MEMORANDUM

To: **Thomas E. Brinkman, Jr., Chair, House Insurance Committee**
Members, House Insurance Committee
From: **Bureau of Workers' Compensation**
Subject: **Memorandum in Support of H.B. 27 Amendment to R.C. 4123.57**
Date: **March 13, 2017**

Purpose

This memorandum is presented in support of an amendment in the Bureau of Workers' Compensation ("BWC") Budget Bill, H.B. 27, and explains why the amendment is constitutional and represents sound policy for BWC.

The amendment is in R.C. 4123.57 (lines 807 to 814), supported by uncodified section 741.10 (lines 1581 to 1590), H.B. 27 as introduced.

Background Law

The workers' compensation statutes provide various forms of compensation and benefits for the injured worker ("IW").

Temporary total disability (TT) replaces a worker's lost wages following an injury, payable until the IW returns to work or reaches maximum medical improvement.

An IW may file an application ("C-92") for permanent partial disability (%PP) under R.C. 4123.57 no sooner than 26 weeks from the last payment of TT. The 26 week delay ensures that the injuries heal to a degree of permanency.

R.C. 4123.57 states that when the C-92 application is filed, BWC shall schedule the IW for an independent medical examination ("IME"). The IME report is the basis whereby BWC, utilizing a statutory formula, determines the %PP to award to the IW.

Currently, if after repeated attempts the IW continues to fail to attend the IME, BWC suspends the C-92 application.

R.C. 4123.52 vests BWC and the Industrial Commission ("IC") with continuing jurisdiction over an IW's claim. The continuing jurisdiction is limited to 5 years from the last compensation paid in the claim (this is the current law; prior versions of the law provided for 10 year and 6 year limitations, depending on the date of injury). The Ohio Supreme Court described this statute of limitations as "directed at dormant claims, permitting finality through extinguishment after a set period of inactivity."

Problems Caused by the Current Law

Many C-92 applications are filed by counsel for IWs, frequently long after the 26 week waiting period but within the continuing jurisdiction time period. There are various reasons why an IW may fail to attend the required IME. For example, where the IW has healed and returned to

work, the IW may not want to take time off to attend an exam that may not result in an award (a C-92 application does not guarantee an award; if the exam shows no impairment, the application is denied). Additionally, counsel for the IW may have lost contact with the IW or the IW may have changed his or her address.

Currently, if BWC suspends a C-92 application, the running of the statute of limitations in the claim is tolled or suspended. Absent any further action by the IW on the C-92, the tolling is indefinite and perpetual.

At present, BWC has approximately 20,000 claims with suspended C-92 applications. These claims are in a state of limbo with the average length of time for the suspension being 10 years.

The current statute results in an ironic and fundamental unfairness. For an IW who files a C-92 application and diligently complies with the statutory requirements by attending the IME, BWC will deny or award a %PP, and the continuing jurisdiction of that IW's claim will continue to run. In the absence of further compensation, after 5 years, the IW's claim will extinguish. On the other hand, the running of the statute of limitations for the IW who fails or refuses to attend the IME is suspended, essentially in perpetuity as the claim remains open even if the IW is not actively pursuing the application.

BWC's Proposed Amendment

Rather than suspend a C-92 application when the IW fails to pursue a C-92 application, BWC proposes to dismiss the application without prejudice. The IW may refile the application at any time within the continuing jurisdiction of the claim.

Section 741.10 of the bill addresses the 20,000 application backlog. BWC proposes to apply the amendment to these pending applications, but permit the IW to refile the application within two years from the dismissal.

Fulton's Objections, 3/8/17 Testimony Before Committee

Phil Fulton testified that there are two problems with BWC's proposed amendments.

First, Fulton alleges that the BWC amendment in R.C. 4123.57 is inconsistent with R.C. 4123.53(C) and R.C. 4123.651.

Second, Fulton alleges that the uncodified language in Section 741.10 is unconstitutional because it affects injured workers' substantive rights.

BWC Responses to Fulton's Testimony

1. Alleged inconsistency between R.C. 4123.57 and R.C. 4123.53(C) and R.C 4123.651(C)

Response: The alleged inconsistencies identified by Fulton are nothing more than an example of Ohio's Legislature exercising its legislative authority to establish, as it proposes here, different standards and remedies within Ohio's workers' compensation statute. Consequently, these differences within the statutory framework of Chapter 4123 were intended by the Legislature and are entirely permissible.

Analysis: R.C. 4123.53(A) provides that BWC and IC "may require any employee claiming the right to receive compensation to submit to a medical examination" at any time. R.C. 4123.53(C) provides that if an IW fails to appear at an exam "scheduled pursuant to this section," the IW's "right to have his or her claim for compensation considered" is suspended.

R.C. 4123.651 covers employer ordered exams. R.C. 4123.651(C) states that if the IW "refuses to submit to any examination scheduled under this section," the IW's right to "have his claim for compensation or benefits considered" is suspended. (emphasis added)

The Legislature already has sanctioned a slight difference in consequences between R.C. 4123.53(C) and R.C. 4123.651 for failing to appear for an IME. In the former the result is a suspension of compensation whereas in the latter the result is a suspension of compensation and benefits.

R.C. 4123.57 has a wholly contained process for determining an IW's %PP. When an IW files a C-92 application, an IME is required under that statute. The BWC amendment proposes a remedy to dismiss, without prejudice, the C-92 application for the IW's failure to attend the C-92 exam. Although the remedy is different than the suspension called for in R.C. 4123.53 or R.C. 4123.651, the Legislature is free to establish a different outcome. The justification for the "inconsistency" is the different purposes of the forms of compensation and the different reasons for the exams.

Fulton cites the *Anderson* case where the Supreme Court said that R.C. 4123.53(C) does not permit denial or dismissal of a claim, but only suspension of the application. That is the reason BWC is asking the Legislature to create specific, clear statutory authority to dismiss a C-92 application as crafted in the amendment to R.C. 4123.57. The amendment in R.C. 4123.57 is specifically intended to overcome this restriction.

Fulton asks that with the two "conflicting and competing statutes," "which one do we use?" BWC does not believe a conflict exists. But, two maxims of statutory construction control should it be determined a conflict does exist. First, the more specific statute controls over the more general statute, and second, the later enacted statute controls. (see R.C. 1.51 and R.C. 1.52: "If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.")

If H.B. 27 were to become law, the R.C. 4123.57 amendment is a more specific instruction on handling a failure to appear at an IME than R.C. 4123.53(C), and would be the later enacted statute. BWC does not believe that the Legislature needs to provide any further clarification or justification for the differences between R.C. 4123.53(C) and R.C. 4123.57.

2. Alleged Constitutional Problems with the Amendment

Response: The uncodified language in Section 741.10 at the end of the bill is within the Legislature's prerogative to establish the prospective or retroactive application of an amendment and to determine the statute of limitations applicable to the exercise of a right.

Analysis: The uncodified language addresses the backlog of 20,000 suspended C-92 applications. The language permits BWC to dismiss without prejudice the suspended applications, but gives the IW two years to refile.

A statutory amendment may be applied prospectively or retroactively. See, *Thorton v. Montville Plastics & Rubber, Inc*., 2009-Ohio-360. Where the Legislature intends for retroactive application of a statute, and the statute affects a substantive right, as opposed to being merely a remedial measure, a litigant may challenge the constitutionality of the retroactive application.

The test for unconstitutional retroactivity requires first a determination as to whether the Legislature expressly intended the statute to apply retroactively. When an express intent for retroactivity is found, the second part of the test for unconstitutional retroactivity requires a determination as to whether the law is substantive or merely remedial. The reason is that while Section 28, Article II of the Ohio Constitution denies to the General Assembly the power to pass retroactive laws, the prohibition "has reference only to laws which create and define substantive rights, and has no reference to remedial legislation." Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, *** and generally come in the form of "rules of practice, courses of procedure, or methods of review." *State ex rel. Kilbane v. Indus. Comm*., 2001-Ohio-34.

Fulton testified that the proposed language would affect IW's substantive rights "since it would be closing claims." This statement is inaccurate. The uncodified language would permit BWC to dismiss the suspended C-92 applications in pending claims. The dismissal of the C-92 application would not close the claim; only the running of the statute of limitations for that claim would close the claim. If there is still time on the statute of limitations, that claim would remain open, but the suspension would indeed remove the toll on the running of the statute.

Even in cases where the statute of limitations would no longer be tolled and the claim is near expiration, the uncodified languages offers what Fulton acknowledged is "overly generous fairness" by providing the IW an additional two years to refile the C-92 application. Fulton stated that "jurisdiction cannot be given where it does not exist. Neither the administrative agencies nor the courts can extend periods fixed by statute." BWC does not dispute this statement, as it would not be BWC or a court establishing the extra two years to refile. Rather, it is the Legislature. Unquestionably, the Legislature has the power to enact statutes of limitations.

Fulton's argument that the proposed language is unconstitutional is premised on the assumption that a reviewing court would deem the dismissal of a C-92 application, as opposed to its suspension, a substantive right, by virtue of its impact on the statute of limitations. BWC believes that the application's dismissal, with a right to refile, is remedial, since it affects the remedy provided and only has an incidental effect on the statute of limitations. See *State ex rel. Romans v. Elder Beerman Stores Corp*., 2003-Ohio-5363.

3. <u>Fulton's Proposed Alternative Language for R.C. 4123.57</u>

<u>Response</u>: Fulton's proposal would suspend the C-92 for two years, and after the passage of two years BWC can dismiss the C-92. This proposal simply continues the current process, retaining suspension as a strategy objective, with the statute of limitations being tolled. After a two year suspension and dismissal, the IW or counsel is allowed time to refile the C-92, starting another two year suspension cycle. Fulton's proposal will perpetuate rather than remedy the 20,000 application backlog.