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### Appellate Procedures in Workmen's Compensation Cases

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*Appellate Procedures  
In Workmen's Compensation Cases  
James D. Kendis\**

**W**ORKMEN'S COMPENSATION<sup>1</sup> IN THE STATE OF OHIO DATES BACK to 1911 when the Ohio legislature enacted a voluntary Workmen's Compensation program.<sup>2</sup> The legislation was soon tested in the courts and declared constitutional by the Ohio Supreme Court in the case of *State ex rel. Yapple v. Creamer*,<sup>3</sup> the court finding that this type of "social" legislation was valid under the state police power.<sup>4</sup> The legislature, in 1912, presented a constitutional amendment to the people of the State of Ohio for the purpose of establishing a formal Workmen's Compensation system which was adopted as Article II, Section 35.<sup>5</sup> This section amended in 1923,<sup>6</sup> to become effective in 1924, is the authority under which the present Workmen's Compensation law is administered.<sup>7</sup>

The appellate procedure in Workmen's Compensation claims is found in Sections 4123.515 through .519 of the Ohio Revised Code.<sup>8</sup> These procedures can be divided into two classes: (1) appeals within the administrative network, and (2) appeals to the court. This work will discuss both classes of appeals and their interrelationship.

### I. Administrative Appeals

In order to clearly understand the appeal procedures, it is necessary to first discuss in detail the administrative network.

The Ohio Constitution<sup>9</sup> provides that the administrative power in the Workmen's Compensation system shall be vested in a "board"<sup>10</sup> (commonly called the Industrial Commission). When, in 1955, the statutory administrative duties<sup>11</sup> of processing claims became too

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<sup>1</sup> Workmen's compensation is a system of social legislation which compensates injured workmen for injuries and monetary loss due to industrial accident, casualty or disease. 58 OHIO JUR. 2d *Workmen's Compensation* §1 (1963).

<sup>2</sup> 102 Ohio Laws 524 (1911).

<sup>3</sup> 85 Ohio St. 349, 97 N.E. 602 (1912).

<sup>4</sup> *Id.* See 58 OHIO JUR. 2d *Workmen's Compensation* §2 (1963).

<sup>5</sup> OHIO CONST. art II, §35 (1912).

<sup>6</sup> OHIO CONST. art. II, §35 (1924).

<sup>7</sup> *Id.*

<sup>8</sup> The appeals procedure in workmen's compensation claims was specifically excluded from the General Administrative Procedure Act. OHIO REV. CODE §119.01.

<sup>9</sup> OHIO CONST. art. II, §35 (1924).

<sup>10</sup> *Id.*

<sup>11</sup> OHIO REV. CODE §4121.13, .13(E).

great for the commission, an additional agency was created by the legislature,<sup>12</sup> the Bureau of Workmen's Compensation.<sup>13</sup> Also in 1955 an additional means of appeal was set up by the creation of the Regional Boards of Review.<sup>14</sup> These three bodies administer and adjudicate the Workmen's Compensation law in the state of Ohio.

#### *Deputy Administrators*

The first quasi judicial administrative level is that of the Deputy Administrator.<sup>15</sup> Claims are heard by these deputies, or their agents, throughout the state of Ohio. At these hearings, parties have an opportunity to present all pertinent testimony, be it medical or factual.<sup>16</sup> At the conclusion of the hearing, a decision is rendered.<sup>17</sup> From an unfavorable decision of a Deputy Administrator, the claimant or the employer may appeal to another administrative division.

#### *Application for Reconsideration*

The Workmen's Compensation Act provides that within ten days from the date of receipt of denial from a Deputy Administrator, the aggrieved party may file an application for reconsideration with the office of the Administrator of the Bureau of Workmen's Compensation in Columbus, Ohio.<sup>18</sup> These applications may be filed in any branch office. The Administrator need not hear an appeal and can refuse it without hearing.<sup>19</sup> In the event of a refusal to hear a case, or in the event of a denial after a claim has been heard, the aggrieved party may file an appeal to the next administrative level; the Regional Board of Review.<sup>20</sup>

#### *Appeals to the Regional Board of Review*

The next appellate level within the Workmen's Compensation structure consists of three-man boards known as the Regional Boards

<sup>12</sup> OHIO REV. CODE §4121.12.

<sup>13</sup> The delegation of powers to the Bureau of Workmen's Compensation was held constitutional in the case of *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 138 N.E.2d 660 (1956).

<sup>14</sup> OHIO REV. CODE §4123.14.

<sup>15</sup> In order to process claims, the Administrator of the Bureau of Workmen's Compensation has established a number of "deputies" and others to aid him in the administrative and quasi judicial duties. These deputies are found in most major cities throughout the state of Ohio. OHIO REV. CODE §4123.515.

<sup>16</sup> OHIO REV. CODE §4123.515. See, *Rules Governing Claims Procedures Before the Bureau of Workmen's Compensation, Board of Review, The Industrial Commission of Ohio* (hereinafter cited IC/WC) Rule 21-09 (B) (2).

<sup>17</sup> This decision is reduced to writing and mailed to the claimant and the employer at their respective addresses. OHIO REV. CODE §4123.515. See IC/WC Rule 21-09 (C) (11).

<sup>18</sup> OHIO REV. CODE §4123.515.

<sup>19</sup> *Id.*

<sup>20</sup> OHIO REV. CODE §4123.516.

of Review.<sup>21</sup> A party dissatisfied with the decision of the Deputy Administrator or the Administrator after an application for reconsideration may appeal to one of these boards within twenty days from the receipt of an unfavorable decision.<sup>22</sup> Unlike applications for reconsideration to an administrator, timely appeals to Regional Boards must be heard. Once an appeal is received, the Industrial Commission must assign the case for hearing before a board near the residence of the claimant.<sup>23</sup> When this assignment is made, a copy of the assignment is mailed to the claimant, to the employer, and to the Administrator. The hearings before these Boards are *de novo*.<sup>24</sup> Present at the hearings are the claimant and his representative, the employer and his representative, and the State Attorney General.<sup>25</sup> The Administrator's representative, the Attorney General, supports the previous decision of the Bureau of Workmen's Compensation.<sup>26</sup>

Evidence at these hearings consists of oral testimony, affidavits, depositions, written statements, and any other written documents which have a bearing on the contested matter.<sup>27</sup> As a general rule, the Boards do not follow the rules of evidence. They will consider in evidence anything which is pertinent to the matter before them.

The Boards of Review, at the completion of a hearing, issue a formal order by mailing copies of the decision to the claimant, employer, and the Bureau of Workmen's Compensation.<sup>28</sup>

A party dissatisfied with the decision of the Board of Review may then proceed with an appeal to the highest administrative branch — the Industrial Commission.<sup>29</sup>

#### *Appeals Before the Industrial Commission*

A party has twenty days from the receipt of an adverse decision to perfect an appeal to the Industrial Commission.<sup>30</sup> Appeals can be filed by the claimant or his representative, the employer or his representative, or the Administrator representing the Bureau of Workmen's Compensation.<sup>31</sup>

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<sup>21</sup> OHIO REV. CODE §4123.14.

<sup>22</sup> OHIO REV. CODE §4123.516.

<sup>23</sup> *Id.*

<sup>24</sup> IC/WC 21-09 (B) (1)-(4).

<sup>25</sup> OHIO REV. CODE §4123.518; IC/WC 21-09 (C) (4).

<sup>26</sup> *Id.*

<sup>27</sup> IC/WC 21-09 (B) (1), (2).

<sup>28</sup> OHIO REV. CODE §4123.518.

<sup>29</sup> OHIO REV. CODE §4123.516.

<sup>30</sup> *Id.*

<sup>31</sup> OHIO REV. CODE §4123.516; IC/WC 21-18 (A)-(E).

The rules provide that each and every appeal filed is to be given a preliminary review.<sup>32</sup> The Industrial Commission is given the power, after review, to refuse to hear an appeal even though it is timely filed.<sup>33</sup> Those matters which contain special interest, new evidence, or are not appealable to court are set for formal argument. If the Industrial Commission decides not to consider the matter, notice of the refusal to hear the claim<sup>34</sup> is sent to all parties.

Should the Industrial Commission desire to hear the matter, the notice of the time of hearing is sent to all parties.<sup>35</sup> Hearings before the Industrial Commission are always set in Columbus. As with the Board of Review, the Attorney General represents the Administrator at these proceedings.<sup>36</sup>

Copies of the decisions of the Industrial Commission are mailed to the parties by certified mail. Since the Industrial Commission is the highest administrative level, its decision on all issues presented is *res judicata* for all other administrative proceedings. A party dissatisfied with the decision of the Industrial Commission must look to the courts for relief.<sup>37</sup>

### *Bypass Appeals*

The Workmen's Compensation Code provides that certain administrative levels can be bypassed.<sup>38</sup> From an adverse decision of the Deputy Administrator, the claimant or employer has a right to appeal directly to the Regional Board of Review, thereby bypassing the Administrator's reconsideration level.<sup>39</sup> For the claimant, the bypassing of the reconsideration level has some distinct advantages. Applications for reconsideration to the Administrator are always heard in Columbus and this represents hardships to claimants living out of the Franklin County area.<sup>40</sup> Further, an application for reconsideration is not a *de novo* hearing but only a review of a previous decision.<sup>41</sup> For the employer, the application for reconsideration has the advantage of stopping the payment of benefits to the claimant

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<sup>32</sup> IC/WC 21-18 (F).

<sup>33</sup> OHIO REV. CODE §4123.516.

<sup>34</sup> OHIO REV. CODE §4123.516.

<sup>35</sup> OHIO REV. CODE §§4123.516, 4123.518.

<sup>36</sup> OHIO REV. CODE §4123.518.

<sup>37</sup> OHIO REV. CODE §4123.519.

<sup>38</sup> OHIO REV. CODE §4123.516.

<sup>39</sup> *Id.*

<sup>40</sup> IC/WC 21-18 (D).

<sup>41</sup> There is some discussion within the Bureau of Workmen's Compensation to eliminate this appeal since it creates a hardship to claimants and does not actually do anything that the Regional Boards of Review cannot do. See IC/WC 21-18 (A), (D).

until the claim is heard.<sup>42</sup> The major disadvantage to claimants and employers alike is found in the short appeal period. Section 4123.515 provides that an application for reconsideration must be filed within ten days from the receipt of the notice of denial of the Deputy Administrator. The appeal to the Regional Boards of Review may be perfected within twenty days.<sup>43</sup> Thus a party has a longer period to file an appeal to the Regional Boards of Review.

### *Summary*

The legislature has provided for a number of administrative appeals in order to give the parties to a Workmen's Compensation case a full opportunity to present their claims. Each of the administrative bodies hears all evidence and makes a determination based upon the pertinent evidence presented. Because of the complex administrative network, few appeals are ever taken from the administrative network to the courts of common pleas. However, in those claims where a party feels that his cause has not been properly adjudicated before the administrative agencies, the legislature has provided Section 4123.519 which permits an appeal to the common pleas court.

## **II. Appeals to Court**

While the Ohio Constitution guarantees an injured party a remedy at law for his injuries,<sup>44</sup> the actual right to file an appeal to court in a Workmen's Compensation case is limited to certain statutory instances.<sup>45</sup>

The present statute which permits a court appeal is Ohio Revised Code Section 4123.519. This section states in pertinent part:

The claimant or the employer may appeal a decision of the Industrial Commission in any injury 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.<sup>46</sup>

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<sup>42</sup> OHIO REV. CODE §4123.515.

<sup>43</sup> OHIO REV. CODE §4123.516.

<sup>44</sup> The Ohio Constitution provides that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law, and shall have justice administered without denial or delay." OHIO CONST. art. VIII, §7 (1802).

Certain areas of the Workman's Compensation law do not permit a claimant to recover compensation either because of failure of the legislature to provide for that kind of injury, or because of action by the courts. *See, e.g., Daniels v. MacGregor Co.*, 2 Ohio St.2d 89, 206 N.E.2d 554 (1965). It would appear that article VIII of the Ohio Constitution might provide authority for some sort of relief outside the Workmen's Compensation law.

<sup>45</sup> The right to appeal in Workmen's Compensation matters is granted in OHIO REV. CODE §4123.519. The general administrative appeals act specifically excludes Workmen's Compensation claims. OHIO REV. CODE §119.01.

<sup>46</sup> OHIO REV. CODE §4123.519.

This statutory provision has been strictly construed and the courts of Ohio have held that a claimant or employer has no inherent right to appeal to the court.<sup>47</sup> "The right is purely statutory and the statute conferring the right must be construed and enforced strictly."<sup>48</sup> In order to understand statutory appeals, it is necessary to first review the history as it relates to court appeals.

### *History of the Court Appeal*

The original Workmen's Compensation law permitted only claimants to appeal to the courts when their claim for relief was denied.<sup>49</sup> The appeal was tried *de novo* and the entire procedure was in accordance with the then existing rules of civil procedure.<sup>50</sup> In 1925, acting on recommendations made by various administrative experts, the state of Ohio adopted the rehearing procedure which was followed until 1955.<sup>51</sup> This rehearing procedure limited the court to the admissible evidence presented before the Industrial Commission.<sup>52</sup> That evidence was reduced by a court reporter to a record of proceedings.<sup>53</sup> The record of proceedings was read to the jury in matters that went to trial.<sup>54</sup> While this procedure enabled the parties to produce a complete record without the worries connected with actual trial, e.g., subpoenas for witnesses, and special arrangements to hear the testimony of doctors, it was soon discovered that the rehearing tended to be a lengthy and cumbersome procedure.<sup>55</sup> With the increase in the number of claims filed, the legislature attempted to streamline the lengthy rehearing procedure and in 1955 reinstated the *de novo* court appeal.<sup>56</sup> At the same time, the legislature also provided the employer with a right to appeal unfavorable decisions to court.<sup>57</sup>

With the abolition of the rehearing procedure, the administrative appeal network was expanded to its current form.<sup>58</sup> The Regional Boards of Review were set up and given the opportunity to take evidence with the hope of eliminating the backlog created by

<sup>47</sup> See, e.g., *Hovanec v. Scanlon*, 152 N.E.2d 697 (Ohio Ct. App. 1957).

<sup>48</sup> *Id.* at 700.

<sup>49</sup> 102 Ohio Laws 524 (1911).

<sup>50</sup> *Id.* See YOUNG, WORKMEN'S COMPENSATION LAWS OF OHIO §11.13 (2 ed. 1971) (hereinafter cited as YOUNG).

<sup>51</sup> 111 Ohio Laws 218 (1925).

<sup>52</sup> See YOUNG §11.13.

<sup>53</sup> *Id.*

<sup>54</sup> 111 Ohio Laws 218 (1925).

<sup>55</sup> See YOUNG §11.13.

<sup>56</sup> 126 Ohio Laws 1015, 1026 (1955).

<sup>57</sup> *Id.*

<sup>58</sup> There have been some minor changes in 1957 and 1959 but these changes did not affect or change the law materially. See YOUNG §§11.13, 11.20

the lengthy rehearing procedure.<sup>59</sup> Many experts still favor the rehearing type of procedure for administrative appeals. In most other administrative law matters in the state of Ohio, the rehearing procedure is still followed.<sup>60</sup> It has also been adopted by the Social Security Administration.<sup>61</sup> Although the rehearing procedure was at times cumbersome, it did provide the parties with an opportunity to make a complete and thorough record, enabled all witnesses to record their testimony at a time convenient to them, and enabled the attorneys, once a record was completed, to appear in court and to try the cases at times convenient to the court as well as themselves. The present *de novo* procedure as it exists in Section 4123.519, treats the Workmen's Compensation case in approximately the same manner as any other civil case.<sup>62</sup>

### *Time for Filing the Appeal*

Section 4123.519 provides that an appeal may be perfected within sixty days of the receipt of the notice of denial of the state administrative agency. The Code provides a separate procedure for appeal for both claimants and employers.<sup>63</sup> A claimant may perfect his appeal from the unfavorable decision of the Industrial Commission, from a decision of a Regional Board of Review when the Industrial Commission refuses to hear the case, from a Regional Board without the necessity of filing an appeal to the Industrial Commission, or from an unfavorable decision of the Administrator on reconsideration.<sup>64</sup> The employer, however, can file an appeal only after the Industrial Commission has either heard his argument and denied it or has refused to hear the appeal.<sup>65</sup> In the latter case, the employer's appeal is from the decision of the Regional Board of Review.<sup>66</sup>

The sixty day period for filing an appeal is a mandatory requirement and is strictly enforced.<sup>67</sup> The Code provides:

Notice of such appeal shall be filed by the appellant with the commission and the court of common pleas within sixty

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<sup>59</sup> OHIO REV. CODE §4123.516.

<sup>60</sup> See OHIO REV. CODE §119.09.

<sup>61</sup> 20 C.F.R. §404.910 (1969).

<sup>62</sup> See YOUNG §11.13.

<sup>63</sup> OHIO REVISED CODE §4123.519; See YOUNG §11.14.

<sup>64</sup> *Id.* The claimant, however, must accurately mention in his notice of appeal the division from which he is appealing.

<sup>65</sup> *Id.* The reason for this is clear. To provide the "bypass" method of appeal to the employer could create a severe hardship on a claimant and delay his claim in the courts for many years.

<sup>66</sup> OHIO REV. CODE §4123.519.

<sup>67</sup> See YOUNG §11.19.



days after the date of the receipt of the decision appealed from . . . Such filing shall be the only act required to perfect the appeal and vest jurisdiction in the court.<sup>68</sup>

The Ohio Supreme Court has repeatedly stressed that this appeal time and the demands of the statute will be strictly enforced.<sup>69</sup> A party who fails to file his appeal with the Industrial Commission within sixty days and files it instead with the Bureau of Workmen's Compensation will not fulfill the statutory requirement.<sup>70</sup>

Once the appeal has been properly perfected, the claimant has the duty<sup>71</sup> to file his petition or complaint, setting forth his position in the claim.<sup>72</sup> The petition or complaint should contain "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."<sup>73</sup> The Court of Appeals has held that filing of the petition or complaint does not vest jurisdiction in the court.<sup>74</sup> Under this line of reasoning, it has been held that mistakes or errors in the filing of this petition or complaint do not necessarily render the appeal defective.<sup>75</sup> It has been further held that if the petition or complaint is not filed within thirty days, a motion to dismiss will not automatically lie.<sup>76</sup>

While the courts have been liberal in the interpretation of the requirements of the petition or complaint, they have been strict in interpreting the requirements for the form of the appeal.<sup>77</sup>

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<sup>68</sup> OHIO REV. CODE §4123.519.

<sup>69</sup> See, e.g., *Starr v. Young*, 172 Ohio St. 317, 175 N.E.2d 514 (1961).

<sup>70</sup> *Davidson v. Keller*, 9 Ohio App. 2d 340, 224 N.E.2d 538 (1967). In *Davidson*, the appellant mailed his notice of appeal to the Bureau of Workmen's Compensation within the statutory period. The Industrial Commission, however, never received the appeal until after the sixty days had passed. The Court of Appeals ruled that the appeal was not filed within the statutory period and that the receipt by the Bureau of Workmen's Compensation was not sufficient. Since this decision, a special stamp has been made which bears the name of both divisions of the administrative agency with the intent of avoiding this harsh result.

<sup>71</sup> OHIO REV. CODE §4123.519.

<sup>72</sup> The complaint or petition must be filed within thirty days after the filing of the notice of appeal. *Id.* The claimant always has the burden of proof and must file the complaint or petition even though the employer has filed the notice of appeal. *Smith & Co., v. Wreede*, 110 Ohio App. 252, 168 N.E.2d 757 (1959).

<sup>73</sup> OHIO REV. CODE §4123.519. The present wording was added on December 11, 1967. 132 Ohio Laws 1402 (1967). The previous statute was vague and led to some questions as to what was necessary. See Note, *Appeals Under the Ohio Workmen's Compensation Act*, 17 CASE W.RES L.REV. 282, 294-297 (1965).

<sup>74</sup> See, e.g., *Smoliga v. Keller*, 3 Ohio App. 2d 250, 210 N.E.2d 269 (1965).

<sup>75</sup> *Id.* See *Hanna Coal Co. v. Young*, 1 Ohio App. 2d 230, 204 N.E.2d 399 (1963).

<sup>76</sup> *Industrial Chrome Services, Inc. v. Corona*, 2 Ohio App. 2d 95, 206 N.E.2d 580 (1965).

<sup>77</sup> See YOUNG §11.19.

### *Form of the Court Appeal*

Section 4123.519 provides that the "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 appealed therefrom. The Ohio Supreme Court held in the case of *Starr v. Young*<sup>78</sup> that the words of the statute are to be strictly construed and dismissed a claimant's appeal where the "appeal to court" failed to state the claim number and to designate which of the parties was the employer.<sup>79</sup> In *Singer Sewing Machine v. Pucket*,<sup>80</sup> the court re-examined its position with respect to the strict rule in *Starr* and relaxed its position to the extent where it permitted an appeal where the appellant fulfills the requirement but errs slightly. In *Singer*, the appellant set forth the date that the decision was mailed and not the date of decision.<sup>81</sup> The Supreme Court seemed to feel that the appeal substantially complied with the statute and that the defect was not fatal.<sup>82</sup> It is difficult to reconcile the Supreme Court's decisions in these cases. There are, however, two possible interpretations. First, the *Starr* case involved a situation where a party committed an error of omission and left out specific requirements. In the *Singer* case, the appellant committed an error of commission in that he mistakenly set forth the date of mailing.<sup>83</sup> A second method of reconciling these two decisions is to perceive the trend in the Supreme Court toward liberalization of its attitudes with respect to the requirements of Workmen's Compensation court appeals. Certainly with the adoption of the new rules of civil procedure there is a feeling in the courts that parties should not lose a matter due merely to minor errors in following procedural rules.<sup>84</sup>

### *Where an Appeal is Filed*

The statute provides that the action is to be filed in the county where the accident occurred, or if the accident occurred outside the state of Ohio, in the county where the contract of employment

<sup>78</sup> 172 Ohio St. 317, 175 N.E.2d 514 (1961).

<sup>79</sup> *Id.*

<sup>80</sup> 176 Ohio St. 32, 197 N.E.2d 353 (1964).

<sup>81</sup> *Id.*

<sup>82</sup> There are numerous other cases on the question of defects in the notice of appeal. In *Hovanec v. Scanlon*, 152 N.E.2d 697 (Ct. App. Mahoning Cty. 1957), a lower court dismissed an appeal for a failure to name the employer in the caption of the appeal although the employer was mentioned in the body. *But see*, *Taylor v. Keller*, 6 Ohio St. 2d 9, 215 N.E.2d 597 (1966). The same result was reached in *Champ v. Keller*, 11 Ohio App.2d 183, 229 N.E.2d 242 (1965). There, an erroneous date of decision was held to be fatal. *But see* *Singer Sewing Machine v. Pucket*, 176 Ohio St. 32, 197 N.E.2d 353 (1964).

<sup>83</sup> In *Hahn v. Multi-Colortype Co.*, 7 Ohio App.2d 50, 219 N.E.2d 216 (1966), the court seemed to follow this theory in that it held a typographical error, the transposition of two numbers, did not invalidate a notice of appeal.

<sup>84</sup> YOUNG §11.20 at 216.

is made.<sup>85</sup> While this provision in the Code seems clear, problems arise in the areas of steel haulers and truckers. Frequently, the contracts of employment are sophisticated three-party arrangements or joint ventures by many parties. In such a situation, a claimant may have a difficult time establishing exactly where his contract of employment was made.

The venue requirement in Section 4123.519 of the Ohio Revised Code is clear. The new rules of civil procedure provide that the venue requirement can be relaxed in certain situations.<sup>86</sup> At the time of the writing of this article, several cases are pending in the courts to test whether or not the strict venue requirements of Section 4123.519 are to be followed or whether the rules of civil procedure take precedence over them, permitting a relaxation of the strict requirement. In all probability, the courts will follow Civil Rule 1(C), and exempt Workmen's Compensation action from the liberal venue requirements.<sup>87</sup>

Frequently, problems arise where a claimant works in many states and the accident occurred outside the state of Ohio. To deal with this difficult legal situation, the Code provides for, and the Bureau of Workmen's Compensation encourages, employers and employees to enter into specific contracts to be bound by one state's Workmen's Compensation law.<sup>88</sup>

#### *Answer to a Workmen's Compensation Petition or Complaint*

The answer to the Workmen's Compensation complaint or petition is substantially the same as in any other civil matter.<sup>89</sup> The Ohio Revised Code, in Section 4123.519, provides that after the complaint or petition is filed, that further proceedings are to be in accordance with the rules of civil procedure.<sup>90</sup> Generally, unless an error is made in the notice of appeal, the appellee concedes and admits the jurisdiction of the court and the fact of employment. The basic issues in a Workmen's Compensation case are the questions of accidental injury and the relationship of the injury received therefrom which ultimately determine participation or non-

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<sup>85</sup> OHIO REV. CODE §4123.519.

<sup>86</sup> OHIO R. CIV. P., Rule 3 (B), (C).

<sup>87</sup> See, *Reference Manual for Continuing Legal Education Program, 1970 Civil Rules Conference*, p. 31 (1970).

<sup>88</sup> OHIO REV. CODE §4123.54. The Bureau of Workmen's Compensation has special forms for the parties to execute to agree to be bound by a certain state's Workmen's Compensation law.

<sup>89</sup> OHIO REV. CODE §4123.519; YOUNG §11.20, at 214-15.

<sup>90</sup> *Id.*

participation in the Workmen's Compensation fund.<sup>91</sup> A problem always arises as to whether or not a specific matter is appealable within the meaning of the Workmen's Compensation law.

*What is Appealable Under the Workmen's Compensation Law*

The appeal statute permits an appeal in any "injury case other than a decision as to the extent of disability."<sup>92</sup> Although the statute seems clear in its meaning, there have been numerous Supreme Court cases attempting to further clarify the phrase.

The Code provides for an appeal in "injury" cases only.<sup>93</sup> Accordingly, it was not surprising that in the early decision of *Johnson v. Industrial Commission*,<sup>94</sup> the Supreme Court ruled that the courts had no jurisdiction to hear appeals in occupational disease claims. However, the courts have provided a remedy in these claims. In order to protect the right of a party in an unfavorable denial in an occupational disease claim, the courts have permitted mandamus actions.<sup>95</sup> This area of mandamus actions will be discussed more fully elsewhere in this article.<sup>96</sup>

Although many cases have discussed the meaning of "extent of disability" one of the best cases on this point is that of *Brecount v. Procter & Gambel Co.*<sup>97</sup> There the court ruled that decisions that go to the claimant's right to participate are appealable to court.<sup>98</sup> Those questions that go to the degree of participation are not appealable, and the decision of the Industrial Commission is final.<sup>99</sup> For example, the courts have ruled that a finding that a claimant is not permanently and totally disabled but is only partially disabled is an extent of disability decision in that it is not a ruling on the claimant's right to participate.<sup>100</sup>

<sup>91</sup> The actual question for the jury is whether or not the claimant can participate or continue to participate in the State Insurance Fund. *Moore v. Young*, 7 Ohio App.2d 209, 220 N.E.2d 295 (1966).

<sup>92</sup> OHIO REV. CODE §4123.519.

<sup>93</sup> *Id.*

<sup>94</sup> 164 Ohio St. 294, 130 N.E.2d 807 (1955). See *Szekely v. Young*, 174 Ohio St. 213, 188 N.E.2d 424 (1963).

<sup>95</sup> *State, ex rel. Lorty v. Industrial Comm'n.*, 18 Ohio St. 2d 107, 247 N.E.2d 863 (1969).

<sup>96</sup> See notes 106-120, *infra*.

<sup>97</sup> 166 Ohio St. 477, 144 N.E.2d 189 (1957).

<sup>98</sup> Decisions as to the relationship of a disability to an injury are always appealable to court. See, e.g., *Carpenter v. Scanlon*, 168 Ohio St. 139, 151 N.E.2d 561 (1958). Unfortunately, the Industrial Commission has, at times, had difficulty in defining exactly what action has been taken. The wording of the decision is important in determining whether or not a claim is appealable. See YOUNG §11.18, at 211.

<sup>99</sup> *Brecount v. Procter & Gamble Co.*, 166 Ohio St. 477, 144 N.E.2d 189 (1957).

<sup>100</sup> *Frank v. Youngstown Sheet & Tube Co.*, 152 N.E.2d 708 (Ohio Ct. App. 1956).

There are several other areas where courts permit appeals. Each area, however, is one in which the claimant is absolutely denied a right to participate under the Workmen's Compensation law. The Ohio courts have permitted appeals where portions of the injury have been denied<sup>101</sup> and where the question of statute of limitations has been an issue.<sup>102</sup>

Until recently, there was a "gray area" where the Bureau of Workmen's Compensation or the Industrial Commission would limit a degree of participation through decisions as to payment rates or medical care. The courts have recently held that the setting of the average weekly wage — the determinative factor in payment rates — is not appealable in that it goes to the extent of disability.<sup>103</sup> Further, the courts have held that a denial of chiropractic adjustments and treatments is an extent of disability determination and is not appealable.<sup>104</sup>

There seems to be no serious question as to whether or not the decision of a permanent partial disability is appealable to court. The experts agree that such decisions are strictly within the prerogative of the Industrial Commission, for to rule otherwise would be promoting endless litigation in each claim.<sup>105</sup>

#### *Mandamus*

Although the Legislature has precluded appeals in occupational disease claims and extent of disability matters, this does not mean the party is totally without relief. The courts of the state of Ohio have for a long time permitted mandamus actions if it can be shown that the Industrial Commission has clearly abused its discretion in the processing or the ruling on the case.<sup>106</sup> The courts have set up specific rules where a mandamus action will lie.<sup>107</sup>

The legal authority for the mandamus action is found in the Ohio Constitution.<sup>108</sup> It can be invoked when it can be determined that the relator has no plain and adequate remedy in the ordinary

<sup>101</sup> *Carpenter v. Scanlon*, 168 Ohio St. 139, 151 N.E.2d 561 (1958).

<sup>102</sup> *Druley v. Keller, Admr.*, 14 Ohio Misc. 81, 236 N.E.2d 228 (C.P.Ct. Clark County 1966).  
See also *Butler v. Pittsburgh Plate Glass Co.*, 171 Ohio St. 19, 168 N.E.2d 150 (1960).

<sup>103</sup> *Anderson v. Flowers*, 19 Ohio App. 2d 148, 250 N.E.2d 276 (1969).

<sup>104</sup> *State ex rel. Campbell v. Industrial Comm'n.*, 28 Ohio St. 2d 154, 277 N.E.2d 219 (1971).

<sup>105</sup> *Barney v. Sears, Roebuck & Co.*, No. 2028 (Ct. of Appeals, Trumbull Cty., 1972), *appeal denied*, Ohio Sup. Ct., No. 72-792 (1973); *Green v. General Motors Corp.*, No. 879, 881 (C.P.Ct. 1972); *Bais v. National Screw & Mfg.*, No. 718397 (C.P.Ct. 1972). See *State ex rel. Shewalter v. Industrial Comm'n.*, 19 Ohio St. 12, 249 N.E.2d 51 (1969).

<sup>106</sup> See *State ex rel. Pressley v. Industrial Comm'n.*, 11 Ohio St. 2d 141, 228 N.E.2d 631 (1967); *YOUNG* §11.22.

<sup>107</sup> *Id.*

<sup>108</sup> OHIO CONST. art. IV §2, 6 (1851); OHIO REV. CODE §2731.02.

course of the law by way of appeal.<sup>109</sup> The petition in mandamus actions can be filed in the common pleas courts, the Court of Appeals, or the Supreme Court.<sup>110</sup> It is not error to file the petition directly in the Court of Appeals or Supreme Court and neither court can dismiss the petition solely because the party did not proceed to file at the lowest possible level.<sup>111</sup>

Once the petition in mandamus has been filed, the court will first determine if there is a plain and adequate remedy at law, and, if none is available, the court will hear the matter and exercise its discretion based upon the facts and circumstances in the individual case before it.<sup>112</sup> A mandamus action will not lie to enforce a private right of one person against another.<sup>113</sup> It will be permitted, however, to compel a public officer to perform an official act where such officer is under a clear duty to do so.<sup>114</sup> The courts adhere strictly to the doctrine that there must be a clear duty to act and an abuse of discretion involved.<sup>115</sup>

The courts refuse to grant petitions in mandamus where there is substantial evidence to support the findings by the Industrial Commission on a question of fact.<sup>116</sup> Mandamus petitions have been permitted where the Industrial Commission arbitrarily denies a claim.<sup>117</sup> Examples of where mandamus actions have been permitted can be found within the areas of safety violations,<sup>118</sup> permanent partial disability decisions,<sup>119</sup> and occupational disease claim denials.<sup>120</sup>

### *Evidence*

The burden of proof in a Workmen's Compensation case falls upon the claimant even though the employer may have been the appellant in the case.<sup>121</sup> The jury is charged with the duty of determining whether or not the claimant is entitled to participate in the Workmen's Compensation Fund or to further participate in

<sup>109</sup> See *State ex rel. Pressley v. Industrial Comm'n.*, 11 Ohio St. 2d 141, 228 N.E.2d 631 (1967); YOUNG §11.22.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *State ex rel. Haines v. Industrial Comm'n.*, 29 Ohio St. 2d 15, 278 N.E.2d 24 (1972).

<sup>117</sup> *State ex rel. Hutton v. Industrial Comm'n.*, 29 Ohio St. 2d 9, 278 N.E.2d 34 (1972).

<sup>118</sup> *State ex rel. Truckey v. Industrial Comm'n.*, 29 Ohio St. 2d 132, 279 N.E.2d 875 (1972).

<sup>119</sup> *State ex rel. Shewalter v. Industrial Comm'n.*, 19 Ohio St. 2d 12, 249 N.E.2d 51 (1969).

<sup>120</sup> See, e.g., *Popham v. Industrial Comm'n.*, 5 Ohio St. 2d 85, 214 N.E.2d 80 (1966).

<sup>121</sup> OHIO REV. CODE §4123.519. See note 72, *supra*.

the State Fund.<sup>122</sup> The exact issues which are to be tried are those issues which were decided adversely to the party appealing the case.<sup>123</sup> In the case of *Mims v. Lennox-Haldeman Corporation*,<sup>124</sup> the Court of Appeals held that the only decision before the court is the adverse decision of the Industrial Commission and not those matters which were decided in favor of the appellant.

The rules of evidence in a Workmen's Compensation case are the same as the rules in any other civil matter.<sup>125</sup> This fact can create an unusually harsh result for claimants, and, sometimes, even employers. The Bureau of Workmen's Compensation and the Industrial Commission often take into consideration evidence which is not admissible in court. This evidence frequently can be the determinative factor in the allowance or denial within the administrative agency. The strict rules of proof in the court may often fail to permit the same evidence as received by the state agency and, therefore, create a hardship on one of the parties. This is especially true in death claims where hearsay evidence is excluded.

The Code provides for the taking of a deposition,<sup>126</sup> and that the cost of the taking of the deposition, excluding a doctor's time, will be paid for by the Industrial Commission and be charged as costs. This aids claimants who do not have unlimited funds to present the best possible evidence without regard to the cost of the action.

### Summary

Workmen's Compensation appeals are a complex and sophisticated area of the law. The rules for appealing within the administrative agency as well as those to court have been strictly construed and very little can be done for a party who fails to follow the dictates of a statute.

Appeals within the administrative agency are many, but because of the extensive network, the claimant and the employer both have a right to present any evidence which may have a bearing on the case. It is only after the parties have had this opportunity that there is the possibility of appealing to court. The statutory rules governing court appeals have been strictly construed and attorneys must be careful to follow the Code, and the many cases that explain it.

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<sup>122</sup> *Moore v. Young*, 7 Ohio App. 2d 209, 220 N.E.2d 295 (1966).

<sup>123</sup> *Mims v. Lennox-Haldeman Corp.*, 199 N.E.2d 20 (Ohio Ct. App. Cuyahoga Cty. 1964), appeal denied, 177 Ohio St. 180 (1964).

<sup>124</sup> *Id.*

<sup>125</sup> OHIO REV. CODE §4123.519. See YOUNG §11.20.

<sup>126</sup> OHIO REV CODE §4123.519.

It is perhaps unfortunate that the appeal to court in a Workmen's Compensation case is so complex since the party appealing only wishes an opportunity to present the evidence to substantiate his position. Many appellants err in the procedures involved and never have an opportunity to proceed with the merits of their case. With the courts handing down numerous decisions in this difficult area, it is mandatory that one with an interest in handling these claims keep up to date and follow very closely the dictates of the Ohio courts.