplus Fund for the payment of such benefits.

Current law identifies cardiovascular and pulmonary disease of firefighters as one of the list of injuries or diseases for which an employer may receive a "handicapped reimbursement" credit for employing workers with such diseases. As with the addition of "respiratory" diseases as a compensable occupational disease for firefighters and police officers (see previous section of analysis), the bill includes "respiratory" diseases and expands the entire provision to cover police officers which are not now included.

Medical Examinations

Existing law, unchanged by the bill, permits an employee who is injured or disabled in the course of his employment the free choice in the selection of a physician. The bill permits an employer, without Commission approval and at the employer's expense, to require such an employee who makes a claim to be examined by a physician of the employer's choice one time only upon any issue asserted

by the employee, his physician or upon any issue to be considered by the Commission. The Commission must consider and rule upon any further requests for examination. The bill requires the claimant to promptly provide a current signed release of medical information when requested by the employer.

Disabled Workers' Relief Fund

The Disabled Workers' Relief Fund (DWRF) provides supplemental payments to totally and permanently disabled persons experiencing a gradual erosion over time of the purchasing power of their fixed (at the time of injury) workers' compensation benefits. Currently, all employers are assessed a flat rate per $100 of payroll. That rate may not exceed 10¢ per $100 of payroll.

The bill also eliminates the current assessment of self-insuring employers for DWRF. For self insuring employers, the Bureau is required to make the DWRF payments due and bill the employers semi-annually for amounts owed. For all other employers, the bill requires that for injuries and disabilities occurring on or after January 1, 1987, an additional DWRF assessment must be levied at a rate per $100 of payroll determined for each separate classification of employer annually, in an amount sufficient to carry out the DWRF.

The bill specifies that a person found eligible for DWRF payments will receive monthly the lesser of the difference between the current maximum figure (roughly $766) and (1) any Social Security Disability benefit, or (2) his current permanent, total disability award per month.

The bill eliminates current law's prohibition that individuals who receive the minimum award for permanent total disability may not receive DWRF benefits.

Administrative Changes

The bill makes numerous administrative changes in the Workers' Compensation Law:

Joint-rulemaking

The bill requires the Bureau and the Commission to jointly adopt rules governing the operating procedures of the Bureau, regional boards of review, and the Commission. The Bureau is responsible for publishing the joint rules in a single publication.

Policy manuals

Currently, the Industrial Commission's medical section issues a Commission policy manual for impairment evaluations. The bill specifies that treating physicians of claimants or physicians to whom claimants are referred for evaluation must receive the manual free of charge and that the Commission must ensure that the manual receives the widest possible distribution to physicians.

Investigators

The bill permits a District Director, in addition to duties imposed by the Administrator of the Bureau, to assign investigators to investigate alleged violations of persons receiving compensation for permanent total disability and engaging in remunerative activity incompatible with that status.

Prompt Pay Procedures

Current law generally requires any state agency that purchases, leases, or otherwise acquires any equipment, materials, goods, supplies or services to pay an interest charge to the provider if it fails to make payment either by the date agreed upon between the agency and the provider or, if no such agreement was made, within 30 days after receipt of a proper invoice. An extension is allowed if the invoice contains defects or improprieties and the agency so notifies the provider within 15 days after receipt of the invoice.

Current law specifically exempts from the Prompt Pay Law bills submitted to the Industrial Commission and the Bureau of Workers' Compensation with respect to workers' compensation, public work-relief employees' compensation, coal-workers' pneumoconiosis benefits, or marine industry fund benefits. Law not included in the bill requires the Bureau's Administrator to adopt rules providing for the immediate payment of workers' compensation claims to hospitals, with a right of refund or deduction from payments on disallowed claims.

The bill eliminates the Bureau's and Industrial Commission's general exemption from the Prompt Pay Law and establishes specific procedures for applying the Prompt Pay Law to invoices submitted to the Bureau for equipment, materials, goods, supplies, or services provided in connection with claims for compensation under these programs for injuries or occupational disease. Invoices submitted to the Industrial Commission or the Bureau that are not covered by the bill's special procedures for claims would be subject to the general state Prompt Pay Law.

Special Prompt Pay Procedures Related to Workers' Compensation Claims

Payments in connection with a claim against the state Insurance Fund, Public Work-Relief Employees' Compensation Fund, [Coal] Workers' Pneumoconiosis Fund, or Marine Industry Fund as compensation for injuries or occupational disease would have to be paid either (1) by the payment date agreed to in writing between the Bureau and the provider, or (2) if no such agreement was made, within 30 days after receipt of a "proper invoice" or after the "final adjudication" allowing payment of an award to the claimant, whichever is later.

A "proper invoice" would have to include the claimant's name, claim number, date of injury, employer's name, provider's name and address, and description of the equipment, materials, goods, supplies, or services provided, the date provided, and the amount of the charge. When more than one item is included on a single invoice, each item must be considered separately in determining whether the invoice is a proper invoice.

A "final adjudication" would mean the latest of:

(1) The date of the decision or action by the Bureau, Industrial Commission, or a court allowing payment of an award to the claimant from which there is no further right to reconsideration or appeal that would require the Bureau to withhold compensation and benefits;

(2) The date on which rights to reconsideration or appeal have expired without an application for reconsideration or appeal having been filed;

(3) The date on which an application for reconsideration or appeal is withdrawn.

If the Bureau or Industrial Commission makes a modification with respect to prior findings, including a modification pursuant to court order, the adjudication process would no longer be considered final for purposes of the required payment date for invoices for goods or services provided after the modification if the propriety of those invoices is affected by the modification.

Procedure when proper invoice precedes final adjudication

When a proper invoice is received before a final adjudication has occurred with respect to a claim, the Bureau must notify the provider in writing of the claim's status and that the Bureau will process the invoice after the final adjudication. If the Bureau fails to provide this notice within 15 days after the invoice's receipt and the final adjudication allows payment of an award to the claimant that includes the item or service included in the invoice, the Bureau would have to pay interest charges as if the required payment date were the 30th day after the invoice's receipt.

Procedure when an invoice is defective

If prior to a final adjudication the Bureau determines that an invoice contains a defect, the Bureau must so notify the provider in writing at least 15 days before what would be the required payment date had there been no defect. The notice must describe the defect and note any additional information necessary to correct it. The required payment date will then be redetermined when the Bureau actually receives a proper invoice.

Statute of Limitations

Existing Workers' Compensation law requires employers to keep records of all injuries and occupational diseases received or contracted by employees in the course of their employment that result in seven days or more of total disability. Reports for injuries or death resulting from an injury must be made within one week after the occurrence of the injury or death while reports for injuries

or death resulting from an occupational disease must be made within one week after the occurrence of or diagnosis of or death from the disease. The bill replaces the reporting requirement timetable from occurrence or diagnosis to when the employer acquires knowledge and specifies that each day an employer fails to file such a report, adds a day to the applicable statute of limitations for filing claims. This extension of the statute of limitations, though, may not be for more than two additional years.

Regional Boards

Under the bill, the Industrial Commission may reassign workers' compensation claims to another board if the caseload of one board is sufficient to result in an unreasonable delay in hearing a claim. The board inheriting the claim must meet at the location of the original board to hear the reassigned claim. (Current law, unchanged by the bill, states that the Commission may at any time recall any claim and reassign it.)

Appeals to Court of Common Pleas

The bill broadens the current provisions on the jurisdiction of appeals of Commission decisions to the courts. Currently, injury and occupational disease claims are to be appealed to the court of common pleas of the county in which the injury was inflicted or in which the exposure to the cause of the disease occurred. Alternatively, injury claims may, under present law, be appealed to the court in the county in which the contract of employment was made, if the injury occurred out of the state. The bill creates two additional jurisdictional bases for bringing suit: (1) where the contract of employment was made, if the exposure to the disease occurred outside the state; and (2) if jurisdiction cannot be obtained through the above means, the appellant may use the venue provisions of the Ohio Rules of Civil Procedure to vest jurisdiction.

The bill also extends the application of certain procedures to cases pending before any court on appeal as of January 1, 1986.

Select Commission on Workers' Compensation Administration

The bill creates the Select Commission on Workers' Compensation Administration consisting of ten members, five members representing labor and five representing employers, appointed within 30 days of the effective date of the bill, by the Governor with the advice and consent of the Senate, with no more than five members being of the same political party.

The Select Commission must examine the administrative structures and duties of the Commission and Bureau to identify any overlap or duplication that may be eliminated or altered to improve the efficiency of the administration of the workers' compensation system and make a report and recommendation to the Governor and the General Assembly by July 1, 1987.

DWRF Liability

With the calendar year in which the bill takes effect and for the following nine years, the Industrial Commission must write off as a loss 1/10 of the unfunded liability of DWRF existing as of the bill's effective date.

Budget Requests

The Bureau and Commission must, within six months after the effective date of the bill, submit budgets and a detailed schedule for implementing the revisions of the bill to the Office of Budget and Management, the Legislative Budget Office and the Chairmen of Senate Finance and House Finance Appropriations Committees requesting funds to implement the revisions and modifications of the bill.

Rules for payment to health care providers

Existing law requires the Administrator of the Bureau to adopt rules with respect to payments made for health care providers for workers' compensation claims. The bill requires the Administrator to adopt rules that fully implement these provisions by no later than July 1, 1987.

Severability Clause

The bill expressly provides that if any action or provision of the bill is held invalid or unconstitutional by a court, that such a holding does not invalidate the other provisions or sections that may be given effect.

AMENDED HOUSE BILL NO. 355

Act Effective Date:	8-29-86
Date Passed:	5-14-86
Date Approved by Governor:	5-30-86
Date Filed:	5-30-86
File Number:	214
Chief Sponsor:	CONLEY

General and Permanent Nature: Per the Director of the Ohio Legislative Service Commission, this Act's section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

To amend section 713.21 of the Revised Code to permit a regional planning commission to purchase or receive as a gift property and buildings within which it is housed and carries out its activities.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 713.21 of the Revised Code be amended to read as follows:

713.21 Regional planning commission [Eff. 8-29-86]

The planning commission of any municipal corporation or group of municipal corporations, any board of township trustees, and the board of county commissioners of any county in which such municipal corporation or group of municipal corporations is located or of any adjoining county may co-operate in the creation of a regional planning commission, for any region defined as agreed upon by the planning commissions and boards, exclusive of any territory within the limits of a municipal corporation not having a planning commission. After creation of a regional planning commission, school districts, special districts, authorities, and any other units of local government may participate in the regional planning commission, upon such terms as may be agreed upon by the planning commissions and boards.

The number of members of such regional planning commission, their method of appointment, and the proportion of the costs of such regional planning to be borne respectively by the various municipal corporations, townships, and counties in the region and by other participating units of local government shall be such as is determined by a majority of the planning commissions and boards. Any member of a regional planning commission may hold any other public office and may serve as a member of a city, village, and a county planning commission, except as otherwise provided in the charter of any city or village. Such boards and legislative authorities of such municipal corporations, and the governing bodies of other participating units of local government, may appropriate their respective shares of such costs. The sums so appropriated shall be paid into the treasury of the county in which the greater portion of the population of the region is located, and shall be paid out on the certificate of the regional planning commission and the warrant of the county auditor of such county for the purposes authorized by sections 713.21 to 713.27, inclusive, of the Revised Code. The regional planning commission may accept, receive, and expend funds, grants, and services from the federal government or its agencies, from departments, agencies, and instrumentalities of this state or any adjoining state or from one or more counties of this state or

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XVII. Occupational Safety and Health Administration, Department of Labor
Part 1910. Occupational Safety and Health Standards (Refs & Annos)
Subpart O. Machinery and Machine Guarding (Refs & Annos)

29 C.F.R. § 1910.212

§ 1910.212 General requirements for all machines.

Currentness

(a) Machine guarding--

(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

(2) General requirements for machine guards. Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.

(3) Point of operation guarding.

(i) Point of operation is the area on a machine where work is actually performed upon the material being processed.

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

(iii) Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

(iv) The following are some of the machines which usually require point of operation guarding:

(a) Guillotine cutters.

(b) Shears.

(c) Alligator shears.

(d) Power presses.

(e) Milling machines.

(f) Power saws.

(g) Jointers.

(h) Portable power tools.

(i) Forming rolls and calenders.

(4) Barrels, containers, and drums. Revolving drums, barrels, and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum, or container cannot revolve unless the guard enclosure is in place.

(5) Exposure of blades. When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (½) inch.

(b) Anchoring fixed machinery. Machines designed for a fixed location shall be securely anchored to prevent walking or moving.

SOURCE: 39 FR 23502, June 27, 1974; 51 FR 24526, 24527, July 7, 1986; 51 FR 34561, Sept. 29, 1986; 53 FR 8352, March 14, 1988; 61 FR 9240, March 7, 1996; 69 FR 31881, June 8, 2004, unless otherwise noted.

AUTHORITY: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 5–2002 (67 FR 65008), as applicable; 29 CFR part 1911. Sections 1910.217 and 1910.219 also issued under 5 U.S.C. 553.

Notes of Decisions (64)

Current through April 26, 2012; 77 FR 24872.

End of Document