

TO BE RESCINDED

4125-1-01 **Compensation for wage losses.**

(A) The following definitions shall apply to the adjudication of applications for wage loss compensation:

- (1) "Claimant," for purposes of wage loss compensation, means an employee as defined in division (A) of section 4121.01 and division (A)(1) of section 4123.01 of the Revised Code, who asserts a right, demand, or claim for benefits pursuant to division (B) of section 4123.56 of the Revised Code.
- (2) "Employment" means work performed or to be performed pursuant to a contract of hire between an employee and an employer as those terms are defined in divisions (A) and (B) of section 4123.01 of the Revised Code. "Employment" also includes work performed or to be performed as self-employment.
- (3) "Former position of employment" means the employment engaged in by the claimant, including job duties, hours and rate of pay, at the time of the industrial injury allowed in the claim or on the date of disability, in an occupational disease claim allowed under Chapter 4123. of the Revised Code.
- (4) "Employer of record" means the employer with whom the claimant was employed at the time of the injury.
- (5) "Restriction" means any physical and/or psychiatric limitation caused by the impairments causally related to the allowed conditions in the claim.
- (6) "Physical capabilities" means the claimant's physical and/or psychiatric abilities as diminished solely by the restrictions caused by the impairments resulting from the allowed conditions in the claim. In no case will the claimant's "physical capabilities" be reduced by any impairment of the claimant's physical and/or psychiatric abilities, which arises subsequent to the injury or, in occupational disease claims, the date of disability, unless that impairment results from an allowed condition in the claim.
- (7) "Suitable employment" means work which is within the claimant's physical capabilities, and which may be performed by the claimant subject to all physical, psychiatric, mental, and vocational limitations to which the claimant is subject at the time of the injury which resulted in the allowed conditions in the claim or, in occupational disease claims, on the date of the disability which resulted from the allowed conditions in the claim.
- (8) "Comparably paying work" means suitable employment in which the claimant's

weekly rate of pay is equal to or greater than the average weekly wage received by the claimant in his or her former position of employment.

- (9) "Working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.
- (10) "Non-working wage loss" means the dollar amount of the diminishment in wages sustained by a claimant who has not returned to work because he or she has been unable to find suitable employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restrictions caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.
- (11) "Claimant's weekly wage loss" means his or her working wage loss or non-working wage loss during a calendar week ending at midnight Saturday.
- (12) "Retirement" means voluntary termination of employment by a claimant such that the claimant is completely removed from the active work force.
- (13) "Voluntary separation from employment" means separation from employment by the claimant when:
 - (a) There exists no valid medical reason for the separation;
 - (b) The separation is not precipitated by a violation(s) of local, state, or federal law by the employer which has a direct, substantial, and adverse impact on the claimant in his or her employment;
 - (c) The termination is not the result of the claimant's retirement;
 - (d) The separation is not precipitated by a breach of a collective bargaining agreement as a result of action of the employer; and
 - (e) The separation is not precipitated by a breach of the contract of hire, as defined in section 4123.01 of the Revised Code, as a result of actions of the employer or conduct of the employer that a reasonable person

should have known would be interpreted as a breach of the contract of hire.

- (14) "Discharge for just cause" means:
- (a) Termination of employment by the employer generated by the claimant's violation of a work rule or policy which clearly defined the prohibited conduct, had previously been identified by the employer as a dischargeable offense, and was known or should have been known to the employee; or
 - (b) In instances where there is no work rule or policy, "discharge for just cause" shall mean discharge as a direct result of conduct by the claimant that a reasonable person should have known would result in a discharge from employment.
- (15) "Adjudicator" means the administrator of the bureau of workers' compensation, a district hearing officer, a staff hearing officer, or the industrial commission. However, in the case of a wage loss application filed with a self-insuring employer, the self-insuring employer shall make the initial determination as provided in paragraph (G) of this rule.
- (16) "Present earnings" means the claimant's actual weekly earnings which are generated by gainful employment unless the claimant has substantial variations in earnings. Where the claimant has substantial variations in earnings, the adjudicator shall apportion the earnings over such period of time that reasonably reflects the claimant's efforts to earn such an amount. Earnings generated from commission sales, bonuses, gratuities, and all other forms of compensation for personal services customarily received by a claimant in the course of his or her employment and accounted for by the claimant to his or her employer will be included in present earnings for the purposes of computing the wage loss award. In instances where sales commission, bonuses, gratuities, or other compensation are not paid on a weekly or biweekly basis, their receipt will be apportioned prospectively over the number of weeks it is determined were required to initiate and consummate the sale or earn the bonus, gratuity, or other compensation. In the case of a claimant engaged in self-employment, "present earnings" means gross income minus expenses. For purposes of calculating present earnings, there shall be a rebuttable presumption that a claimant engaged in self-employment has a gross income of at least one hundred dollars per week or such other compensation that the bureau of workers' compensation shall impute to self-employed persons for purposes of determining premium payments. Income derived from self-employment shall be reported on at least a quarterly basis.

- (17) "Principal income source employment" means any employment from which the claimant has derived twenty-five per cent or more of his or her individual gross income for any period of six months or more, during the past ten years.
 - (18) "Statewide average weekly wage" has the same meaning as set forth in division (C) of section 4123.62 of the Revised Code.
 - (19) "Wages" means the amount upon which the claimant's average weekly wage is calculated pursuant to section 4123.61 of the Revised Code.
- (B) A claimant who has a working wage loss or a non-working wage loss shall receive compensation at sixty-six and two thirds per cent of the claimant's weekly wage loss, not to exceed the statewide average weekly wage, for no longer than the time period authorized by division (B) of section 4123.56 of the Revised Code.
- (C) Applications for compensation for wage losses shall be filed with the bureau of workers' compensation on forms provided by the bureau. In cases involving self-insured employers, a copy of the application shall be filed with the self-insured employer. Failure to file the request on the appropriate form shall not result in the dismissal of said request, but shall result in the suspension of the application until the appropriate form is filed.
- (1) The claimant must certify that all the information that is provided in the application is true and accurate to the best of his or her knowledge and further certify that he or she served a copy of the application, with copies of supporting documents, on the employer of record.
 - (2) A medical report shall accompany the application. The report shall contain:
 - (a) A list of all restrictions;
 - (b) An opinion on whether the restrictions are permanent or temporary;
 - (c) When the restrictions are temporary, an opinion as to the expected duration of the restrictions;
 - (d) The date of the last medical examination;
 - (e) The date of the report;

- (f) The name of the physician who authored the report; and
 - (g) The physician's signature.
- (3) Supplemental medical reports regarding the ongoing status of the medical restrictions causally related to the allowed conditions in the claim must be submitted to the bureau of workers' compensation or the self-insured employer in self-insured claims once during every ninety day period after the initial application, if the restrictions are temporary, or once during every one hundred eighty day period after the initial application, if the medical restrictions are permanent. The supplemental report shall comply with paragraph (C)(2) of this rule.
- (4) The application shall contain an employment history. The employment history shall include a reasonably detailed description of each position which was principal income source employment held by the claimant.
- (5) All claimants seeking or receiving working or non-working wage loss payments shall supplement their wage loss application with wage loss statements, describing the search for suitable employment, as provided herein. The claimant's failure to submit wage loss statements in accordance with this rule shall not result in the dismissal of the wage loss application, but shall result in the suspension of wage loss payments until the wage loss statements are submitted in accordance with this rule.
- (a) A claimant seeking or receiving wage loss compensation shall complete a wage loss statement(s) for every week during which wage loss compensation is sought.
 - (b) A claimant seeking wage loss compensation shall submit the completed wage loss statements with the wage loss application and/or any subsequent request for wage loss compensation in the same claim.
 - (c) A claimant who receives wage loss compensation for periods after the filing of the wage loss application and/or any subsequent request for wage loss compensation in the same claim shall submit the wage loss statements completed pursuant to paragraphs (C)(5)(a), (C)(5)(d) and (C)(5)(e) of this rule every four weeks to the bureau of worker's compensation or the self-insured employer during the period when wage loss compensation is received.
 - (d) Wage loss statements shall include the address of each employer

contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the method of contact, and the result of the contact.

(e) Wage loss statements shall be submitted on forms provided by the bureau of workers' compensation.

(D) The claimant is solely responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the claimant meets this burden, wage loss compensation shall be denied. A party who asserts, as a defense to the payment of wage loss compensation, that the claimant has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion. However, any party asserting other defenses to the payment of wage loss compensation, through motion, appeal, or otherwise is solely responsible for and bears the burden of producing evidence to support those defenses. If there is insufficient evidence to support a defense to the payment of wage loss compensation, that defense shall not be used as a grounds to deny such compensation. In no case shall this rule be construed as placing on the industrial commission any burden to produce evidence.

In considering a claimant's eligibility for compensation for wage loss, the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:

(1) The claimant's search for suitable employment.

(a) As a prerequisite to receiving wage loss compensation for any period during which such compensation is requested, the claimant shall demonstrate that he or she has:

(i) Complied with paragraph (C)(2) of this rule and, if applicable, with paragraph (C)(3) of this rule;

(ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested. The claimant shall also seek suitable employment with the employer of record where there has been an interruption in wage loss compensation benefits for a period of three months or more; and

(iii) Registered with the ohio bureau of employment services and begun or continued a job search if no suitable employment is available

with the employer of record.

- (b) A claimant may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the claimant's job search, he or she is unable to find such employment, the claimant shall expand his or her job search to include entry level and/or unskilled employment opportunities.
- (c) A good faith effort to search for suitable employment which is comparably paying work is required of those seeking non-working wage loss and of those seeking working-wage loss who have not returned to suitable employment which is comparably paying work, except for those claimants who are receiving public relief and are defined as work relief employees in Chapter 4127. of the Revised Code. A good faith effort necessitates the claimant's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. In evaluating whether the claimant has made a good faith effort, attention will be given to the evidence regarding all relevant factors including, but not limited to:
 - (i) The claimant's skills, prior employment history, and educational background;
 - (ii) The number, quality (e.g., in-person, telephone, mail, with resume), and regularity of contacts made by the claimant with prospective employers, public and private employment services;
 - (iii) Except as provided in paragraph (D)(1)(c)(v) of this rule, for a claimant seeking any amount of non-working wage loss, the amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that a claimant did not search for work for as many hours as were worked in the former position of employment shall not necessarily be dispositive;
 - (iv) Except as provided in paragraph (D)(1)(c)(v) of this rule, for a claimant seeking any amount of working wage loss, the amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought as well as the

number of hours spent working; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that the sum of the hours the claimant spent searching for work and working is not as many hours as were worked in the former position of employment shall not necessarily be dispositive;

- (v) Where the claimant, in the former position of employment, worked a variable number of hours per week, the adjudicator shall determine, with respect to the former position of employment, for the period of fifty-two calendar weeks preceding the injury, or in occupational disease cases, the date of disability, the minimum, maximum, and average number of hours per week the claimant worked. If the claimant worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the claimant actually worked. The adjudicator shall consider these determinations in relation to:
 - (a) The amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought as well as the number of hours spent working, for a claimant seeking any amount of working wage loss; and
 - (b) The amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment, for a claimant seeking non-working wage loss; while the adjudicator shall consider the determinations arrived at pursuant to paragraph (D)(1)(c)(v) of this rule in reaching a conclusion as to whether there was a good faith job search, no number of hours per week, in and of itself, shall necessarily be dispositive.
- (vi) Any refusal by the claimant to accept assistance from the bureau of workers' compensation in finding employment;
- (vii) Any refusal by the claimant to accept the assistance, where such assistance is rendered free of charge to the claimant, of any public or private employment agency or the assistance of the employer of record in finding employment;
- (viii) Labor market conditions including, but not limited to, the numbers and types of employers located in the geographical area surrounding the claimant's place of residence;

- (ix) The claimant's physical capabilities;
 - (x) Any recent activity on the part of the claimant to change his or her place of residence and the impact such a change, if made, would have on the reasonable probability of success in the search for employment;
 - (xi) The claimant's economic status as it impacts on his or her ability to search for employment including, but not limited to, such things as access to public and private transportation and telephone service and other means of communications;
 - (xii) The self-employed claimant's documentation of efforts undertaken on a weekly basis to produce self-employment income;
 - (xiii) Any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings; and
 - (xiv) Whether the claimant restricts his or her search to employment that would require him or her to work fewer hours per week than he or she worked in the former position of employment. However, the claimant shall not be required to seek employment which would require him or her to work a greater number of hours per week than he or she worked in the former position of employment; and
 - (xv) Whether, as a result of the restrictions arising from the allowed conditions in the claim, the claimant is enrolled in a rehabilitation program with the bureau of vocational rehabilitation whereby the claimant attends an educational institution approved by the bureau of vocational rehabilitation.
- (2) The claimant's failure to accept a good faith offer of suitable employment.
- (a) Offers of employment by the employer of record will not be given consideration by the adjudicator unless they are made in writing and contain a reasonable description of the job duties, hours, and rate of pay.
 - (b) The adjudicator shall consider employment descriptions of any jobs

offered to the claimant by employers other than the employer of record.

- (c) Although the claimant's refusal to accept a good faith offer of suitable employment may be considered by the adjudicator as a reason for denying, reducing, or eliminating wage loss compensation, the claimant shall not be required, as a precondition to the receipt of wage loss compensation, to accept a job offer which would require him or her to work a greater number of hours per week than the former position of employment except as provided in paragraph (D)(2)(c)(i) of this rule.
 - (i) Where the claimant, in the former position of employment, worked a variable number of hours per week and the claimant is offered a job which would require the claimant to work a variable number of hours per week, the offer of variable hour employment shall not be considered an offer of unsuitable employment solely because the minimum or maximum number of hours per week to be worked by the claimant in the position offered is insubstantially greater or less than the minimum or maximum number of hours per week which the claimant worked in the former position of employment. In determining whether, pursuant to this paragraph, an offer of employment is suitable, the adjudicator shall:
 - (a) Determine, for the period of fifty-two calendar weeks preceding the date of the industrial injury or, in occupational disease cases, the date of disability, the maximum, minimum, and average number of hours per week which the claimant worked in the former position of employment. If the claimant worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the claimant actually worked;
 - (b) Compare the maximum and minimum number of hours per week which the claimant could be required to work in the position of employment offered to the claimant to the determinations made in paragraph (D)(2)(c)(i)(a) of this rule to assist in determining whether the offer is one of suitable employment.
- (3) Other actions of the claimant that constitute voluntarily limiting income from employment including, but not limited to, discharges for just cause which result in a wage loss not causally related to the allowed conditions in the claim, retirement, and voluntary separation from employment.
 - (a) A claimant's discharge for just cause from any position of employment

shall not be considered by the adjudicator in determining a claim for wage loss compensation where the medical evidence shows that, as a result of the restrictions, the claimant is unable to return to the position of employment from which he or she was discharged.

- (b) The claimant's failure to seek suitable employment which would require him or her to work a greater number of hours than the former position of employment shall not be considered a voluntary limitation on income from employment.
 - (c) The claimant's failure to work a greater number of hours per week than he or she worked in his or her former position of employment shall not be considered a voluntary limitation on income from employment.
 - (d) If the claimant voluntarily works less than the number of hours per week he or she worked in the former position of employment, and this results in a wage loss, the claimant shall be considered to have voluntarily limited his present earnings, and the claimant's wage loss compensation shall be reduced pursuant to paragraph (F)(3) of this rule.
- (4) The claimant shall not be entitled to wage loss if the claimant has received a full release to return to his or her former position of employment.
- (E) The industrial commission and its hearing officers in issuing orders granting or denying compensation for wage losses shall comply with the requirements of division (B) of section 4121.36 of the Revised Code. To comply with division (B)(2) of said section, the commission and/or hearing officer shall recite in those orders that they have considered and weighed the evidence, as required by paragraph (D) of this rule.
- (1) In the event of a denial of compensation for a week or period of weeks for which an application has been made, the commission or hearing officer shall recite in the order that the claimant has not met his or her burden of proving compliance with this rule for that week or period of weeks and shall state the evidence relied upon to support the denial of wage loss for that week or period of weeks.
 - (2) If the commission or hearing officer grants any amount of wage loss compensation for a week or period of weeks for which an application has been made, the commission or hearing officer must find and recite in the order that:

- (a) The claimant's present earnings are less than the claimant's wages;
- (b) The difference between the claimant's wages and present earnings is the result of a medical impairment that is causally related to an industrial injury or an occupational disease allowed in a claim which was filed under Chapter 4123. of the Revised Code and in which wage loss is requested;
- (c) The claimant has made a good faith effort to search for suitable employment which is comparably paying work but has not returned to suitable employment which is comparably paying work; and
- (d) The claimant has otherwise complied with the requirements of this rule.

(F) Computation of wage loss

- (1) Unless otherwise provided in paragraph (H)(3) of this rule, diminishment of wages shall be calculated based on the:
 - (a) Claimant's average weekly wage at the time of the injury or at the time of the disability due to occupational disease in accordance with the provisions of section 4123.61 of the Revised Code; and
 - (b) The claimant's present earnings.
- (2) If a claimant applies for wage loss compensation for a period during which he received amounts from a wage replacement program fully funded by the employer, such amounts shall be considered as present earnings for purposes of wage loss calculation.
- (3)
 - (a) The wage loss compensation to be paid to a claimant who voluntarily fails to accept a good faith offer of suitable employment or of suitable employment which is comparably paying work shall be calculated as sixty-six and two-thirds per cent of the difference between the claimant's average weekly wage in the former position of employment and the weekly wage the claimant would have earned in the employment he or she refused to accept.

- (b) If the adjudicator finds that the claimant has returned to employment but has voluntarily limited the number of hours which he is working, and that the claimant is nonetheless entitled to wage loss compensation, the adjudicator, for each week of wage loss compensation requested by the claimant, shall determine: the number of hours worked by the claimant in the employment position to which he has returned, and the hourly wage earned by the claimant in the employment position to which he has returned. In such a case, the adjudicator shall order wage loss compensation to be paid at a rate of sixty-six and two-thirds per cent of the difference between:
- (i) The weekly wage the claimant would have earned in the former position of employment if the claimant had worked only the number of hours the claimant actually worked each week in the employment position to which the claimant returned; and
 - (ii) The weekly amount the claimant actually earned in the employment position to which he returned.
 - (iii) In situations where the adjudicator finds that the claimant has returned to employment and has voluntarily limited the number of hours which he is working, and that the claimant is nonetheless entitled to wage loss compensation, but that paragraphs (F)(3)(b)(i) and (F)(3)(b)(ii) of this rule are not directly applicable, the adjudicator shall have the discretion to establish a number of hours to be utilized in the calculation of wage loss compensation that is not unreasonable, unconscionable or arbitrary.
- (4) A claimant's wage loss compensation shall not be reduced by any amounts the claimant receives from unemployment compensation, social security disability benefits, or public or private retirement plans. The wage loss compensation of a claimant who is receiving public relief shall not be reduced by any monies received by the claimant from work relief.
- (5) Regardless of whether a claimant is otherwise qualified to receive wage loss benefits during any period of time, a claimant shall not be awarded wage loss benefits for any period before the date on which he or she complies with paragraph (D)(1)(a) of this rule. Wage loss benefits may only be awarded for periods after the claimant's compliance with said paragraph.
- (G) Where the employer of record is a self-insuring employer it shall:

- (1) Adjudicate the initial application for wage loss compensation and inform the claimant of its decision no later than thirty days after a request for wage loss compensation is received;
- (2) Adjudicate all issues which arise with respect to the claimant's ongoing entitlement to wage loss compensation and inform the claimant of its decision in no later than thirty days after the issue arises; and
- (3) Ensure that a copy of any decision described in paragraphs (G)(1) and (G)(2) of this rule is filed with either the bureau of worker's compensation or the industrial commission for placement in the claim file.

(H) Prospective application

- (1) This rule shall apply to the adjudication of entitlement to wage loss compensation for period(s) on or after the effective date of this rule, unless otherwise provided in paragraph (H)(3) of this rule.
- (2) This rule shall not apply to the adjudication of entitlement to wage loss compensation for any period(s) before the effective date of this rule.
- (3) Notwithstanding paragraph (H)(1) of this rule, if a claimant files an application for wage loss compensation in a claim in which the injury occurred or the date of disability arose before the effective date of this rule, the wage loss compensation paid shall be calculated based on the greater of the full weekly wage or the average weekly wage.

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CERTIFIED ELECTRONICALLY

Certification

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Date

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