ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. Estate of Dean E. Sziraki Relator, vs. Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio, Respondents.	CASE NO. 2011-0799 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case. No. 10AP-267

RELATOR ESTATE OF DEAN E. SZIRAKI'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

Kurt M. Young (#0061917)
Law Offices of Kurt M. Young, LLC
1217 Jefferson Ave.
Toledo, OH 43604
(419) 244-7885
(419) 244-7886 - fax
kmy@kmylaw.com

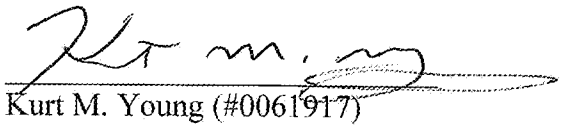
COUNSEL FOR RELATOR, ESTATE OF DEAN E. SZIRAKI

Patsy A. Thomas (0063312)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-6730
614-728-9535 fax

COUNSEL FOR RESPONDENTS,
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, AND
INDUSTRIAL COMMISSION OF OHIO

Now Comes Relator, the Estate of Dean Sziraki, under Supreme Court Rule 18.02(B)(4), and moves this Court to reconsider its decision on the merits denying Relator's writ of mandamus to compel the Respondents to award the schedule loss benefits under R.C. 4123.57(B), based on the lack of an application. Relator's requests for a writ should be granted because it became the Respondents clear legal duty to make the award upon their knowledge that Dean was incompetent and incapable of requesting the schedule loss award under his own volition. Additionally, the decision as it stands now ignores years of stare decisis; overturns years of case law; rewrites multiple Revised Code sections, Administrative Code sections, and Bureau of Workers' Compensation policies; and violates the Equal Protection Clauses of the United States Constitution and Ohio Constitution. Therefore, Relator humbly requests that this Court reconsider its decision based on the following memorandum in support and grant Relator's writ of mandamus.

Respectfully Submitted,



Kurt M. Young (#0061917)
COUNSEL FOR THE RELATOR,
ESTATE OF DEAN E. SZIRAKI

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

The Court's recent decision in *State ex rel. Estate of Sziraki v. Admr. of Bur. of Workers' Comp.*, Slip Opinion No. 2013-Ohio 4007, incorrectly denied Relator's writ of mandamus. In doing so, the Court incorrectly held that an application is needed to trigger a schedule loss award where no application had been needed before this to actually trigger the award. The Court incorrectly grafted the application and the application process for percentage of permanent partial disability awards under R.C. 4123.57(A) onto schedule loss benefits under R.C. 4123.57(B).

In addition, without specifically stating the cases and laws overturned, the Court has fundamentally changed the intent and meaning of scheduled loss benefits by redefining this benefit from being a damages award, payable from the moment of the loss to loss of earning capacity ceasing upon the injured worker's death. Thus, the Court's decision will also affect death benefit awards.

If unmodified, the *Sziraki* opinion radically alters the entire scheduled loss benefit and death benefit processes while fundamentally changing the clear legislative intent behind Ohio Workers' Compensation system. For the reasons explained below, the Court should reconsider its decision and grant Relator's writ of mandamus.

DISCUSSION

This Court has misapplied the application and the process used for percentage of permanent partial disability awards under R.C. 4123.57(A) and grafted it onto schedule loss benefits under R.C. 4123.57(B). While this Court notes that an application is repeatedly referenced in R.C. 4123.57 and that "it appears that R.C. 4123.57 clearly contemplates an

application as the act that begins the process," this application and its process are actually for the determination of percentage of permanent partial disability awards under R.C. 4123.57(A). *State ex rel. Estate of Sziraki v. Admr. of Bur. of Workers' Comp.*, Slip Opinion No. 2013-Ohio 4007 ¶ 24-25. Earlier in the same quoted sentence that states "the employee may file an application," the statute references the twenty-six week waiting period before the application can be made to the Bureau of Workers Compensation (Bureau). R.C. 4123.57. However, this waiting period has never been applied to schedule loss benefits because they are payable from the moment of the loss. *State ex rel. Young, v. Indus. Comm.*, 139 Ohio St. 601, 41 N.E.2d 570 (1942), paragraph two of the syllabus. In addition, the same sentence also states that is for the "determination of the *percentage* of the employee's *permanent partial disability*." (Emphasis added.) R.C. 4123.57. Under R.C. 4123.57(A), it states that "[t]he district hearing officer, upon the application, show determine the *percentage* of the employee's *permanent partial disability*." (Emphasis added.) R.C. 4123.57(A). There is a clear legislative intent that the preamble to R.C. 4123.57 is to be used with a determination of percentage of permanent partial disability under R.C. 4123.57(A) and not section (B). Furthermore, R.C. 4123.57(A) goes on to specifically exempt the district hearing officer from the determination of schedule loss benefits under R.C. 4123.57(B). *Id.*

The Ohio legislature contemplated two different process for awarding Permanent Partial Disability and Scheduled Loss

In the third paragraph of the preamble to R.C. 4123.57, the process is laid out for what happens when an application, which is a C-92 that is specific for percentage of permanent partial disability (PPD) awards, is filed to determine the percentage of the injured worker's permanent partial disability. First the injured worker files the application with no medical evidence. R.C. 4123.57. Next, the Bureau sends the injured worker for medical examination. *Id.* After the

determination of the percentage by the Bureau medical section, the parties are allowed to file an objection within 20 days of this order and submit their own medical evidence. *Id.*

However the process for a scheduled loss award under R.C. 4123.57(B) is completely different. The injured worker cannot file any application for the award because one does not exist nor has one ever existed for this benefit. If the benefit is not granted based on information in the claim file, like the first report of an injury, by the Bureau or self-insured employer, then the only recourse is for an injured worker to file a C–86 motion. Ohio Bureau of Worker's Compensation, Permanent Partial (PP)/Scheduled Loss Compensation, http://www.ohiobwc.com/basics/InfoStation/InfoStationContent.asp?Item=1.2.3.11 ("temporary disabled" when access was attempted on Sept. 26, 2013), *see also* Ohio Adm.Code 4123-3-15(C)(1). A C-86 motion, which is a general motion to request any benefit, additional allowance, etc., requires that the motion state what is requested along with the evidence to support the motion. Then the Bureau or self-insured employer will determine the payment of the benefit based on the schedule. Ohio Adm.Code 4123-3-15(C)(2). If a party objects to this decision, that party's only recourse is to appeal the order pursuant to section 4123.511 as required under R.C. 4123.57(F), which is a 14 day appeal period. R.C. 4123.57(F); Ohio Adm.Code 4123-3-15(C)(2); *see* R.C. 4123.511(B)(1).

The clear legislative intent of R.C. 4123.57 is that the legislature instituted one process for the determination of PPD, which is encompassed under the preamble and R.C. 4123.57(A), and another process for scheduled loss benefits. While the legislature never defined a specific process for scheduled loss in the Revised Code, the Bureau has effected its duty to administer the workers' compensation fund, as directed under the Ohio Constitution Article II, Section 35, by granting scheduled loss benefits based upon information in the claim file and through the general

C-86 motion. This Court in *Sziraki* grafted the application and process used for PPD onto R.C. 4123.57(B) for scheduled loss benefits. *See Sziraki*, Slip Opinion No. 2013-Ohio 4007, at ¶ 24-25.

If this Court lets *Sziraki* stand, it will fundamentally rewrite R.C. 4123.57. The effect of this decision will be that the Bureau must now apply the 26 week waiting period after the last payment from R.C. 4123.56 to all scheduled loss benefits, allow injured workers to file C-86 motions with no evidence to support the motion because the Bureau must now send the injured worker for medical exam, and it completely eliminates R.C. 4123.57(F) because the appeal process under R.C. 4123.511 no longer applies because now it must be an objection that is filed within 20 days. The 26 week waiting period will push back the ability for an injured worker to receive a schedule loss benefit for years, possibly 5 to 10 years. For someone who has lost the use of a finger, a hand, an arm, a toe, a foot, a leg, sight, hearing, or facial disfigurement being forced to wait years for compensation is unconscionable. Because the C-86 motion for scheduled loss no longer needs medical evidence to support the loss, the Bureau must now expend money to conduct medical examinations for **all** scheduled loss benefits; even for ones it can clearly determine from the injured worker's claim file. By eliminating R.C. 4123.57(F), the injured worker will not have the protections the de novo review of R.C. 4123.511. Now the injured worker only has the PPD process of objection and reconsideration of the Bureau's decision regarding their scheduled loss benefit.

This Court's initial decision incorrectly bifurcated the word "may"

In construing the word "may" to mean a "shall" or "must" for the injured worker and "may" for the Bureau and self-insured employer, this Court has bifurcated the word "may." In Ohio, the rule of statutory construction is that "the word 'may' shall be construed as permissive

and the word 'shall' be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive the construction other than their ordinary usage." *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus. In fact, the Supreme Court of the United States has stated that "when the same Rule uses both in the 'may' and 'shall,' the normal inference is that each is used in its usual sense – the one act being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485, 91 L.Ed. 436, 67 S.Ct. 428 (1947), citing *United States v. Thoman*, 156 U.S. 353, 360, 15 S.Ct. 378, 39 L.Ed. 450 (1895).

Here, the Court has ignored its own rule of statutory construction because it based the requirement of an application on changing "may" to a "shall" or "must" for the injured worker on the mere appearance of the requirement of an application rather than a clear and unequivocal legislative intent for an application. Even in the language cited by this Court from R.C. 4123.57, the legislature used both "may" and "shall" making it quite clear that the legislature knew the difference between their intent and meaning. Thus, the "may" in R.C. 4123.57 is permissive and cannot be used to mandate an application or new requirements onto the injured worker that the legislature did not intend.

If *Sziraki* stands, this Court will have bifurcated the word "may" to mean a "shall" or "must" for the injured worker to file an application but leaving it as a "may" for the Bureau or self-insured employer to provide the benefit if they so choose. The effect allows the Bureau to never to sua sponte grant an incompetent injured worker like Dean Sziraki or someone similarly situated the benefits of the Ohio Workers' Compensation system because he is incapable of filing an application or any form required by the Bureau.[1]

[1] Interestingly, during the pendency of this case the Bureau modified its Scheduled Loss Policy that now calls for an application. Bureau of Workers' Compensation, *Scheduled Loss Compensation, Policy #CP-19-01*,

This decision will allow the Bureau to completely obliterate the purpose of the Ohio Constitution, Article II, Section 35, which states that it is "[f]or the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment." Ohio Constitution, Article II, Section 35. Thus, this Court's decision will allow the Bureau to completely ignore and refuse to assist Ohio's most severely injured workers, who are incompetent like Dean Sziraki.

The *Sziraki* decision will stand for the proposition that "may" is to be a "shall" or "must" from now on. Therefore, the Bureau will no longer pay scheduled loss without an application no matter how serious the injury is.

This Court's initial decision creates a mandatory application requirement and overturns prior years of case law, the Ohio Administrative Code, and Bureau policies

In *Young*, this Court answered the question, "When does an allowance for loss . . . began to run?" *State ex rel. Young, v. Indus. Comm.*, 139 Ohio St. 601, 606, 41 N.E.2d 570 (1942). The *Young* Court held that an injured worker's entitled compensation for loss begins to run immediately upon suffering the loss. *Young*, paragraph two of the syllabus. This Court also held that scheduled loss compensation is allowed to be in addition to temporary total disability (TTD). *Young*, paragraph one of the syllabus, *see also State ex rel. Bohan v. Indus. Comm.*, 146 Ohio St. 618, 620, 67 N.E.2d 536 (1946). These holdings allow an injured worker to receive compensation under both R.C. 4123.56 and 4123.57(B).

If fact, these decisions state that benefits for scheduled loss begin accruing at the moment of loss. Scheduled loss benefits have nothing to do with compensating the injured for earning

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https://www.bwc.ohio.gov/basics/PolicyLibrary/FileShell.aspx?file=%2fPolicyLibraryContent%2fClaims+Policy%2fScheduled+Loss+Compensation.htm (accessed Sept. 26, 2013). However, this contradicts the rule the Bureau adopted to cover Scheduled Loss. *See* Ohio Adm .Code 4123-3-15(C).

capacity. *State ex rel. Dudley v. Indus. Comm.*, 135 Ohio St. 121, 125 19 N.E.2d 895 (1939). In *Dudley*, the Court stated an injured worker could lose sight in one eye and not even miss one day of work. *Id.* This makes scheduled loss benefits akin to a damages award. The legislature wanted injured workers to get these benefits because it wanted the injured worker for the dmage of suffering these specific loss and loss of use.

In the *Sziraki* decision, without directly stating it, this Court has overruled this case law because this Court now mandates that the Bureau follow the application process for PPD, which it has just grafted onto the scheduled loss process. *See Sziraki*, Slip Opinion No. 2013-Ohio 4007, at ¶ 24-25. This means that through this decision this Court is fundamentally altering when the scheduled loss benefit begins to accrue from the moment of loss to the date of application. If Dean had somehow came out of his vegetative state a couple months before his death and ask the Bureau through a C-86 motion for scheduled loss benefits, the Bureau would have paid him the accruals from the moment of his loss back in 1991 in one lump sum. But since Dean had no one with the authority to act until after his death, the Bureau and Industrial Commission (Commission) limited his scheduled loss benefits to the two year look back under R.C. 4123.52.

It is interestingly to note that if Dean had miraculously been able to request the scheduled loss before his death, the Bureau would have paid the entire award from 1991 the date of his loss to his death. But because Dean was incompetent and incapable of making this request during his life and no one had the authority to act on his behalf until after his death, the Bureau was able to limit the amount of benefits he would receive. Another interesting fact is the Bureau Staff Attorney Michael Sourek made it blatantly obvious that the Bureau knew Dean was incompetent and that he was entitled to other benefits by the letter Mr. Sourek sent to Dean's mother. (R. at 73-74.) In the letter, Mr. Sourek made an ultimatum that if she did not pursue guardianship of

Dean's estate then the Bureau would get the guardianship. (*Id.*) Thus, the Bureau's attorney made representations to a third party and assumed a duty and then never followed through.

In fact, this Court has always stood against this agencies using delay to avoid the payment of benefits. *See State ex rel. Johnston v. Ohio Bur. of Workers' Comp.*, 92 Ohio St. 3d 463, 751 N.E.2d 974 (2001). In *Johnston*, this Court nullified a statute "where the Administrator of Workers' Compensation fail[ed] to process an application . . . within a reasonable period of time." *Id.* at 475. The Court seriously questioned why a settlement would take eight months for the Administrator to process an application. *Id.*

Here, the Bureau and Commission sat on a statutory permanent total disability application for Dean for over four years, from 1998 to 2002, before awarding it. (R. at 60-61.) Knowing that Dean was due money from this award that the Bureau could not pay or that Dean was entitled to other compensation but because Dean lacked an authorized representative Dean could do nothing to help, the Bureau about four years later in 2006 had its Staff Attorney Michael Sourek finally gave an ultimatum to Dean's mother to get a guardian for Dean estate or the Bureau would take on this duty. (R. at 73-74.) However, the Bureau did nothing to get a guardian of the estate for Dean, and Dean died in 2007 well before the next four year period had run where the Bureau would have further interaction on Dean's claim. (R. at 75.) Thus, at the very least Dean suffered over 8 years of ineffective processing by the Bureau in which nothing was resolved before he died.

In addition, the Court's initial decision here now mandates that all future scheduled loss benefits do not begin to run immediately upon the loss but rather from the point of application. This will allow continuing jurisdiction under R.C. 4123.52 to limit all scheduled loss benefits to the two-year look back from the date of application. Now, the Bureau will be able to prevent

injured workers from applying for scheduled loss benefits potentially for years, and then when injured worker can finally apply for scheduled loss they will be limited to the two-year look back. In addition, this decision means compensation under R.C. 4123.56 and 4123.57(B) are no longer allowed to be paid at the same time. Therefore, this is a fundamental change in how Ohio Workers' Compensation has handled scheduled loss compensation for the last 70 years and will work to deny benefits to the severely injured workers.

In October 2010, the Ohio Administrative Code 4123-3-15(C) became effective and stated that a scheduled loss benefits can be determined "based upon information in the claim file, such as on the first report of injury, or on motion of a party." Ohio Adm. Code 4123-3-15(C)(1). The code further stated that the "parties have a right to appeal the [scheduled loss] order or contest the decision pursuant to section 4123.511 of the Revised Code." Ohio Adm. Code 4123-3-15(C)(2).

However, this Court's decision rewrites the above quoted sections. This is because the benefits are now based upon an application rather than information in the claim file, which would be known to the Bureau or self-insured employer. Also by mandating the use of the PPD application process for scheduled loss process, this Court has eliminated the right to appeal a scheduled loss order pursuant to R.C. 4123.511, and now must use the 20 day objection period process. Therefore, this Court is now stating to the Bureau that the Bureau has been handling the scheduled loss process all wrong for years and has overturned the Bureau's recently adopted rules.

Finally, the Bureau produces a guide for self-insured employers to assist them in the administration of workers' compensation. In that guide, the Bureau states to the self-insured employers that they "should begin payment of the scheduled loss award as soon as the physician

of record provides medical evidence." Bureau of Workers' Compensation, *Procedural Guide for Self-Insured Claims Administration*, 31 (2011), https://www.bwc.ohio.gov/downloads/blankpdf/SIClmsProcedureGuide.pdf (accessed Sept. 26, 2013). The guide also states that "[s]cheduled loss awards are payable beginning the date of the loss." *Id.* Thus, the Court have told the Bureau that it has misinformed the public, employees, employers, and self-insured employers about scheduled loss benefits for years and incorrectly administrating scheduled loss.

It is well-settled law that an agency like the Bureau is to effectuate the policy declared by the Ohio General Assembly through rules and policies. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567, 697 N.E.2d 198 (1998). Therefore, this Court through *Sziraki* has decided the Bureau has been failing in its duty of administrating and effectuating scheduled loss for decades. If this decision is allowed to stand, this Court will have rewritten a significant portion of Ohio's Workers' Compensation law and will show that the public has been misinformed by the Bureau for years.

In the alternative, the Relator requests that this Court reconsider its decision in light of the above analysis because the Relator does not believe the Court wanted to fundamentally alter Ohio Workers' Compensation in this manner. The Relator asserts that this writ can be granted without any fundamental change to the Ohio Workers' Compensation system. This can be done by limiting the case to its facts, which is that the Bureau has a clear legal duty to have a guardian appointed for incompetent injured workers, like Dean Sziraki, who was absolutely incapable of making their own decisions and did not have an authorized representative. In the absence of such an appointment, and especially when the Bureau has knowledge that an injured workers is incompetent and assumes a duty to have a guardian appointed on behalf of the injured worker

and fails to follow through, it has a clear legal duty to administer and pay all compensation due to such workers.

The initial decision changes scheduled loss from being a damage award to an earning capacity award

In this decision, the Court stated that scheduled loss is "intended to compensate for the injured worker's loss of earning capacity." *State ex rel. Estate of Sziraki v. Admr. of Bur. of Workers' Comp.*, Slip Opinion No. 2013-Ohio 4007, ¶ 17. The Court went on to state that a "loss-of-use award is personal to the injured worker and ceases upon his death when there is no more loss of his earning capacity." *Id.* This Court based these statements on its former decisions in *Moorehead* and *McKenney*. *See State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203; *State ex rel. Estate of McKenney v. Indus. Comm.*, 110 Ohio St.3d 54, 2006-Ohio-3562, 850 N.E.2d 694.

The first statement is from a concurring opinion by Justice Lundberg Stratton in *Moorehead*. While the majority in *Moorehead* ruled that the Commission has the discretion to determine the amount of payments for scheduled loss, Justice Lundberg Stratton stated that scheduled loss benefits cease upon death of the injured worker based upon her view that scheduled loss benefits are "intended to compensate for injured workers presumed loss of earning capacity." *Moorehead* at ¶ 22, 25. She derived this reasoning from this Court's decision in *McKenney*. *Id.* In *McKenney*, this Court came to the conclusion that scheduled loss benefits were intended to compensate for the loss of earning capacity and ceased upon death of the injured worker. *McKenney* at ¶ 16. However this reasoning was not based on prior Ohio case law but rather on Larson's Workers' Compensation Law, which is a national treatise. *McKenney* at ¶ 16, 18.

The *McKenney* Court and Justice Lundberg Stratton's view is completely incompatible and inconsistent with prior decisions on scheduled loss benefits. In *Young*, this Court held that scheduled loss is in addition to TTD, which is for impairment of earning capacity. *State ex rel. Young, v. Indus. Comm.*, 139 Ohio St. 601, 41 N.E.2d 570 (1942), paragraph one of the syllabus. Thus, scheduled loss is not about earning capacity. In *Doughty*, this Court held that a scheduled loss benefits "bears a closer resemblance to damages than it does to compensation for impaired earning capacity." *State ex rel. Doughty v. Indus. Comm.* 61 Ohio St.3d 736 , 739, 576 N.E.2d 801 (1991), *see State ex rel. General Motors Corp. v. Indus. Comm.*, 42 Ohio St. 2d 278, 282, 328 N.E.2d 387 (1975)("Although an award for permanent and total disability is generally aimed at compensating for impairment of earning capacity, benefits for partial disability [i.e. scheduled loss] are more akin to damages for work-related injuries."); *State ex rel. Hammond v. Indus. Comm.*, 64 Ohio St. 2d 237, 239, 416 N.E.2d 601 (1980)("R. C. 4123.57(C) [now R.C. 4123.57(B)] also provides for benefits which are in the nature of general damages, but for which the General Assembly has chosen to fix a specific award by allowing compensation at a specified level for a stated number of weeks, depending on the injury"); *State ex rel. Dudley v. Indus. Comm.*, 135 Ohio St. 121, 125 19 N.E.2d 895 (1939) ("We thus see that compensation for loss of the sight of an eye is arbitrarily fixed, and has nothing whatever to do with impairment of earning capacity. It is quite possible, as demonstrated by the instant case, that a workman might lose the sight in one of his eyes due to an accidental injury and not lose one day's work or be reduced in wages."). Furthermore, in *Miller*, this Court stated,

> We have, however, always viewed PTD and partial disability compensation--including R.C. 4123.57(C) [now R.C. 4123.57(B)]--as having *different goals*. Total disability benefits, whether temporary or permanent, compensate for the loss of earnings or earning capacity. In contrast, *partial disability benefits have been compared to damages and are awarded irrespective of work capacity*. Using

> this rationale, the sequence of disability--i.e., whether R.C. 4123.57(C) benefits are requested before or after PTD--is irrelevant.

(citations omitted)(emphasis added) *State ex rel. Miller v. Indus. Comm*, 97 Ohio St.3d 418, 2002-Ohio-6664, 780 N.E.2d 268 ¶ 12.

Therefore, if this Court lets the *Sziraki* decision stand, it will have overruled all the case law referenced above. It will be a complete reversal of this Court's decisions for over the past seven decades. It should be noted that this change came about subtly by this Court in *McKenney* and *Sziraki* completely ignoring stare decisis. In fact, this Court could have made the change proposed by in *Moorehead* if it had wanted to but it chose not to accept Justice Lundberg Stratton's analysis of the reasoning behind the scheduled loss benefit.

In addition, while this Court's decision overturned a lot of statutory law, it has called into question other statutory laws. This is because if scheduled loss is based on earning capacity and ceases upon death than scheduled loss benefits can no longer be allowed to be paid after death or continued after death to the injured worker's surviving spouse, dependent children, or other dependents as the administer determines. R.C. 4123.57(B). Thus, this Court has completely eliminated a major portion of R.C. 4123.57(B).

In fact, if *Sziraki* stands then death benefits are no longer allowed from scheduled loss benefits. Thus, death benefit awards under R.C. 4123.59 and 4123.60 are no longer allowed to include scheduled loss benefits because they cease at death. This means *Sziraki* will completely alters the clear legislative intent and rewrite these two Ohio Workers' Compensation laws because if it ceases at death it cannot be paid to anyone after the death of the injured worker.

In addition, this decision calls into question whether scheduled loss benefits under R.C. 4123.57(B) can even be awarded with permanent total disability awards. While R.C. 4123.58(E) state that they can be paid together, this Court has previously reasoned that this is allowed

because the two statutes sections have different goals: one deals with earning capacity, the other deals with damages. R.C. 4123.58(E); *State ex rel. Miller v. Indus. Comm*, 97 Ohio St.3d 418, 2002-Ohio-6664, 780 N.E.2d 268, ¶ 12; *see State ex rel. Kincaid v. Allen Refractories Co.*, 14 Ohio St. 3d 129, 2007-Ohio-3758, 870 N.E.2d 701, ¶ 9 (noting "permanent partial compensation resembles a damages award, and permanent total disability compensates for impaired earning capacity). In fact, this decision puts this Court's recent decision in *Coleman* into question because how can this Court, according to *Sziraki*, allow statutory permanent total disability and scheduled loss benefits at the same time if both deal with earning capacity. *See State ex rel. Coleman v. Indus. Comm.*, 136 Ohio St. 3d 77, 2013-Ohio-2406, 990 N.E.2d 585 (allowing both scheduled loss and permanent total disability awards when each has had a separate analysis).

Therefore, this Court's initial *Sziraki* decision not only rewrites statutes against clear legislative intent, but it also calls into question R.C. 4123.58(E) and all the case law that supports the clear legislative intent.

In regards to the above analysis, the Relator requests that this Court reconsider the *Sziraki* decision because the Relator does not believe the Court further wanted to fundamentally alter and rewrite the Ohio Workers' Compensation law in this manner. Relator's writ can be granted and limited to its facts, which have been stated clearly above. At the core of this case we have Dean Sziraki who became an incompetent quadriplegic from his workplace accident and the Bureau knew from the date of his accident to his death that neither he nor anyone authorized to represent him could apply for and receive benefits. In this limited circumstance when the Bureau knows it has an incompetent injured worker with no one that is authorized to represent him, it becomes the Bureau's clear legal duty to either appoint a guardian on his behalf or identify and pay all compensation due to him.

Consecutive payments not supported by evidence as required by *Noll*

In issuing an order either granting or denying benefits, this Court has stated over and over again that the Commission "must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision." *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203, 206, 567 N.E.2d 245 (1991); quoting *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481, 483-484, 453 N.E. 2d 721 (1983). In *Gay v. Mihm*, this Court stated that "*Mitchell* clearly requires that the commission specify, in each case, the evidence upon which it relies, and further requires that the commission explain why the claimant is or is not entitled to the benefits requested." *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315, 320, 626 N.E.2d 666, (1994).

Here, the District Hearing Officer awarded 850 weeks of scheduled loss benefits but limited it to the two-year look back. (R. at 85-86). However, this order was silent as to whether this award was concurrent or consecutive. The Staff Hearing Officer ruled it to be consecutive rather than concurrently without any reasoning given. (R. at 89). Thus, the Staff Hearing Officer did not follow the *Noll* requirement of specifically stating what evidence they relied upon and the reasoning behind it for making this award consecutive versus concurrent.

Relator understands the Court's reluctance to play "super" Industrial Commission. But until this decision, this Court has required some notation of why a hearing officer decided a certain way to allow the courts to determine a rationale for the decision and whether such is in the sound discretion of the Commission, and supported by some evidence or not. This should be even more compelling case for this Court to require this explanation as even the Bureau argued, at least initially, for 104 weeks for each scheduled loss of limb award concurrent, but that is not the result the Commission reached.

Therefore, at the very least this Court should grant Relator's writ to have the Industrial Commission correct the order to properly explain its reasoning.

This Court's initial decision violates Dean Sziraki the equal protection rights under the Equal Protection Clauses of the United States and Ohio Constitutions

The equal protection standards for determining violations of the United States Constitution and Ohio Constitution are essentially the same. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 352-353, 639 N.E.2d 31 (1994); *see* Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 2. "The general rule [under Equal Protection] is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *see Clifford v. Daugherty*, 62 Ohio St.2d 414, 417-418, 406 N.E2d 517 (1980).

While a law may be neutral on its face, "yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citations omitted) *Pers. Admr. of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

As has been shown above in this memorandum of support, scheduled loss benefits awarded under R.C. 4123.57(B) had been well-settled law before this Court made its initial

ruling in *Sziraki*. The law for awarding scheduled loss benefits stated (1) that the injured worker is entitled to the benefit from the moment of loss; (2) that the benefit is considered to be a damage award; (3) that the benefit can be paid concurrent with temporary total disability and permanent total disability; (4) that after the injured worker's death the benefit shall be payable to the injured worker surviving spouse, dependent children, and dependents as the administer determines; and (5) that no application is needed to receive the benefit.

The Relator does not dispute that R.C. 4123.57(B) is neutral on its face and rationally related to a legitimate state interest. However, how the law has been administered by the Bureau and applied by this Court has made it unjust and illegally discriminatory against Dean Sziraki and those similarly situated. The Bureau definitely knew that Dean had lost the use of his arms and legs when he had been awarded a statutory permanent total disability on April 8, 2002. (R. at 61.) In fact on February 1, 2006, Bureau Staff Attorney Michael Sourek sent a letter to Dean's mother notifying her that the Bureau knew that Dean was incompetent and was entitled to other benefits. (R. at 73-74.) In this letter, the Bureau gave an ultimatum that if a proper guardian was not appointed for Dean; the Bureau would have a guardian appointed for Dean. (*Id.*) Thus, a Bureau Staff Attorney Michael Sourek made representation to a third party and assumed a duty for the Bureau but failed to follow through.

After Dean's death, the Commission refused award to his Estate, as part of his death benefits, the scheduled loss benefits that he was entitled and had accrued from the moment of his loss, which was his workplace accident. (R. at 79-80.) The Commission forced the Estate to file a C-86 motion in order to award the scheduled loss benefits. (*Id.*) Then the Commission used the C-86 motion to limit the Estate's scheduled loss benefits to two years back. (R. at 89.)

Here, the Bureau and the Commission denied equal justice to Dean and his Estate. Their administering of Dean's claim served a discriminatory purpose not only because they were aware of the consequences of their actions, but in their role as decision makers over Dean's claim they selected this particular course of action to enforce its adverse effects upon Dean. This is because they knew that Dean was incompetent and threatened to take action to get him the benefits he was entitled to but chose not to follow through with this action. Thus, these Ohio agencies administered Dean's claim with unclean hands and denied Dean his equal protection under the Equal Protection Clauses of the United States Constitution and the Ohio Constitution.

In fact, this Court's initial decision in this case has reaffirmed this violation of Dean's equal protection rights. This Court has chosen a course of action to fundamentally reverse well-settled law for awarding scheduled loss benefits because of its adverse effects it will have upon an identifiable group that includes Dean Sziraki. That identifiable group is injured workers that are incompetent and have no authorized representative.

Therefore, not only has the Bureau and Commission violated Dean's equal protection rights under the Equal Protection Clauses of the Unites States Constitution and the Ohio Constitution, this Court by its initial decision continues to violate Dean's right to equal protection. Relator requests that this Court reconsider its initial decision, correct these equal protection violations that have been done onto Dean and grant Relator's writ and award the scheduled loss benefits to Dean's Estate.

CONCLUSION

The Relator humbly requests that this Court reconsider its decision denying the writ and grant the writ because if this decision stands it will radically alter the entire scheduled loss benefits and death benefit processes while fundamentally changing the clear legislative intent

behind Ohio Workers' Compensation system. The writ can be granted by limiting the case to its facts. *Sziraki* can stand for the proposition that the Bureau only has a clear legal duty in the situations where the injured worker is incompetent and has no authorized representative, and the Bureau has indicated a willingness to assume the duty to either appointed a guardian for the injured worker or identify and pay all compensation that is due to the injured worker.

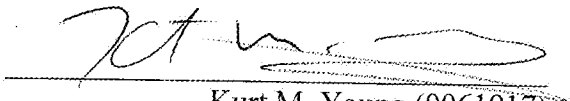
Respectfully submitted,

Kurt M. Young
Counsel for Relator,
Estate of Dean E. Sziraki

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was sent by ordinary U. S. mail to Patsy A. Thomas, Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, counsel for Respondents Administrator, Bureau of Workers' Compensation and Industrial Commission of Ohio, 30 West Spring Street, Columbus, Ohio 43266 on September 26th, 2013.

Respectfully submitted,



Kurt M. Young (0061917)
Counsel for Relator,
Estate of Dean E. Sziraki