



How to Prepare for a Workers' Compensation Hearing

From the Employer's Perspective

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Preliminary Matters

Steps to Take BEFORE an Injury:

- Train supervisors to listen and document conversations when employees complain about physical problems or injuries at home such as car accidents, a chronic injury/condition, moving to a new home or helping someone move.
- This information may be helpful to defense of a claim later.
- If the company policy changes, make sure an updated acknowledgement is obtained.

Preliminary Matters

Steps to take **AFTER** an injury:

Gather as much information as possible after an injury is reported while the information is fresh in everyone's mind:

- Make sure the described injury makes sense based on the claimant's job description.
- Do not certify a claim until you have medical documentation and an actual diagnosis. Many times, the medical records will have a different description of injury than what was reported or described on the accident report or the FROI-1.
- Medical records may also identify a pre-existing, chronic problem that could lead you to contest what would otherwise seem to be a compensable claim. For self insured employers, once you certify a claim you cannot change that unless there are new and changed circumstances that were not discoverable at the time you certified the claim. The fact that you did not have the medical is not enough, if that medical existed.

Claim Certification

If you certify a claim, be **very specific** about the conditions that are being accepted and look closely at the description of injury.

- Do not certify a claim for “back” – identify whether it is cervical, thoracic or lumbar, and specify strain, sprain, contusion, etc.
- Do not certify a claim for a “concussion” or “post-concussion syndrome” in the event of a head injury. The diagnosis of concussion or post-concussion syndrome requires a very specific symptom complex to be present, and you should require an injured worker to file for the additional allowance of a concussion or post-concussion syndrome and prove the existence of these diagnoses. In most cases it may be necessary to obtain an independent medical exam (IME) in order to evaluate whether a concussion or post-concussion syndrome exists. Look for discrepancies in whether the injured worker reported a loss of consciousness to the employer, on the accident report and FROI-1 and to the doctor, and whether their story changed later in that regard.

Claim Certification

- Do not certify a claim for “pain” or “headache”. These are symptoms and should not be initially accepted as allowed conditions in a claim.
- Do not certify a claim for any degenerative conditions such as arthritis, osteoarthritis or substantial aggravation of any pre-existing conditions without fully investigating and gathering all relevant medical records.

Claim Certification

- Do not certify a claim if the incident described is idiopathic. Idiopathic injuries are caused by a pre-existing physical weakness of the injured worker, such as a history of dizziness or vertigo, unexplained falls due to low blood sugar because the person is diabetic and has not eaten, etc.
- Exceptions to this include a fall that causes an injury because the workplace environment added to the dangerous effects of the fall, such as a person who sustains a fall due to low blood sugar but hits a piece of machinery or a work implement on the way to the floor.

Claim Certification

- Do not certify a claim if the injury involves horseplay. Make sure that the supervisor and/or someone in a position of authority is not condoning or engaging in the horseplay as that may be presented as a reason to allow a claim that would otherwise be denied on the basis of horseplay.

Prepare for Allowance of a Claim

Preparation for the allowance hearing begins as soon as the claim is filed.

Things to look for:

- Is there a delay in reporting the injury? If so, gather timecards and present that information to a hearing officer to show how many shifts were worked in the regular, full duty position, without complaining, before reporting the injury. This shows how many missed opportunities there were to report the alleged injury.

Prepare for Allowance of a Claim

- Make sure the description of injury on the FROI-1 matches the history taken by the treating doctor and what was reported to the employer.
- Someone came to work in the morning with physical complaints before their shift started and then claimed a work-related injury to the same body part that was already bothering them.
- An injury is reported within a few minutes of beginning the shift.
- Someone is on the verge of disciplinary action that will lead to his or her termination for violation of a company policy relating to attendance or job performance and they claim an injury that is un-witnessed or does not make sense, just prior to being terminated.

Prepare for Allowance of a Claim

- ORC 4123.01 defines what constitutes an injury. The statute states that ANY injury received in the course of and arising out of the employment is compensable.
- Injury is defined as 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 workers' employment.

Prepare for Allowance of a Claim

- **4123.01 states that an injury does not include:**
- 1. Psychiatric conditions unless caused by the injury (physical allowances) or caused by sexual conduct in which the claimant was forced by threat of physical harm to participate;
- 2. Injury caused by natural deterioration of tissue, an organ or part of the body;
- 3. Injury incurred in voluntary participation in an employer-sponsored recreation or fitness activity IF the employee signs a waiver;
- 4. (This one is new as of 9-23-22) Injury or disability sustained by an employee who is performing their job duties in a work area inside their home that is separate and distinct from the location of the employer, unless all of the following apply:
 - (a) The employee's injury or disability arises out of the employee's employment.
 - (b) The employee's injury or disability was caused by a special hazard of the employee's employment activity.
 - (c) The employee's injury or disability is sustained in the course of an activity undertaken by the employee for the exclusive benefit of the employer.
- 5. A condition that preexisted an injury unless the condition was substantially aggravated by the injury.

Substantial Aggravation

Substantial Aggravation (Effective 8-25-2006)

A substantial aggravation must be documented by objective diagnostic findings, objective clinical findings or objective test results. Subjective complaints may be evidence of a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings or objective test results are insufficient to substantiate a substantial aggravation.

Substantial Aggravation

Substantial Aggravation Back to Status Quo

An employer can argue that a condition allowed on the theory of substantial aggravation has abated and returned to pre-injury status based on ORC 4123.54(G)

The medical evidence must prove that the preexisting condition has returned to a level that would have existed without the injury.

Test for *in the course of and arising out of* the employment

- The injury must be *in the course of the employment* (time, place, circumstances of injury), AND
- Injury must also *arise out of the employment* (there must be a causal connection between the injury and the employment).

The “Totality of the Circumstances” test set forth in *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 276, 551 N.E.2d 1271, (citing *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, 20 O.O.3d 376, 423 N.E.2d 96) is used to determine if an injury is “arising out of” the employment. The circumstances to consider include, but are not limited to:

1. the proximity of the scene of the accident to the place of employment,
2. the degree of control the employer had over the scene of the accident, and
3. the benefit the employer received from the injured employee’s presence at the scene of the accident.

Prepare for Allowance of a Claim

- Read the medical documentation carefully to look for indications of prior medical problems with the same parts of the body that are claimed to be injured.
- Obtain a BWC C-101 medical release form and a provider list from the injured worker (or their counsel if they are represented) so that all prior medical records that are pertinent to the defense of the claim can be collected.
- Talk to the immediate supervisor and co-workers on the same shift because oftentimes you will obtain information which may assist in the defense of the claim.

Prepare for Allowance of a Claim

- Gather witness statements and put them in affidavit form with notarization. Hearing Officers may not consider handwritten statements that are not notarized.
- Check to see if there is video evidence of the injured worker's workstation or accident location that may be relevant to the defense of the claim. Many employers have cameras in the workplace which may capture a view of the scene of an alleged injury and may shed light on whether or not an injury occurred as described.

Prepare for Allowance of a Claim

- Consider an IME
 - Be sure to tell the IME doctor the story of the claim, what the concerns are and to ask specific questions to obtain the doctor's opinion within "reasonable medical probability."
 - If diagnostic testing has been completed, obtain the testing on disc (not just the typed interpretations) and send the discs to your IME doctor for review if your IME doctor is qualified to read diagnostics.
 - Make sure the IME doctor has a job description for the job the injured worker was doing at the time of the injury.
 - Submit any witness statements to the IME doctor.
 - Don't wait to schedule the IME. If due diligence is not exercised in scheduling the IME promptly after the claim is filed, the Industrial Commission may not grant a continuance of a hearing due to a scheduled IME.

Prepare for Allowance of a Claim

- Request that any other workers' compensation claims for injuries to the same parts of the body are referenced for the hearing, so that information regarding those claims will be available for review by the employer, counsel, hearing reps and the hearing officer. Also make any relevant information from the other claims available to the IME doctor.
- Submit all evidence to the Industrial Commission and the injured worker's attorney in advance of the hearing and not a few days beforehand or it is likely that the hearing will be continued.

Defend Additional Conditions

Once the claim is allowed, the injured worker may request the allowance of an additional PHYSICAL or PSYCHOLOGICAL condition.

You will want to review the medical documentation submitted with the Motion in order to determine if the condition appears supported or not.

Defend Additional Conditions

Allowance of an additional physical or psychological condition

Three ways to request

- **Direct causation** – the condition occurred as a direct result of the incident.
- **Substantial aggravation** – the condition pre-existed the incident and was substantially aggravated by the incident.
- **Flow Through** – the condition occurred as a result of some other circumstance that occurred after the incident, such as an altered gait caused by the incident, which resulted in another condition developing on a flow through basis after the initial injury.

Defend Additional Conditions

Allowance of a psychological condition

To be compensable, a psychological condition must be related to the actual physical injury in the claim and not the traumatic nature of the incident itself per *Armstrong v Jurgensen*, a 2013 Ohio Supreme Court case. For example, if a person is injured during a shooting, and sustains a minor injury the request for the psychological condition must be based on the physical injury and not the traumatic nature of the shooting.

Defend Additional Conditions

- Obtain a BWC C-101 medical release form and a provider list so you can gather complete, relevant records, including all prior psychological treatment records.
- Obtain an IME.
 - For a psychological condition have the IME doctor administer any psychological testing necessary to determine whether the requested psychological condition is present and related to the physical injury in the claim under any of the theories of causation.
 - Ask the doctor to address whether the condition is MMI, whether it requires any ongoing treatment or medication and whether it prevents the injured worker from returning to their former position of employment.
- NOTE: Keep in mind that a psychologist cannot address medication issues and a psychiatrist is necessary to address medications. If a psychiatrist is not available for the IME, you can get the IME with a psychologist and also obtain a companion file review from a psychiatrist to address medications.

Defend a Request for Temporary Total Compensation

The purpose of TTD is to compensate an injured worker for lost earnings during a period of disability when an injury heals. The injured worker must show that he or she cannot return to the former position of employment and that the industrial injury is the cause of the lost earnings.

Defend a Request for TTD

Ohio R.C. 4123.56 – states temporary total is payable when the allowed physical or psychological conditions in a claim prevent the injured worker from returning to their former position of employment.

Temporary total is not payable:

- If the employee has returned to work;
- If the treating physician has released the employee to return to their former position of employment;
- When work within the restrictions is made available by the employer or another employer;
- When the employee has reached maximum medical improvement.

Defend a Request for TTD

Things to look for:

- Make sure the office notes from the physician of record match the information they have provided on Medco-14 forms. Make sure the certification of time off work is for the allowed conditions in the claim.
- If the injured worker has physical restrictions, consider making a light duty job offer in writing for a position within their restrictions.

Defend a Request for TTD

- Conduct surveillance if you think the injured worker is capable of more than what their doctor's office notes say they are capable of.
- Have the investigator perform a full social media mining search to determine if the person may be working or may be posting things on Facebook about their activities that are inconsistent with being off work.
- Use a reputable investigation company that knows what they can and cannot do so that the privacy rights of the individual are not infringed upon.

Voluntary Abandonment is abolished

- There is no longer the concept of voluntary abandonment in Ohio. The legislature added Section (F) to ORC 4123.56 on June 16, 2021, which indicates:
- If an employee is unable to work or suffers a wage loss as a direct result of the injury, they are entitled to TTD. If the reason they are not working or have suffered a wage loss is NOT due to the injury, they are not entitled to TTD. The new language states that it is the intent of the legislature to supersede ANY previous judicial decision that applied the doctrine of voluntary abandonment.

Voluntary Abandonment is abolished

This has caused a lot of confusion for both employers and injured workers.

The question is whether the claimant is out of work for reasons related to or unrelated to the allowed conditions in the claim.

The answer to the question of temporary total eligibility depends upon the timeline of events and the specific facts of each claim.

New Rule Regarding Spinal Cord Stimulators

OAC 4123-6-35 - Effective September 1, 2022

The new rule is intended to make sure that SCS's are being used for the right circumstances. The SCS is approved for:

- Failed thoracic or lumbar surgery
- CRPS (Complex regional pain syndrome)
- Non-operable peripheral vascular disease
- Neuropathic pain
- Chronic thoracic or lumbar radiculopathy
- Spinal cord dysesthesias

New Rule Regarding Spinal Cord Stimulators

The SCS is NOT approved for:

- Failed cervical spinal surgery
- Neuropathic pain post-cervical surgery
- Cervical radiculopathy
- An injured worker with a pacemaker or defibrillator
- An injured worker with metabolic or alcohol neuropathy
- An injured worker with somatization disorder (psychosomatic complaints)
- An injured worker with untreated or uncontrolled substance abuse disorder, psychosis or bipolar disorder.

New Rule Regarding Spinal Cord Stimulators

Prior to being considered for SCS, an injured worker must undergo 60 days of conservative care and a behavioral health assessment.

If the criteria are met, a seven (7) day trial must be completed with the results documented.

New Remote Work Provisions

- ORC 4123.01(C)(4) - Effective September 23, 2022

The new provision states that an “injury” does not include an injury or disability sustained by an employee who is performing their job duties in a work area inside their home that is separate and distinct from the location of the employer, unless **all** of the following apply:

- The employee’s injury or disability arises out of the employee’s employment
- The employee’s injury or disability was caused by a special hazard of the employee’s employment activity
- The employee’s injury or disability is sustained in the course of an activity undertaken by the employee of the exclusive benefit of the employer