

House Insurance Committee
March 8, 2017
Philip J. Fulton
House Bill 27

Chairman Brinkman, Vice Chairman Henne, Ranking Member Bocchieri, and members of the House Insurance Committee. My name is Phil Fulton and I am testifying today for the Ohio Association For Justice and the Ohio Association of Claimants' Counsel as an interested party on HB 27, but primarily on the proposal to dismiss permanent partial disability applications, or what we call C-92's, found on lines 807 to 814 of the bill.

Some of you may not know me so I have attached my resume for your perusal. I have spent my entire professional career in the workers' compensation world, representing injured workers since 1980, but I also taught Workers' Compensation Law at Capital Law School for 9 years, and since 1991, I have written the treatise on Ohio Workers' Compensation Law, published by Lexis Nexis.

During the last 20 years or so, I have been quite active in the system from a policy standpoint, both administratively and legislatively, and very much in a bipartisan perspective. This has included legislative activities involving subrogation, extraterritorial injuries, and the 2006 Omnibus bill, and many rules and policy discussions, too numerous to list. I believe the Administrator would agree that there is no bigger supporter for the Ohio Workers' Compensation system than myself.

This is why I am testifying today as I believe that the language found on lines 807 to 814 of the bill may not accomplish the wishes of the BWC and may actually cause unnecessary chaos. Let me explain.

Most importantly, the proposed language is totally incongruent with the present statute. R.C. 4123.53(C) is the statute which the BWC has used to suspend the 20,000 some applications. In State ex rel. Anderson v. State of Ohio, Dept. of State Personnel, 60 Ohio St.2d 106, the Ohio Supreme Court emphasized that R.C. 4123.53(C) does not permit the denial or dismissal of a claim for compensation, but only a suspension of the application.

So we now have 2 conflicting and competing statutes- one only permits a suspension, while the other permits a dismissal of the application. Which one do we use?

So you ask, what is the problem since the injured worker can always just refile. But this is not always true. In some cases, the only thing which keeps the claim open is the C-92 application, as it has tolled, or stopped, the running of the statute of limitations from closing or denying the claim. The new proposal submitted by the BWC specifically states that the dismissed application does not toll the continuing jurisdiction under R.C. 4123.52. According to the Administrator, on average the 20,000 applications have been suspended more than 10 years. The consequence of this language is that probably many, if not all, of the 20,000 claims would be closed or denied by the dismissal of the C-92 application.

As a result, the proposed language will adversely affect injured workers' substantive rights since it will be closing claims. This raises an issue with Article 2, Section 28 of the Ohio Constitution, which prohibits the passage of retroactive laws that affect substantive rights. So you may either have the inability of the BWC to get rid of these applications, because the language cannot be used retroactively, or the BWC could face a class action lawsuit for the unconstitutional dismissal of 20,000 C-92 applications.

Neither obviously is a good choice.

Now I am cognizant of the BWC's effort to resolve what I consider is an irreconcilable conflict with R.C. 4123.52, through uncodified law. Section 741.10 (lines 1581 to 1590) of the bill provides the following language:

Notwithstanding any provision of section 4123.52 of the Revised Code to the contrary, for all claims pending on the effective date of the act, an employee may refile an application for a determination of the percentage of the employee's permanent partial disability within two years after a dismissal of the application...

I truly do applaud this overly generous fairness to injured workers, although I am shocked that my friends from the business community have agreed to this especially considering the contentious debate we had a decade ago in reducing the SOL from 10 years to 5 years. Regardless, jurisdiction cannot be given where it does not exist. Neither the administrative agencies nor the courts can extend periods fixed by statute. *State ex rel. Valve Casting Co. v. Indus. Comm.* (1978), 60 Ohio App. 2d 170, 396 N.E.2d 240. Once that period has expired, the BWC or IC is without authority to make any further finding, award or order. *State ex rel. Fields v. Indus. Comm.* (1937), 132 Ohio St. 449. Furthermore, on its face, it is a retroactive law prohibited by the Constitution.

Even if one feels comfortable with this uncodified language, we will still be bewildered by the competing and conflicting statutes of R.C. 4123.57, with its dismissal language, and R.C. 4123.53 (C), with its suspension language. And it cannot simply be resolved by deleting any language in R.C. 4123.53 (C). This statute has a much broader effect as it concerns every type of examination that can be performed at the request of either the BWC or the IC. It also is a companion statute to R.C. 4123.651, which permits employers to schedule examinations and request a suspension for the failure to appear. Examinations, due process, and suspensions are an integral part of the workers' compensation system. Confusion over this process is unwanted.

Fortunately, there may just be a solution to this dilemma. Rather than having conflicting statutory provisions, why not devise a symbiotic relationship between them. This is how it would work.

1. When an injured worker misses a C-92 examination, the BWC implements its present policy (See IME Procedures, IV (G)(2)(b)). If the injured worker missed the exam, and without good cause, the BWC will suspend the application pursuant to the statutory authority of R.C. 4123.53 (C).

2. Thereafter, the injured worker will be provided a time period to contact the BWC to advise of their willingness to attend the examination and to remove the suspension of the C-92 application.
3. If at the conclusion of this time period, the injured worker has not notified the BWC of their availability to attend an exam, the BWC will issue a 30 day notice advising the employee that if they do not contact the BWC within 30 days of their availability to attend the exam, the BWC will be dismissing the application.

This process is fair, supplies the necessary due process to an injured worker, and will shortly solve the BWC's problem with the pending 20,000 applications. Here is the suggestive statutory language to substitute for lines 807 to 814.

If a C-92 application is suspended pursuant to R.C. 4123.53(C) for failure to attend an exam, an employee has two years thereafter to notify the BWC of his or her availability to attend a medical exam. If at the end of that two year period the employee has not notified the BWC of his or her availability to attend a medical exam, the Bureau may send a notice to the employee's last known address informing him or her that the Bureau will dismiss their application. If the employee fails to contact the Bureau within 30 days, the Bureau may dismiss the employee's application without prejudice. A dismissed application does not toll the continuing jurisdiction of the IC.

This language has the full support of OAJ, OACC and the AFL-CIO.

Mr. Chairman, I am willing to answer any questions regarding this proposal.

PHILIP J. FULTON

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Ohio State University (1977) - B.A.
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Firm Profile - Dedicated to representing victims of workplace injuries and disabilities in matters of workers' compensation and social security disability
AV Rating - Martindale-Hubbell Bar Register of Preeminent Lawyers
U.S. News, Best Law Firms, First Tier Workers' Compensation Law Claimant, 2010-2017

ASSOCIATIONS:

BWC Board of Directors, 2007-2008
Capital University Law School
Adjunct Professor, Workers' Compensation Law, 2005-2014
Board of Counselors, 2005-2014; Chair 2009-2010
Class of 2012- Adjunct Professor of the Year
Philip J. Fulton National Moot Court Team
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Industrial Commission Nominating Counsel, 2010-2017
Larson's National Workers' Compensation Advisory Board, Ohio Member
National Organization of Social Security Claimants Representative
Ohio Association of Claimants' Counsel, Vice-President
Ohio Association for Justice (formerly Ohio Academy of Trial Lawyers)
President 2005-2006
President Elect 2004-2005
Vice-President 2003-2004
Secretary 2002-2003
Treasurer 2001-2002
Member, Executive Committee, 1993-94, 2000-2007
Member, Legislative Committee, 2003-2009
Chairperson, Workers' Compensation Section, 1994-95, 2000-2001
Executive Committee member of Workers' Compensation Section
Co-Legislative Chairperson, Workers' Compensation Section
Strickland-Fisher Agency Review, Regulatory Climate- Bureau of Workers' Compensation and Industrial Commission, Co-chair
Workers' Compensation College, Fellow
Workplace Injury Litigation Group Board Member

AWARDS:

Best Lawyers in America, Woodward/White, Inc. (1995-2017)
Best Lawyers 2012 Columbus- OH Workers' Compensation Law- Claimants Lawyer of the Year
Columbus Monthly, "Top Lawyers, The City's Best and Brightest", Nov., 2003
Columbus Monthly, "Top Lawyers, The List: Columbus Legal Stars", Aug., 1997
Consumer Business Review, Workers' Compensation Attorney for New Millennium, 2000
Ohio Association for Justice Amicus Curiae Award, 2009
Ohio Academy of Trial Lawyers, Workers' Compensation Outstanding Service Award, May, 2005
Ohio Academy of Trial Lawyers, Distinguished Service Award, 4/02
Ohio Academy of Trial Lawyers, Inducted into Workers' Compensation Hall of Fame, 4/25/97
Ohio Academy of Trial Lawyers, Distinguished Service Award, 4/28/94
Ohio Academy of Trial Lawyers, Outstanding Effort on Behalf of Injured Workers & Workers' Compensation Section 4/28/94
Ohio Academy of Trial Lawyers, Outstanding Effort on Behalf of Workers' Compensation Section, 4/28/93
Ohio State Chiropractic Association, President's Award 2001
Ohio Super Lawyers 2004-2017
Ohio Super Lawyers 10-year Ribbon (10 for 10)
Ohio Super Lawyers - Top 100 Ohio Super Lawyers, 2005
Ohio Super Lawyers - Top 50 Columbus Super Lawyers, 2004, Law and Politics Magazine

PUBLICATIONS:

LexisNexis Expert Commentary- When Are Ohio Permanent and Total Disability Benefits No Longer Permanent:
State ex rel. Spohn v. Indus. Comm. 115 Ohio St.3d 329, 2007-Ohio-5027
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- Substantial Aggravation: The More Things Change..., Volume 17, Issue 1
- Isn't It Ironic? How the Courts "Defer" To The Legislature While Continuing To Expand The Judicially Created
Voluntary Abandonment Doctrine, Volume 23, Issue 2
Ohio Workers' Compensation Law, Lexis Nexis, 1991, 1998, 2008, 2011

SPEAKER:

Ohio Association for Justice (formerly Ohio Academy of Trial Lawyers)
Ohio CLE Institute
National Business Institute
Ohio State Chiropractic Association
AFL-CIO
Ohio Self-Insured Association
NFIB

397 N.E.2d 1199 (Ohio 1979), 79-188, State ex rel. Anderson v. State of Ohio, Dept. of State Personnel /**/ div.c1 {text-align: center} /**/

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397 N.E.2d 1199 (Ohio 1979)

60 Ohio St.2d 106

The STATE ex rel. ANDERSON, Appellant,

v.

The STATE of OHIO, DEPT. OF STATE PERSONNEL et al., Appellees.

No. 79-188.

Supreme Court of Ohio.

December 12, 1979

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On March 11, 1972, John J. Anderson, the appellant, injured his back in the course of his employment with the Ohio Youth Commission while breaking up a fight. His workers' compensation claim was allowed for "lumbar discogenic syndrome."

On March 27, 1974, appellant filed an Application for the Determination of the Percentage of Permanent Partial Disability with the Industrial Commission, an appellee herein. He was examined by Dr. R. J. Hansell of the Bureau of Workers' Compensation Medical Section who found that appellant suffered an eight percent permanent partial disability. Dr. Beryl Oser, appellant's treating physician, recommended that he be found 55 to 60 percent permanent partially disabled. On January 14, 1975, the commission awarded appellant 30 percent permanent partial disability.

On March 11, 1975, appellant filed a motion with the Bureau of Workers' Compensation requesting that his claim be allowed for a further condition described as "severe anxiety neurosis." Accompanying the motion was a report from Dr. Saim Giray, a psychiatrist. In his report, Dr. Giray diagnosed a "severe anxiety neurosis" and estimated a 50 percent permanent partial disability. The bureau granted the motion on April 3, 1975, finding that appellant's anxiety neurosis was the direct and proximate result of his injury on March 11, 1972. Pursuant to appellant's motion, the commission, on June 4, 1975, increased appellant's percentage of permanent partial disability to 80 percent.

On November 17, 1975, appellant filed a motion with the commission requesting that he be found permanently and [60 Ohio St.2d 107] totally disabled. He also submitted a report from Dr. Giray who concluded that appellant was permanently and totally disabled "(c)onsidering the severity and fixation degree of this claimant's neurosis along with his continuing physical residuals * * * ." The commission referred appellant to Dr. Thomas T. F. Tsai, also a psychiatrist. He concluded that appellant was "suffering from severe Depressive Anxiety Neurosis with much anger and hostility due to his basic aggressive personality." He recommended that appellant be found permanently and totally disabled if his physical disability was over 20 percent. The commission then referred the claim file to Dr. Lon Cordell, Ph. D., a psychologist on its medical staff, for a peer review report. Dr. Cordell did not personally examine appellant. In his report,

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however, he noted that Dr. Tsai specifically stated that appellant's severe depressive anxiety neurosis is due to his basic aggressive personality, but did not state that the aggressive personality is the result of his industrial injury. Dr. Cordell then noted that an aggressive personality is the result of a "lifetime development." Although not concluding whether appellant is permanently and totally disabled due to his industrial injury, Dr. Cordell recommended that the commission refer appellant to another psychiatrist for further examination. The commission scheduled another examination to be performed by Drs. Parker and Oliver on May 23, 1977. Upon the advice of counsel, appellant refused to submit to another examination.

On August 31, 1977, the commission denied appellant's motion finding from proof of record that he is not permanently and totally disabled. The commission's order stated "(t)he finding and order is based on the medical reports of Dr. R. J. Hansell, Dr. Thos. Tsai, Dr. Lon Cordell, evidence in the file and evidence adduced at the hearing."

Appellant then filed a complaint in mandamus in the Court of Appeals, alleging the order of the commission constitutes an abuse of discretion. The writ was denied.

The cause is now before the court upon an appeal as of right.

John R. Workman, Columbus, for appellant.

William J. Brown, Atty. Gen. and James R. Piercy, Asst. Atty. Gen., for appellees. [60 Ohio St.2d 108]

PER CURIAM

In substance, appellant alleges that the commission abused its discretion in denying his motion for permanent and total disability. It is well established that mandamus will not lie where there is some evidence to support the finding of the Industrial Commission. However, where there is no evidence upon which the commission could have based its factual conclusion an abuse of discretion is presented and mandamus becomes appropriate. *State ex rel. Wallace, v. Indus.*

Comm. (1979), 57 Ohio St.2d 55, 386 N.E.2d 1109.

We agree with appellant that the commission's conclusion that he is not permanently and totally disabled could not be based on any evidence before the commission. Dr. Cordell's report cannot constitute such evidence because he did not conclude whether appellant is permanently and totally disabled. See Wallace, *supra*. His report was merely a recommendation that the commission order another psychiatric examination. In addition, Dr. Giray found appellant to be permanently and totally disabled; Dr. Tsai found that appellant suffered from severe depressive anxiety neurosis and would be permanently and totally disabled if his physical disability were greater than 20 percent; and Dr. Hansell examined appellant before his psychiatric disability was recognized and found permanent partial disability.

Appellees also reach the conclusion that the commission had the discretion to deny appellant's motion for permanent and total disability pursuant to R.C. 4123.53 because he refused to submit to an examination ordered by the commission. The commission's order, however, states that it denied appellant's motion because it found from proof of record that he was not permanently and totally disabled. It does not mention that he failed to submit to an examination. Further, R.C. 4123.53 states that if a claimant refuses to submit to an examination ordered by the commission "his right to have his claim for compensation considered * * * shall be Suspended during the period of such refusal * * * ." (Emphasis added.) Denial of a claim cannot be equated with suspension of consideration of that claim.

Accordingly, the judgment of the Court of Appeals is reversed, and the writ of mandamus allowed ordering the commission [60 Ohio St.2d 109] to vacate its August 31, 1977, order and to proceed with appellant's motion for permanent and total disability.

Judgment reversed and writ allowed.

CELEBREZZE, C. J., and HERBERT, PAUL W. BROWN, SWEENEY and LOCHER, JJ.,
concur.

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WILLIAM B. BROWN, J., dissents.

HOLMES, J., not participating.

HOME	SCHEDULES	LEGISLATION	LEGISLATORS	COMMITTEES	SESSION	BUDGET	LAWS	PUBLICATIONS
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Ohio Constitution [The 1851 Constitution with Amendments to 2015]

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II.28 Retroactive laws

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

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3. Failure to Appear
 - a. BWC shall follow the failure to appear process in the *Independent Medical Exams (IME) and Physician File Reviews (PFR)* policy and procedures when an IW fails to appear for a BWC scheduled exam.
 - b. BWC shall refer the *Motion (C-86)* to the Industrial Commission of Ohio (IC) when an employer files a C-86 requesting claim suspension due to an IW's failure to appear for an employer-scheduled exam.
4. Addendums
 - a. Requests for addendums to a DEP %PP examination report shall be sent to all parties in the claim.
 - b. Addendum reports shall be attached to and processed with original %PP examination reports.
 - c. Additional information is available in the *Independent Medical Exams (IME) and Physician File Reviews (PFR)* policy.

G. Suspending the Application

1. It is the policy of BWC to indefinitely suspend a C-92 application if:
 - a. The IW fails to appear for a BWC scheduled C-92 exam as detailed in the *Independent Medical Exams (IME) and Physician File Reviews (PFR)* policy and procedures; or
 - b. A lump sum settlement (LSS) application is filed as detailed in the *Lump Sum Settlement* policy and procedure.
2. The C-92 application will remain suspended until:
 - a. The IW appears for a C-92 exam and the application can be processed; or
 - b. The IW withdraws the C-92 application; or
 - c. The LSS is approved and the C-92 application can be dismissed; or
 - d. The LSS is denied and field staff moves forward with processing the C-92 application.

H. Tentative Orders for C-92 Applications

1. It is the policy of BWC to:
 - a. Issue a tentative order (TO) to grant, dismiss or suspend a C-92 application, except for initial C-92 applications with conflicting medical evidence, which shall be referred to the IC as provided in Section IV.E.2 above.
 - b. Accept the recommendation of the BWC medical reviewer and issue a TO if there is a conflict in the medical evidence involving a request for an increase in a %PP.
 - c. Dismiss the current application and grant the IW the remaining percentage up to 100% in the claim in which the medical evidence is supporting a whole person impairment (WPI) of 90% or more.
 - d. If the %PP request is granted but earnings information is not available:
 - i. Issue a TO indicating that the %PP has been granted but is not payable until earnings information is received.
 - ii. Issue an order setting wages when the earnings information is received.
 - e. If the %PP request is granted and earning information is available but wages have not been set, issue one TO granting the %PP award and concurrently issue a BWC order setting the wages for the award.
 - f. Hold the TO for a 20 day objection period plus mailing time.
 - g. Waive the objection period if a written waiver signed by the employer and IW is received.
 - h. Refer objections to a TO to the Industrial Commission of Ohio (IC).
2. Parties objecting to the TO may file:

- b. An *Injured Worker Statement for Reimbursement of Travel Expenses (C-60)* form may be included with the IW's notice of exam.
- c. If the IW's notice of exam letter is returned by the post office due to incorrect mailing address, field staff shall attempt to find a new address for the IW by:
 - i. Contacting the IW by phone; and/or
 - ii. Contacting the IW's representative by phone; and/or
 - iii. Contacting the MCO; and/or
 - iv. Contacting a treating provider; and/or
 - v. Researching the Internet and phone books.
- d. If contact with the IW or IW's representative is made after the receipt of returned mail and the exam information can be provided in time for the IW to attend the exam, field staff shall:
 - i. Document in notes that the exam information was provided by phone;
 - ii. Update the IW's address information in the claims processing system; and
 - iii. Resend the notice of exam to the IW at the updated address.
- e. If contact is made with the IW or IW's representative after the receipt of returned mail and there is not sufficient time to provide notice of the exam, field staff shall:
 - i. Cancel the scheduled exam;
 - ii. Update the IW's address in the claims processing system;
 - iii. Complete all tasks associated with the original exam referral;
 - iv. Update exam scheduling information in the claims management system to close out the original exam referral; and
 - iv. Create a new medical exam scheduling case and create case event.
- f. If it is not possible to obtain a new address for the IW, field staff shall:
 - i. Staff with the supervisor;
 - ii. Cancel the scheduled exam; and
 - iii. Proceed with processing the claim as if the IW failed to appear, as outlined in Section IV.G. of these procedures.
- 9. Send the DEP physician the "Physician Notice for Independent Medical Exam" letter using the appropriate exam reason and questions.
 - a. The address that appears on the system generated physician notice of exam may not be the address which is appropriate for mailing correspondence.
 - b. The exam scheduler may need to manually address an envelope to mail the physician notice of the exam.
- 10. Notify the CSS of the date and time of the exam when interpreter services must be scheduled. See the *Interpreters* policy and procedure for additional information.
- 11. See Section V. below for more information regarding specific exam types.

F. BWC exam cancelations

- 1. If it is necessary for BWC to cancel or reschedule an IW's exam, the CSS or CA shall make repeated attempts to contact the IW and/or the IW's representative by phone.
- 2. If the first phone contact is unsuccessful, the CSS shall send written notice of the cancelation and, if appropriate, the reschedule date.

G. Failure to Appear and Requests to Cancel Without Rescheduling

- 1. Field staff shall contact the IW's representative immediately upon notice from the DEP physician that the IW failed to appear for a BWC-scheduled exam. If the IW is not represented, field staff shall contact the IW directly.
- 2. If the initial attempt to contact the IW's representative or IW is not successful:
 - a. For exams other than those for C-92 field staff shall:
 - i. Attempt up to 2 additional phone contacts on 2 different days;
 - ii. If the IW is not represented and there is not a valid phone number for the IW on file, send a certified letter requesting that the IW call the CSS;
 - iii. Allow 3 business days for response to phone messages or letters, or 6 days for a certified letter; and
 - iv. Continue with the failure to appear process if no response is received.
 - b. For C-92 exams field staff shall:
 - v. Allow 3 business days for a response to the original phone message;
 - vi. If a request to reschedule is received, reschedule the exam without suspending the application; or

- vii. If no request to reschedule is received or phone contact cannot be made, continue with the failure to appear process.
3. When speaking with the IW or IW's representative, field staff shall determine if the IW failed to appear for or is requesting to cancel an appointment for good cause based on extraordinary, unforeseen circumstances, which include, but are not limited to:
 - a. Death of an immediate family member;
 - b. Hospitalizations or medical emergencies;
 - c. Auto accidents;
 - d. Notice of the exam was not received due to an incorrect address;
 - e. Proper notice of the exam was not provided to the injured worker; or
 - f. Weather emergencies.
 4. When determining if the IW failed to appear or is requesting that an exam be rescheduled for good cause, field staff shall take into consideration BWC's efforts to schedule within the IW's availability. This consideration shall include, but not be limited to:
 - a. Was the IW notified that we were unable to schedule within his or her availability and why (e.g. we have no physicians with the specialty needed available within the IW's availability)?
 - b. Did the IW provide good reasons for the limited availability (e.g., the IW requested that the exam be scheduled later in the day due to the need to place a child on a bus in the morning or the IW was planning to be away on vacation)?
 5. If it is determined that good cause does exist, benefits shall continue and field staff shall reschedule the exam as soon as possible.
 - a. Generally, field staff shall not require the IW to provide evidence to support the good cause reason for failure to appear, canceling or rescheduling the exam.
 - b. Field staff may require evidence (e.g., obituary, medical reports/bills) if the IW has a history of failure to appear for, canceling or rescheduling this or other exams.
 6. If the IW contacts BWC and requests that an exam be canceled and not rescheduled field staff shall:
 - a. Explain to the IW that failure to appear for a BWC-scheduled exam may result in suspension of an application and/or suspension or denial of benefits as described in Section 8 below; and
 - b. Contact the IW's representative, if one exists, to provide notice that a BWC-scheduled exam has been canceled at the IW's request.
 7. If it is determined that good cause does not exist for the failure to appear, or the IW requests that an exam be canceled and not rescheduled, field staff shall staff the claim with a supervisor. The supervisor shall:
 - a. Verify that Section IV.B. of this procedure was followed when the exam was scheduled;
 - b. Complete the *Failure to Appear for an IME Checklist* found on COR; and
 - c. Contact the IW representative, or IW if the IW does not have a representative, to discuss the suspension or denial of benefits as described in Section 8 below.
 8. If good cause does not exist for the failure to appear, or if the IW requests that an exam be canceled and not rescheduled, field staff shall proceed with processing as follows, with supervisor approval:
 - a. EOD exam: Suspend TT compensation
 - i. Suspend TT compensation beginning with the next scheduled payment period (payment for the current scheduled payment period should be permitted to pay);
 - ii. Send the TT Suspension letter found on the claims management system to the IW and IW representative; and
 - iii. Suspend any subsequent request for compensation other than for Lump Sum Settlement (LSS).
 - iv. Medical benefits are not suspended.
 - v. See the *Failure to Appear in PowerSuite* job aid on COR for additional information.
 - b. Statutory OD exam: Deny the claim by sending an Initial Denial Order if unable to reschedule or the IW fails to appear for the second scheduled exam.

- c. Initial determination exam other than statutory OD: Make an initial determination based on evidence in the claim, which may include a PFR obtained in lieu of the exam.
- d. C-92 exam:
 - i. If the IW fails to appear without rescheduling, suspend the application by issuing a suspension tentative order (TO); or,
 - ii. If the IW asks that the exam be canceled and not rescheduled, consider the application to have been withdrawn and dismiss the application by issuing a dismissal TO.
 - a) Field staff shall make one attempt to contact the IW representative, if there is one, by telephone prior to dismissing the application.
 - b) Field staff shall document the conversation or attempt to contact the IW attorney in notes.
- e. Evaluation of substantial aggravation exam: Send suspension letter to suspend the compensation and/or medical benefits requested based on the substantially aggravated condition.
- f. ADR Exams: Send suspension letter to suspend the request for treatment.
- g. Other requests: Send suspension letter to suspend the request.
- 9. The CSS or CA must complete a new exam scheduling case when an exam must be rescheduled.
- 10. If requested by the IW, field staff shall reschedule the exam as soon as possible, except for initial allowance exams when determination of the claim must be made.
- 11. If the IW appears for the re-scheduled exam, field staff shall:
 - a. EOD exams:
 - i. Send the "TT Reinstatement Letter" from the claims management system; and
 - ii. Pay TT beginning the date the suspension began.
 - b. C-92 exams:
 - i. Issue the appropriate Tentative Order (TO) based on the findings of the exam report; and
 - ii. If the application was suspended, add the following statement in the add text section of the order: "Processing of the application that was suspended due to the injured worker's failure to appear for a previously scheduled exam is reinstated."
 - c. For all other exams: Continue processing the request and issue the appropriate decision.
 - d. Process any other requests that were suspended because of the failure to appear suspension.
- 12. If the issue for which the exam was scheduled becomes moot (e.g., IW returns to work after the exam date, withdraws request, or new medical evidence is received) field staff shall:
 - a. For EOD exams, if the IW returns to work after the exam date and later requests a new period of TT compensation, the suspension shall be lifted for the new period and TT shall be considered.
 - i. The period of TT suspended as a result of the failure to appear shall remain suspended.
 - ii. If the IW files a *Motion* (C-86) requesting payment for the suspended period field staff shall refer the request to the IC.
 - iii. If the IW attends an EOD exam for the new period of TT, field staff shall staff with a BWC attorney to determine if payment should be considered for the previously suspended period.
 - b. For other exams, dismiss the application as appropriate or continue processing based on newly received evidence.
- 13. If the IW withdraws a request and subsequently re-files the same or a similar request, field staff shall consider scheduling an exam for the new request.

H. Requests to Reschedule an Exam

- 1. When contacted by an IW to reschedule an exam (including where the IW has failed to appear for a previously scheduled exam), field staff shall:
 - a. Determine the reason for the request to reschedule the exam;
 - b. Explain to the IW the importance of attending a BWC-scheduled exam and the consequence of not attending an exam;

- c. Verify or obtain the IW's availability to attend the rescheduled exam (i.e., when is the IW not available to attend) and explain that we will reschedule as soon as possible which may result in less than 14 days notice of the exam;
 - d. Contact the examining physician to cancel the scheduled exam if appropriate;
 - e. Complete a new exam scheduling case;
 - f. For other than C-92 exams, reschedule the exam as soon as possible (which may be in less than 14 days if it is possible to provide notice to the IW in advance of the exam); and
 - g. If applicable, suspend processing of the claim or application as described in Section 2 below.
2. Field staff shall process the IW's claim or application as follows:
- a. EOD exam:
 - i. If the reason for rescheduling is for good cause, field staff shall allow TT to continue; or,
 - ii. If the reason for rescheduling is not for good cause, field staff shall:
 - a) Suspend TT compensation beginning with the next scheduled payment period (payment for the current scheduled payment period should be permitted to pay);
 - b) Send the TT Suspension letter found on the claims management system to the IW and IW's representative; and
 - c) Suspend any subsequent request for compensation other than for Lump Sum Settlement (LSS).
 - d) Medical benefits are not suspended.
 - e) See the *Failure to Appear in PowerSuite* job aid on COR for additional information.
 - b. Statutory OD exam: Withhold making a decision regarding the claim until the IW attends the rescheduled exam or fails to attend the rescheduled exam.
 - i. If the IW fails to attend the second exam for reasons other than good cause, the CSS may deny the claim.
 - ii. The CSS shall staff with a supervisor prior to denying the claim.
 - c. Initial determination exam other than statutory OD:
 - i. If the exam can be rescheduled within the 28-day decision timeframe, withhold making a decision in the claim until the IW attends the exam, or
 - ii. If the exam cannot be rescheduled within the 28-day decision timeframe, make the initial determination based on evidence in the claim, which may include a PFR obtained in lieu of the exam.
 - d. C-92 exam: Reschedule the exam without suspending the application.
 - e. Evaluation of substantial aggravation exam:
 - i. If the reason for rescheduling is for good cause, continue processing the claim; or
 - ii. If the reason for rescheduling is not for good cause, send the suspension letter to suspend all activity in the claim.
 - f. Other requests: Staff with supervisor to determine if the request will be suspended or not until the IW attends the exam.
- I. The DEP physician must obtain prior approval for diagnostic testing that may be needed to complete the evaluation of the IW. The CSS or MSS shall:
1. Review the *Medical Evidence for Diagnosis Determination* (MEDD) policy and procedures or other on-line resources to evaluate the appropriateness of diagnostic testing;
 2. Notify the DEP physician of BWC's decision regarding diagnostic testing; and
 3. Document in notes the specific diagnostic testing requested, the decision regarding the request, and the method used to provide notification of the decision to the DEP physician.
- J. IME Reports
1. Field staff shall follow-up with the DEP physician if the IME report is not received within 14 days of the date of exam.
 2. Field staff shall image the IME report into the claim upon receipt, even if an addendum will be requested.
 3. Evaluating the report:
 - a. A MSS shall complete a quality assurance review of all IME reports, except those for C-92 applications.
 - b. For C-92 IME reports: