

**IN THE SUPREME COURT OF OHIO**

STATE, EX REL. WASTE MANAGEMENT OF OHIO, INC.	:	Case No. 2021-0961
Relator-Appellant,	:	On Appeal from the Franklin County Court of Appeals Tenth Appellate District
-v-	:	(Case No. 19-AP-453)
INDUSTRIAL COMMISSION OF OHIO	:	
and	:	
TRAVIS GELHAUSEN (DEC'D)	:	
C/O SABRINA GELHAUSEN, (DEPENDENT) C/O TAYLOR ALLOWAY	:	
Respondents-Appellees.	:	

**SUPPLEMENT TO MERIT BRIEF OF APPELLANT WASTE MANAGEMENT OF OHIO**

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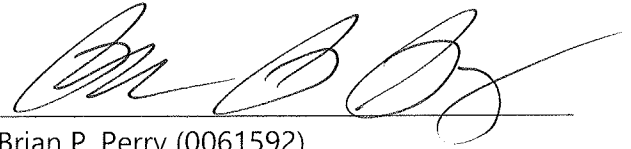
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Industrial Commission of Ohio*

For Index of Supplement to Merit Brief please see the Evidence Stipulation with Table of Contents, attached.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brian P. Perry', is written over a horizontal line.

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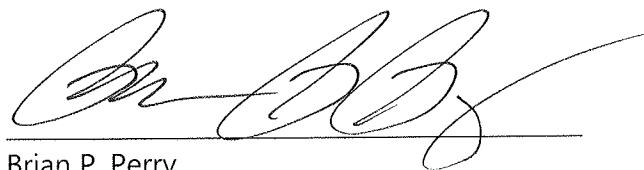
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by Electronic Mail  
this 16<sup>th</sup> day of December, 2021 upon:

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*Attorney for Respondent-Appellee,  
Industrial Commission of Ohio*

A handwritten signature in black ink, appearing to read 'Brian P. Perry', written over a horizontal line.

Brian P. Perry  
*Attorney for Relator-Appellant*

FILED  
APPEALS COURT  
FRANKLIN CO. OHIOCOURT OF APPEALS  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO

2019 SEP -6 AM 9:37

CLERK OF COURTS

STATE, EX REL. WASTE MANAGEMENT OF  
OHIO, INC.,

: Case No. 19AP-453

Relator,

: Magistrate Bisca

-v-

: EVIDENCE STIPULATION

INDUSTRIAL COMMISSION OF OHIO, et al.,

Respondents.

Now comes the parties, by and through counsel, and stipulate that the attached documents are copies of original documents in Industrial Commission Claim No. 17-202032 and shall constitute the entire evidentiary record before the Court in this case. It is also agreed by the parties that the record can be supplemented by written agreement of the parties, by submission of certified copies of the documents from the claim file by order of the Court.

Respectfully submitted,

/s/ Brian P. Perry

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/s/ Natalie J. Tackett-Eby

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*Counsel for Respondent,*

*Industrial Commission of Ohio*

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# Ohio Bureau of Workers' Compensation

Motion

## Instructions

- Parties to the claim requesting a decision by BWC or the Industrial Commission of Ohio must use this form if any other form or application does not apply. Parties to the claim include the injured worker, employer and/or their authorized representatives and BWC. For a complete list of injured worker and employer forms visit [ohiobwc.com](http://ohiobwc.com), or call BWC at 1-800-0110BWC.
- Health-care providers or managed care organizations (MCOs) do not use this form. Health-care providers or MCOs must use the *Physician's Request for Medical Service or Recommendation for Additional Conditions for Industrial Injury or Occupational Disease (C-9)*.
- You must submit proof with this form to support the requested action. When requesting an additional condition, please include medical documentation, such as medical reports that include a physician statement addressing causal relationship between the requested condition and the industrial injury, diagnostic test results, radiology exam results, operative reports, etc. When requesting full or average weekly wage adjustments, include earning statements, such as pay stubs, C-94A wage statement form, payroll report, W2, tax forms, etc.
- The applicant must mail a copy of the *Motion* to all parties and/or their authorized representatives to the claim and will indicate a copy has been mailed by signing Certificate of Service below.

Section I	Injured worker name Travis J. Gelhausen, Deceased / Taylor Alloway, Claimant		Claim number 17-202032 SI	
	Street address 7611 Dewey Road	City Thompson	State OH	Nino-digit ZIP code 44086

This *Motion* is a request to consider the following:

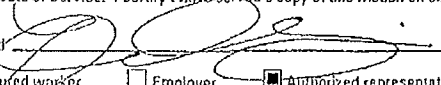
Now comes Taylor Alloway, claimant in the case of Travis J. Gelhausen, Deceased, by and through counsel, and hereby requests payment of Loss of Use Compensation pursuant to R.C. 4123.57 and State ex rel. Moorehead v. Indus. Comm., 112 Ohio St.3d 27 2006-Ohio 6384 for the following: (1) Total loss of use Right arm (2) Total loss of use Left arm (3) Total loss of use Right leg and (4) Total loss of use Left leg (5) Total loss of vision in both eyes (6) Bilateral hearing loss based upon the Death Certificate, Cuyahoga County Medical Examiner's report and Affidavit of Witness, Jolene Szapowal.

Claimant further requests that this award should be paid with a start date of October 18, 2017, and to be paid concurrently.

In support of this *Motion*, the following evidence is included: (Please indicate the evidence included to support the request, such as medical reports that include a physician statement addressing causal relationship between the requested condition and the industrial injury, earning statements or any other evidence to support the requested action as outlined in the instructions.)

Section III	Certificate of Death
	Cuyahoga County Medical Examiner's Report
	Affidavit of Witness, Jolene Szapowal
	C-230 Authorization to Receive Workers' Compensation Payments / Accrued & Future Payments of Scheduled Loss
All documentation available in BWC repository	

Certificate of Service: I certify I have served a copy of this *Motion* on all parties and representatives to the claim.

Signed  Date signed 5/1/17

☐ Injured worker ☐ Employer ☒ Authorized representative ☐ Administrator of the Ohio Bureau of Workers' Compensation

BWC-1208 (Rev. 9/08/2008) Distribution: Original - Claim File Copies - as needed  
C-86

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032      Claims Heard: 17-202032  
 MO-DPH-SI-COV  
 PCN: 2181571 Travis Gelhausen

TRAVIS GELHAUSEN  
 C/O SABRINA J. GELHAUSEN, CHILD  
 C/O TAYLOR MALLORY  
 7611 DENEY RD  
 THOMPSON OH 44086-9801

Date of Injury: 10/10/2017      Risk Number: 20003887-0  
 Date of Death: 10/10/2017

This claim has been previously allowed for: DEATH.

This matter was heard on 08/20/2018 before District Hearing Officer Marc Stone pursuant to the provisions of R.C. Sections 4121.34 and 4121.511 on the following:

C-86 Motion filed by injured worker on 05/02/2018.  
 Issue: 1) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT ARM  
 2) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT ARM  
 3) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT LEG  
 4) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT LEG  
 5) Scheduled Loss/Loss Of Use - TOTAL LOSS OF VISION IN BOTH EYES  
 6) Scheduled Loss/Loss Of Use - BILATERAL HEARING LOSS

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Elzeur  
 APPEARANCE FOR THE EMPLOYER: Ms. Galtuzzi  
 APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is ordered the C-86 Motion filed 05/02/2018 is denied in part and dismissed in part.

Prior to a discussion on the merits, the request for bilateral hearing loss/scheduled loss was withdrawn by the attorney for the Claimant in this case.

It is ordered the request for SCHEDULED LOSS OR TOTAL LOSS OF USE OF BILATERAL ARMS; BILATERAL LEGS; AND TOTAL LOSS OF VISION BILATERALLY are all DISALLOWED.

It is the finding of this Hearing Officer that it has not been established that the decedent lived for a discernable period of time after sustaining the injuries which resulted to his death.

The medical professionals which arrived on the scene of the motor vehicle accident found the decedent to be unresponsive and without signs of life. The decedent had to be extricated from the truck at 12:16 PM, and by way of telephone to Hillcrest Hospital was pronounced dead at 12:18 PM.

This file does contain a witness statement from J. Szapowal. This witness statement is not medical evidence to establish survival after the impact. The witness indicates that she was able to witness the decedent from chest to legs. She stated that it was her impression that he was alive and breathing for approximately a three minute period. The witness was not a medical professional, which this Hearing Officer is willing to rely on in her assessment.

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032

of the medical condition of the decedent.

This Hearing Officer finds that without the witness statement discussed above, it appears that the decedent essentially experienced instantaneous death. As a result, there is no basis to award the above scheduled loss/loss of use requested in the Motion filed 05/02/2018.

Specifically regarding the request for loss of vision bilaterally Hearing Officer Memo P4 is controlling. In order to be entitled to the loss of vision the evidence must demonstrate an actual loss of function of the eyes. Doctor P. Hogya, M.D., opined there was insufficient evidence that the Decedent suffered injury to the functioning of the eyes resulting in total loss.

This order is based on the opinions of P. Hogya, M.D., dated 06/30/2018, as well as 08/02/2018. The Wallace and the Segraves decisions are relied upon as well.

All the evidence was reviewed and considered.

The Self-Insuring Employer is hereby ordered to comply with the above findings.

An IC-12 Notice of Appeal from this order may be filed within 14 days of the receipt of the order. The IC-12 Notice of Appeal may be filed online at [www.ic.ohio.gov](http://www.ic.ohio.gov) or the IC-12 may be sent to the Industrial Commission, Cleveland Regional Office, 615 Superior Avenue, N.W. - 5th Floor Cleveland, OH 44113-1898.

Typed By: lwg

Date Typed: 08/21/2018

Marc Stone

District Hearing Officer

Notice of Contested Claim: 05/21/2018

Findings Mailed: 08/24/2018

Electronically signed by  
 Marc Stone

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

17-202032  
 Travis Gelhausen  
 c/o Sabrina J. Gelhausen, Child  
 C/O Taylor Alloway  
 7611 Dewey Rd  
 Thompson OH 44086-9801

ID No: 10312-90  
 Frank L. Gallucci Jr. L.P.A.  
 55 Public Sq Ste 2222  
 Cleveland OH 44113-1801

Risk No: 20003087-0  
 Waste Management Of Ohio Inc  
 1001 Fannin St Ste 4000  
 Houston TX 77002-6711

ID No: 550-00  
 Gallagher Bassett Services Inc  
 One Metro Place  
 545 Metro Pl S Ste 250  
 Dublin OH 43017-5310

ID No: 1434-80  
 Gallagher Bassett  
 545 Metro Pl S Ste 250  
 Dublin OH 43017-5310

ID No: 20230-91  
 Dinsmore & Shohl  
 255 E 5th St Ste 1900  
 Cincinnati OH 45202-1971

Ohio Industrial Commission  
RECORD OF PROCEEDINGS

Claim Number: 17-202032

ID No: 9993-05  
BWC, LAW - Cleveland  
615 W Superior Ave Fl 6  
Cleveland OH 44113-1601

BWC, LAW DIRECTOR

---

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ic.ohio.gov](http://www.ic.ohio.gov). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

---

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032      Claims Heard: 17-202032  
MO-DTH-SI-COV  
PCN: 2381571      Travis Gelhausen

TRAVIS GELHAUSEN  
C/O SARRINA J. GELHAUSEN, CIVIL  
C/O TAYLOR ALLONAY  
7611 DEWEY RD  
THOMPSON OH 44086-9801

Date of Injury: 10/18/2017      Risk Number: 20003887-0  
Date of Death: 10/18/2017

This claim has been previously allowed for: DEATH.

This matter was heard on 10/01/2018 before Staff Hearing Officer Oleh Mahlay pursuant to the provisions of R.C. Sections 4121.35(B) and 4123.511(D) on the following:

APPEAL of District Hearing Officer order from the hearing dated 06/20/2018, filed by Injured Worker on 08/30/2018.

- Issue: 1) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT ARM  
2) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT ARM  
3) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT LEG  
4) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT LEG  
5) Scheduled Loss/Loss Of Use - TOTAL LOSS OF VISION IN BOTH EYES  
6) Scheduled Loss/Loss Of Use - BILATERAL HEARING LOSS

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Elzeer  
APPEARANCE FOR THE EMPLOYER: Mr. Gatozzi; Court Reporter  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the District Hearing Officer, issued 08/24/2018, is vacated.

It is the order of the Staff Hearing Officer that the Injured Worker's C-86 Motion, filed 05/02/2018, is denied.

The Hearing Officer notes that at the underlying District Hearing Officer hearing the Injured Worker withdrew the request for BILATERAL HEARING LOSS. Therefore, this request remains DISMISSED.

It is the order of the Hearing Officer that the request for a TOTAL LOSS OF USE RIGHT ARM; TOTAL LOSS OF USE LEFT ARM; TOTAL LOSS OF USE RIGHT LEG; TOTAL LOSS OF USE LEFT LEG; and TOTAL LOSS OF VISION IN BOTH EYES is DENIED.

The Hearing Officer finds that the Decedent did not survive for a discernable period of time after being involved in this work injury which resulted in his death. Therefore, the requested scheduled loss or total loss of use of the requested body parts has not been established. This finding is supported by the reports and conclusions of Paul Hogg, M.D.,

Dr. Hogg indicates that the Decedent was found to be unresponsive immediately after the work accident, and the officially declared time of death was delayed due to the fact that he was trapped inside his vehicle and had a prolonged extrication with the assistance of mechanical tools. Within two minutes of extrication EMS personnel contacted the emergency department physician for official confirmation of time of death.



Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032

Dr. Hoggia indicates that breathing observed by the non-medical witness is known as agonal respirations, and they are not adequate respirations to sustain oxygenation. As to the cervical injuries in this claim, Dr. Hoggia finds that while traumatic atlanto-axial subluxation may be associated with varying degrees of upper extremity and/or lower extremity paresis, not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper and/or lower extremities. The Hearing Officer finds that the Decedent has failed to establish that there was a loss of use of any of these body parts alleged. Relative to the eyes, there is no documentation in the autopsy report, or elsewhere, to establish any total loss of vision prior to death. Furthermore, the requirements enumerated in Adjudications Before the Ohio Industrial Commission Memorandum P4 have not been met relative to a loss of vision.

In the case of *Moorehead v. Industrial Commission*, 112 Ohio St.3d 27, 2006, the Supreme Court indicated that R.C. 4123.57(B) does not specify a required length of time of survival after a loss-of-use injury before benefits pursuant to R.C. 4123.57(B) are payable. In this case, the Hearing Officer finds that the Decedent did not survive the accident when he died at the scene and pronounced dead immediately after being removed from the vehicle. The affidavit of the non-medical bystander fails to medically establish that the Decedent survived this accident.

For these reasons, the Hearing Officer finds that the Injured Worker's Motion must be denied.

All evidence contained in the record has been reviewed and considered by the Hearing Officer prior to rendering this decision. This order is based on the report of Dr. Hoggia dated 08/02/2018, 06/30/2018, Memorandum P4, the autopsy report, and the *Moorehead* case.

The Self-Insuring Employer is hereby ordered to comply with the above findings.

AUTHORIZATION TO RECEIVE WORKERS' COMPENSATION PAYMENT IS ON FILE FOR THE ABOVE LISTED Injured Worker.

All the evidence was reviewed and considered.

An IC 12 Notice of Appeal from this order may be filed within 14 days of the receipt of the order. The IC-12 Notice of Appeal may be filed online at [www.ic.ohio.gov](http://www.ic.ohio.gov) or the IC-12 Notice of Appeal may be sent to the Industrial Commission, Cleveland Regional Office, 615 Superior Avenue, N.W. - 5th Floor Cleveland, OH 44113-1698.

Typed By: kec  
 Date Typed: 10/11/2018  
 Findings Mailed: 10/13/2018

Olch Mahlay  
 Staff Hearing Officer

Electronically signed by  
 Olch Mahlay

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

---

Ohio Industrial Commission  
RECORD OF PROCEEDINGS

Claim Number: 17-202032

17-202032  
Travis Gelhausen  
c/o Sabrina J. Gelhausen, Child  
C/O Taylor Alloway  
7611 Dewey Rd  
Thompson OH 44086-9803

ID No: 10312-90  
Frank L Gallucci Jr L P A  
55 Public Sq Ste 2222  
Cleveland OH 44113-1901

Risk No: 20003887-0  
Waste Management Of Ohio Inc  
1001 Fannin St Ste 4000  
Houston TX 77002-6711

ID No: 550-80  
Gallagher Bassett Services Inc  
One Metro Place  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 1434-80  
Gallagher Bassett  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 20238-91  
Dinsmore & Shohl  
255 E 5th St Ste 1900  
Cincinnati OH 45202-1971

ID No: 9993-05  
BWC, Law - Cleveland  
615 W Superior Ave Fl 6  
Cleveland OH 44113-1001

BWC, LAW DIRECTOR

---

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**RECORD OF PROCEEDINGS**

Claim Number: 17-202032      Claims Heard: 17-202032  
MO-DTH-SI-COV  
PCN: 2181571      Travis Gelhausen

THAVIS GELHAUSEN  
C/O SADRINA J. GELHAUSEN, CHILD  
C/O TAYLOR ALLOWAY  
7611 DEXBY RD  
THOMPSON OH 44086-9801

Date of Injury: 10/18/2017      Risk Number: 20003887-0  
Date of Death: 10/18/2017

IC-12 Notice Of Appeal filed by Injured Worker on 10/26/2018.  
Issue: 1) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT ARM  
2) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT ARM  
3) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE RIGHT LEG  
4) Scheduled Loss/Loss Of Use - TOTAL LOSS OF USE LEFT LEG  
5) Scheduled Loss/Loss Of Use - TOTAL LOSS OF VISION IN BOTH EYES  
6) Scheduled Loss/Loss Of Use - BILATERAL HEARING LOSS

Pursuant to the authority of the Industrial Commission under R.C. 4123.511(E), it is ordered that the injured worker's appeal, filed 10/26/2018, from the Staff Hearing Officer order, issued 10/13/2018, be refused and that copies of this order be mailed to all interested parties.

This appeal was reviewed by two (2) Staff Hearing Officers on behalf of the Commission. Both Staff Hearing Officers concur with this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN SIXTY (60) DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed By: kh  
Date Typed: 10/30/2018 (SZ)  
Findings Mailed: 11/01/2018

\_\_\_\_\_  
D. Greim  
Staff Hearing Officer

Electronically signed by  
D. Greim

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

Ohio Industrial Commission  
RECORD OF PROCEEDINGS

Claim Number: 17-202032

17-202032  
Travis Gelhausen  
c/o Sabrina J. Gelhausen, Child  
C/O Taylor Alloway  
7611 Dewey Rd  
Thompson OH 44086-5801

ID No: 10312-90  
Frank L Gallucci Jr L P A  
55 Public Sq Ste 2222  
Cleveland OH 44113-1901

Risk No: 20003887-0  
Waste Management Of Ohio Inc  
1001 Fannin St Ste 4000  
Houston TX 77002-6711

ID No: 550-80  
Gallagher Bassett Services Inc  
One Metro Place  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 1434-80  
Gallagher Bassett  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 20238-91  
Dinmore R Shohl  
255 E 5th St Ste 1900  
Cincinnati OH 45202-1971

ID No: 9993-05  
BWC, Law - Cleveland  
635 W Superior Ave Fl 6  
Cleveland OH 44113-1801

BWC, LAW DIRECTOR

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Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032  
 MO-DTH-GI-COV  
 PCN: 2183171 Travis Gelhausen

Claims Heard: 17-202032

DINSMORE & SHOHL  
 255 E 5TH ST STE 1900  
 CINCINNATI OH 45202-1971

RECEIVED

DEC 06 2018

Date of Injury: 10/18/2017  
 Date of Death: 10/18/2017

Risk Number: 20003887-0

This claim has been previously allowed for: DEATH.

Request for Reconsideration Filed by Dependent on 11/09/2018.

- Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52  
 2) SCHEDULED LOSS / LOSS OF USE - TOTAL LOSS OF USE RIGHT ARM  
 3) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT ARM  
 4) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE RIGHT LEG  
 5) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT LEG  
 6) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF VISION IN BOTH EYES  
 7) SCHEDULED LOSS/LOSS OF USE - BILATERAL HEARING LOSS

INTERLOCUTORY ORDER

The Dependent's Request for Reconsideration, filed 11/09/2018, from the Staff Hearing Officer order, issued 10/13/2018, is referred to the Commission Level Hearings Section to be docketed before the Members of the Industrial Commission. The issues to be heard are:

- Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52  
 2) Scheduled Loss / Loss Of Use - TOTAL LOSS OF USE RIGHT ARM  
 3) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT ARM  
 4) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE RIGHT LEG  
 5) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT LEG  
 6) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF VISION IN BOTH EYES  
 7) SCHEDULED LOSS/LOSS OF USE - BILATERAL HEARING LOSS

It is the finding of the Commission the Dependent has presented evidence of sufficient probative value to warrant adjudication of the Request for Reconsideration regarding the alleged presence of a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow.

Specifically, it is alleged the Staff Hearing Officer erred in the application of *State ex rel. Moorhead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1201, to the facts in this claim.

The order issued 11/01/2018 is vacated, set aside, and held for naught.

Based on these findings, the Commission directs the Dependent's Request for Reconsideration, filed 11/09/2018, be set for hearing to determine whether the alleged clear mistakes of fact and of law, as noted herein, are sufficient for the Commission to invoke its continuing jurisdiction.

In the interest of administrative economy and for the convenience of the parties, after the hearing on the question of continuing jurisdiction, the Commission will take the matter under advisement and proceed to hear the merits of the underlying issue(s). The Commission will thereafter issue an order on the matter of continuing jurisdiction under R.C. 4123.52. If authority to invoke

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032

continuing jurisdiction is found, the Commission will address the merits of the underlying issue(s).

This order is issued pursuant to *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 592 N.E.2d 188 (1998), *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and in accordance with Ohio Adm.Code 4121-3-09.

This order is interlocutory in nature and not subject to appeal pursuant to Ohio Adm.Code 4121-3-09(C)(9)(b)(iv).

Typed by: rc  
 Date Typed: 11/29/2018

The above findings and order was approved and confirmed by the majority of the members.

Thomas H. Bainbridge Yes  
 Chairman

Jodie M. Taylor Yes  
 Commissioner

Electronically signed by  
 Thomas H. Bainbridge

Electronically signed by  
 Jodie M. Taylor

Karen L. Gillmor, Ph.D. Yes  
 Commissioner

Electronically signed by  
 Karen L. Gillmor, Ph.D.

ATTESTED TO BY:

Findings Mailed: 12/01/2018

Executive Director

Electronically signed by  
 Tim Adams

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

17-202032  
 Travis Gelhausen  
 c/o Sabrina J. Gelhausen, Child  
 C/O Taylor Alloway  
 7611 Dewey Rd  
 Thompson OH 44086-9801

ID No: 10312-90  
 Frank L. Gallucci Jr L P A  
 55 Public Sq Ste 2222  
 Cleveland OH 44113-1901

Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 17-202032

Risk No. 20003887-0  
Waste Management Of Ohio Inc  
1001 Fannin St Ste 8000  
Houston TX 77002-6711

ID No: 550-80  
Gallagher Bassett Services Inc  
One Metro Place  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 1434-80  
Gallagher Bassett  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 20238-91  
Dinmore & Shohl  
255 E 5th St Ste 1900  
Cincinnati OH 45202-1971

ID No: 9994-05  
BWC, Law - Columbus  
Attn: Director Of Legal Operations  
30 W Spring St # L-26  
Columbus OH 43215-2216

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ic.ohio.gov](http://www.ic.ohio.gov). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032 Claims Heard: 17-202032  
 MO-OTH-SI-COV  
 PCN: 2183171 Travis Gelhausen

TRAVIS GELHAUSEN  
 C/O SABRINA J. GELHAUSEN, CHILD  
 C/O TAYLOR ALLOWAY  
 7611 DENNY RD  
 THOMPSON OH 44086-9801

Date of Injury: 10/18/2017 Risk Number: 20003887-0  
 Date of Death: 10/18/2017

This claim has been previously allowed for: DEATH.

This matter was heard on 02/05/2019 before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511 and 4123.52 on the following:

Request for Reconsideration filed by Dependent on 11/09/2018.

- Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52  
 2) SCHEDULED LOSS / LOSS OF USE - TOTAL LOSS OF USE RIGHT ARM  
 3) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT ARM  
 4) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE RIGHT LEG  
 5) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF USE LEFT LEG  
 6) SCHEDULED LOSS/LOSS OF USE - TOTAL LOSS OF VISION IN BOTH EYES  
 7) SCHEDULED LOSS/LOSS OF USE - BILATERAL HEARING LOSS

Notices were mailed to the Dependent, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE DEPENDENT: Mr. Elzeer, Mr. Duffy, Court Reporter  
 APPEARANCE FOR THE EMPLOYER: Mr. Perry  
 APPEARANCE FOR THE ADMINISTRATOR: No Appearance

HEARD BY: Mr. Brinbridge, Ms. Taylor, Mrs. Gillmor

02/05/2019 - It is the decision of the Industrial Commission the Dependent's Request for Reconsideration, filed 11/09/2018, is taken under advisement for further review and discussion and an order be issued without further hearing.

02/05/2019 - After further review and discussion, it is the decision of the Commission the Dependent has met the burden of proving the Staff Hearing Officer order, issued 10/13/2018, contains a clear mistake of fact in the order from which reconsideration is sought, and a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer failed to properly apply the rule of *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, to the facts in this claim. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 370, 707 N.E.2d 1122 (1994), and *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

The Dependent's Request for Reconsideration, filed 11/09/2018, is granted. The Dependent's Appeal, filed 10/26/2018, from the Staff Hearing Officer order, issued 10/13/2018, is granted to the extent of this order. It is further ordered the Staff Hearing Officer order, issued 10/13/2018, is vacated.



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Claim Number: 17-202032

The Commission finds the deceased Injured Worker (Decedent) sustained a catastrophic motor vehicle injury at approximately 11:38 AM on 10/18/2017, and died from mechanical asphyxia shortly thereafter. In support of its findings the Commission relies upon: the traffic crash report and investigative report from Gates Mills Police, dated 10/19/2017; the medical examiner's verdict from Thomas Gilson, M.D., dated 10/19/2017; the autopsy report from Amanda Spencer, D.O., dated 03/15/2018; the affidavit from Jolene Szapowal, dated 04/30/2018; and the report from Donato Borrillo, M.D., dated 09/08/2018. It is the decision of the Commission to grant, in part, the Defendant's C-86 Motion, filed 05/02/2018, as follows.

The Commission finds the Defendant has demonstrated the Decedent sustained the following, as scheduled under R.C. 4123.57(B), as a result of the 10/18/2017 industrial injury: the loss of the left arm; the loss of the right arm; the loss of the left leg; and the loss of the right leg.

Accordingly, the Commission awards, pursuant to R.C. 4123.57(B), compensation for: the loss of the left arm; the loss of the right arm; the loss of the left leg; and the loss of the right leg.

In support of its findings and awards of compensation, the Commission relies upon the report from Dr. Borrillo, M.D., dated 09/08/2018. In his 09/08/2018 report, Dr. Borrillo opined the Injured Worker suffered a permanent loss of use of both the upper and lower extremities as a result of the cervical injuries at C-4 that Dr. Spencer identified in her 03/15/2018 autopsy report.

The Commission also relies upon State ex rel. *Moorehead v. Indus. Comm.*, supra, which held R.C. 4123.57(B) does not require any specific duration of survival after an employee suffers a loss of use, nor does it require the employee to be cognizant of the loss. The Commission finds R.C. 4123.57(B) is applicable here because the Decedent did in fact survive the injury, for at least three minutes. In support of its findings the Commission relies upon Ms. Szapowal's affidavit stating that following the injury, she saw the Decedent continue to breathe for approximately three minutes before he expired in her presence.

The Commission further finds the Defendant has not demonstrated the Decedent sustained the following, as scheduled under R.C. 4123.57(B), as a result of the 10/18/2017 industrial injury: the loss of the sight of the left eye; and the loss of the sight of the right eye. Accordingly, the Commission denies compensation, pursuant to R.C. 4123.57(B), for: the loss of the sight of the left eye; and the loss of the sight of the right eye.

In support of its denials of compensation, the Commission finds the 07/03/2018 report from Dr. Borrillo to be unpersuasive evidence the Decedent sustained a loss of sight of the bilateral eyes. The Commission finds Dr. Borrillo's opinion was based upon his mistaken belief that "bilateral orbit fractures were also noted on autopsy." Upon its review of the 03/15/2018 autopsy report, the Commission finds Dr. Spencer did not identify the existence of any orbit fractures. Accordingly, the Commission finds Dr. Borrillo's 07/03/2018 report to be defective and non-probative.

The Commission finds the portion of the C-86 requesting compensation for bilateral hearing loss was dismissed at a prior hearing and remains dismissed.

All evidence was reviewed and considered prior to rendering this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed by: dmj  
 Date Typed: 02/05/2019

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202632

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor, and voted on as follows:

<u>Thomas H. Bainbridge</u> Chairman	Yes	<u>Jodie M. Taylor</u> Commissioner	Yes
Electronically signed by Thomas H. Bainbridge		Electronically signed by Jodie M. Taylor	

<u>Karen L. Gillmor, Ph.D.</u> Commissioner	No
Electronically signed by Karen L. Gillmor, Ph.D.	

ATTESTED TO BY:

Findings Mailed: 03/27/2019

Executive Director

Electronically signed by  
Tim Adams

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

17-202032  
Travis Gelhausen  
c/o Sabrina J. Gelhausen, Child  
c/o Taylor Alloway  
7611 Dewey Rd  
Thompson OH 44086-9801

ID No: 10312-90  
Frank L. Gallucci Jr. J. P. A.  
55 Public Sq Ste 2222  
Cleveland OH 44113-1901

Risk No: 200036A7-0  
Waste Management Of Ohio Inc  
1001 Pannin St Ste 4000  
Houston TX 77002-6711

ID No: 550-80  
Gallagher Bassett Services Inc  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 1434-80  
Gallagher Bassett  
545 Metro Pl S Ste 250  
Dublin OH 43017-5310

ID No: 20238-91  
Dinsmore & Shohl  
255 E 5th St Ste 1900  
Cincinnati OH 45202-1971

*Ohio Industrial Commission*  
**RECORD OF PROCEEDINGS**

Claim Number: 17-202032


ID No: 9994-05  
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Columbus OH 43215-2216

BWC, LAW DIRECTOR

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<b>GATES MILLS</b>				Incident Number													
1470 CHAGRIN RIVER RD 440-423-4403				17-00180492													
Incident / Offense Report																	
Method Received		Time Received		Time Dispatched													
E		11:18:07		11:19:40													
Time Arrived		Time Cleared:															
11:23:20		17:37:58															
Report Date / Time		Incident Occurred From		Incident Occurred To													
Date Time		Date Time		Date Time													
Thursday 10/19/2017 05:48:57		Wednesday 10/18/2017 11:18:07		Wednesday 10/18/2017 11:18:07													
Location of the Incident (Street #, Street, Apt. #, City, State, Zip)					Zone												
GATES MILLS OH 44040 S.R. 174 @ BRIGHAM RD					NZ												
Persons Involved:			Property:														
TRAVIS JAMES GELHAUSEN - VIC			DASH CAM														
JOSEPH P BOLAN - WIT			WALLET														
JOLENE J SZAPOWAL - WIT			Amount:														
DANIEL J MILLER - WIT			CELLULAR PHONE														
AARON A DARDZINSKI - GOV			ANDROID TABLET														
DANIELLE NICOLE MORGAN - CIV																	
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Units:	Officers:																
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2nd: 1	MIKE POLLITRO																
3rd: 2	MIKE DAY																
4th:																	
5th:																	
Photos: 0																	
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Codes:	Descriptions:	OFFENSES															
5495B	MOTOR VEHICLE ACCIDENT - FATAL																
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Weapons Used:	Trade Marks:	Hate Bias:															
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Entry:	Location Type:																
	Highway/roadway/street																
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Refer to Arrest:	Incident #:	Tow#: 170018049	Dispatcher:	Officer in Charge: 3531	Entry Id: 3531												
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Case Status:	Cleared Date:	Cleared By: 3531															
Narrative: 17-00180492 Page: 1																	
<p>On Wednesday, October 18, 2017 at 1119 hours, Gates Mills Police responded to the intersection of S.R. 174 at Brigham Road for a motor vehicle accident with injuries.</p>																	
 Reviewing Supervisor:			SCT MIKE POLLITRO Officer:														

## GATES MILLS

Incident Number

Page # 2

Persons Involved with Incident

17-00180492

Incident #: 1700180492      Relation: VIC      Arrest #:      CAD #:

Date of Contact: 10/18/2017      Phone: 440-444-2910

First Name: TRAVIS      Middle: JAMES      Last Name: GELHAUSEN      Title: MR.      DOB: 08/31/1992      SSN: [REDACTED]

Street #: 6820      Street Name: MADISON RD      Apt:      City: THOMPSON      St: OH      Zip: 44086      Cell Phone: 440-444-3810      Employee Phone:

Hgt: 508      Wgt: 150      Hair: BLN      Eyes: HAZ      Race: W      Sex: M      Physical Marks:

Offenses:

Resident Class: Other      Suspected of using: /      Victim Type: Individual

Incident #: 1700180492      Relation: WIT      Arrest #:      CAD #:

Date of Contact: 10/18/2017      Phone: 216-990-0089

First Name: JOSEPH      Middle: F      Last Name: BOLAN      Title: MR.      DOB: 09/14/1941      SSN: [REDACTED]

Street #: 10035      Street Name: N WINTERGREEN      Apt:      City: CHARDON      St: OH      Zip: 44024      Cell Phone:      Employee Phone:

Hgt: 510      Wgt: 200      Hair: GRY      Eyes: BLU      Race: W      Sex: M      Physical Marks:

Offenses:

Resident Class: Other      Suspected of using: /      Victim Type:

Incident #: 1700180492      Relation: WIT      Arrest #:      CAD #:

Date of Contact: 10/18/2017      Phone: 440-533-5342

First Name: JOLENE      Middle: J      Last Name: SZAPOWAL      Title:      DOB: 01/20/1979      SSN: [REDACTED]

Street #: 11117      Street Name: CHILLICOTHE RD      Apt:      City: CHESTERLAND      St: OH      Zip: 44026      Cell Phone:      Employee Phone:

Hgt: 503      Wgt: 130      Hair: BRO      Eyes: BRO      Race: W      Sex: F      Physical Marks:

Offenses:

Resident Class: Other      Suspected of using: /      Victim Type:

Gm  
Reviewing Supervisor:

Bureau Supervisor:


Officer:


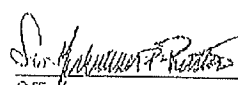
GATES MILLS										Incident Number	
Page # 3		Persons Involved with Incident						17-00180492			
Incident #:	Relation:	Arrest #:	CAD #:	Date of Contact:	Phone:						
1700180492	WIT			10/18/2017	440-693-4482						
First Name:	Middle	Last Name:	Ti:	DOB:	SSN:						
DANIEL	J	MILLER	MR.	05/15/1996	[REDACTED]						
Street #:	Street Name:	Apt:	City:	St:	Zip:	Cell Phone:	Employee Phone:				
9136	LAIRD RD		MIDDLEFIELD	OH	44062						
Hgt:	Wgt:	Hair:	Eyes:	Race:	Sex:	Physical Marks:					
510	140	BLN	GRN	W	M						
Offenses:											
Resident Class:		Suspected of using:				Victim Type:					
Other		/									
Incident #:	Relation:	Arrest #:	CAD #:	Date of Contact:	Phone:						
1700180492	GOV			10/18/2017	216-721-5610						
First Name:	Middle	Last Name:	Ti:	DOB:	SSN:						
AARON	A	DARDZINSKI		08/24/1979	[REDACTED]						
Street #:	Street Name:	Apt:	City:	St:	Zip:	Cell Phone:	Employee Phone:				
11001	CEDAR RD		CLEVELAND	OH	44106						
Hgt:	Wgt:	Hair:	Eyes:	Race:	Sex:	Physical Marks:					
601	240	BLN	BLU	W	M						
Offenses:											
Resident Class:		Suspected of using:				Victim Type:					
Other		/									
Incident #:	Relation:	Arrest #:	CAD #:	Date of Contact:	Phone:						
1700180492	OIV			10/18/2017	866-797-9018						
First Name:	Middle	Last Name:	Ti:	DOB:	SSN:						
DANIELLE	NICOLE	MORGAN		06/04/1981	[REDACTED]						
Street #:	Street Name:	Apt:	City:	St:	Zip:	Cell Phone:	Employee Phone:				
38401	MENTOR AVE APT 4303		WILLOUGHBY	OH	44094						
Hgt:	Wgt:	Hair:	Eyes:	Race:	Sex:	Physical Marks:					
506	210	BRO	BRO	B	F						
Offenses:											
Resident Class:		Suspected of using:				Victim Type:					
Other		/									

Gm  
Reviewing Supervisor:


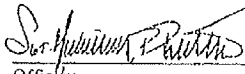
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
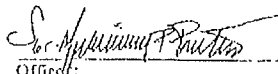
*[Signature]*  
Date:

GATES MILLS										Incident Number	
Page # 4										Persons Involved with Incident	
Incident #:		Relation:		Arrest #:		CAD #:		Date of Contact:		Phone:	
1700180492		NOK						10/18/2017		440-444-2910	
First Name:		Middle		Last Name:		Tit:		DOB:		SSN:	
TAYLOR		KAYE		ALLOWAY		MS.		06/10/1994		[REDACTED]	
Street #:		Street Name:		Apt:		City:		St:		Zip:	
6820		MADISON RD		A		THOMPSON		OH		44086	
Cell Phone:		Employee Phone:									
440-444-8810											
Hgt:		Wgt:		Hair:		Eyes:		Race:		Sex:	
505		148		BRO		GRN		W		F	
Physical Marks:											
Offenses:											
Resident Class:				Suspected of using:				Victim Type:			
Other				/				/			
Incident #:		Relation:		Arrest #:		CAD #:		Date of Contact:		Phone:	
1700180492								10/19/2017			
First Name:		Middle		Last Name:		Tit:		DOB:		SSN:	
GARY		P		PAOLETTO				01/24/1955		[REDACTED]	
Street #:		Street Name:		Apt:		City:		St:		Zip:	
12595		HOVEY DRIVE				CHESTERLAND		OH		44026	
Cell Phone:		Employee Phone:									
440-725-0453											
Hgt:		Wgt:		Hair:		Eyes:		Race:		Sex:	
505		185		BRO		BRO		W		M	
Physical Marks:											
Offenses:											
Resident Class:				Suspected of using:				Victim Type:			
Other				/				/			
<div style="text-align: center;">  </div>											
Reviewing Supervisor:				Bureau Supervisor:				Officer:			

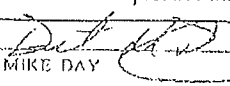
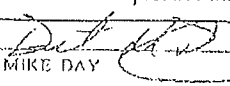
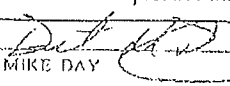
GATES MILLS				Incident Number A 74000183004022
Page # 5		Property Involved with Incident		
Item #: Item:	001 DASH CAM	NCIC#	Property Tag # "298"	
Make:	Model: Serial #:	Quantity:	Unit Measure:	
DRIVECAM	DC-3P00-00 ER924EFS	1.00	UCR Property Code:	
Value:	Owner Applied Number: Type:	Televisions, Radios, Stereos, Etc.		
	Seized			
NCIC Entry:	NCIC Remove:			
Notes: DASH CAM FROM WASTE MANAGEMENT GARBAGE TRUCK.				
Item #: Item:	002 WALLET	NCIC#	Property Tag # "299"	
Make:	Model: Serial #:	Quantity:	Unit Measure:	
Value:	Owner Applied Number: Type:	1.00	UCR Property Code:	
	Seized			
NCIC Entry:	NCIC Remove:			
Notes: DESERT DIGITAL CAMO PATTERN TRI-FOLD CONTAINING: OHIO COMMERCIAL DRIVER'S LICENSE (TV423790) (CLASS B) <del>33 \$1.00 (\$39.00)</del> USA MEDICAL CARD (██████████) COMERICA BANK MASTER CARD (██████████ 6089) HUNTINGTON BANK MASTERCARD (██████████ 32910) SOCIAL SECURITY CARD (██████████) GEICO BUSINESS CARD (DAVID BAUGHMAN) WASTE MANAGEMENT QUICK REFERENCE PHONE # CARD PLASTIC POUCH CONTAINING STAR FROM AMERICAN FLAG				
 Reviewing Supervisor:		 Bureau Supervisor:		
		Officer:		

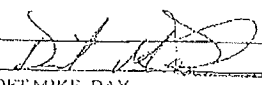


GATES MILLS				Incident Number <b>17-00180492</b>
Page # 6		Property Involved with Incident		
Item #: Item:	003 CELLULAR PHONE	NCIC#	Property Tag # "300"	
Make:	Model:	Serial #:	Quantity: Unit Measure:	
KYOCERA	DURAXV	8231440881662787143	1.00	
Value:	Owner Applied Number:	Type:	UCR Property Code:	
		Seized		
NCIC Entry:		NCIC Remove:		
Notes: DRIVER ISSUED WASTE MANAGEMENT PHONE				
Item #: Item:	004 ANDROID TABLET	NCIC#	Property Tag # "301"	
Make:	Model:	Serial #:	Quantity: Unit Measure:	
SAMSUNG	GALAXY	354736073112931	1.00	
Value:	Owner Applied Number:	Type:	UCR Property Code:	
	264264	Seized		
NCIC Entry:		NCIC Remove:		
Notes: DASH MOUNT WASTE MANAGEMENT DIGITAL LOG				
 Reviewing Supervisor:		Bureau Supervisor:		 Officer:

GATES MILLS										Incident Number																																																							
Page # 7		Vehicles Involved with the Incident								17-00180492																																																							
No:	Value:	Plate:	LIC St.:	LIC Yr.:	LIC Type:	VIN #:																																																											
001		PIIK9505	OH	08/31/2018	CO	1M2AC07C26M011073																																																											
Year:	Make:	Model:	Style:	Color:	Ownership Verification:		Tow No:	Date of Theft:																																																									
2006	MACK		TK	/	Other																																																												
Recovery Condition:		Recover Date:		Recover Location:		NCIC#		Owner Applied #:																																																									
<table border="0"> <tr> <td colspan="4"></td> <td colspan="2">Damaged Missing:</td> <td colspan="5"></td> </tr> <tr> <td>Front:</td> <td>NO</td> <td>Rear:</td> <td>NO</td> <td>Doors :</td> <td>NO</td> <td>Deck :</td> <td>NO</td> <td colspan="3">NCIC Entry:</td> </tr> <tr> <td>Interior:</td> <td>NO</td> <td>Engine:</td> <td>NO</td> <td>Trans :</td> <td>NO</td> <td>Dash:</td> <td>NO</td> <td colspan="3"></td> </tr> <tr> <td>Vin Plate:</td> <td>NO</td> <td>LIC Plate:</td> <td>NO</td> <td>Ignition:</td> <td>NO</td> <td>Other:</td> <td></td> <td colspan="3">NCIC Remove:</td> </tr> <tr> <td colspan="11">Misc:</td> </tr> </table>															Damaged Missing:							Front:	NO	Rear:	NO	Doors :	NO	Deck :	NO	NCIC Entry:			Interior:	NO	Engine:	NO	Trans :	NO	Dash:	NO				Vin Plate:	NO	LIC Plate:	NO	Ignition:	NO	Other:		NCIC Remove:			Misc:										
				Damaged Missing:																																																													
Front:	NO	Rear:	NO	Doors :	NO	Deck :	NO	NCIC Entry:																																																									
Interior:	NO	Engine:	NO	Trans :	NO	Dash:	NO																																																										
Vin Plate:	NO	LIC Plate:	NO	Ignition:	NO	Other:		NCIC Remove:																																																									
Misc:																																																																	
<div style="display: flex; justify-content: space-between; margin-top: 200px;"> <div>             Reviewing Supervisor:         </div> <div>           Bureau Supervisor:         </div> <div>             Officer:         </div> </div>																																																																	

GATES MILLS		Incident Number										
Investigative Report	Title / Subject: FATAL MVA	17-00180492										
<p>On Wednesday, October 18, 2017 at 1118 hours, Chagrin Valley Dispatch received multiple calls reporting a motor vehicle accident within the intersection of S.R. 174 and Brigham Road. The callers stated a Waste Management Garbage Truck had flipped on its side and that the driver was trapped inside the cab of the vehicle.</p> <p>Ptl. Arch Kimbrew, Det. Michael Day and I, along with the Gates Mills and Mayfield Village Fire Departments, responded to the scene. Upon our arrival, we observed a white and green Waste Management truck (Ohio registration: PHK9595) resting on its driver's side facing north on S.R. 174. Witnesses at the scene stated the driver (Travis James Gelhausen), who was trapped inside the cab, was not responsive. We then approached the truck but were unable to get a response from the driver and discovered that there was no way to remove Gelhausen without the assistance of mechanical tools. At this time we secured the scene and identified witnesses as both GMFD and MVFD arrived.</p> <p>While members of the Fire Department were extricating the driver I advised CVD to contact the VEG Accident Investigation Unit as well as Ken's Auto to respond. Upon their arrival, they assisted at the scene. At about the same time, supervisors from Waste Management arrived and provided us with Gelhausen's emergency contact information.</p> <p>At 1216 hours, Gelhausen was extricated from the truck and was attended to by Mayfield Village Paramedics. At 1218 hours Dr. Wieland (Hillcrest Hospital's Attending E.R. Physician) pronounced Gelhausen deceased. At this time, the Cuyahoga County Medical Examiner's Office was contacted and were dispatched to the scene.</p> <p>At 1225 hours, I called the Geauga County Communications Center and requested that an officer from the Thompson Police Department make notification to the next of kin (Taylor Alloway - listed as his emergency contact according to Waste Management's current records). At 1441 hours, CVD advised me that an Officer Nappi from Thompson Police Department made notification with Alloway.</p> <p>At 1336 hours, Death Investigator Aaron Dardzinski #19, from the Cuyahoga County Medical Examiner's Office arrived on scene and conducted his investigation. At 1358 hours the body was removed from the scene by the Medical Examiner's transport team (Reginald Morgan #35 - Unit 1102).</p> <p>At this time VEG AIU, Ohio State Highway Patrol, Geauga County Sheriff's Office and the Gates Mills Police Department continued their investigations. It was learned that a Samsung Galaxy S8 Tablet and a DriveCam Dashboard Recorder were present in the vehicle. We then spoke with Danielle Morgan (District Manager with Waste Management) who signed a consent to search form for the vehicle per Tim Kelly's (Waste Management Safety Manager) instructions. Det. Michael Day then collected the following items as evidence: 1 DriveCam Recorder, 1 Samsung Tablet, 1 Waste Management issued cell phone and Gelhausen's wallet.</p> <p>At approximately 1700 hours, the AIU as well as The Ohio State Highway, Gates Mills Police and the Geauga County Sheriff's Office completed their investigations and the truck was removed by Rich's Towing and is being stored at Ken's Autobody.</p> <p>Further investigation to be completed by VEG AIU.</p>												
<table style="width: 100%; border: none;"> <tr> <td style="width: 35%;">By: SGT MIKE POLLUTRO</td> <td style="width: 15%;">Badge# 3531</td> <td style="width: 15%;">Date: 10/19/2017</td> <td style="width: 15%;">Time: 09:35:3</td> <td style="width: 20%;">No. 001 Page #: 1</td> </tr> <tr> <td>Reviewing Supervisor: <i>gm</i></td> <td></td> <td>Date: 10/20/17</td> <td></td> <td></td> </tr> </table>			By: SGT MIKE POLLUTRO	Badge# 3531	Date: 10/19/2017	Time: 09:35:3	No. 001 Page #: 1	Reviewing Supervisor: <i>gm</i>		Date: 10/20/17		
By: SGT MIKE POLLUTRO	Badge# 3531	Date: 10/19/2017	Time: 09:35:3	No. 001 Page #: 1								
Reviewing Supervisor: <i>gm</i>		Date: 10/20/17										

GATES MILLS		Incident Number						
Investigative Report	Title / Subject: SUPPLEMENT	17-00180492						
<p>October 19, 2017:</p> <p>Per previous arrangements, Officer Kimbrew, Sgt Pollutro and I met with Tim Kelly, Waste Management Safety Manager, at the Gates Mills Police Department. Tim was able to provide us with a copy of the DriveCam video that had been uploaded to their server while at the crash scene on October 18, 2017. The split screen video shows Gelhausen operating the Waste Management truck and the roadway. During the video you can see, what appears to be, Gelhausen trying to use the air horn to warn a vehicle that is approximately one hundred (100) feet in front of the Waste Management truck while it travels westbound on Brigham Rd between Racebrook Ln and SR 174. Gelhausen attempts to maintain control of the truck as it approaches the intersection, turning the wheel to the right and over turning the truck. The video indicates that Gelhausen was driving from the left side of the truck at approximately 24 mph and was wearing his seat belt. A copy of the video was placed on the Detective's drive and a copy of the completed nondisclosure agreement was placed in the case jacket.</p> <p>After reviewing the video we talked with Tim further. Tim was able to show us the route that Gelhausen had taken while he was in training via a GPS log. The route normally showed the vehicle taking Wilson Mills westbound to southbound County Line Rd. They would then turn westbound on to US 322 and take that to I 271 south to the dump located in Oakwood Village. However, on the day of the accident Gelhausen had not turned south on County Line Rd and continued westbound on Wilson Mills, where is changes to Brigham Rd. It is unclear as to why there was a deviation from previous routes but it should be noted that this was the first day that Gelhausen had been driving this route alone.</p> <p>I received a call from Eileen T. Gerson, Paralegal for Gallagher Sharp LLP. Eileen explained that they are representing Waste Management and offered to assist us in obtaining information from the electronic control module (ECM) for the Waste Management truck with their reconstructionist, HRYCAY.</p> <p>I spoke with Sgt Fox, OSP, and learned that he was unable to gather any sufficient data from the truck's ECM while at the crash scene. He indicated that HRYCAY may have a better chance of obtaining important information from the ECM since they work with Waste Management. I also spoke with Officer Nyce (AIU) and he indicated the same.</p> <p>I later called Eileen and told her that we would be interested in working with HRYCAY to obtain the information from the ECM. Eileen stated that she would call the necessary people and see if they are available on Friday, October 20, 2017 to perform the download.</p> <p>October 19, 2017:</p> <p>Gary Paoletto contacted me and later stopped in the Gates Mills Police Department to complete a written statement based on what he observed while stopped at the stop sign northbound SR 174 at Brigham Rd.</p> <p>October 20, 2017:</p> <p>I met with Ryan Hicks and Derek Lanoue, HRYCAY, at Ken's Auto. They were able to download the event information after fixing some wiring issues. When the download was complete they took measurements of the truck for their report. After Ken's Auto I escorted them to the crash site where they completed their reconstruction. They were also provided with the Motor Carrier Enforcement information taken by Ed Wiklinski, Ohio State Highway Patrol. It should be noted that due to proprietary hardware from Mack trucks the download will be uploaded into a template and given to us at a later date after they return to Windsor,</p>								
<table style="width: 100%; border: none;"> <tr> <td style="width: 35%; border: none;"> By: <u>DET MIKE DAY</u>  </td> <td style="width: 15%; border: none;"> Badge# 3550 </td> <td style="width: 50%; border: none;"> Date: 10/19/2017 Time: 14:07:1 No. 002 Page #: 1 </td> </tr> <tr> <td style="border: none;"> Reviewing Supervisor: _____ </td> <td colspan="2" style="border: none;"> Date: _____ </td> </tr> </table>			By: <u>DET MIKE DAY</u> 	Badge# 3550	Date: 10/19/2017 Time: 14:07:1 No. 002 Page #: 1	Reviewing Supervisor: _____	Date: _____	
By: <u>DET MIKE DAY</u> 	Badge# 3550	Date: 10/19/2017 Time: 14:07:1 No. 002 Page #: 1						
Reviewing Supervisor: _____	Date: _____							

GATES MILLS		Incident Number
Investigative Report	Title / Subject: SUPPLEMENT	17-00180492
Canada.		
Travis Gelhausen's wallet was released to his mother.		
October 23, 2017: I spoke with Officer Nyce about the crash and garbage truck. At this time they would still like a hold on the truck while they complete the investigation at their end.		
October 24, 2017: Per Officer Nyce, the AIU is complete with the garbage truck and can be released. I later called Eileen and advised her.		
October 27, 2017: The garbage truck's module information, that had been downloaded by HRYCAY, was received from Eileen and forwarded to Officer Nyce and the case folder on the Detective's drive. I called Ryan Hicks and spoke with him about the data. He said that he still needs to compile the numbers but that Mack reports the switches backwards and that we will be most interested in switches 1, 2 and 3; which are brake related. He also said that the computer in this truck was off by approximately 350 days so we will need to use the event from November 13, 2016. I later called Officer Nyce and advised him of the information.		
November 15, 2017: Officer Nyce delivered the completed AIU report to Chief Minichello. The report was placed with the case jacket and later scanned to an electronic copy.		
November 21, 2017: I spoke with Prosecutor Cicero and advised him of the completed report. Due to the fact that there are no criminal charges we are concluding our investigation.		
I later called Ryan Davis, Waste Management, and made arrangements with him for the pick up the evidence that had been seized at the time of the crash.		
 By: DET MIKE DAY      Badge# 3550      Date: 10/19/2017      Time: 14:07:1      No. 002      Page #: 2 Reviewing Supervisor: _____      Date: _____		

## CALL FOR SERVICE REPORT

Date: 10/18/2017 Time: 11:18:07 Mrc: T Dispatchers: CBH DLE

1700100492

Location: BRIGHAM RD CHAGRIN RIVER RD City: GATES MILLS Zone: Grid:

Call Type: SQUAD CALL-5 MVA Incident#: Accident#: 1200016 EMS #: Fire #

Reviewed By: Disposition: REPORT

Caller:

Common Name:

Caller:  
JAY WALTER

Caller Address:

Phone  
216-218-1397

Units / Times

Unit	Disp	Route	Arrive	Clr	Leave	Hos	Ins	Quar	Badge1	Badge2
1411	11:21:07		11:47:48	16:32:25			16:21:10	16:32:25	1411	
1412	11:21:07	11:23:48	11:27:55	13:07:29				13:07:29	1412	
1453	11:26:16		11:37:19	11:55:00			11:51:14	11:55:00	1453	
1471	11:21:07	11:23:55	11:26:55	14:07:43			12:39:11	14:07:43	1471	
1472	11:21:07	11:23:17	11:26:48	16:32:28			16:21:13	16:32:28	1472	
3507	11:19:40		11:23:20	17:37:53					3507	
3531	11:19:41		11:23:22	17:37:56					3531	
3550	11:19:43		11:23:24	17:37:58					3550	

## Narrative

Vehicles Involved:  
PHK9505 OH 1M2AC07C26M011073 MACK  
GARBAGE TRUCK ROLLOVER  
MALE INSIDE

-- From 10/18/2017 11:19:46 To 10/18/2017 11:19:47 Disp QDS --  
ADDITIONAL CALL FROM TONYA HOGAN (216-534-3815)  
ADVISING OF SAME

-- From 10/18/2017 11:20:17 To 10/18/2017 11:20:19 Disp DLE --  
MAYFIELD VILLAGE ADVISED

-- From 10/18/2017 11:20:43 To 10/18/2017 11:20:44 Disp QDS --  
ADDITIONAL CALL FROM KELLY ADVISING OF ACCIDENT W/ INJURY  
216-313-0520

-- From 10/18/2017 11:23:25 To 10/18/2017 11:23:27 Disp DLE --  
SHUTTING DOWN BRIGHAM WB AT CL

-- From 10/18/2017 11:23:27 To 10/18/2017 11:24:03 Disp DLE --  
3551 REQUEST MAYFIELD VILLAGE TO SHUT DOWN S/B W/ SON MILLS AT RIVER RD

-- From 10/18/2017 11:24:59 To 10/18/2017 11:25:01 Disp DLE --  
MALE STILL TRAPPED - UNRESPONSIVE

-- From 10/18/2017 11:25:00 To 10/18/2017 11:25:18 Disp HR --  
MAYFIELD VILLAGE OFFICER OUT TO ASSIST

Units / Times									
Unit:	Disp:	Route:	Arrive:	Clr:	Leave:	Pos:	Ins:	Quar:	Badge1 Badge2
-- From 10/18/2017 11:25:28 To 10/18/2017 11:25:30 Disp CTA -- PERSONSCENE UNITS MALE IS STILL IN THE TRUCK AND UNRESPONSIVE									
-- From 10/18/2017 11:26:19 To 10/18/2017 11:26:19 Disp CTA -- 1453 ENROUTE TO STATION									
-- From 10/18/2017 11:25:18 To 10/18/2017 11:25:55 Disp HR -- CHESTER WILL BE ENROUTE TO SHUT DOWN WILSON MILLS AT COUNTY LINE									
-- From 10/18/2017 11:28:54 To 10/18/2017 11:29:06 Disp DLE -- AIU TEAM NEEDED R/O CALLED KEN'S DIRECT TO GET TRUCK UPRIGHT. METRO TRAFFIC TO BE NOTIFIED OF ROAD CLOSED									
-- From 10/18/2017 11:33:35 To 10/18/2017 11:33:36 Disp DLE -- 3550 ADVISED SERVICE DEPT THE ARE SHUTTING DOWN SHERMAN, BATTLES AND WILSON MILLS RD.									
-- From 10/18/2017 11:32:40 To 10/18/2017 11:32:41 Disp DLE -- 2429 LEAVING THE VILLAGE TO PICK UP AIU UNIT									
-- From 10/18/2017 11:36:05 To 10/18/2017 11:36:06 Disp DLE -- 4909 EN ROUTE TO BRIGHAM & RIVER									
-- From 10/18/2017 11:50:10 To 10/18/2017 11:50:12 Disp DLE -- WASTE MANAGEMENT IS REQUESTING TO HAVE INTERSTATE TOWING TOW VEHICLE WHEN IT IS ABLE TO BE TOWED.									
-- From 10/18/2017 11:54:47 To 10/18/2017 11:54:49 Disp DLE -- 4905 OUT AT RIVER & BRIGHAM									
-- From 10/18/2017 12:05:17 To 10/18/2017 12:05:19 Disp DLE -- WASTE MANAGEMENT IS EN ROUTE TO 3550'S LOCATION									
-- From 10/18/2017 12:06:07 To 10/18/2017 12:06:08 Disp DLE -- 3531 ADVISED MEDICAL EXAMINER WAS NOTIFIED									
-- From 10/18/2017 12:19:39 To 10/18/2017 12:19:40 Disp CTA -- VICTIM EXTRICATED FROM TRUCK AT THIS TIME									
-- From 10/18/2017 12:19:13 To 10/18/2017 12:19:15 Disp DLE -- ROADS CLOSED - RIVER S/B WILSON MILLS RIVER N/B FROM SHERMAN BRIGHAM W/B TO BATTLES									
-- From 10/18/2017 12:24:42 To 10/18/2017 12:24:43 Disp CTA -- FACEBOOK POST ABOUT ROAD CLOSURE AND TOTAL TRAFFIC NOTIFIED									
-- From 10/18/2017 12:31:59 To 10/18/2017 12:32:02 Disp DLE -- SCALES ARE EN ROUTE NOW TOW TRUCK STILL CAN NOT REMOVE THE TRUCK UNTIL OSP ARRIVES ON SCENE									
-- From 10/18/2017 12:39:25 To 10/18/2017 12:39:27 Disp CTA -- @ 1218 DR WEILAND PRONOUNCED THE DRIVER DECEASED									
-- From 10/18/2017 12:46:59 To 10/18/2017 12:47:00 Disp DLE -- COMMAND TRANSFERRED TO 1451 - MAYFIELD VILLAGE CLEARED THE SCENE									
-- From 10/18/2017 13:35:11 To 10/18/2017 13:35:52 Disp DLE -- 3550 ADVISED CORONER ON SCENE									
-- From 10/18/2017 13:54:26 To 10/18/2017 13:49:34 Disp DLE -- MAYFIELD CITY SCHOOLS ADVISED.									

Unit:	Disp:	Route:	Arrive:	Clr:	Leave:	Hos:	Ins:	Quar:	Badge1	Badge2
Units / Times										
-- From 10/18/2017 13:57:47 To 10/18/2017 13:58:06 Disp TJG -- MEDICAL EXAMINER HAS POSSESSION OF THE BODY AND IS TRANSPORTING IT AWAY FROM THE SCENE AT THIS TIME										
-- From 10/18/2017 14:02:11 To 10/18/2017 14:02:18 Disp TJG -- PER THOMPSON PD OFFICER NAPPI (440-298-1305) THEY HAVE BEEN UNABLE TO MAKE THE DEATH NOTIFICATION TO THE GIRLFRIEND YET...THEY LEFT A MESSAGE WITH HER LANDLORD										
-- From 10/18/2017 13:57:57 To 10/18/2017 13:58:00 Disp CTA -- MAYFIELD TRANSPORTATION GARAGE NOTIFIED CODE RED MESSAGE SENT ABOUT ROAD CLOSURE										
-- From 10/18/2017 14:07:15 To 10/18/2017 14:07:19 Disp CBH -- WITNESS TO THE CRASH, WILLING TO MAKE A STATEMENT GARY PAOLETTO 440-725-0453										
-- From 10/18/2017 14:41:37 To 10/18/2017 14:41:38 Disp CBH -- GIRLFRIEND WAS NOTIFIED										
-- From 10/18/2017 17:34:36 To 10/18/2017 17:35:35 Disp AR -- ALL ROADS ARE OPEN TO NORMAL TRAFFIC. METRO TRAFFIC WAS ADVISED AND SOCIAL MEDIA OUTLETS UPDATED.										



30

31

17-202032

MOTORIST / NON-MOTORIST / OCCUPANT										LOCAL REPORT NUMBER	
Unit Number: <b>01</b> Name: Last, First, Middle: <b>GELHAUSEN TRAVIS JAMES</b>						Date of Birth: <b>08/31/1992</b>		Age: <b>25</b>		Gender: <b>M</b> (F - Female, M - Male)	
Address: City, State, Zip: <b>6820 MADISON RD A THOMPSON OH 44086</b>						Contact Phone: (Include Area Code) <b>440-444-2910</b>					
Insured By: <b>5</b>		Insured Type: <b>4</b>		EINS Agency: <b>MAYFIELD</b>		Motorist Facility Number Taken To: <b>CORONER'S</b>		Safety Equipment Used: <b>04</b>		DOT Compliance: <input type="checkbox"/> Non-Compliant Helmet	
DL State: <b>OH</b>		DL License Number: <b>TV423790</b>		DL Class: <b>2</b>		DL Valid: <input type="checkbox"/> No <input type="checkbox"/> Yes		Common: <input type="checkbox"/> No <input type="checkbox"/> Yes		Alcohol/Drug Suspected: <input type="checkbox"/> No <input type="checkbox"/> Yes	
Offense Charged: ( ) Local Code: <b>NONE</b>		Offense Description: <b>NONE</b>		Citation Number: <b>1</b>		Alcohol Test Status: <b>1</b>		Alcohol Test Type: <b>1</b>		Alcohol Test Value: <b>1</b>	
Unit Number: <b>1</b>		Name: Last, First, Middle: <b>BOLAN JOSEPH P</b>		Date of Birth: <b>09/14/1941</b>		Age: <b>76</b>		Gender: <b>M</b> (F - Female, M - Male)		Contact Phone: (Include Area Code) <b>216-990-0089</b>	
Insured By: <input type="checkbox"/>		Insured Type: <input type="checkbox"/>		EINS Agency: <input type="checkbox"/>		Motorist Facility Number Taken To: <input type="checkbox"/>		Safety Equipment Used: <input type="checkbox"/>		DOT Compliance: <input type="checkbox"/> Non-Compliant Helmet	
DL State: <input type="checkbox"/>		DL License Number: <input type="checkbox"/>		DL Class: <input type="checkbox"/>		DL Valid: <input type="checkbox"/> No <input type="checkbox"/> Yes		Common: <input type="checkbox"/> No <input type="checkbox"/> Yes		Alcohol/Drug Suspected: <input type="checkbox"/> No <input type="checkbox"/> Yes	
Offense Charged: ( ) Local Code: <b>NONE</b>		Offense Description: <b>NONE</b>		Citation Number: <b>1</b>		Alcohol Test Status: <input type="checkbox"/>		Alcohol Test Type: <input type="checkbox"/>		Alcohol Test Value: <input type="checkbox"/>	
Unit Number: <b>1</b>		Name: Last, First, Middle: <b>SZAPOWAL JOLENE J</b>		Date of Birth: <b>01/20/1979</b>		Age: <b>38</b>		Gender: <b>F</b> (F - Female, M - Male)		Contact Phone: (Include Area Code) <b>440-533-5342</b>	
Insured By: <input type="checkbox"/>		Insured Type: <input type="checkbox"/>		EINS Agency: <input type="checkbox"/>		Motorist Facility Number Taken To: <input type="checkbox"/>		Safety Equipment Used: <input type="checkbox"/>		DOT Compliance: <input type="checkbox"/> Non-Compliant Helmet	
DL State: <input type="checkbox"/>		DL License Number: <input type="checkbox"/>		DL Class: <input type="checkbox"/>		DL Valid: <input type="checkbox"/> No <input type="checkbox"/> Yes		Common: <input type="checkbox"/> No <input type="checkbox"/> Yes		Alcohol/Drug Suspected: <input type="checkbox"/> No <input type="checkbox"/> Yes	
Offense Charged: ( ) Local Code: <b>NONE</b>		Offense Description: <b>NONE</b>		Citation Number: <b>1</b>		Alcohol Test Status: <input type="checkbox"/>		Alcohol Test Type: <input type="checkbox"/>		Alcohol Test Value: <input type="checkbox"/>	

17-2-02.032



OHIO DEPARTMENT  
OF PUBLIC SAFETY  
EDUCATION • SERVICE • PROTECTION

## TRAFFIC CRASH WITNESS STATEMENT

014-3

17-202032

LOCAL REPORT NUMBER 17-00180492	REPORTING AGENCY GATES Mills Police	DATE OF CRASH M 10/0 18/17
------------------------------------	--	-------------------------------

FOR LOCAL USE ONLY - DO NOT SUBMIT TO THE STATE EXCEPT FOR FATAL CRASHES

I, Daniel Miller HEREBY MAKE THIS VOLUNTARY STATEMENT TO  
PRINTED

P. A. Knebrew AT S.R. 1742 Bessemer Rd  
OFFICER'S NAME LOCATION

I WAS WORKING AT THE CORNER OF THE ~~ST~~ ST AND  
I HEARD A TRUCK COMING AS IT LOOKED LIKE HE  
WAS DOING 45 OR 50 MPH OR THEN I HEARD A LOUD  
BANG

ADDRESS OF WITNESS  
9136 Vinland Rd. Mobile, AL 36622

SIGNATURE OF WITNESS  
X Daniel Miller

OFFICER'S SIGNATURE  
X P. A. Knebrew

PHONE  
940-697-4492

KSY 7003 4/07

US 173208



OHIO DEPARTMENT  
OF PUBLIC SAFETY  
SAFETY • SERVICE • PROTECTION

## TRAFFIC CRASH WITNESS STATEMENT

OH-3

17-202032

LOCAL REPORT NUMBER 1700180492	REPORTING AGENCY Gates L.H. Rd	DATE OF CRASH M 10 D 18 Y 17
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FOR LOCAL USE ONLY - DO NOT SUBMIT TO THE STATE EXCEPT FOR FATAL CRASHES

1. Gary Paolitto PRINTED	HEREBY MAKE THIS VOLUNTARY STATEMENT TO
P. K. [Signature] OFFICER'S NAME	AT 1470 Chagrin River Rd. LOCATION
<p>I was North bound on Chagrin River Rd in Gates Mills at 11:30 am - stopped at the stop sign. Brisken Rd, hesitated for a second to look around. Then I saw a Waste Management Truck coming at high rate of speed like he didn't know the road ended. He cut his wheel hard at the stop sign, the truck tipped over on its side HARD, and slid across Chagrin River Rd. through the barricades.</p>	
ADDRESS OF WITNESS 12595 Honey D. Chatterbox Ct #44026	
PHONE 440.725.0453	
SIGNATURE OF WITNESS X Gary Paolitto	OFFICER'S SIGNATURE X [Signature] #3507

HSY 7003 8/13 (700-0820)

20978 - P36



OHIO DEPARTMENT  
OF PUBLIC SAFETY  
SAFETY • SERVICE • PROTECTION

## TRAFFIC CRASH WITNESS STATEMENT

OH-3

17-202032

LOCAL REPORT NUMBER 17-00180492	REPORTING AGENCY Gates House P.D.	DATE OF CRASH M. 10 / D. 18 / Y. 17
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FOR LOCAL USE ONLY - DO NOT SUBMIT TO THE STATE EXCEPT FOR FATAL CRASHES

I, <u>Joe Bolan</u> HEREBY MAKE THIS VOLUNTARY STATEMENT TO	
PRINTED	
<u>P. K. Kasper</u>	AT <u>Brownman Road S.R. 124</u>
OFFICER'S NAME	LOCATION
<p>I WAS 100' BEHIND TRUCK IT WENT THEN IT STOP SIGN <del>TO</del> TURNED RIGHT AND ROLLED OVER. DRIVER WAS TRAPPED IN CAB NOT SURE OF SPEED OF TRUCK I WAS STOPPING FOR STOP SIGN</p> <p><i>[Signature]</i></p>	
ADDRESS OF WITNESS 10035 N. WINTERGREEN DR. CHANDLER 44024	
PHONE 216. 998-0089	
SIGNATURE OF WITNESS X <i>[Signature]</i>	OFFICER'S SIGNATURE X <i>[Signature]</i> #3107

ISS 503 8/13 [760-0820]



OHIO DEPARTMENT  
OF PUBLIC SAFETY  
EDUCATION • SERVICE • PROTECTION

## TRAFFIC CRASH WITNESS STATEMENT

Q14-3

17-202032

LOCAL REPORT NUMBER 17-00180492	REPORTING AGENCY GATES MILLS POLICE	DATE OF CRASH 10/20/07
------------------------------------	--	---------------------------

FOR LOCAL USE ONLY - DO NOT SUBMIT TO THE STATE EXCEPT FOR FATAL CRASHES

I, John Szamrai  
PRINTED  
Eat Day AT Wilson Mills WILSONS  
LOCATION  
Baldwin's garage truck barrel down  
Hill, too fast to stop. I was at top of hill  
behind him going 35 he couldn't have stopped  
that truck at the sign, if he hit the break  
I couldn't tell, he took that curve and  
blew the sign, hitting the good rail.

ADDRESS OF WITNESS  
7017 E. Mill Creek Rd (Oak Creek) L/A 826  
PHONE  
410-533-2492

SIGNATURE OF WITNESS  
X [Signature]  
OFFICER'S SIGNATURE  
X [Signature] #3507

HSY 7003 4/07

RQ202633



Tear off this sheet and return the completed form to your employer's managed care organization (MCO) or to your local BWC customer service office.



Bureau of Workers' Compensation

Claim Number: 17-202032

# First Report of an Injury, Occupational Disease or Death

By signing this form, I:

- Elect only receive compensation and/or benefits that are provided for in this claim under Ohio workers' compensation laws;
- Waive and release my right to receive compensation and benefits under the workers' compensation laws of another state for the injury or occupational disease, or death resulting from an injury or occupational disease, for which I am filing this claim;
- Agree that I have not and will not file a claim in another state for the injury or occupational disease or death resulting from an injury or occupational disease for which I am filing this claim;
- Confirm that I have not received compensation and/or benefits under the workers' compensation laws of another state for this claim, and that I will notify BWC immediately upon receiving any compensation or benefits from any source for this claim.

## WARNING:

Any person who obtains compensation from BWC or self-insuring employers by knowingly misrepresenting or concealing facts, making false statements or accepting compensation to which he or she is not entitled, is subject to felony criminal prosecution for fraud.

(R.C. 2913.48)

Injured worker and injury/disease/death info.

Last name, first name, middle initial Gelhausen, Travis		Sex <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female		Marital status <input checked="" type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Separated <input type="checkbox"/> Widowed		Date of birth 8/31/1992	
Home mailing address 6820 MADISON RD APT A		City THOMPSON		State OH		9-digit ZIP code 44086-9774	
Wage rate \$ _____ Per <input type="checkbox"/> Hour <input type="checkbox"/> Month <input type="checkbox"/> Week <input type="checkbox"/> Year <input type="checkbox"/> Other		What days of the week do you usually work? <input type="checkbox"/> Sun <input type="checkbox"/> Mon <input type="checkbox"/> Tues <input type="checkbox"/> Wed <input type="checkbox"/> Thur <input type="checkbox"/> Fri <input type="checkbox"/> Sat		Regular work hours From _____ To _____		Occupation or job title Roll off driver	
Have you been offered or do you expect to receive payment or wages for this claim from anyone other than the Ohio Bureau of Workers' Compensation? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, please explain.							
Employer name WASTE MANAGEMENT OF OHIO INC							
Mailing address (number and street, city or town, state, ZIP code and county) 1001 FANNIN ST STE 4000 HOUSTON, TX 77002-6711							
Location, if different from mailing address							
Was the place of accident or exposure on employer's premises? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If no, give accident location, street address, city, state and ZIP code) Chagrin River Road Mayfield OH							
Date of injury/disease 10/18/2017		Time of injury <input type="checkbox"/> a.m. <input type="checkbox"/> p.m.		If fatal, give date of death 10/18/2017		Time employee began work <input type="checkbox"/> a.m. <input type="checkbox"/> p.m.	
Date hired 9/7/2017		State where hired OH		Date employer notified 10/18/2017		State where supervised OH	
Description of accident (Describe the sequence of events that directly injured the employee, or caused the disease or death.) Driver was attempting to make a right hand turn and lost control of the truck, causing it to roll over.						Type of injury/disease and part(s) of body affected (For example, sprain of lower left back) Accident resulted in a fatality	
Benefit application release of information - I am applying for a claim under the Ohio Bureau of Workers' Compensation Act for work-related injuries that I did not initiate. I affirm that I elect to receive compensation and benefits under the Ohio workers' compensation laws for my claim, and I waive and release my right to file for and receive compensation and benefits under the laws of any other state for this claim. I request payment for compensation and/or medical benefits as allowable, and a written direct payment to my medical provider. I permit and authorize any provider who attends, treats or examines me, and the Ohio Rehabilitation Services Commission (where relevant) to release medical, psychological, psychiatric, vocational or social information that is causally or historically related to my physical or mental injuries relevant to issues necessary for the administration of my claim to BWC, the Industrial Commission of Ohio, the employer in this claim, the employer's BWC managed care organization and any authorized representatives. My previous or future BWC claims may affect decisions made in this claim. Proper administration of the present claim may require BWC to share claims information with the employers of record for their authorized representatives and/or my authorized representative for any and all past, present or future claims. The released claims information may include any record maintained in my claim files.							
Injured worker signature		Date		E-mail address		Telephone number (440) 444-8810	
Health-care provider name		Telephone number		Fax number		Initial treatment date	
Street address		City		State		9-digit ZIP code	
Diagnosis(es): Include ICD code(s)							
Will the incident cause the injured worker to miss eight or more days of work? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No							
Is the injury causally related to the industrial incident? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No							
E code		11-digit BWC provider number		Date			
Health-care provider signature							

Treatment info.

Employer policy number 20003887-0		Check <input checked="" type="checkbox"/> Employer is self-insuring <input type="checkbox"/> Injured worker is owner/partner/member of firm	
Telephone number (614) 675-2216	Fax number (614) 675-5250	E-mail address	Federal ID number 251623264
Was employee treated in an emergency room? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Was employee hospitalized overnight as an inpatient? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If treatment was given away from work site, provide the facility name, street address, city, state and ZIP code			
<input checked="" type="checkbox"/> Certification - The employer certifies that the facts in this application are correct and valid		<input type="checkbox"/> Rejection - The employer rejects the validity of this claim to the reason(s) listed below	
For self-insuring employers only <input type="checkbox"/> Clarification - The employer clarifies and allows the claim for the condition(s) below: <input type="checkbox"/> Medical only <input type="checkbox"/> Lost time			
Employer signature and title Mike Cilino - MJC (Electronic Signature)		Date 10/21/2017	
OSHA case number			

Employer policy number 20003887-0		Check <input checked="" type="checkbox"/> Employer is self-insuring <input type="checkbox"/> Injured worker is owner/partner/member of firm	
Telephone number (614) 675-2216	Fax number (614) 675-5250	E-mail address	Federal ID number 251623264
Was employee treated in an emergency room? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Was employee hospitalized overnight as an inpatient? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If treatment was given away from work site, provide the facility name, street address, city, state and ZIP code			
<input checked="" type="checkbox"/> Certification - The employer certifies that the facts in this application are correct and valid		<input type="checkbox"/> Rejection - The employer rejects the validity of this claim to the reason(s) listed below	
For self-insuring employers only <input type="checkbox"/> Clarification - The employer clarifies and allows the claim for the condition(s) below: <input type="checkbox"/> Medical only <input type="checkbox"/> Lost time			
Employer signature and title Mike Cilino - MJC (Electronic Signature)		Date 10/21/2017	
OSHA case number			

BWC-1101 (Rev. 12/02/2010)  
FROI-1 (Combines C-1, C-2, C-3, C-6, C-60, OD-1, OD-1-22)  
Web, 10/21/2017 9:33:00 AM [Eastern Time]

This form meets OSHA 301 requirements

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Bureau of Workers'  
CompensationApplication for Death Benefits  
and/or Funeral Expenses

Please reference page two of this form for information regarding evidence that you must submit with the application. You can submit this form and supporting documentation via fax to 1-800-833-0350 or to your local BWC customer service office.

Name of decedent <b>TRAVIS JAMES GELHAUSEN</b>		Claim number if known	Date of death <b>8-31-92</b>
Check all that apply:			
<input checked="" type="checkbox"/> I am applying for death benefits and, if applicable, funeral expenses (check one of the boxes below) and proceed to section 3.			
<input type="checkbox"/> For myself			
<input type="checkbox"/> For myself and other dependents of the decedent			
<input checked="" type="checkbox"/> On behalf of dependents of the decedent			
<input type="checkbox"/> I am only applying for reimbursement of funeral expenses or services related to the decedent's death. Proceed to section 2.			
<b>This section is completed when only requesting reimbursement of funeral expenses or other services.</b>			
Complete this section and proceed to section 6			
2	Name	Street address, city, state, ZIP code	Relationship to decedent if applicable
	Social Security number or Federal tax ID #	Cell/phone number with area code	Email address
<b>List all persons who were dependent on the decedent for support (attach sheet for additional dependents if needed)</b>			
<b>First dependent</b>			
	Name	Street address, city, state, ZIP code	Relationship to decedent
	SABRINA JOAN GELHAUSEN	P.O. Box 23	DAUGHTER
	Social Security number	Cell/phone number with area code and email address	Date of birth
	714-56-6137	N/A	3-19-15
<b>Second dependent</b>			
	Name	Street address, city, state, ZIP code	Relationship to decedent
	Social Security number	Cell/phone number with area code and email address	Date of birth
<b>Third dependent</b>			
	Name	Street address, city, state, ZIP code	Relationship to decedent
	Social Security number	Cell/phone number with area code and email address	Date of birth
<b>Complete this section if you are the decedent's spouse</b>			
4	Was the decedent residing with you at time of death? Yes <input type="checkbox"/> No <input type="checkbox"/> If no, please explain why you were living separately.		
	Were you previously married? Yes <input type="checkbox"/> No <input type="checkbox"/>		
<b>Decedent Information</b>			
5	Was decedent married more than once? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> Does the decedent have any children not listed in section 3? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
<b>Signature</b>			
I am applying for death benefits, reimbursement of services related to the decedent's death and/or funeral expenses under the Ohio Bureau of Workers' Compensation Act for work-related injuries. I affirm that I elect to receive compensation and benefits under Ohio's workers' compensation laws for my claim, and I waive and release my right to file for and receive compensation and benefits under the laws of any other state for this claim. I request payment for compensation and/or benefits as allowable.			
I certify the information on this form is true and correct to the best of my knowledge. I understand that any person who knowingly makes a false statement, misrepresentation, concealment of fact or any other act of fraud in obtaining benefits and/or compensation as provided by BWC or self-insuring employers, or who knowingly accepts compensation to which that person is not entitled, is subject to criminal prosecution and may, under appropriate criminal provisions, be punished by a fine or imprisonment or both.			
Person completing this form (please print)			
Taylor Alloway			Date
Signature of person completing this form			October-29-2017
Taylor Alloway			Cell/phone number
			(440) 269 9961

OCT 23 2017

40



Thomas P. Gilson, M.D.  
Medical Examiner

Cuyahoga County  
Medical Examiner's Office  
11001 Cedar Avenue, Cleveland, Ohio 44106  
MEDICAL EXAMINER'S VERDICT

THE STATE OF OHIO,  
SS.  
CUYAHOGA COUNTY

CASE NUMBER: IN2017-02047

Be it Remembered, That on the 18th day of October, 2017, information was given to me, Thomas P. Gilson, M.D., Medical Examiner of said County, that the dead body of a man supposed to have come to his death as the result of criminal or other violent means, or by casualty, or by suicide, or suddenly when in apparent health, or in any suspicious or unusual manner, (Sec. 313-11, 313-12 R.C. Ohio) had been found on ground, in vicinity of the River and Brigham Roads Intersection in Gates Mills of Cuyahoga County, on the 18th day of October, 2017.

I viewed or caused to be viewed the said body at the Medical Examiner's Office. After the viewing and making inquiry into the circumstances that caused the death of the said person, I obtained further information, to-wit: (GMPD #17-00180492). I also carefully examined or caused to be examined the said dead body at 8:34 AM on the 19th day of October, 2017 and I find as follows; to-wit:

I, Thomas P. Gilson, M.D., Medical Examiner of said county, having diligently inquired, do true presentment make in what manner Travis James Gelhausen, whose body was at the Medical Examiner's Office on the 19th day of October, 2017 came to his death. The said Travis James Gelhausen was married but separated, 25 years of age, a resident of Thompson, Geauga County, Ohio, and a native of Claridon Township, Ohio; was of the White race, and had enucleated eyes, blonde/brown hair, blonde/brown beard, blonde/brown mustache, was 69 inches in height, and weighed 144 pounds.

Upon full inquiry based on all the known facts, I find that the said Travis James Gelhausen came to his death officially on the 18th day of October, 2017 on ground, in vicinity of the River and Brigham Roads Intersection and was officially pronounced dead at 12:18 P.M., by Dr. Weinland. There is history; that the said Travis James Gelhausen, 7811 Dewey Road, Thompson, Geauga County, Ohio, was employed by Waste Management. On October 18th, 2017 at about 11:18 A.M., this man was working, operating a 2006 Mack LE garbage truck, traveling westbound on Brigham Road, in vicinity of Chagrin River Road (SR 174), Gates Mills, Ohio, when a traffic accident occurred. The Gates Mills Police and Paramedics were called and on arrival, the said Travis James Gelhausen was found to have expired, with serious visible injuries, and was pronounced dead at the aforementioned time and date. The County Medical Examiner's Office was notified and Esposito Mortuary Services was dispatched. This man was then transported to the Medical Examiner's Office where an autopsy was performed. That death in this case was the end result of mechanical asphyxia, with an other condition of blunt force injuries of head, neck, trunk, and extremities with cutaneous, soft tissue, and skeletal injuries, sustained in a garbage truck - fixed object collision, and was an accident while at work.

Cause of Death: Mechanical asphyxia.

Other Condition(s): Blunt force injuries of head, neck, trunk, and extremities with cutaneous, soft tissue, and skeletal injuries.  
GARBAGE TRUCK-FIXED OBJECT ACCIDENT, DRIVER. WHILE AT WORK.

Travis James Gelhausen  
(Name of Deceased)

M.D.

Cuyahoga County Medical Examiner

Case: W2017-02647  
Name: Travis James Gainsen

City: Cuba, Mo

#### GROSS ANATOMIC DESCRIPTION

**EXTERNAL EXAMINATION:** The body is that of a normally developed and adequately nourished White male, whose appearance is consistent with the reported age of 25 years. The body weighs 144 pounds and is 69 inches in length. Rigor mortis is absent. Lividity is faint and fixed on the anterior chest. The skin temperature is cold.

The scalp hair is short and blonde-brown and has a normal distribution. The facial hair is long and blonde-brown. The eyes are enucleated, and plastic eye shields are within each orbit. The palpebral conjunctiva reveal bilateral petechiae. The right ear, nose, and mouth show no structural abnormalities. There are at least two piercings in the left earlobe. There is one piercing in the midline lower lip. Scattered petechiae are seen on the oral and gingival mucosa. The teeth are natural and in good condition. The neck is of normal configuration, and there are no palpable masses. The thorax is symmetrical and normal in configuration. The breasts are of normal male configuration, and there are no palpable masses. The abdomen is flat. The external genitalia are of normal male circumcised conformation, and there are no external lesions. The extremities appear normal, and the joints are not deformed. All digits are present. The skin of the superior face is plethoric with cutaneous petechiae on the forehead, bilateral eyelids, and bilateral postauricular skin. The remaining skin is of normal pliability and texture and presents no significant lesions. There is no icterus. Patient identification tags are on the left great toe.

#### SCARS AND IDENTIFYING MARKS:

##### Tattoos:

1. A 9" x 6" black ink writing tattoo is on the right lateral abdomen.
2. A 3 1/2" x 3" black ink skull figure tattoo is on the midline upper back.
3. There is a collage of polychromatic tattoos extending circumferentially from the superior right upper arm to the dorsal right hand.
4. An 8" x 2 1/2" polychromatic figure tattoo is on the left anterior forearm.

#### EXTERNAL AND INTERNAL EVIDENCE OF RECENT THERAPY:

1. At least six puncture wounds with surrounding ecchymosis are on the right upper chest.

#### EXTERNAL AND INTERNAL EVIDENCE OF ORGAN DONATION:

1. The eyes have been enucleated, and plastic eye shields are present within each orbit.
2. A U-shaped incision, partially closed with sutures, is in the skin and subcutaneous soft tissues of the anterior thorax. Longitudinal incisions are through the anterior and bilateral ribs, and the anterior chest plate has been removed. The heart with attached great vessels are absent. Surgical pathology report and four microscopic slides are received from the Cryolife Laboratory on October 17, 2017.
3. Longitudinal incisions, each closed with sutures, are in the skin of the lateral upper extremities and extend from the lateral pelvis through each lower extremity to the dorsal feet. Segments of the long bones of each extremity as well segments of the pelvis are absent and replaced with rigid poles.
4. Rectangular areas of superficial skin harvesting are on the trunk and bilateral lower extremities.

#### EXTERNAL AND INTERNAL EVIDENCE OF RECENT INJURY:

1. A 6" x 4" dark red acute subgaleal hemorrhage is in the left frontal and temporal scalp.
2. Multiple scattered lacerations are on the right lateral orbit and temple, clustered over a 2" x 1/2" area, measuring up to 1/4" in greatest length.
3. A 1/2" x 1/2" red-purple contusion is on the superior midline forehead.
4. Acute hemorrhage is seen underlying the bilateral orbital roofs and right masticid.
5. A 2 1/2" x 1" rectangular pink-red contusion extends from the right paramedial neck onto the left superior neck. Possible oblique striations are seen within this contusion.
  - a. A focal area of abrasion is noted within the contusion on its left lateral aspect.
5. There is a hemorrhagic subluxation of the atlanto-axial vertebrae.

Case: IN2047-02047

Name: Travis James Gelhausen

Cryostat

7. A hemorrhagic fracture is in the superior aspect of the C4 vertebral body with overlying prevertebral fascia hemorrhage.
8. A 6 1/2" X 1 1/2" purple-black contusion is on the left lateral thorax.
9. There is a 3" x 2 1/2" black contusion on the left anterior pelvis.
10. A 4 1/2" x 1/2" red-blue contusion is on the right lateral thigh.
11. A 9" x 4 1/2" red-purple contusion is on the left lateral thigh.
12. A 3/2" x 1/2" ovoid red abrasion on the left inferior knee.
13. There is a 1/2" x 1/2" ovoid red abrasion on the left anterior lower leg.

The above injuries are numbered by convention from the top downward, and the numbering is not intended to imply the severity or sequence in which the injuries may have been sustained. The above injuries, once having been described, will not be referred to below. The remainder of the external examination of the head, neck, trunk, and extremities is unremarkable.

**INTERNAL EXAMINATION:** The body is opened by means of the usual "Y" and biparietal incisions. The viscera of the thoracic and abdominal cavities occupy their normal sites. The serosal surfaces are smooth and glistening. No significant fluid accumulations are present within the pericardial sac, pleural cavities, or abdominal cavity. There are no abnormal masses present. The diaphragmatic leaves are normally situated. The margins of the liver and spleen are in proper relationship to their costal margins. The weights of the organs are as follows and, unless specified below, show no additional evidence of congenital or acquired disease.

Right lung - 600 grams  
 Left lung - 510 grams  
 Spleen - 150 grams  
 Liver - 1520 grams  
 Right kidney - 160 grams  
 Left kidney - 180 grams  
 Brain - 1430 grams

**NECK:** The neck organs are excised en bloc and examined separately. The surface of the tongue and serial cross sections through the tongue show no gross abnormalities. The larynx and trachea have a normal caliber and are free of obstruction. The laryngeal and tracheal mucosa is soft and tan-pink. The paravertebral musculature, including dissection of the anterior and posterior cervical musculature is unremarkable. The cervical spine, hyoid bone, and tracheal cartilage are intact.

#### CARDIOVASCULAR:

**Heart:** For further details please refer to the attached Cryostat Laboratory surgical pathology report.

**Aorta and its major branches:** The aorta and its principal branches are patent throughout. There are no thrombi, areas of erosion, or zones of significant narrowing present.

**Venas cavae and their major tributaries:** The superior and inferior venae cavae and their major tributaries are patent throughout. No areas of extrinsic or intrinsic stenosis are present.

**RESPIRATORY:** The major bronchi have a normal caliber and are free of obstruction. The right and left lungs have a normal lobar configuration. The visceral pleura is smooth and glistening. There are no subpleural emphysematous bullae. The pulmonary arteries are free of emboli and thrombi. The lungs are crepitant throughout. The parenchyma is unremarkable.

**RETICULOENDOTHELIAL:** The spleen has a normal configuration. The capsule is blue-gray and smooth, without areas of thickening. On section, the splenic pulp is of normal consistency and appearance. No abnormal lymph nodes are encountered.

**DIGESTIVE:** The esophagus is free of lesions. The stomach has a normal configuration. The serosa is smooth and glistening. The wall is of normal thickness and the mucosa is thrown into rugal folds. There are no areas of ulceration. The stomach contains approximately 150 ml of tan-brown fluid. The duodenum is free of ulceration and other intrinsic lesions. The remainder of the small bowel, the colon, and the rectum are normal in appearance. The appendix is present and is unremarkable.

Case: 142617-02047  
Name: Travis James Gelhausen

City: Cuyahoga

#### HEPATOBIILIARY:

Liver: The capsule is smooth and glistening. The liver configuration is normal. Multiple cross sections through the liver reveal a normal lobular pattern.

Gallbladder: The gallbladder is of normal size and configuration. The wall is thin, and the mucosa is bile-stained. It contains approximately 10 ml of bile. No calculi are present.

PANCREAS: The pancreas is soft and normally lobulated. Multiple cross sections through the pancreas reveal normal tan-pink parenchyma without intrinsic lesions.

#### GENTOURINARY SYSTEM:

Kidneys: The right and left kidneys are similar. The capsules strip with ease to reveal smooth subcapsular surfaces. The renal arteries and veins are patent and free of stenosing lesions. On section, the renal cortices are of normal thickness and the cortico-medullary demarcations are distinct. The medullae are unremarkable. The pelvo-calyceal systems are normal in appearance. The ureters are unremarkable.

Bladder: The bladder is of normal configuration. The mucosa is intact and free of ulcerations or other lesions. It contains no urine.

Prostate and seminal vesicles: Multiple cross sections through the prostate reveal rubbery, firm, grey-white parenchyma, free of lesions. The seminal vesicles are unremarkable.

Testes: The testes are both present within the scrotal sac, and bivalve sections show normal parenchyma.

ENDOCRINE SYSTEM: No abnormalities are present in the pituitary, thyroid, or adrenal glands.

MUSCULOSKELETAL: The remaining axial and appendicular skeleton show no abnormalities. The remaining exposed musculature is unremarkable.

HEAD/BRAIN: The skull is intact. The dura is smooth and glistening. The convexities of the cerebral hemispheres are symmetrical. The leptomeninges are thin and transparent. The subarachnoid space does not contain any hemorrhage. The cerebrum presents with mild edema, with flattening of the gyri and narrowing of the sulci. There is no evidence of subfalcine, uncus, or cerebellar tonsillar herniation present. The major cerebral arteries show no significant atherosclerosis or congenital anomalies. The roots of the cranial nerves are unremarkable. Coronal sections through the cerebral hemispheres show a grossly normal cortical ribbon and underlying white matter. The basal ganglia and diencephalon show no gross abnormalities. Serial cross sections through the brainstem and sagittal sections through the cerebellum fail to show any gross lesions or abnormalities. The ventricular system is symmetrical and of normal size and configuration. After removal of the brain, the base of the skull does not demonstrate any fractures.

SPINAL CORD: The spinal cord is smooth, white, and glistening, and serial cross sections through the spinal cord show no gross abnormalities.

#### MICROSCOPIC DESCRIPTION

BRAIN:	Mild congestion of the cerebral and leptomeningeal vasculature
HEART:	Sections received from Cryolife No histopathological diagnosis in sectioned tissue
LUNGS:	Large areas of atelectasis with occasional foci of alveolar ectasia are seen Pulmonary hemorrhage and diffuse congestion are also noted The alveoli contain increased aggregates of debris- and pigment-laden macrophages and patchy edema Interstitial anthracotic pigment-laden macrophages are noted
LIVER:	No significant pathologic abnormality identified The parenchyma maintains an organized architecture with no fibrosis, discrete inflammatory infiltrates, or steatosis

1: 11. 22. 1943

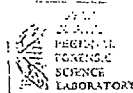
*Amanda Spencer*  
Amanda Spencer, D.O.

5-15-18  
Date





Toxicology Laboratory Report  
Cuyahoga County Regional Forensic Science Laboratory  
11001 Cedar Avenue, Cleveland, Ohio 44106  
Final Report



Page 1 of 3

Case Number :	IN2017-02047	Report Date :	Wednesday, December 27, 2017
Name :	Travis Golhausen	Receipt Date :	Thursday, October 19, 2017
Agency :	Cuyahoga County (CCMEO)	Pathologist :	ASPE - Amanda Spencer D.O.

P1 - Femoral Blood	F2 - Femoral Blood	A1 - Cavity Blood	P5 - Femoral Blood
F4 - Femoral Blood	G1 - Gastric	I1 - Bite	L1 - Liver
R1 - Longterm Storage	R2 - Longterm Storage	R3 - Longterm Storage	V1 - Vitreous Humor

Specimen Received: *Handwritten signature* 1/10/18

COMMENT: P1 - P6, V1 = Lilebanc draw; A1, R1 - R3 = right pleural cavity blood

Drug Group/Class	Result	Quantitation	Analyte(s)
Volatile Screen & Confirmation	None Detected		See Last Page, Group 1
Opiate ELISA Screen	None Detected		See Last Page, Group 1
Cannabinoids by LC/MS/MS	Positive		See Last Page, Group 2
Delta-9-THC-COOH	(C.L. = 95.45%)	5.3 ± 1.0 ng/mL	
Amphetamine ELISA	None Detected		See Last Page, Group 7
Barbiturates ELISA Screen	None Detected		See Last Page, Group 7
Benzodiazepines ELISA Screen	None Detected		See Last Page, Group 7
Cannabinoids ELISA Screen	Positive		See Last Page, Group 7
Carisoprodol ELISA Screen	None Detected		See Last Page, Group 7
Cocaine Mth. ELISA Screen	None Detected		See Last Page, Group 7
Fentanyl ELISA Screen	None Detected		See Last Page, Group 7
Methamphetamine ELISA Screen	None Detected		See Last Page, Group 7
Oxycodone ELISA Screen	None Detected		See Last Page, Group 7
Phencyclidine ELISA Screen	None Detected		See Last Page, Group 7
Tricyclic Antidepressants ELISA Screen	None Detected		See Last Page, Group 7
Methadone ELISA Screen	None Detected		See Last Page, Group 7
Zolpidem ELISA Screen	None Detected		See Last Page, Group 7
Buprenorphine ELISA Screen	None Detected		See Last Page, Group 7

Drug Group/Class	Result	Quantitation	Analyte(s)
Carbon Monoxide	None Detected		See Last Page, Group 3

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed			

Case #: H0817-00047

Page: 11

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

Drug Group/Class	Result	Quantitation	Analyte(s)
No Test Performed	---		

## DRUGS ANALYZED/QUANTIFIED BY CCRFSL/CCMEO TOXICOLOGY

- [illegible]

I certify that the specimen identified by this case, number 17017-02067 have been handled and analyzed in accordance with all applicable requirements. The result in this report relate to the items tested. For purposes of identification and case linking the Toxicology Lab uses case numbers exclusively. Name is subject to change based on receipt of information. This report shall not be reproduced except in full without the written approval of the Cuyahoga County Regional Forensic Science Laboratory.

Forensic Toxicology Consultant

John F. Wyman, PhD

STATE OF OHIO )  
 ) SS: AFFIDAVIT  
COUNTY OF GEAUGA )

I, Jolene Szapowal, being first duly sworn, hereby declare under oath the following:

- 1) I am a resident of Geauga County, Ohio with a date of birth of January 20, 1979 and a mailing address of 11117 Chillicothe Road, Chesterland, Ohio 44026.
- 2) I am a witness to a motor vehicle collision that occurred on October 18, 2017 at the intersection of Bringham Road and Chagrin River Road, located in Gates Mills, Cuyahoga County, Ohio.
- 3) I was traveling behind a waste management garbage truck driven by Travis Gelhausen. We were traveling westbound on Bringham Road when the garbage truck attempted a right hand turn onto Chagrin River Road, when the garbage truck crashed.
- 4) After witnessing the crash, I parked my vehicle and attempted to administer aid to Mr. Gelhausen, the driver of the garbage truck.
- 5) When I approached the garbage truck I could see Mr. Gelhausen from his ribs to his knees and could see that he was still breathing.
- 6) At no point in time that I was with Mr. Gelhausen was he able to move his arms or legs.
- 7) Mr. Gelhausen continued breathing for approximately three minutes while I rubbed his leg in an effort to comfort him.
- 8) Mr. Gelhausen ultimately expired in my presence as I witnessed his body seize and he stopped breathing.

FURTHER AFFIANCE SAYETH NAUGHT

*J. Szapowal*  
Jolene Szapowal

Before me, a Notary Public, in and for said County and State, appeared Jolene Szapowal who states that the above signature is her own free act and deed, this 30 day of April, 2018



SHANNON MCFARLAND  
Notary Public - State of Ohio  
Recorded in Lake County  
My Commission Expires 7-7-2021

*Shannon McFarland*  
NOTARY PUBLIC

PAUL T. HOGYA, M.D., FACEP  
245 BUENA VISTA DRIVE  
SOUTH LEBANON, OH 45065

PHONE 513/494-0308

FAX 513/494-0310

June 30, 2018

Brian Perry, Esq.  
Dinsmore & Shohl, LLP  
255 East Fifth Street  
Suite 1900  
Cincinnati, OH 45202

Re: Travis Gelhausen (deceased)  
Claim # 17-202032  
DOI: 10/18/17  
Employer: Waste Management of Ohio

Alleged Conditions: Total Loss of Use of the Right and Left Arm  
Total Loss of Use of the Right and Left Leg  
Total Loss of Vision in Both Eyes  
Bilateral Hearing Loss

Dear Mr. Perry:

I received your recent correspondence regarding the above industrial injury claim. I had the opportunity to review all the enclosed claim files available with regard to this claim. I accept the objective findings of the examining physicians in regard to the allowed conditions in this claim as described in the medical records, although I may not agree with their conclusions.

Alleged Mechanism of Injury: Driver - Waste Management Garbage Truck Accident.

Pertinent Medical Data:

- FROI-1 report reviewed.
- C-86 motion dated 5/1/18 reviewed.
- Dr. Amanda Spencer (Cuyahoga County Medical Examiner Office) autopsy report dated 10/19/17 reviewed:
  - o 6" x 4" dark red acute subgaleal hemorrhage in the left frontal and temporal scalp.
  - o Multiple scattered lacerations right lateral orbit and temple.
  - o Contusion on the superior midline forehead.
  - o Acute hemorrhage underlying the bilateral orbital roofs and right mastoid.
  - o Contusion extending from right paramedical neck onto the left superior neck with focal abrasion within the contusion on its left lateral aspect.
  - o Hemorrhagic subluxation of the atlanto-axial vertebrae.

RE: Travis Gelhausen (deceased)  
Claim # 17-202032  
June 30, 2018  
Page 2

- Hemorrhagic fracture superior C4 vertebral body.
- Contusions to the left lateral thorax; left anterior pelvis; right lateral thigh; left lateral thigh; left inferior knee; left anterior lower leg.
- Cerebrum shows mild edema with flattening of the gyri and narrowing of the sulci.
- Toxicology Report dated 12/27/17 reviewed:
  - Positive for marijuana THC metabolites at 5.3 ng/ml.
- Affidavit from Jolene Szapowal dated 4/30/18 reviewed.
- Mayfield Village EMS report dated 10/18/17 reviewed.
- Chagrin Valley Enforcement Group Accident Reconstruction Report reviewed.
- Sgt. Mike Pallutro (Gates Mills Police Department) Investigative Report dated 10/20/17 reviewed.
- Memo F4 – Loss of Use of Vision and/or Hearing Secondary to Traumatic Brain Injury reviewed.

**OPINION:** I was asked to perform an independent medical file review on this industrial injury claim. After having had the opportunity to review the available medical documentation, there is adequate information with which to formulate an independent, objective medical opinion with respect to this matter, these opinions being based on a reasonable degree of medical probability and certainty.

*Question 1: Does the medical evidence demonstrate whether Mr. Gelhausen actually survived the crash for a discernible period of time? Please discuss the difference between actual time of death as opposed to the officially declared time of death. In addition, please also discuss the Affidavit of Ms. Szapowal in which she describes what she perceived to be some possible breathing activity for a period of time which she estimates at three minutes.*

The actual death is cessation of breathing, heart beat and brain function. An officially declared time of death is when a qualified medical professional confirms cessation of breathing, heart beat and brain function. If none of these are present, then the doctor will announce an officially declared time of death. In Mr. Gelhausen's case, although found to be unresponsive immediately after the accident, the officially declared time of death was delayed due to the fact that he was trapped inside his vehicle and had a prolonged extrication with the assistance of mechanical tools. Within two minutes of extrication, EMS personnel contacted the ED physician for official confirmation of time of death.

The only evidence that Mr. Gelhausen survived the crash for a discernible period of time is non-medical and from the lay witness, Ms. Szapowal. The autopsy showed that he suffered a major cervical spine injury described as hemorrhagic subluxation of the atlanto-axial vertebrae. He also showed evidence of a significant concussion as manifested by brain swelling, i.e. the cerebrum shows mild edema with flattening of the gyri and narrowing of the sulci. There was evidence of head trauma with various lacerations and contusions. The brain itself showed no signs of hemorrhage.

RE: Travis Gelhausen (deceased)  
 Claim # 17-202032  
 June 30, 2018  
 Page 3

The atlanto-axial joint is the junction between neck and skull. It encloses and supports the spinal cord. The spinal cord is least reinforced in neck compared to thorax and abdomen. The atlanto-axial joint is the joint between first and second cervical vertebra. The first cervical vertebra is known as the atlas and the second cervical vertebra is known as the axis vertebrae. The joint is formed between odontoid process of the axis and the posterior surface of the atlas. The odontoid process is covered by a ligament that is attached to posterior surface of atlas on the side of odontoid process. The ligament forms a ring around odontoid process for stabilization. The upper part of the joint and first cervical vertebrae protects the lower section of brain stem known as medulla, which controls lower brainstem functions. The medulla deals with the autonomic (involuntary) functions of breathing, heart rate and blood pressure as well as other reflexes such as vomiting, sneezing, coughing, hiccups, swallowing and gagging.

At no time would Mr. Gelhausen have been conscious with these actual injuries. The breathing activity referenced by Ms. Szapowal is what is known as agonal respirations. Agonal respirations are an inadequate pattern of breathing associated with extreme physiological distress. They are not adequate respiration to sustain oxygenation. It can be thought of as more of an automatic response of the last remnants of the brainstem. Whatever the case, it can easily be confused for ordinary respiration, leading to the mistaken impression that the "breathing" person must also have a pulse. This confusion is part of why the American Heart Association no longer recommends checking for breathing as part of layperson's CPR. Ms. Szapowal estimated some three minutes of breathing. From a clinical standpoint, these estimates must always be considered with "a grain of salt" due to the stressful emergency nature of the situation. For instance, that is why estimates of seizure activity are notoriously inaccurate.

*Question 2: Is the medical evidence sufficient to prove that Mr. Gelhausen sustained a complete loss of use of his right or left arm prior to his death as a result of the accident on October 18, 2017?*

There is not medical evidence sufficient to prove that Mr. Gelhausen sustained a complete loss of use of his right or left arm prior to his death as a result of the accident on October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged loss of use of his right or left arm. Traumatic atlanto-axial subluxation may be associated with varying degrees of upper extremity paresis, but not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper extremities.

Nicholas Theodore, Bizhan Aarabi, Sanjay S. Dhall, Daniel E. Gelb, R. John Hurlbert, Curtis J. Rozzelle, Timothy C. Ryken, Beverly C. Walters, Mark N. Hadley; The Diagnosis and Management of Traumatic Atlanto-occipital Dislocation Injuries, *Neurosurgery*, Volume 72, Issue suppl 3, 1 March 2013, Pages 114-126.

RE: Travis Gelhausen (unlicensed)  
Claim # 17-202032  
June 30, 2018  
Page 4

*Question 3: Is the medical evidence sufficient to prove that Mr. Gelhausen sustained a total loss of use of his right or left leg prior to his death as a result of the accident on October 18, 2017?*

There is not medical evidence sufficient to prove that Mr. Gelhausen sustained a complete loss of use of his right or left leg prior to his death as a result of the accident on October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged loss of use of his right or left leg. Traumatic atlanto-axial subluxation may be associated with varying degrees of lower extremity paresis, but not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the lower extremities.

Nicholas Theodore, Bizhan Aarabi, Sanjay S. Dhall, Daniel E. Gelb, R. John Hurlbert, Curtis J. Rozzelle, Timothy C. Ryken, Beverly C. Walters, Mark N. Hadley; The Diagnosis and Management of Traumatic Atlanto-occipital Dislocation Injuries, *Neurosurgery*, Volume 72, Issue suppl\_3, 1 March 2013, Pages 114-126.

*Question 4: Is the medical evidence sufficient to prove that Mr. Gelhausen sustained injuries to his eyes which resulted in a total loss of vision prior to his death from injuries sustained in the accident of October 18, 2017?*

There is not medical evidence sufficient to prove that Mr. Gelhausen sustained injuries to his eyes which resulted in a total loss of vision prior to his death from injuries sustained in the accident of October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged total loss of vision. There was no documentation in the autopsy report to establish any total loss of vision prior to his death.

*Question 5: Is the medical evidence sufficient to prove that Mr. Gelhausen sustained a complete loss of hearing in either of his ears prior to his death as a result of injuries sustained in the motor vehicle accident of October 18, 2017?*

There is not medical evidence sufficient to prove that Mr. Gelhausen sustained a complete loss of hearing in either of his ears prior to his death as a result of injuries sustained in the motor vehicle accident of October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged complete loss of hearing. There was no documentation in the autopsy report to establish any complete loss of hearing prior to his death.

This opinion is based on the medical file documentation provided to me. If there are any questions, please do not hesitate to contact me.



RE: Travis Gelhausen (deceased)  
Claim # 17-202032  
June 30, 2018  
Page 5

Respectfully submitted,

*Paul T. Hogle, MD*

Paul T. Hogle, MD, FACEP

Certified Medical Review Officer,  
*Medical Review Officer Certification Council (MROCC)*  
Certified Aviation Medical Examiner,  
*FAA Civil Aerospace Medical Institute (CAMI)*

PTH/erh

Jul. 5. 2018 10:09AM

Plevin & Gallucci

2168615322

No. 1630 P. 2/4

**Donato Borrillo, MD, JD, MS**

*Board Certified American Board of Preventive Medicine*

*Licensed to practice medicine in Ohio, South Carolina, Florida, Michigan, New York, Illinois, and Indiana*

*Licensed to practice law in Ohio*

6800 W. Central Avenue, Bldg. E  
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159 Civitas St., Ste 209  
Mt. Pleasant, South Carolina 29464

1717 K Street, NW, Suite 900  
Washington D.C. 20006

July 3, 2018 .

Plevin & Gallucci  
55 Public Square Suite 2222  
Cleveland, Ohio 44113

RE: Travis Gelhausen  
Claim Number: 17-202032  
Date of Injury/Death: 10/18/2017  
Requested Conditions: Loss of use of upper and lower bilateral extremities; Loss of use of both eyes

Dear Sir or Madam:

Thank you for the opportunity to review the medical claim file of Travis Gelhausen.<sup>1</sup>

- I. Issue: To a reasonable degree of medical certainty, did Mr. Gelhausen suffer a permanent loss of use of both the upper and lower extremities as a result of the industrial injury of October 18, 2017? Similarly, did Mr. Gelhausen suffer a permanent loss of sight as a result of the same accident?
- II. Conclusion: Yes. To a reasonable degree of medical certainty, Mr. Gelhausen suffered a loss of use of the bilateral upper and lower extremities as a result of his motor vehicle accident on October 18, 2017. The autopsy report notes a subluxation of the atlanto-axial vertebra and hemorrhagic fracture of the superior aspect of the C4 vertebral body with hemorrhage. This cervical injury correlates with the witness statement and affidavit of Ms. Szapowal who found the injured worker still breathing at the accident scene. To a reasonable degree of medical certainty, Mr. Gelhausen suffered a permanent loss of use of both the upper and lower extremities as a result of his cervical injury as witnessed. Even if he had survived for longer than the brief amount of time post accident, he still would not have recovered functional use of the extremities.

<sup>1</sup> Date of birth is 08/31/1992; Date of death is 10/18/2017

RE: Travis Gelhausen  
 Claim Number: 17-202032  
 Page 2

Similarly, on autopsy, bilateral orbital fractures were noted. To a reasonable degree of medical certainty, he suffered permanent injuries to both eyes, which are housed in the orbits, as a result of his motor vehicle accident on October 18, 2017.

III. Facts based on the medical record: I accept the following findings and reports of examining physicians.<sup>2</sup>

Mr. Travis Gelhausen was 25 years of age<sup>1</sup> on the date of accident of October 18, 2017. On the date of injury, Mr. Gelhausen was driving a sanitation truck that rolled over and turned onto the driver's side. He remained entrapped within the cab. EMS and fire were dispatched at 11:18 on October 18, 2017. Witnesses were initially on scene, including Ms. Szapowal who was also interviewed as a witness by the Ohio Department of Public Safety officer on scene (3507 badge number). Ms. Szapowal provided an affidavit in which she testified finding Mr. Gelhausen "still breathing." He was not moving his arms or legs, and she provided comfort until he seized and stopped breathing in her presence. The investigating officers and officers who arrived on scene found Mr. Gelhausen to have passed.

After extrication and pronouncement of his death by Dr. Weiland, an autopsy was performed by Dr. Spencer. In pertinent part on autopsy, a hemorrhagic fracture of the superior aspect of C4 vertebral body with overlying prevertebral fascia hemorrhage was noted in addition to hemorrhagic subluxation of the atlanto-axial vertebrae. Bilateral orbit fractures were also noted on autopsy. The external evidence of injury also included lacerations of the right lateral orbit and temple. Acute hemorrhage was seen underlying the bilateral orbital roof and right mastoid. The cause of death, upon examination of the thoracic ribcage and its organs with the heart having been donated, was mechanical asphyxia. A Death Certificate was issued with blunt force injuries to the head, neck, trunk, and extremities with subcutaneous soft tissue and skeletal injuries being noted as significant conditions associated with the mechanical asphyxia.

IV. Discussion: In my medical opinion, Mr. Travis Gelhausen suffered a permanent loss of use of the upper and lower extremities from the injuries incurred on October 18, 2017. He was still alive at the time of his accident for a brief period of time, which was witness by a bystander who responded to the accident scene. His brief period of breathing is consistent with still being alive, as his autopsy did not reveal a decapitation or crush injury of the head. The autopsy did note a C4 vertebral fracture in addition to an atlanto-axial subluxation injury. This is at the base of the skull and is associated with the first cervical

<sup>2</sup> In accordance with standards for file review State ex rel. Wallace v. Industrial Commission (1979), 57 Ohio St.2d 55, 59 and also State ex rel. Bowie v. Greater Cleveland Regional Transit Authority (1996) 75 Ohio St.3d 458, 460 and State ex rel. Dobbins v. Industrial Comm., 109 Ohio St.3d 235, 2006-Ohio-2286.

JUL 5 2018 10:10AM

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No. 1636 P. 4/4

RE: Travis Gelhausen  
Claim Number: 17-202032  
Page 3

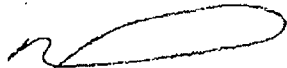
vertebra. The collective neck injury, no doubt, resulted in a quadriplegia with loss of use of the upper and lower extremities. This also correlates with the witness statement.

Bilateral orbital roof injuries consistent with fractures and acute hemorrhage were also found on autopsy. The eyes were enucleated, presumably for organ donation. To a reasonable degree of medical certainty, a loss of use of the visual apparatus, excluding the cornea, occurred. For these reasons, bilateral loss of use of the eyes is also substantiated.

In my medical opinion, the loss of use in the present claim specifically includes loss of use of the right upper extremity and left upper extremity and loss of use of the right lower extremity and left lower extremity, a permanent loss of use of all four extremities, in addition to loss of use of the bilateral eyes.

I thank you very much for allowing me to participate in the evaluation of this unfortunate employee. If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,



Donato J. Borrillo, M.D., J.D., M.S.

DJB:trmm

PAUL T. HOGYA, M.D., FACEP  
245 BUENA VISTA DRIVE  
SOUTH LEBANON, OH 45065

PHONE 513/494-0308

FAX 513/494-0310

August 2, 2018

Brian Perry, Esq.  
Dinsmore & Shohl, LLP  
255 East Fifth Street  
Suite 1900  
Cincinnati, OH 45202

Re: Travis Celbansen (deceased)  
Claim # 17-202032  
DOI: 10/18/17  
Employer: Waste Management of Ohio

***Alleged Conditions:*** Total Loss of Use of the Right and Left Arm  
Total Loss of Use of the Right and Left Leg  
Total Loss of Vision in Both Eyes  
Bilateral Hearing Loss

Dear Mr. Perry:

I received your recent correspondence requesting an addendum regarding the above claimant upon whom I provided a medical file review on June 30, 2018. I accept the objective findings of the examining physicians in regard to the allowed conditions in this claim as described in the medical records, although I may not agree with their conclusions. I reviewed my report in full prior to issuing this supplemental report

**Newly Submitted and Pertinent Medical Data:**

- Dr. Borrillo letter dated 7/3/18 reviewed.
- Supplemental Printouts regarding brain oxygen deprivation; types of paralysis; and hypoxia reviewed.

**OPINION:** I was asked to perform an addendum to my recent independent medical file review on this industrial injury claim. After having had the opportunity to review the available medical documentation, there is adequate information with which to formulate an independent, objective medical opinion with respect to this matter, these opinions being based on a reasonable degree of medical probability and certainty.

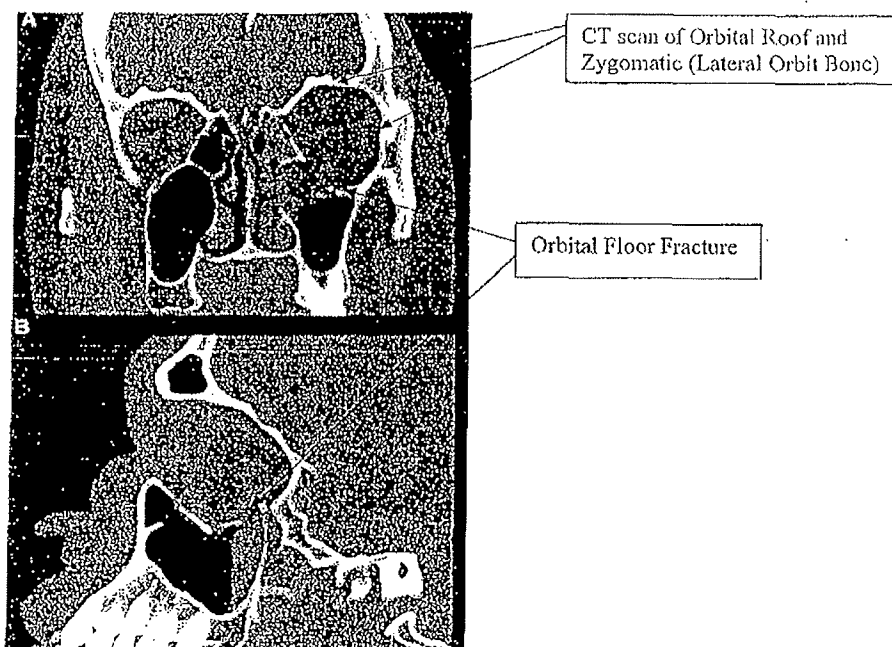
***Question 1: Does Dr. Borrillo's opinions change the opinions previously expressed in your June 30, 2018 report in any way?***

The updated opinions from Dr. Borrillo dated 7/3/18 do not change my opinions as expressed in my 6/30/18 report in any way.

RE: Travis Gelhausen (deceased)  
Claim # 17-202032  
August 2, 2018  
Page 2

Bilateral orbital roof fractures do not result in "loss of use" of the eyes. It simply represents a fracture of the surrounding orbit of the globe, not an injury to the globe (eye) itself, such as the vitreous, retina, macula, optic nerve, etc. that would reasonably be a source of total loss of use of the eyes. External lacerations of lateral orbit and temple do not alter that fact. The opinion of Dr. Borrillo does not alter that fact.

It is also my understanding that in order to establish total loss of vision in both eyes, I must consider the fact that regulations require proof of at least a 25% loss of uncorrected vision before a loss of vision award can be made.



RE: Travis Gelhausen (deceased)  
 Claim # 17-202032  
 August 2, 2018  
 Page 3

As I previously noted, there is no convincing medical evidence of total loss of use of the upper and lower extremities. At no time would Mr. Gelhausen have been conscious with these actual injuries. Thus, whether or not he is considered to have been "alive" for three minutes or less, there was no conscious ability for him to recognize or appreciate a total loss of use of the upper and lower extremities and/or vision. He was not conscious or alive in the sense of being able to follow a command to move the upper and lower extremities. No physical examination was performed to assess decorticate or decerebrate posture, abnormal reflexes, sensation, upper motor neuron release signs, etc. Decorticate posture is an abnormal posturing in which a person is stiff with bent arms, clenched fists, and legs held out straight. The arms are bent in toward the body and the wrists and fingers are bent and held on the chest. This type of posturing is a sign of severe damage in the brain. Decorticate posture is a sign of damage to the nerve pathway between the brain and spinal cord. The posturing may occur on one or both sides of the body.

The nervous system includes the brain, spinal cord, and spinal nerves. The brain is the master control for all body functions. The spinal cord serves as the main line of communication between the brain and the body. The spinal nerves relay messages to and from the spinal cord and other parts of the body. There are three types of messages that travel along the spinal cord. They are sensory, motor, and reflex. Injury to the spinal cord results in loss of feeling and movement below the injured area. A complete injury means that there is total loss of feeling and movement below the injury. With an incomplete injury some feeling and/or movement will stay below the level of injury. This was never assessed by a physician with respect to an alleged total loss of use of the upper and lower extremities and there was no level of consciousness in that regard either. The autopsy results are not synonymous with such an evaluation. Even severe spinal cord injuries on detailed imaging studies may appear to suggest quadriplegia yet on examination there may signs of partial function, which is why we examine individuals in addition to imaging data with regard to function, treatment and prognosis.

The breathing activity referenced by Ms. Szapowal is what is known as agonal respirations. Agonal respirations are an inadequate pattern of breathing associated with extreme physiological distress. They are not adequate respiration to sustain oxygenation. It can be thought of as more of an automatic response of the last remnants of the brainstem. Whatever the case, it can easily be confused for ordinary respiration, leading to the mistaken impression that the "breathing" person must also have a pulse. This confusion is part of why the American Heart Association no longer recommends checking for breathing as part of layperson's CPR. Ms. Szapowal estimated some three minutes of breathing. From a clinical standpoint, these estimates must always be considered with "a grain of salt" due to the stressful emergency nature of the situation. For instance, that is why estimates of seizure activity are notoriously inaccurate.

The opinions expressed by Dr. Borillo do not alter my opinions in this regard either.

RE: Travis Gelhausen (deceased)  
Claim # 17-202032  
August 2, 2018  
Page 4

This opinion is based on the medical file documentation provided to me. If there are any questions, please do not hesitate to contact me.

Respectfully submitted,

*Paul T. Hogya, MD*

Paul T. Hogya, MD, FACEP  
Certified Medical Review Officer,  
*Medical Review Officer Certification Council (MROCC)*  
Certified Aviation Medical Examiner,  
*FAA Civil Aerospace Medical Institute (CAMI)*

PTH/erb



From: 2168610804 To: 2167875289 Speed: 14400 Time: September 28, 2018 at 11:45:22 AM EDT  
 Sep. 28. 2018 11:46AM Plevin & Gallucci 2168615322 No. 5294 P. 2/3

**Donato Borrillo, MD, JD, MS**

*Board Certified American Board of Preventive Medicine*

*Licensed to practice medicine in Ohio, South Carolina, Florida, Michigan, New York, Illinois, and Indiana  
 Licensed to practice law in Ohio*

6800 W. Central Avenue, Bldg. E 159 Civitas St., Ste 209 1717 K Street, NW, Suite 900  
 Toledo, Ohio 43617 Mt. Pleasant, South Carolina 29464 Washington D.C. 20006

September 8, 2018

**ADDENDUM**

Plevin & Gallucci  
 55 Public Square Suite 2222  
 Cleveland, Ohio 44113

RE: Travis Gelhausen  
 Claim Number: 17-202032  
 Date of Injury/Death: 10/18/2017  
 Requested Conditions: Loss of use of upper and lower bilateral extremities; Loss of use of both eyes

Dear Sir or Madam:

In response to your request for an addendum, I reviewed the report of my colleague Dr. Hogya dated June 30, 2018. I respectfully disagree with his opinion and again opine that to a reasonable degree of medical certainty, Mr. Gelhausen suffered a loss of use of the bilateral upper and lower extremities because of his motor vehicle accident on October 18, 2017.

*It is uncontested that the autopsy report notes a subluxation of the atlanto-axial vertebra and hemorrhagic fracture of the superior aspect of the C4 vertebral body with hemorrhage. This cervical injury correlates with the witness statement and affidavit of Ms. Szapowal who found the injured worker still breathing at the accident scene.*

Dr. Hogya acknowledges the observation by Ms. Szapowal; however, he discounts its value because it was made by a layperson. In my medical opinion, a layperson can recognize the act of breathing. Mr. Gelhausen's breathing was *not* shallow and *not* in need of auscultation with a stethoscope, rather it is characterized as audible and characterized by Dr. Hogya as agonal.

From: 12168610804 To: 2167875269 Speed: 14400 Time: September 28, 2018 at 11:45:22 AM EDT [ DIC ] pg. 3 of 3 \*\*  
 Sep. 28. 2018 11:47AM Plevin & Gallucci 2168615322 No. 5294 P. 3/3

RE: Travis Gelhausen  
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According to the Merriam-Webster dictionary, Agonal is defined as, *adjective* ag-o-nal \ 'a-gə-nəl \ 1: marked by or characteristic of agony

- They could hear *agonal* groans coming from inside and were sure that someone was still alive and was calling for help.  
 - Lawrence Wright

2: of, relating to, or associated with the act of dying; occurring just before death

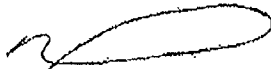
- In the *agonal* stage, death comes from hemorrhage and shock.  
 - Richard Preston
- Kennedy had a very weak pulse and was experiencing what's called *agonal* breathing, labored, gasping, the body's final attempts to sustain life.  
 - Deanna Watson

Black's Law Dictionary, Fourth Edition, page 88, defines Agony as violent physical pain or mental distress of mind connected with or arising from the physical injury, so that evidence of condition of mind is admissible under an allegation that plaintiff suffered great pain and agony. City of Chicago v McLean, 133 Ill. 148, 153, 24 N.E. 527, 8 L.R.A. 765.

Dr. Hoya is indeed correct in opining that agonal breathing carries a poor prognosis and is an indicator of impending death; however, Mr. Gelhausen was *alive and breathing* immediately after his violent accident. During this albeit brief period of being alive, which was of sufficient duration to be witnessed, Mr. Gelhausen suffered a permanent loss of use of both the upper and lower extremities as a result of his cervical injury.

I thank you very much for allowing me to participate in the evaluation of this unfortunate employee. If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,



Donato J. Borrillo, M.D., J.D., M.S.

DJB:tmn

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

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TRAVIS GELHAUSEN,

Claimant,

and

Claim No. 17-202032

Hearing Officer Oleh Mahlay

WASTE MANAGEMENT OF OHIO, INC.,

Employer.

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INDUSTRIAL COMMISSION HEARING  
MONDAY, OCTOBER 1, 2018  
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A hearing before the Industrial Commission of Ohio, Hearing Officer Oleh Mahlay, taken before me, Sarah Lane, Notary Public within and for the State of Ohio, 5th Floor State Office Building, 615 W. Superior Avenue, Cleveland, Ohio, commencing at 9:20 a.m. the day and date above set forth.

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APPEARANCES:

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On behalf of the Claimant;

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On behalf of the Employer.

1 THE HEARING OFFICER: Good morning.  
2 We're here on the request for scheduled loss and  
3 specifically the total loss of use of the right arm,  
4 total loss of use of the left arm, total loss of use  
5 of the right leg, total loss of use of the left leg,  
6 total loss of vision in both eyes, and also notice  
7 for hearing is bilateral hearing loss.

8 MR. ELZEER: We withdrew that.

9 THE HEARING OFFICER: Mr. Elzeer, at  
10 the DHO hearing you withdrew the bilateral hearing  
11 loss, so I'll note that that remains dismissed.  
12 Okay?

13 Let's talk about the other request for  
14 total loss. Go ahead.

15 MR. ELZEER: Thank you. We are asking  
16 that you grant our motion filed on 5/2 of '18 for  
17 the other -- the conditions you just mentioned.  
18 We're relying upon Dr. Borillo's report from 7/3  
19 of '18, his addendum reference from 9/8 of '18, also  
20 Dr. Amanda Spencer's autopsy report from 3/15  
21 of '18. And should you do so, there's a power of  
22 attorney on file from both May 2nd of '18 and  
23 May 30th of 2018.

24 This was a motor vehicle accident  
25 Mr. Gelhausen experienced during the course and

1 scope of his employment on Wednesday, October 18th  
2 of 2017 somewhere around 11:18 in the morning.  
3 That's the time Chagrin Family Dispatch received  
4 multiple calls regarding this motor vehicle  
5 accident. The police officers approached and, you  
6 know, they found that they had a call for Mayfield  
7 Village paramedics. They also called the county,  
8 and they didn't arrive -- it looks like at  
9 12:16 p.m. he was extricated from the truck by the  
10 paramedics and at 12:18 he was pronounced dead.  
11 We're talking about the actual call of death at  
12 about an hour after all this happened. And then  
13 they contacted the Cuyahoga County Medical  
14 Examiner's Office that was dispatched to the scene.

15 Well, at the scene of the accident was a  
16 Jolene, and you spell her last name -- I don't know,  
17 I think it's called Szapowal. It's S-Z-A-P-O-W-A-L.  
18 She said in her affidavit: I'm a resident of Geauga  
19 County, Ohio with the date of birth of January 20,  
20 1979, with the mailing address of 11117 Chilicothe  
21 Road, Chesterland, Ohio 44026. I am a witness to  
22 the motor vehicle accident that occurred on  
23 October 18th, 2017 at the intersection of Brigham --  
24 that's B-R-I-G-H-A-M -- Road and Chagrin River Road  
25 located in Gates Mills, Cuyahoga County, Ohio. I

1 was traveling behind a waste management truck driven  
2 by Travis Gelhausen. That's spelled  
3 G-E-L-H-A-U-S-E-R-N. We were traveling westbound on  
4 Brigham Road when the garbage truck attempted a  
5 right turn on Chagrin River Road when the garbage  
6 truck crashed.

7 After witnessing the crash, I parked my  
8 vehicle and attempted to administer aid to  
9 Mr. Gelhausen, the driver of the garbage truck.  
10 When I approached the garbage truck, I could see  
11 Mr. Gelhausen from his ribs to his knees and I could  
12 see that he was still breathing. At no point in  
13 time when I was with Mr. Gelhausen was he able to  
14 move his arms or legs. Mr. Gelhausen continued  
15 breathing for approximately three minutes while I  
16 rubbed his legs in an effort to comfort him.  
17 Mr. Gelhausen ultimately expired in my presence as I  
18 witnessed his body seize and he stopped breathing.

19 Now, as far as the DHO's order, we are  
20 asking you to vacate the DHO's order for two  
21 reasons: Both mistake of fact and mistake of law.  
22 The DHO found there was no scheduled loss because he  
23 wasn't willing to rely upon a witness statement in  
24 absence of a medical provider's. So number one,  
25 there's a mistake of law because basically he's

1       saying that for someone to have a scheduled loss in  
2       this instance it depends on how fast the medical  
3       providers can get there.

4               If we're looking at somebody in the inner  
5       city or suburbs who gets injured close to the fire  
6       station, the providers could be there in a couple of  
7       minutes to declare the person still alive, but if  
8       you're out in the rural area, the country area, and  
9       someone survives for 10 minutes but they don't get  
10      there for 15, that person wouldn't be able to have a  
11      scheduled loss. The law doesn't differentiate this.

12              But secondly, more importantly, there is  
13      medical evidence in the file that shows that he  
14      survived this injury. There are two reports --  
15      actually, three. You've got Dr. Borillo's report  
16      from 7/3, his addendum from 9/8, and Dr. Amanda  
17      Spencer's report from 2/15 of '18, the only doctor  
18      who actually examined Mr. Gelhausen.

19              If we take a look at Dr. Amanda Spencer's  
20      report, she said the cause of death was mechanical  
21      asphyxia. All other conditions: Blunt force  
22      injuries to the head, the neck, the trunk, and  
23      extremities with cutaneous soft tissue injury and  
24      skeletal injuries.

25              Now, what is mechanical asphyxia? Well,



1 asphyxia, according to Wikipedia, is a condition of  
2 severely deficient oxygen supply to the body that  
3 arises from abnormal breathing. There are many  
4 circumstances which can induce asphyxia, all of  
5 which are characterized by the inability of an  
6 individual to acquire sufficient oxygen through  
7 breathing for an extended period of time. Asphyxia  
8 can cause coma or death.

9 I wanted to read that again. There are  
10 many circumstances that can induce asphyxia, all of  
11 which are characterized by the inability of an  
12 individual to acquire sufficient oxygen through  
13 breathing for an extended period of time. There is  
14 no evidence that you can have instantaneous  
15 asphyxia, which the employer is alleging here. The  
16 mere definition of mechanical asphyxia is for an  
17 extend period of time.

18 How long does it take for this extended  
19 period of time? Well, according to the evidence I  
20 put on file, anywhere from two to four minutes.  
21 Marcellus Galbreath, an online doctor who's an  
22 internal medicine doctor from the University of  
23 Cincinnati says about three minutes, which is  
24 consistent with what everybody else says, two to  
25 four minutes, and is identical to what our witness

1 statement is, that it was about three minutes until  
2 he expired and his breathing stopped.

3 Now, State ex rel. Wallace, the cite is  
4 57 Ohio State 2d 55. It's a 1979 case. It  
5 specifically says a reviewing doctor must accept the  
6 objective findings of the examining physician and if  
7 they don't, it's not sum evidence. If you take a  
8 look at Dr. Hoggia's reports from 6/30 and, I  
9 believe, 8/2 of '18 of his addendum, he goes through  
10 and lists the findings. He stops where it comes to  
11 mechanical asphyxia. He doesn't put that in his  
12 report, the cause of death.

13 Well, that raises the question: How can  
14 you accept the diagnosis of the examining doctor if  
15 you don't even list it in your report? There's only  
16 two possibilities for him not to do this. Two  
17 possibilities: Number one, he stopped breathing  
18 right when he listed all of the findings. In his  
19 first report from 6/30 he goes through and lists the  
20 objective findings from Dr. Spencer. He just  
21 doesn't list the mechanical asphyxiation, the most  
22 important cause of death. So either he stopped  
23 breathing or he intentionally omitted that from his  
24 report.

25 Why would he intentionally omit it? Well,

Opinion, not objective.  
factual  
fx

1 he would have to explain it and how you can't have  
2 an instantaneous asphyxiation by the mere definition  
3 and how that's inconsistent with his report where he  
4 says, "Well, this was an instantaneous death." Even  
5 his own objective findings show that this is not an  
6 instantaneous death. That was his conclusion, but  
7 I'm asking you to reject his report just based on  
8 the fact that he doesn't accept the examining -- the  
9 medical examiner, Dr. Spencer's, findings that this  
10 was a mechanical asphyxiation and goes off on this  
11 tangent that, well -- what he actually says is that  
12 the breathing activity referenced by Ms. Szapowal is  
13 what is known as agonal respiration. That's  
14 A-G-O-N-A-L.

15 Agonal respirations are an inadequate  
16 pattern of breathing associated with extreme  
17 physiological distress. Well, dead people don't  
18 have extreme physiological distress, at least that I  
19 know of. I've never talked to a dead person, but  
20 clearly his own definition says that, you know,  
21 these were agonal respirations. And Dr. Borillo  
22 agrees. All that means is it's insufficient  
23 oxygenation to breathe.

24 I looked up on Google the definition of  
25 agonal respiration. It's a gasping respiration or

1 an abnormal pattern of breathing in the brainstem  
2 reflex characterized by gasping or labored breathing  
3 accompanied by *strange vocalization and myoclonus,*  
4 *M-Y-O-C-L-O-N-U-S.* The duration of agonal  
5 respiration could be as brief as two breaths or last  
6 up to several hours. That's the definition.

7 So according to Dr. Hogya's opinion,  
8 somebody who had these agonal respirations for up to  
9 two hours would be considered instantaneously dead.

10 THE HEARING OFFICER: Two hours?

11 MR. ELZEER: That's what the  
12 definition says. It says anywhere from two breaths  
13 up to -- I'm sorry. It says several hours. I  
14 mistakenly said two hours. This says several hours  
15 in the definition according to Google.

16 So according to Dr. Hogya, somebody who has  
17 this abnormal pattern of breathing, this agonal  
18 respiration for several hours, would be considered  
19 instantaneously dead according to his rationale.  
20 That would lead to an absurd result. It makes  
21 absolutely no sense.

22 So, I mean, Dr. Hogya, what he's trying to  
23 do is distinguish between ordinary respirations and  
24 agonal respiration. The law doesn't do that. So  
25 not only does it not make sense when he says, "Well,

1        what she witnessed was an inadequate pattern of  
2        breathing, but it was instantaneous death."

3                Now, so based upon that, we are asking that  
4        you find that he did survive the injury; that's what  
5        Dr. Borillo says in his report from the 7/3. He  
6        says the autopsy report notes a subluxation of the  
7        anterolateral axial vertebra and hemorrhagic  
8        fracture of the superior aspect of the C4 vertebral  
9        body with hemorrhage. The cervical injury  
10       correlates with the witness statement and affidavit  
11       of Ms. Szapowal who found that the injured worker  
12       was still breathing at the accident scene. To a  
13       reasonable degree of medical certainty,  
14       Mr. Gelhausen suffered a permanent loss of use of  
15       both his upper and lower extremities as a result of  
16       this cervical injury as witnessed.

17               Even if he had survived longer than a brief  
18       amount of time post accident, he would not have  
19       still recovered functional use of these extremities.  
20       He goes on to say that, you know, he reviewed the  
21       autopsy and, you know, he had this hemorrhagic  
22       fracture of the superior aspect of the C4 vertebral  
23       body overlying the prevertebral fascia hemorrhage  
24       which was noted in addition to the hemorrhagic  
25       subluxation of the anterior axial vertebra.

1           Bilateral orbital fractures were also noted  
2       upon autopsy. The external evidence of the injury  
3       also includes lacerations to the right lateral orbit  
4       and temple. And he's aware, he says in his report,  
5       that mechanical asphyxia was the ultimate diagnosis.  
6       He said his brief period of breathing is consistent  
7       with still being alive. It says autopsy did not  
8       reveal a decapitation or crush injury to the head.

9           He does note a C4 vertebral fracture in  
10      addition to this anterior axial subluxation injury.  
11      You know, this is at the base of the skull and  
12      associated with the first cervical vertebra. The  
13      collective neck injury no doubt resulted in  
14      quadriplegia with loss of the use of the upper and  
15      lower extremities. This correlates with the witness  
16      statement.

17           My medical opinion: Loss of use of -- the  
18      present claim specifically includes loss of use of  
19      the right upper extremity, the left upper extremity,  
20      loss of use of the right lower extremity, and the  
21      loss of the left lower extremity, and permanent loss  
22      of use of all four extremities, in addition to the  
23      loss of use of both eyes.

24           In his addendum, he specifically goes  
25      through and talks about what agonal respiration is.

1 THE HEARING OFFICER: Who is "he"?  
2 Just for the record.

3 MR. ELZEER: Dr. Borillo in his  
4 addendum from 9/8 specifically goes through and  
5 describes what agonal respiration is and he says --  
6 yeah, I mean, this is in Black's Law Dictionary. It  
7 involves agony and in his opinion he was clearly --  
8 when I reference "he," Mr. Gelhausen -- was clearly  
9 still alive for those three minutes during this  
10 phase with Ms. Szapowal comforting him.

11 Now, as far as the second part of the test,  
12 we believe based upon Dr. Borillo's report, the  
13 witness statement from Ms. Szapowal, and Dr. Amanda  
14 Spencer's diagnoses, that clearly he survived this  
15 injury. Certainly, the employer has provided no  
16 evidence to the file that I saw that shows you can  
17 have an immediate decapitation injury, you know, in  
18 death for asphyxia. It's just not possible  
19 according to the mere definition of it, a definition  
20 Dr. Hoya fails to include.

21 Now, secondly, as far as the second part of  
22 the test, we have to show that he not only survived  
23 the injury, but there was a scheduled loss for all  
24 practical purposes under the Alcoa case.

25 What the Alcoa case also says is the

1 following: Quoting what happened in Moorehead,  
2 though Moorehead did survive the fall, albeit for a  
3 short period of time, it is undisputed that he did  
4 not die upon impact. Revised Code 4123.57(B) does  
5 not specify or require a length of time of survival  
6 after a loss of use injury before benefits pursuant  
7 to 4123.57(B) are payable.

8 It went on to say: We, therefore, cannot  
9 condone the Industrial Commission's additional  
10 requirement that the worker survived for some  
11 extended period of time left unspecified by the  
12 Commission or the general assembly when considering  
13 the worker's entitlement to a scheduled loss  
14 benefit. Similarly, there's no language in Revised  
15 Code 4123.57(B) requiring that the injured worker be  
16 consciously aware of his paralysis in order to  
17 qualify for the scheduled loss benefits.

18 Well, if we take a look at Dr. Hogg's  
19 report, he said the exact opposite. He comes up  
20 with a conclusion that's the exact opposite of the  
21 case law. This is in State ex rel. Moorehead.

22 In Dr. Hogg's first report from 6/30 he  
23 said the following: Question one, at no time would  
24 Mr. Gelhausen have been unconscious with respect to  
25 the actual injuries. He goes on to say: At no time



1 would the -- in question two, I'm sorry -- at no  
2 time would Mr. Gelhausen have been conscious with  
3 these actual injuries to appreciate the alleged  
4 loss, use of his right or left arm. He goes on to  
5 say, though, traumatic atlantoaxial subluxation may  
6 be associated with varied degrees of upper extremity  
7 paresis, but not all individuals that sustain this  
8 traumatic anterolateral axial subluxation had a  
9 complete loss of the upper extremities.

10 So he's acknowledging the C4 fracture in  
11 exactly what Mr. Gelhausen went through before his  
12 death can cause exactly what we're asking in the  
13 scheduled losses, but not everybody who has that,  
14 you know, has this type of injury, has that.

15 Question three says: At no time would  
16 Mr. Gelhausen have been conscious with respect to  
17 the actual injuries to appreciate the alleged loss  
18 of use of his right or left leg. He goes on to say,  
19 again, that traumatic anterolateral axial  
20 subluxation may be associated with varying degrees  
21 of lower extremity paresis, but not all individuals  
22 who sustain this traumatic anterolateral axial  
23 subluxation have a complete loss of the lower  
24 extremities. He agrees that it can be possible with  
25 these severe injuries that Mr. Gelhausen suffered.

1           And finally, in question four, he says:  
2           Again, at no time would Mr. Gelhausen have been  
3           conscious with respect to the actual injuries to  
4           even appreciate the alleged loss of total vision.

5           So three different times he says, well, he  
6           believes it's relevant that he wouldn't be conscious  
7           for these scheduled losses and he puts that as his  
8           basis of opinion when the State ex rel. Moorehead  
9           says it's irrelevant.

10           So we have Dr. Hogya in two different  
11           reports not accepting the witness statement for  
12           cause of death, not accepting Dr. Amanda Spencer's  
13           objective findings who actually examined him, and  
14           not even commenting on them let alone accepting  
15           them. We have Dr. Hogya come up with his own law  
16           saying that we have to distinguish between ordinary  
17           and agonal respirations.

18           Finally, his opinion is a direct contrary  
19           to the Supreme Court State ex rel. Moorehead where  
20           he says that he just wouldn't even appreciate the  
21           scheduled loss, I'm going to rule against it, in his  
22           medical opinion.

23           We are asking you to reject Dr. Hogya's  
24           report for all those reasons and rely on  
25           Dr. Borillo's report and grant the scheduled loss as

1 requested. If you would do so, there is a power of  
2 attorney on file from 5/2 and 5/30 of '18.

3 THE HEARING OFFICER: Thank you.

4 Ms. Gattozzi.

5 MS. GATTOZZI: Thank you very much.

6 We are asking that you confirm the DHO  
7 decision based upon Dr. Hogya's, H-O-G-Y-A, opinion  
8 from June 30th of 2018 and as well as an addendum  
9 report dated August 2nd of 2017.

10 You'll see, sir, that on the second page of  
11 Dr. Hogya's report he discusses what death is. He  
12 said that the actual death is cessation of  
13 breathing, heartbeat, and brain function, and that  
14 the officially declared time of death is when a  
15 qualified medical professional confirms the  
16 cessation of breathing.

17 In Mr. Gelhausen's case he was found to be  
18 unresponsive immediately after the accident by all  
19 of the medical personnel present at the time. The  
20 only reason there was a delayed time of death was  
21 due to the fact that he was trapped inside the  
22 vehicle and had a prolonged extrication with the  
23 assistance of medical tools.

24 Looking at this case and looking at what  
25 constitutes death, we have here -- the only evidence

1       that we have is a nonmedical layperson and the only  
2       evidence that we have from her is an affidavit that  
3       was prepared six months after the fact, which, of  
4       course, raises issues as far as the reliability of  
5       her memory, and we certainly have no details  
6       whatsoever.

7                You know, if you look at what she states in  
8       her affidavit it comes down to basically two things.  
9       It just says that she approached the truck and could  
10      see he was still breathing and in her six-month  
11      later recollection she said he continued breathing  
12      for three minutes and then he expired. That's it.

13             She is a layperson. She does not have any  
14      medical expertise. She doesn't have the ability to  
15      evaluate the type of breathing, the quality of the  
16      breathing, the rate of breathing. She doesn't have  
17      the expertise to differentiate or even provide  
18      details to establish that the movement of the chest  
19      that she visualized represented life-sustaining  
20      respiration.

21             When Dr. Hogya looked at all of the medical  
22      records, he had determined that he didn't survive  
23      the crash for a discernable period of time. We have  
24      a decedent who suffered severe injuries to the -- to  
25      his neck as well as his head and unfortunately died

1       thereafter.

2               When the witness approached the vehicle,  
3       she only says that she saw him breathing. We don't  
4       know the quality or what type of breathing that was,  
5       but significantly there was no pulse taken so there  
6       was no evidence of a heartbeat at the time.  
7       Clearly, she could not do or had no ability to do  
8       any type of examination or testing or otherwise to  
9       establish any sort of brain function. So, you know,  
10      of the elements to establish that someone has died,  
11      we really don't have anything other than this very  
12      limited affidavit.

13              It's significant that no attempts were made  
14      by any of the EMT's to resuscitate Mr. Gelhausen on  
15      the scene or to even attempt this breathing or any  
16      type of -- to reestablish cardiac function in order  
17      to get him to the emergency room for treatment.  
18      Rather, the EMTs contacted the emergency room pretty  
19      much immediately to have the official declaration of  
20      death.

21              You know, the main court case that we have  
22      here is this Supreme Court case in Moorehead and it  
23      goes -- that's from 2006. Now, in that case the  
24      evidence firmly established the fall rendered  
25      Mr. Moorehead a quadriplegic. There was no dispute

1           whatsoever. In this case we do have a dispute.

2           Dr. Hoggia, you know, notes, and I think  
3           appropriately, that while the injuries were severe,  
4           not all of those types of injuries will result in a  
5           loss of use, and sometimes we're talking about these  
6           permanent scheduled losses, some time needs to pass  
7           to see whether or not an injured worker has actual  
8           permanent residuals as a result of their injuries,  
9           and in this case Mr. Gelhausen's death prevented  
10          that.

11          In Moorehead, also, it was uncontested that  
12          the injured worker expired a full 90 minutes after  
13          the fall. You know, they note that 4123.57 does not  
14          specify required length of time for survival before  
15          benefits are payable, and the exact language that  
16          they use, and I'm quoting, is that there is no  
17          requirement an injured worker survive, quote, for an  
18          extended period of time.

19          And counsel is correct. Consciousness of  
20          that loss during an extended period of time is not  
21          required. I would strongly disagree with counsel's  
22          representation that that is the basis of Dr. Hoggia's  
23          opinion. He notes it, and he wasn't conscious at  
24          any point to discern that, but there was a legal  
25          argument made that you had to be conscious in order

1 to qualify for the scheduled loss. He's making a  
2 medical observation. That was not the basis of his  
3 decision and at no point does Dr. Hogya say that he  
4 should not get this because he didn't appreciate the  
5 loss. That's a misrepresentation of the conclusions  
6 by Dr. Hogya.

7 Now, the Court in Moorehead declined to  
8 define a requisite period of survival, but the very  
9 conclusion anticipates that there must be some  
10 identifiable period of survival, which leads us to  
11 the Sagraves decision in 2012. And it's  
12 S-A-G-R-A-V-E-S.

13 Now, in that one a decedent was struck by a  
14 vehicle. Similarly to the case at hand, there was  
15 no medical intervention administered at the scene.  
16 Paragraph 46 in this decision, the Court notes that  
17 implicit in the holding of Moorehead is that to  
18 obtain a scheduled loss compensation -- in order to  
19 obtain scheduled loss compensation survival must  
20 occur.

21 Now, in issuing the order, the Industrial  
22 Commission in that case found no persuasive medical  
23 evidence that the decedent survived for any  
24 discernable amount of time. There was no persuasive  
25 evidence that the decedent did not die on impact and

1       there was no persuasive medical evidence proving the  
2       decedent suffered a loss of use and that the  
3       Magistrate's decision was adopted by the Court and  
4       denied the request for mandamus.

5               In this case survival is clearly in  
6       dispute. The medical personnel declared  
7       Mr. Gelhausen deceased immediately upon their  
8       examination. At no point were signs of life ever  
9       witnessed or verified by a medical provider at any  
10      time following the accident, and that is important.

11             In this case the witness is not a medical  
12      provider and any claims that she claimed to have  
13      seen his chest moving are not supported by the  
14      evidence that that was a life-sustaining  
15      respiration. She didn't take a pulse and, again,  
16      she didn't have the ability to examine his brain  
17      function.

18             Now, in the Wallace decision, that was in  
19      2013, that also involved a motor vehicle accident.  
20      What's interesting in that case is the paramedics  
21      arrived and there was a bystander attempting to give  
22      CPR to that injured worker and he was transported to  
23      the hospital. There was no pulse, there were no  
24      vital signs, and they actually continued  
25      resuscitation efforts for almost an hour.



1           Notably in that case, they were able to  
2           reestablish some cardiac activity in the hospital,  
3           but the claimant never had a pulse. And so in that  
4           case the loss of use was filed based upon Moorehead  
5           and the likely paralysis upon a spinal injury noted  
6           on the autopsy. In that case, also as well, the  
7           emergency personnel arriving at the scene never  
8           observed the decedent to either breathe on his own  
9           or have a heartbeat on his own, and that the  
10          Magistrate actually declined to rely upon the  
11          official time of death because there was that gap  
12          when they were trying to resuscitate him.

13          The Court cited Sagraves in that decision  
14          and concluded that the Industrial Commission  
15          properly approved a requirement that there would be  
16          persuasive evidence that the claimant, in fact,  
17          survived the death. Without this evidence, any  
18          discussion relating to the likelihood of paralysis,  
19          loss of vision, becomes immaterial in the words of  
20          the Court.

21          So in this case that we have at hand I  
22          believe that there is insufficient if not  
23          nonexistent medical evidence of survival subsequent  
24          to the crash. I don't think that we can rely upon a  
25          bystander to proffer what essentially is a medical  
/

1 opinion as far as whether or not he was still alive.  
2 In this case, you know, the medical personnel didn't  
3 even attempt to resuscitate Mr. Gelhausen and they  
4 established immediately upon their examination that  
5 there were no signs of life.

6 Now, in the statement by the witness there  
7 was no description as to the rate of the alleged  
8 respiration or the quality of the alleged  
9 respiration. She is a layperson and she doesn't  
10 have the medical training to give that, which raises  
11 some questions when we come to Dr. Borillo's most  
12 recent report.

13 Dr. Borillo says in his September 8th  
14 addendum, he says that in his medical opinion a  
15 layperson can recognize the act of breathing. Yes,  
16 we can all recognize the act of breathing, but in a  
17 traumatic situation with a person trapped in a  
18 vehicle, do we have the expertise to evaluate that  
19 respiration to determine whether or not that is  
20 life-sustaining?

21 This is where I think Dr. Borillo oversteps  
22 his bounds because he goes on and says:  
23 Mr. Gelhausen's breathing was not shallow and was  
24 not in need of auscultation with a stethoscope, but  
25 rather it is characterized as audible. The witness

1 doesn't say anything about the type of breathing.  
2 She doesn't say that it was not shallow and, in  
3 fact, she doesn't say it was audible. So if  
4 Dr. Borillo is contributing qualities to the  
5 breathing that are not established by the records,  
6 his opinion cannot be relied upon.

7 He also then goes on and cites the  
8 Merriam-Webster dictionary. We're talking about a  
9 medical definition and the medical definition even  
10 as read to you by counsel earlier includes that the  
11 agonal respirations are reflexive in nature. It's a  
12 reflex that's just residual as the body has died.  
13 He then references the dictionary definition of  
14 agony, which is completely irrelevant, so that's not  
15 appropriate as well.

16 Finally, I would have some general  
17 observations that we cannot decide cases based upon  
18 Wikipedia definitions. You know, we have Wikipedia  
19 definitions and Google research. They are not  
20 specific to the case at hand. They are not looking  
21 at the medical records that are contained in the  
22 claim file. There's nothing that's specific to  
23 Mr. Colhausen and so, you know, Dr. Spencer -- you  
24 know, counsel is relying upon Dr. Spencer's autopsy  
25 report, but I think it's important to note as well

1       that Dr. Spencer does not state that Mr. Gelhausen  
2       survived for any discernable period of time and  
3       that's the key word -- key phrase "a discernable  
4       period of time."

5               Dr. Spencer doesn't say that, doesn't  
6       comment one way or the other that with this death by  
7       the mechanical asphyxiation doesn't say that there  
8       was any discernable period of time following the  
9       asphyxiation, and that isn't the only thing going on  
10      in this. We have multiple head trauma, multiple  
11      injuries that were sustained during the crash.

12             So we think that the DHO properly analyzed  
13      this case. I don't -- there are no problems, no  
14      concerns with Dr. Hogya. He certainly does accept  
15      the findings in full compliance with the Wallace  
16      decision. He finds that there is no discernable  
17      period of survival. And then regarding the loss of  
18      uses, he said that the evidence is insufficient to  
19      even establish that there was a permanent loss.

20             And then, you know, regarding the loss of  
21      vision we have F4, and F4 does not provide for  
22      compensation to be payable absent injury to the  
23      eyes. There is no evidence that the eyes were  
24      injured and, in fact, my understanding is that they  
25      were enucleated for organ donation.

1 Thank you.

2 THE HEARING OFFICER: Before we have  
3 rebuttal, and I'll give everyone a chance for  
4 rebuttal, but just kind of a couple of questions.

5 Mr. Elzeer, is the theory -- let's talk  
6 about the extremities, the bilateral extremities,  
7 lower and upper. Is the theory that the mechanical  
8 asphyxiation caused the loss of use or the cervical  
9 injury caused the loss of use?

10 MR. ELZEER: Both. I mean, you do  
11 have Dr. Borillo saying that the cervical fracture  
12 in and of itself caused the loss of use of four  
13 extremities.

14 THE HEARING OFFICER: So just --

15 MR. ELZEER: And even Dr. Hoggia says,  
16 yes, this type of injury can cause this, but not --  
17 these scheduled losses, but not everybody that has  
18 this injury has the scheduled losses.

19 THE HEARING OFFICER: Does  
20 Dr. Borillo -- because Dr. Hoggia does say not all  
21 individuals that survive traumatic atlantoaxial  
22 subluxation have complete loss of use of the upper  
23 and lower extremities. Does Dr. Hoggia -- I'm sorry,  
24 does Dr. Borillo explain that away, or in this  
25 situation how do we know that the injured -- the

1       decedent, if he had survived, how do we know that he  
2       couldn't have gotten --

3               MR. ELZEER: He said that in his  
4       opinion due to the severity of the C4 fracture, even  
5       had he survived -- there was a line in his report --  
6       even had he survived, he would not have had use of  
7       these four extremities.

8               THE HEARING OFFICER: Dr. Borillo?

9               MR. ELZEER: Dr. Borillo, based on the  
10      fracture.

11              THE HEARING OFFICER: Your rebuttal,  
12      briefly, Mr. Elzeer.

13              MR. ELZEER: Briefly. First of all,  
14      the employer hasn't made any attempt whatsoever and  
15      pretty much glossed over the fact that Dr. Hoggia in  
16      his report on 6/30 and 8/2 never used the word  
17      mechanical asphyxiation. He glossed over that so he  
18      didn't have to address it, so I don't know how they  
19      can say that he's accepting it when he doesn't even  
20      list it in his report.

21              Two reports he went around and he  
22      completely failed to even list it. And you do have  
23      his findings on page one and two of his first  
24      report, 6/30, and he has all the findings except for  
25      that one finding, and it makes you wonder why he

1 didn't list it.

2 Secondly, Dr. Hogya's opinion, he  
3 specifically says in his addendum from 8/2 the  
4 breathing referenced by Ms. Szapowal is known as  
5 agonal respiration. Dr. Borillo addresses that on  
6 page two of his addendum from 9/8. He says  
7 according to Merriam-Webster dictionary agonal is  
8 defined as marked by characteristics of agony. He  
9 could hear the agonal groans coming from inside when  
10 it was sure somebody was alive and calling for help.

11 He goes on to say Black's Law Dictionary,  
12 4th Edition, page 88 defines agony as violent  
13 physical pain or mental distress of the mind arising  
14 from physical injuries, so that evidence of  
15 condition of the mind is admissible under the  
16 allegation that plaintiff suffered great pain and  
17 agony. That's City of Chicago versus McLean, 133  
18 Illinois, page 148. It's also cited 15324 Northeast  
19 527.

20 So even if you accept Dr. Hogya's opinion  
21 that these are agonal respirations, clearly based on  
22 the definition, anywhere from two breaths to several  
23 hours in Dr. Borillo's addendum clearly it was --  
24 Mr. Gelhausen was still alive.

25 Now, as far as the affidavit -- I did want

1 to -- this is the last thing. I did want to dispute  
2 the employer's characterization of this, saying all  
3 she saw is he was still breathing. In the question  
4 to -- in the first report, in the question to  
5 Dr. Hoggia the employer says the affidavit to  
6 Ms. Szapowal in which she perceived some possible  
7 breathing for some period of time. That's not what  
8 she said in the affidavit. What she said was when I  
9 approached the garbage truck I could see  
10 Mr. Gelhausen from his ribs to his knees, could see  
11 he was still breathing, not that he was possibly  
12 still breathing, which the employer basically tried  
13 to mislead Dr. Hoggia when they said, well, she  
14 witnessed some possible breathing.

15 And she goes on to say: Mr. Gelhausen  
16 continued breathing for approximately three minutes  
17 while I rubbed his leg in an effort to comfort him.  
18 You're not going to rub someone's leg if you  
19 perceive them as dead.

20 So, you know, based upon that, we are  
21 asking that you rely upon Dr. Borillo's reports and  
22 not rely upon Dr. Hoggia's reports because it just  
23 doesn't comply with State ex rel. Wallace and for  
24 all the other reasons I mentioned.

25 Thank you.



1 THE HEARING OFFICER: Ms. Gattozzi.

2 MS. GATTOZZI: Thank you.

3 Dr. Hoggia expressly states in both his  
4 June 30th reports as well as the addendum opinion  
5 that he accepts the objective findings of the  
6 examining physicians in regard to the allowed  
7 conditions in the claim. He was provided with all  
8 of that medical documentation including  
9 Dr. Spencer's report, and he had the affidavit from  
10 Ms. Szapowal from April 30th of 2018.

11 You know, what they have here is a case  
12 where they're asking for a significant award based  
13 upon speculation and it's speculation not only that  
14 Mr. Gelhausen survived for a discernable period of  
15 time, but also speculation that he suffered total  
16 loss of use of the bilateral arms, bilateral legs,  
17 as well as his vision. It's improper to base an  
18 award upon speculation. We have speculation that  
19 the breathing motions that the witness saw  
20 represented a sign of life in this particular case  
21 when there was nothing showing that he had a pulse,  
22 nothing showing that he had any type of brain  
23 function, and then there's speculation that he would  
24 have had permanent residuals equating to the loss of  
25 use.

1 Dr. Hogya -- no physical examination was  
2 performed to assess, to decorticate or decerebrate  
3 posture and normal reflexes, sensation, upper motor  
4 neuron release signs, et cetera, and the autopsy  
5 results are not synonymous with such an evaluation.  
6 Even severe spinal cord injuries on detailed imaging  
7 studies may appear to suggest quadriplegia, yet on  
8 examination there may be signs of partial function,  
9 which is why we examine individuals in addition to  
10 imaging data with regard to function.

11 And, you know, just briefly going back to  
12 the breathing issue, if you look on page three of  
13 Dr. Hogya's report it says that the breathing that  
14 she visualized was this agonal respiration. It says  
15 this is something that can easily be confused for  
16 ordinary respiration leading to the mistaken  
17 impression that the breathing -- and breathing is in  
18 quotation marks -- person must also have a pulse.  
19 This confusion is why the American Heart Association  
20 no longer recommends checking for breathing as part  
21 of even a layperson's administration of CPR.

22 She had estimated in her six-month recall  
23 some three minutes of breathing, but from a clinical  
24 standpoint these estimates must always be considered  
25 with a grain of salt due to the stressful emergency

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nature of the situation.

So that's all we have. Thank you.

THE HEARING OFFICER: All right. I  
will take it under advisement. Thank you very much.

MR. ELZEER: Thank you.

(Hearing concluded at 10:00 a.m.)

C E R T I F I C A T E

State of Ohio,               )  
County of Cuyahoga.      ) SS:

I, Sarah Lane, a Notary Public in and for the state of Ohio, do hereby certify that this hearing was by me reduced to stenotypy in the presence of said parties, afterwards transcribed by means of computer-aided transcription, and that the foregoing is a true and correct transcript so given as aforesaid.

I do further certify that this hearing was taken at the time and place as specified in the foregoing caption, and that I am not a relative, counsel, or attorney of either party, that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28 (D), or otherwise interested in the outcome of this action.

IN CLAIMANT WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, this date of October 8, 2018.

Sarah Kane

Sarah Lane, Notary Public

My commission expires December 18th, 2021.

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Oct. 26. 2018 4:47PM Plevin & Gallucci  
via Fax to Dinsmore & Shorff  
Ohio Industrial Commission 216-413-3829  
via Fax to: Gallagher Bassett  
866-407-7857

Claim Number: 17-202032

### NOTICE OF APPEAL

Injured Worker Information		Employer Information	
Name Travis Gelhausen c/o Sabrina Gelhausen, child c/o Taylor Alloway		Name Waste Management of Ohio, Inc.	
Address 6 Susan Lane		Address 1001 Fannin St. Suite 4000	
City, State, Zip Chardon, OH 44024		City, State, Zip Houston, TX 77002-6711	
Telephone	Fax	Telephone	Fax
Rep ID# 010312-90		Rep ID# 550-80	
Name Plevin & Gallucci Co., LPA		Name Gallagher Bassett Services	
Telephone (216) 861-0804	Fax (216) 861-5322	Telephone (614) 764-7616	Fax (866) 407-7857


Appealed by:

☒ Injured Worker  
☐ Employer  
☐ BWC Administrator

Appealing Order of:

☐ BWC Administrator  
☐ District Hearing Officer  
☒ Staff Hearing Officer

Hearing Location Cleveland (city)  
 Heard on 10/01/2018 (mm/dd/yyyy)  
 Date Order Received 10/15/2018 (mm/dd/yyyy)

 NOTE: If you are filing an appeal of a staff hearing officer order, failure to identify the necessary documents may result in a determination not to hear an appeal at the Commission level.

REASON FOR APPEAL: An appeal is being filed to this order due to the mistakes of fact and law. Please see brief attached hereto.  
 The DHO Order of 8/20/2018 disallowed scheduled loss of use of bilateral arms, bilateral legs and bilateral vision. A C-00 motion was filed on 5/2/2018 requesting payment of loss of use compensation pursuant to State ex. rel. Moorehead v. Indira Comm.  
 We respectfully request a hearing before the Commission

Have you filed, or do you intend to file, new evidence not available at the last hearing? ☐ Yes ☒ No

To be completed by Self-Insuring Employer.

☐ Compensation / benefits HAVE or WILL be timely paid as mandated by R.C. 4123.511  
☐ Compensation / benefits WILL NOT be timely paid as mandated by R.C. 4123.511

☐ I will be requesting an interpreter for the upcoming hearing. Language Needed: \_\_\_\_\_  
☐ I will be requesting a court reporter.  
 By checking either or both boxes, I am asking for extra time for the hearing.

I hereby certify that I have mailed copies of this notice to the ☒ injured worker's representative and/or  
☒ employer's representative (check one or both), on 10/26/2018 (mm/dd/yyyy)

If there is no representative, I have mailed a copy to the injured worker and/or employer.

☐ By checking this box, I certify that I am a non-attorney representative who has been authorized and directed to file this notice of appeal by the ☐ Injured Worker ☐ Employer.

Frank G. Gallucci III  
 (Representative's Signature)

IC 12

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IN THE INDUSTRIAL COMMISSION OF OHIO

) CLAIM NO. 17-202032  
 )  
 )  
 )

IN RE TRAVIS GELHAUSEN,  
 DECEASED, C/O SABRINA J.  
 GELHAUSEN, CHILD AND  
 TAYLOR ALLOWAY

) CLAIMANTS' BRIEF IN SUPPORT  
 ) OF APPEAL OF STAFF HEARING  
 ) OFFICER DECISION  
 )  
 )  
 )

Claimants,

Claimants, Sabrina Gelhausen and Taylor Alloway, appeal the Order of the Staff Hearing Officer, mailed Oct. 13, 2018, denying their C-86 Motion Requesting Payment of Loss of Use Compensation, filed May 2, 2018 ("Motion"). The Staff Hearing Officer's decision to deny the Motion relied upon clear mistakes of fact and law that lead to the unjustified denial of benefits due pursuant to R.C. 4123.57. For the following reasons, the Order of the Staff Hearing Officer should be vacated, and the Motion granted.

BACKGROUND

Travis Gelhausen ("Decedent") crashed his Waste Management garbage truck on October 18, 2017, when he attempted to make a right-hand turn at a significant speed. Affidavit of Jolene Szapowal, filed May 2, 2018 ("Szapowal Aff."), ¶ 1-3. The truck flipped on to its side, crashed through a guard rail, and struck a tree before coming to a rest. ODPS Traffic Crash Report, filed April 10, 2018 ("Crash Report"), p. 1; Gates Mills

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*Investigation Report, filed April 10, 2018 ("Police Report"), p. 1.* Jolene Szapowal ("Szapowal"), a witness to the crash, was driving her own vehicle behind Decedent as they passed through Gates Mills. *Szapowal Aff.*, ¶ 2-3. After the collision, she parked and proceeded to Decedent's aid. *Id.*, ¶ 4. Once she reached the Decedent inside the overturned truck she could see that he was still breathing, but he was unable to move his arms or legs. *Id.*, ¶ 5-6. As Szapowal rubbed his leg to comfort him, Decedent continued breathing for three more minutes. *Id.*, ¶ 7. He passed when his body seized and his respirations ended in Szapowal's presence. *Id.*, ¶ 8. Decedent was extricated from the cab of his truck by emergency rescue personnel and pronounced dead a few minutes later. *Police Report, p. 1.*

The Cuyahoga County Medical Examiner's verdict indicates that Decedent lost his life "while at work," and his death was caused by "[m]echanical asphyxia." *Verdict of Medical Examiner Thomas Gilson, M.D., filed April 10, 2018 ("Medical Examiner's Verdict")*, p. 1. The autopsy report listed, among other things, the following evidence of injuries that are relevant to this administrative appeal:

1. A 6" x 4" dark red acute subgaleal hemorrhage is in the left frontal and temporal scalp.
2. Multiple scattered lacerations are on the right lateral orbit and temple, clustered over a 2" x 1/2" area, measuring up to 1/2" in greatest length.
3. 3/4" x 1/2" red-purple contusion is on the superior midline forehead.
4. Acute hemorrhage is seen underlying the bilateral orbital roofs and right mastoid.

\* \* \*

6. There is a hemorrhagic subluxation of the atlanto-axial vertebrae.



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No. 6578 P. 4/14

7. A hemorrhagic fracture is in the superior aspect of the C4 vertebral body with overlying prevertebral fascia hemorrhage.

*Autopsy Report of Amanda Spencer, D.O., filed April 10, 2018 ("Autopsy"), p. 1-2.*

Decedent's eyes had been enucleated for the purpose of organ donation. *Autopsy, p. 1.*

The skull was intact. *Id., p. 3.*

Dr. Donato Borrillo ("Borrillo"), a board-certified doctor of preventive medicine and retired United States Air Force flight surgeon, reviewed the available evidence on behalf of Claimants and determined that the Decedent "was still alive at the time of his accident for a brief period of time[.]" *Report of Donato Borrillo, M.D., filed July 5, 2018 ("Borrillo Report"), p. 2.* He wrote that the "brief period of breathing" witnessed by Szapowal was "consistent with being alive, as his autopsy did not reveal a decapitation or crush injury of the head." *Id.*

Dr. Borrillo concluded to a reasonable degree of medical certainty that Decedent "suffered a loss of use of the bilateral upper and lower extremities as a result of his motor vehicle accident on October 18, 2017." *Borrillo Report, p. 1.* This condition was the "result of his cervical injury as witnessed." *Id.* Dr. Borrillo explained that the "cervical injury correlate[d] with the witness statement and affidavit of Ms. Szapowal who found the [Decedent] still breathing at the accident scene." *Id.* Of this injury, Dr. Borrillo concluded that "if [Decedent] had survived for longer than the brief amount of time post-accident, he still would not have recovered functional use of the extremities." *Id.*

Dr. Borrillo also concluded to a reasonable degree of medical certainty that Decedent "suffered permanent injuries to both eyes, which are housed in the orbits, as a result of his motor vehicle accident on October 18, 2017." *Borrillo Report, p. 2.* The Dr. wrote that "on autopsy, bilateral orbital fractures were noted." *Id.* Dr. Borrillo concluded

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that "excluding the cornea," Decedent suffered "a loss of use of the visual apparatus." *Id.*, p. 3.

Dr. Paul T. Hogya ("Hogya") reviewed the available evidence on behalf of the employer, and offered the largely-unexplained and counter-intuitive opinion that:

There is not medical evidence sufficient to prove that [Decedent] sustained a complete loss of use of his right or left arm prior to his death as a result of the accident on October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged loss of use of his right or left arm. Traumatic atlanto-axial subluxation may be associated with varying degrees of upper extremity paresis, but not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper extremities. (Emphasis added.)

*Report of Paul T. Hogya, M.D., filed July 5, 2018 ("Hogya Report")*, p. 3. Dr. Hogya's opinion characterized the breathing identified by Szapowal as "agonal respiration" that is "not adequate respiration to sustain oxygenation." *Id.* No witness testimony or medical authorities were cited in support of this assertion. *Id.* Regardless of his characterization of Decedent's continued respirations, Dr. Hogya defined "actual death" as the "cessation of breathing, heart beat and brain function." *Id.*, p. 2.

Dr. Hogya was later able to review the Report of Dr. Borrillo, which did not change his opinions. *Addendum of Paul T. Hogya, M.D., filed Aug. 3, 2018 ("Hogya Addendum")*, p. 1. He adhered to his view that "whether or not [Decedent] is considered to have been "alive" for three minutes or less, there was no conscious ability for him to recognize or appreciate a total loss of use of the upper and lower extremities and/or vision." *Id.*, p. 3. Dr. Hogya doubled down on his prior view:

Injury to the spinal cord results in loss of feeling and movement below the injured area. A complete injury means that there is total loss of feeling and movement below the injury. With an incomplete injury some feeling and/or movement will stay below the level of injury. This was never assessed by a physician with respect to an alleged total loss of

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use of the upper and lower extremities and there was no level of consciousness in that regard either. The autopsy results are not synonymous with such an evaluation. Even severe spinal cord injuries on detailed imaging studies may appear to suggest quadriplegia yet on examination there may signs of partial function, which is why we examine individuals in addition to imaging data with regard to function, treatment and prognosis. (Emphasis added.)

*Id.* Finally, Dr. Hogya expressed the peculiar belief that “[b]ilateral orbital roof fractures do not result in ‘loss of use’ of the eyes” because it does not represent “an injury to the globe (eye) itself[.]” *Id.*, p. 2.

Given an opportunity to respond to Dr. Hogya’s Report, Dr. Borrillo “respectfully disagree[d] with his opinion[.]” *Addendum of Paul T. Hogya, M.D., filed September 28, 2018 (“Borrillo Addendum”), p. 1.* Dr. Borrillo observed:

Dr. Hogya acknowledges the observation by Ms. Szapowal; however, he discounts its value because it was made by a layperson. In my medical opinion, a layperson can recognize the act of breathing. [Decedent’s] breathing was not shallow and not in need of auscultation with a stethoscope, rather it is characterized as audible and characterized by Dr. Hogya as agonal. (Emphasis added.)

*Id.* Dr. Borrillo agreed that agonal breathing can be “an indicator of impending death,” but reiterated that Decedent “was *alive and breathing* immediately after his violent accident.” (Emphasis sic.) *Id.*, p. 2. And he finally concluded: “During this albeit brief period of being alive, which was of sufficient duration to be witnessed, [Decedent] suffered a permanent loss of use of both the upper and lower extremities as a result of his cervical injury.” *Id.*

Claimants Sabrina J. Gelhausen and Taylor Alloway (collectively “Claimants”) filed their Motion requesting “payment of Loss of Use Compensation pursuant to R.C. 4123.57 and *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27 2006-ohio 6364” for total loss of use of both arms, both legs, vision in both eyes, and hearing loss bilaterally.

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*Motion*, p. 1. Claimants later withdrew the claim for hearing loss. *Order of the District Hearing Officer*, filed Aug. 24, 2018 ("DHO Order"), p. 1. District Hearing Officer ("DHO") Marc Stone found that it had not been shown that Decedent "lived for a discernable period of time after sustaining the injuries which resulted to his death." *Id.* The DHO stated that Szapowal's statement "is not medical evidence to establish survival after the impact," and the DHO was not "willing to rely" on "her assessment of the medical condition of the decedent." *Id.*, pp. 1-2. The DHO observed that without Szapowal's witness statement, "it appears that the decedent essentially experienced instantaneous death." *Id.*, p. 2. With regard to loss of vision, the DHO relied on Dr. Hoga's Report and determined that there had not been evidence of "actual loss of function of the eyes." *Id.*

Claimants appealed the DHO's order to Staff Hearing Officer ("SHO") Oleh Maylay, who concurred that the Motion should be denied. *Order of the Staff Hearing Officer*, filed Oct. 13, 2018 ("SHO Order"), p. 1-2. The SHO agreed that "the Decedent did not survive for a discernable period of time after being involved in this work injury[.]" *Id.*, p. 1. The SHO rejected Szapowal's affidavit, finding that it "fails to medically establish that the Decedent survived this accident." *Id.*, p. 2. The SHO accepted Dr. Hoga's conclusion that the Decedent's three minutes of breathing were "agonal" and were "not adequate respirations to sustain oxygenation." *Id.* The SHO further relied upon Dr. Hoga's Report to find that "not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper and/or lower extremities." *Id.*

#### ANALYSIS

As an initial matter, it should be observed that both the DHO and SHO have unjustifiably refused to consider uncontradicted eyewitness testimony, and thus their myopic decisions should be rejected for this reason alone. They have not cited any

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authorities actually suggesting that lay individuals are unqualified to testify about whether a person appeared to be breathing, because none exist. Breathing is an essential, everyday life experience that even small children can recognize and explain. See *Morrissey v. Indus. Comm.*, 98 Ohio App. 213, 128 N.E.2d 815 (2<sup>nd</sup> Dist. 1954), paragraph two of the syllabus ("testimony of lay witnesses is admissible on the issue of proximate cause where proof of such issue is not strictly within the field of scientific knowledge"); *Fox v. Indus. Comm.*, 77 Ohio App. 350, 352, 64 N.E.2d 423 (2<sup>nd</sup> Dist. 1945) ("Lay witnesses are permitted to testify with regard to matters which are within their knowledge and with which the average person is familiar."). Both hearing officers appear to believe that unless a worker happens to suffer a catastrophic injury in the presence of a trained medical professional, a *Morehead* claim can never be established. That cannot be the law in Ohio.

In similar fashion, Dr. Hogle's opinions are unmistakably result-driven and are thus unworthy of credence. There was absolutely no reason for the independent witness, Szapowal, to distort or exaggerate her testimony. When her uncontradicted observations are accepted as credible, which they should be absent proof to the contrary, the only permissible finding is that the Decedent was respirating and alive for roughly 3 minutes following her first contact with him. But without citing any evidence of support, Dr. Hogle has leapt to the conclusion that Szapowal was observing nothing more than "agonal respiration" that corpses supposedly exhibit as a matter of routine. With the only eyewitness testimony having thus been explained away—in his view—Dr. Hogle was free to reach to the opinion that he had always intended to reach once he was retained by the employer.

Dr. Hogle has cited no medical literature, studies, or treatise actually confirming that dead bodies always exhibit agonal respiration, which can be mistaken by a lay person

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as regular breathing for a period of three minutes. That is indeed his position, as he cannot possibly know what Szapowal really witnessed unless agonal respirations occur routinely for three minutes or longer when a person dies from the type of injuries suffered by the Decedent in this case. Szapowal provided no more detailed description beyond that the Decedent was "still breathing." *Szapowal Aff.*, ¶ 5. If several minutes of agonal breathing is a phenomenon that happens just occasionally, then Dr. Hogya would have no possible way of determining what Szapowal actually observed and reported. He would simply be speculating, which is impermissible in workers' compensation proceedings. Dr. Hogya's statement that he accepted the objective evidence is just disingenuous because he also embellished upon Szapowal's observation of "breathing." *Id.*; *Hogya Report*, pp. 1-3. Fundamentally, Dr. Hogya lacked personal knowledge of the circumstances of Decedent's last moments. Moreover, his position ignores other objective medical evidence contradicting the theory of instantaneous death, like pronounced contusions and substantial hemorrhaging. *Autopsy*, p. 1-2.

But even if there was a legitimate basis to conclude that the Decedent must have been exhibiting prolonged agonal breathing, the DHO and SHO still could not rely upon Dr. Hogya's internally inconsistent report as any evidence at all in order to conclude that the Decedent did not survive for any discernable period of time after the truck accident. Dr. Hogya's definition of "actual death" included the "cessation of breathing." *Hogya Report*, p. 2. Although Dr. Hogya's report declared that the breathing witnessed by Szapowal was "agonal," the report nonetheless accepted the truth of her assertion that she had seen the Decedent breathing until he died. *Id.*, p. 3. In order to say that the Decedent had not survived any discernable amount of time after the accident, the SHO could not have accepted both the definition of death provided by Dr. Hogya and his medical conclusions.

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In *State ex rel. Wyrick v. Indus. Comm.*, 138 Ohio St.3d 465, 2014-Ohio-541, 8 N.E.3d 878, ¶ 14 (2014), the Ohio Supreme Court rejected this type of internally conflicting view within an expert opinion. In that case, the Industrial Commission of Ohio ("Commission") submitted a report from an independent medical examination indicating that the claimant had lost the use of his rotator cuff, but had significant function of his upper extremity in the use of his forearm, wrist and hand so long as it was maintained at waist level. *Id.* at ¶ 5. The court concluded that the expert report could not constitute some evidence upon which the commission could rely to deny benefits because it was internally inconsistent and had to be disregarded. *Id.* at ¶ 14. An expert cannot opine that an individual has significant remaining function of an upper extremity when the use is limited. *Id.* In light of the fact that the only other expert report demonstrated a loss of use of the arm, the writ was granted. *Id.* at ¶ 15. Based upon *Wyrick*, the SHO abused its discretion and improperly relied upon the reports provided by Dr. Hogle. For that reason, the Reports of Dr. Borrillo are the only expert evidence that may be relied upon in this claim, including the conclusion that the Decedent lost the use of both of his eyes.

Importantly, Szapowal's eyewitness observation that the Decedent could not use his appendages while she stood with him until he passed away is sufficient in and of itself to demonstrate permanent loss of use. *Szapowal Aff.*, ¶ 5-6. The Ohio Supreme Court examined a similar workers' compensation claim that arose after a laborer sustained serious injuries from falling "15 to 20 feet head first onto a concrete floor while working on a raised platform at his job site." *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶ 1. The laborer never regained consciousness and died 90 minutes after the fall. *Id.* The surviving spouse sought the death benefits provided by R.C. 4123.59 and compensation through R.C. 4123.57(B) for

her husband's loss of use of both arms and legs. *Id.* at ¶ 2. The Industrial Commission denied the scheduled loss claim and the Franklin County Court of Appeals refused to issue mandamus relief in part because the laborer had only survived for a short time. *Id.* at ¶ 3-4. In reversing this decision, the Supreme Court held that the Commission had erred as a matter of law in holding that the loss-of-use benefits were unavailable under these circumstances because "R.C. 4123.57(B) does not specify a required length of time of survival after a loss-of-use injury." *Id.* at ¶ 14, 21. The writ was issued and a remand was ordered for the "determination by the commission of the amount of scheduled loss benefits due the" surviving spouse. *Id.* at ¶ 22. When *Moorehead* is applied in this matter, there is no difference in the outcome for Decedent, whether he lived for three minutes or 90 minutes.

In *State ex rel. Arberia, L.L.C. v. Indus. Comm.*, 10th Dist. No. 13AP-1024, 2014-Ohio-5351, the Tenth District Court of Appeals clarified what sort of evidence was required to meet the standard from *Moorehead*. In that case, the decedent had suffered traumatic brain injury after falling from a roof. *Arberia, L.L.C.*, 2014-Ohio-5351 at ¶ 4. The injury, an allowed condition, caused paralysis and vision and hearing impairment. *Id.* at ¶ 5, 8, 74-75. The decedent's wife sought an allowance under R.C. 4123.57(B) for the loss of use of the decedent's eyes, ears, and upper and lower extremities. *Id.* at ¶ 5. The medical records demonstrated that the decedent survived the injury for four and one-half hours. *Id.* at ¶ 4. The Tenth District Court of Appeals held that demonstrating the loss of use is not dependent on whether the decedent would have survived the injury, but rather the claimant must establish the loss of use during the period of time the decedent survived, and therefore, the claim was allowed. *Id.* at ¶ 75; see also *State ex rel. Polyone Corp. v. Indus. Comm.*, 10th Dist. Franklin No. 12AP-313, 2014-Ohio-1376, ¶ 5-6 ("decedent's loss of use was permanent because it was expected to last, and did last, until



his death"). In this claim, Szapowal observed that the Decedent could not move his arms and legs during the period that he was still breathing. *Szapowal Aff.*, ¶ 5-6. That evidence is confirmed by the autopsy report and Dr. Borrillo's report, which show and explain spine injuries that "no doubt, resulted in quadriplegia." *Borrillo Report*, p. 3; *Autopsy*, p. 1-2.

Dr. Hogya's staunch view that the Decedent did not actually lose the use of his limbs or eyes because he never regained consciousness to experience disability serves to confirm that he is unfamiliar with the controlling legal standards, and his resulting conclusions are thus valueless. The Ohio Supreme Court considered in *Moorehead* whether for purposes of a scheduled loss claim an injured decedent must "consciously perceive and experience the physical suffering and hardship caused by the loss of use of a body part in the period between the injury and death." *Moorehead*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203 at ¶ 3. The court held that this was not a requirement of the statute:

When "the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. R.C. 4123.57(B) does not say that compensation is dependent upon a claimant's conscious awareness of his or her loss, whether resulting from amputation or paralysis. Rather, where the requisite physical loss has been sustained, the statute directs that scheduled loss compensation shall be paid. (Emphasis added.)

*Id.* at ¶ 18; see also *Industrial Commission Order, In re: Mennet*, attached at App., pp. 0001-3. An expert witness must not be permitted to provide testimony founded upon an erroneous understanding of the law, particularly a controlling Supreme Court precedent. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 19-22.

Finally, confirmatory diagnostic testing of the Decedent's nerve function below the neck, besides being impossible within the a three-minute discernable span of survival, is not necessary to prove a loss of use of his limbs. In *State ex rel. White v. U.S. Gypsum Co.*, 10th Dist. Franklin No. 87AP-336, 1988 WL 99335 (Sept. 22, 1988), the Tenth District Court of Appeals held that when insufficient evidence is the basis for a denial of the claim and the medical records indicate a loss of use, a claimant has demonstrated the loss of use for the purposes of seeking compensation. *Id.* at \*1-2. Neither as a matter of law, nor as a matter of the medical evidence, did these Claimants need to prove that the Decedent's spinal injuries resulted in an actual and total cutoff of nervous connection between his brain and his appendages. The fact that portions of the Decedent's cervical spine had been fractured and that the joint between his skull and spinal cord had been dislocated was sufficient. *Autopsy*, p. 1-2. The hearing officers were tasked with determining *loss of use* of the Decedent's arms and legs, not loss of feeling or residual nerve activity. It is enough that the available medical evidence found in the Autopsy shows that the Decedent's spinal injuries "no doubt" resulted in quadriplegia. *Borrillo Report*, p. 3. The absence of the unquestionably confirmatory evidence that Dr. Hogle would have preferred to see in support of loss of use cannot be a legitimate basis for denying the C-86 Motion, as his expectation of unquestionable scientific proof is neither realistic nor necessary in for a valid Morehead claim.

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CONCLUSION

For the foregoing reasons, the Order of the Staff Hearing Officer should be vacated,  
and the C-86 Motion should be granted.

Respectfully Submitted,

*s/ Frank Gallucci*

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IN THE INDUSTRIAL COMMISSION OF OHIO

IN RE TRAVIS GELHAUSEN,  
DECEASED, C/O SABRINA J.  
GELHAUSEN, CHILD AND  
TAYLOR ALLOWAY

Claimants,

)  
) CLAIM NO. 17-202032  
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) CLAIMANTS' MOTION FOR  
) RECONSIDERATION  
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MOTION

Claimants, Sabrina Gelhausen and Taylor Alloway, request reconsideration of the decision that was issued on November 1, 2018, refusing any further review of their C-86 Motion Requesting Payment of Loss of Use Compensation, filed May 2, 2018 ("Motion"). The Staff Hearing Officers' decision to deny the Motion relied upon clear mistakes of fact and law that lead to the unjustified denial of benefits due pursuant to R.C. 4123.57. For the following reasons, the order of November 1, 2018, should be reconsidered, the Order of the Staff Hearing Officers should be vacated, and the Motion should be granted.

BACKGROUND

Travis Gelhausen ("Decedent") crashed his Waste Management garbage truck on October 18, 2017, when he attempted to make a right-hand turn at a significant speed. *Affidavit of Jolene Szapowal, filed May 2, 2018 ("Szapowal Aff."), ¶ 1-3.* The truck flipped on to its side, crashed through a guard rail, and struck a tree before coming to a rest. *ODPS Traffic Crash Report, filed April 10, 2018 ("Crash Report"), p. 1; Gates Mills*

*Investigation Report, filed April 10, 2018 ("Police Report"), p. 1.* Jolene Szapowal ("Szapowal"), a witness to the crash, was driving her own vehicle behind Decedent as they passed through Gates Mills. *Szapowal Aff.*, ¶ 2-3. After the collision, she parked and proceeded to Decedent's aid. *Id.*, ¶ 4. Once she reached the Decedent inside the overturned truck she could see that he was still breathing, but he was unable to move his arms or legs. *Id.*, ¶ 5-6. As Szapowal rubbed his leg to comfort him, Decedent continued breathing for three more minutes. *Id.*, ¶ 7. He passed when his body seized and his respirations ended in Szapowal's presence. *Id.*, ¶ 8. Decedent was extricated from the cab of his truck by emergency rescue personnel and pronounced dead a few minutes later. *Police Report, p. 1.*

The Cuyahoga County Medical Examiner's verdict indicates that Decedent lost his life "while at work," and his death was caused by "[m]echanical asphyxia." *Verdict of Medical Examiner Thomas Gilson, M.D., filed April 10, 2018 ("Medical Examiner's Verdict")*, p. 1. The autopsy report listed, among other things, the following evidence of injuries that are relevant to this administrative appeal:

1. A 6" x 4" dark red acute subgaleal hemorrhage is in the left frontal and temporal scalp.
2. Multiple scattered lacerations are on the right lateral orbit and temple, clustered over a 2" x 1/2" area, measuring up to 1/2" in greatest length.
3. 3/4" x 1/2" red-purple contusion is on the superior midline forehead.
4. Acute hemorrhage is seen underlying the bilateral orbital roofs and right mastoid.

\* \* \*

6. There is a hemorrhagic subluxation of the atlanto-axial vertebrae.

7. A hemorrhagic fracture is in the superior aspect of the C4 vertebral body with overlying prevertebral fascia hemorrhage.

*Autopsy Report of Amanda Spencer, D.O., filed April 10, 2018 ("Autopsy"), p. 1-2.*

Decedent's eyes had been enucleated for the purpose of organ donation. *Autopsy, p. 1.*

The skull was intact. *Id., p. 3.*

Dr. Donato Borrillo ("Borrillo"), a board-certified doctor of preventive medicine and retired United States Air Force flight surgeon, reviewed the available evidence on behalf of Claimants and determined that the Decedent "was still alive at the time of his accident for a brief period of time[.]" *Report of Donato Borrillo, M.D., filed July 5, 2018 ("Borrillo Report"), p. 2.* He wrote that the "brief period of breathing" witnessed by Szapowal was "consistent with being alive, as his autopsy did not reveal a decapitation or crush injury of the head." *Id.*

Dr. Borrillo concluded to a reasonable degree of medical certainty that Decedent "suffered a loss of use of the bilateral upper and lower extremities as a result of his motor vehicle accident on October 18, 2017." *Borrillo Report, p. 1.* This condition was the "result of his cervical injury as witnessed." *Id.* Dr. Borrillo explained that the "cervical injury correlate[d] with the witness statement and affidavit of Ms. Szapowal who found the [Decedent] still breathing at the accident scene." *Id.* Of this injury, Dr. Borrillo concluded that "if [Decedent] had survived for longer than the brief amount of time post-accident, he still would not have recovered functional use of the extremities." *Id.*

Dr. Borrillo also concluded to a reasonable degree of medical certainty that Decedent "suffered permanent injuries to both eyes, which are housed in the orbits, as a result of his motor vehicle accident on October 18, 2017." *Borrillo Report, p. 2.* The Doctor wrote that "on autopsy, bilateral orbital fractures were noted." *Id.* Dr. Borrillo

concluded that "excluding the cornea," Decedent suffered "a loss of use of the visual apparatus." *Id.*, p. 3.

Dr. Paul T. Hogya ("Hogya") reviewed the available evidence on behalf of the employer, and offered the largely-unexplained and counter-intuitive opinion that:

There is not medical evidence sufficient to prove that [Decedent] sustained a complete loss of use of his right or left arm prior to his death as a result of the accident on October 18, 2017. At no time would Mr. Gelhausen have been conscious with these actual injuries to even appreciate any alleged loss of use of his right or left arm. Traumatic atlanto-axial subluxation may be associated with varying degrees of upper extremity paresis, but not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper extremities. (Emphasis added.)

*Report of Paul T. Hogya, M.D., filed July 5, 2018 ("Hogya Report")*, p. 3. Dr. Hogya's opinion characterized the breathing identified by Szapowal as "agonal respiration" that is "not adequate respiration to sustain oxygenation." *Id.* No witness testimony or medical authorities were cited in support of this assertion. *Id.* Regardless of his characterization of Decedent's continued respirations, Dr. Hogya defined "actual death" as the "cessation of breathing, heart beat and brain function." *Id.*, p. 2.

Dr. Hogya was later able to review the Report of Dr. Borrillo, which did not change his opinions. *Addendum of Paul T. Hogya, M.D., filed Aug. 3, 2018 ("Hogya Addendum")*, p. 1. He adhered to his view that "whether or not [Decedent] is considered to have been "alive" for three minutes or less, there was no conscious ability for him to recognize or appreciate a total loss of use of the upper and lower extremities and/or vision." *Id.*, p. 3. Dr. Hogya doubled down on his prior view:

Injury to the spinal cord results in loss of feeling and movement below the injured area. A complete injury means that there is total loss of feeling and movement below the injury. With an incomplete injury some feeling and/or movement will stay below the level of injury. This was never assessed by a physician with respect to an alleged total loss of

use of the upper and lower extremities and there was no level of consciousness in that regard either. The autopsy results are not synonymous with such an evaluation. Even severe spinal cord injuries on detailed imaging studies may appear to suggest quadriplegia yet on examination there may signs of partial function, which is why we examine individuals in addition to imaging data with regard to function, treatment and prognosis. (Emphasis added.)

*Id.* Finally, Dr. Hogya expressed the peculiar belief that "[b]ilateral orbital roof fractures do not result in 'loss of use' of the eyes" because it does not represent "an injury to the globe (eye) itself[.]" *Id.*, p. 2.

Given an opportunity to respond to Dr. Hogya's Report, Dr. Borrillo "respectfully disagree[d] with his opinion[.]" *Addendum of Paul T. Hogya, M.D., filed September 28, 2018 ("Borrillo Addendum")*, p. 1. Dr. Borrillo observed:

Dr. Hogya acknowledges the observation by Ms. Szaputowal; however, he discounts its value because it was made by a layperson. In my medical opinion, a layperson can recognize the act of breathing. [Decedent's] breathing was not shallow and not in need of auscultation with a stethoscope, rather it is characterized as audible and characterized by Dr. Hogya as agonal. (Emphasis added.)

*Id.* Dr. Borrillo agreed that agonal breathing can be "an indicator of impending death," but reiterated that Decedent "was **alive and breathing** immediately after his violent accident." (Emphasis sic.) *Id.*, p. 2. And he finally concluded: "During this albeit brief period of being alive, which was of sufficient duration to be witnessed, [Decedent] suffered a permanent loss of use of both the upper and lower extremities as a result of his cervical injury." *Id.*

Claimants Sabrina J. Gelhausen and Taylor Alloway (collectively "Claimants") filed their Motion requesting "payment of Loss of Use Compensation pursuant to R.C. 4123.57 and *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27 2006-ohio 6364" for total loss of use of both arms, both legs, vision in both eyes, and hearing loss bilaterally.



*Motion*, p. 1. Claimants later withdrew the claim for hearing loss. *Order of the District Hearing Officer*, filed Aug. 24, 2018 ("DHO Order"), p. 1. District Hearing Officer ("DHO") Marc Stone found that it had not been shown that Decedent "lived for a discernable period of time after sustaining the injuries which resulted to his death." *Id.* The DHO stated that Szapowal's statement "is not medical evidence to establish survival after the impact," and the DHO was not "willing to rely" on "her assessment of the medical condition of the decedent." *Id.*, pp. 1-2. The DHO observed that without Szapowal's witness statement, "it appears that the decedent essentially experienced instantaneous death." *Id.*, p. 2. With regard to loss of vision, the DHO relied on Dr. Hogg's Report and determined that there had not been evidence of "actual loss of function of the eyes." *Id.*

Claimants appealed the DHO's order to Staff Hearing Officer ("SHO") Oleh Maylay, who concurred that the Motion should be denied. *Order of the Staff Hearing Officer*, filed Oct. 13, 2018 ("SHO Order"), p. 1-2. The SHO agreed that "the Decedent did not survive for a discernable period of time after being involved in this work injury[.]" *Id.*, p. 1. The SHO rejected Szapowal's affidavit, finding that it "fails to medically establish that the Decedent survived this accident." *Id.*, p. 2. The SHO accepted Dr. Hogg's conclusion that the Decedent's three minutes of breathing were "agonal" and were "not adequate respirations to sustain oxygenation." *Id.* The SHO further relied upon Dr. Hogg's Report to find that "not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper and/or lower extremities." *Id.*

On November 1, 2018, two SHOs reviewed the Claimants' Motion on behalf of the Industrial Commission of Ohio ("Commission") and refused further review of the Motion. *Order of the Industrial Commission of Ohio*, filed Nov. 1, 2018 ("IC Order"), p.

1. Claimants now seek reconsideration of that rash decision, which is premised squarely upon mistakes of both fact and law.

#### ANALYSIS

The SHOs' most recent ruling is fundamentally flawed on several levels, which will be separately addressed in this Motion. Their misguided decision cannot be justified as a proper exercise of discretion, as it is apparent that they misunderstood both the controlling legal and evidentiary standards.

#### I. THE UNJUSTIFIED REFUSAL TO CONSIDER UNCONTRADICTED LAY EYEWITNESS TESTIMONY

As an initial matter, it should be observed that both the DHO and SHO have unjustifiably refused to consider uncontradicted eyewitness testimony, and thus their myopic decisions should be rejected for this reason alone. They have not cited any authorities actually suggesting that lay individuals are unqualified to testify about whether a person appeared to be breathing, because none exist. Breathing is an essential, everyday life experience that even small children can recognize and explain. See *Morrissey v. Indus. Comm.*, 98 Ohio App. 213, 128 N.E.2d 815 (2<sup>nd</sup> Dist.1954), paragraph two of the syllabus ("testimony of lay witnesses is admissible on the issue of proximate cause where proof of such issue is not strictly within the field of scientific knowledge"); *Fox v. Indus. Comm.*, 77 Ohio App. 350, 352, 64 N.E.2d 423 (2<sup>nd</sup> Dist.1945) ("Lay witnesses are permitted to testify with regard to matters which are within their knowledge and with which the average person is familiar."). Both hearing officers appear to believe that unless a worker happens to suffer a catastrophic injury in the presence of a trained medical professional, a *Morehead* claim can never be established. That cannot be the law in Ohio.

In similar fashion, Dr. Hoggia's opinions are unmistakably result-driven and are thus unworthy of credence. There was absolutely no reason for the independent witness, Szapowal, to distort or exaggerate her testimony. When her uncontradicted observations are accepted as credible, which they should be absent proof to the contrary, the only permissible finding is that the Decedent was respiring and alive for roughly three minutes following her first contact with him. But without citing any evidence of support, Dr. Hoggia has leapt to the conclusion that Szapowal was observing nothing more than "agonal respiration" that corpses supposedly exhibit as a matter of routine. With the only eyewitness testimony having thus been explained away—in his view—Dr. Hoggia was free to reach to the opinion that he had always intended to reach once he was retained by the employer.

## II. THE UNRELIABLE OPINIONS OF THE EMPLOYER'S EXPERT

### A. The Improper Speculation Over What Was Really Observed

The SHOs have relied heavily upon the employer's expert, Dr. Hoggia, whose ultimate opinion is that Szapowal could not have possibly witnessed the Decedent alive and breathing as she maintained in her sworn statement. It should be remembered that Ohio courts require expert opinions to be based upon scientifically valid principles. *Radford v. Monfort*, 3<sup>rd</sup> Dist. Mercer No. 10-04-08, 2004-Ohio-4702, ¶ 8-10; *Shreve v. United Elec. & Constr. Co., Inc.*, 4<sup>th</sup> Dist. Ross No. 01CA2626, 2002-Ohio-3761, ¶ 93-97; *State of Ohio v. Hassler*, 5<sup>th</sup> Dist. Delaware No. 05 CAA11 0078, 2006-Ohio-3397, ¶ 43-49<sup>1</sup>. Given the significant interests at stake, these same sound standards should certainly apply in these administrative proceedings.

<sup>1</sup> *State v. Hassler* was reversed on grounds unrelated to the issue of the scientific basis of the testimony of an expert witness. *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46.

Dr. Hogya has cited no medical literature, studies, or treatises actually confirming that dead bodies always exhibit agonal respiration, which can be mistaken by a lay person as regular breathing for a period of three minutes. That is indeed his position, as he cannot possibly know what Szapowal really witnessed unless agonal respirations occur routinely for three minutes or longer when a person dies from the type of injuries suffered by the Decedent in this case. Szapowal provided no more detailed description beyond that the Decedent was "still breathing." *Szapowal Aff.*, ¶5. If several minutes of agonal breathing is a phenomenon that happens just occasionally, then Dr. Hogya would have no possible way of determining within a reasonable degree of medical probability what Szapowal had actually observed and reported. He would simply be speculating, which is impermissible in workers' compensation proceedings.

Dr. Hogya's statement that he accepted the objective evidence is just disingenuous because he also embellished upon Szapowal's observation of "breathing." *Id.*; *Hogya Report*, pp. 1-3. Fundamentally, Dr. Hogya lacked personal knowledge of the circumstances of Decedent's last moments. Moreover, his position ignores other objective medical evidence contradicting the theory of instantaneous death, like pronounced contusions and substantial hemorrhaging. *Autopsy*, p. 1-2.

#### B. The Internally Inconsistent Findings

Even if there were a legitimate basis to conclude that the Decedent must have been exhibiting prolonged agonal breathing, the DHO and SHO still could not rely upon Dr. Hogya's internally inconsistent report as any evidence at all in order to conclude that the Decedent did not survive for any discernable period of time after the truck accident. Dr. Hogya's definition of "actual death" included the "cessation of breathing." *Hogya Report*, p. 2. Although Dr. Hogya's report declared that the breathing witnessed by Szapowal was "agonal," the report nonetheless accepted the truth of her assertion that

she had seen the Decedent breathing until he died. *Id.*, p. 3. In order to say that the Decedent had not survived any discernable amount of time after the accident, the SHO could not have accepted *both* the definition of death provided by Dr. Hoya and his medical conclusions.

In *State ex rel. Wyrick v. Indus. Comm.*, 138 Ohio St.3d 465, 2014-Ohio-541, 8 N.E.3d 878, ¶ 14, the Ohio Supreme Court rejected this type of internally conflicting view within an expert opinion. In that case, the Commission submitted a report from an independent medical examination indicating that the claimant had lost the use of his rotator cuff, but had significant function of his upper extremity in the use of his forearm, wrist and hand so long as it was maintained at waist level. *Id.* at ¶ 5. The court concluded that the expert report could not constitute some evidence upon which the Commission could rely to deny benefits because it was internally inconsistent and had to be disregarded. *Id.* at ¶ 14. An expert cannot opine that an individual has significant remaining function of an upper extremity when the use is limited. *Id.* In light of the fact that the only other expert report demonstrated a loss of use of the arm, the writ was granted. *Id.* at ¶ 15. Based upon *Wyrick*, the SHO abused its discretion and improperly relied upon the reports provided by Dr. Hoya. For that reason, the Reports of Dr. Borrillo are the only expert evidence that may be relied upon in this claim, including the conclusion that the Decedent lost the use of both of his eyes.

#### C. The Expert's Misunderstanding of the Controlling Legal Standards

Importantly, Szapowal's eyewitness observation that the Decedent could not use his appendages while she stood with him until he passed away is sufficient in and of itself to demonstrate permanent loss of use. *Szapowal Aff.*, ¶ 5-6. The Ohio Supreme Court examined a similar workers' compensation claim that arose after a laborer sustained serious injuries from falling "15 to 20 feet head first onto a concrete floor while working

on a raised platform at his job site." *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶ 1. The laborer never regained consciousness and died 90 minutes after the fall. *Id.* The surviving spouse sought the death benefits provided by R.C. 4123.59 and compensation through R.C. 4123.57(B) for her husband's loss of use of both arms and legs. *Id.* at ¶ 2. The Industrial Commission denied the scheduled loss claim and the Tenth District Court of Appeals refused to issue mandamus relief in part because the laborer had only survived for a short time. *Id.* at ¶ 3-4. In reversing this decision, the Supreme Court held that the Commission had erred as a matter of law in holding that the loss-of-use benefits were unavailable under these circumstances because "R.C. 4123.57(B) does not specify a required length of time of survival after a loss-of-use injury." *Id.* at ¶ 14, 21. The writ was issued and a remand was ordered for the "determination by the commission of the amount of scheduled loss benefits due the" surviving spouse. *Id.* at ¶ 22. When *Moorehead* is applied in this matter, there is no difference in the outcome for Decedent, whether he lived for three minutes or 90 minutes.

In *State ex rel. Arberia, L.L.C. v. Indus. Comm.*, 10th Dist. No. 13AP-1024, 2014-Ohio-5351, the Tenth District Court of Appeals clarified what sort of evidence was required to meet the standard from *Moorehead*. In that case, the decedent had suffered traumatic brain injury after falling from a roof. *Arberia, L.L.C.*, 2014-Ohio-5351 at ¶ 4. The injury, an allowed condition, caused paralysis and vision and hearing impairment. *Id.* at ¶ 5, 8, 74-75. The decedent's wife sought an allowance under R.C. 4123.57(B) for the loss of use of the decedent's eyes, ears, and upper and lower extremities. *Id.* at ¶ 5. The medical records demonstrated that the decedent survived the injury for four and one-half hours. *Id.* at ¶ 4. The Tenth District Court of Appeals held that demonstrating the loss of use is not dependent on whether the decedent would have survived the injury.

but rather the claimant must establish the loss of use during the period of time the decedent survived, and therefore, the claim was allowed. *Id.* at ¶75; *see also State ex rel. Polyone Corp. v. Indus Comm.*, 10<sup>th</sup> Dist. Franklin No. 12AP-313, 2014-Ohio-1376, ¶5-6 (“decedent's loss of use was permanent because it was expected to last, and did last, until his death”). In this claim, Szapowal observed that the Decedent could not move his arms and legs during the period that he was still breathing. *Szapowal Aff.*, ¶5-6. That evidence is confirmed by the autopsy report and Dr. Borrillo's report, which show and explain spine injuries that “no doubt, resulted in quadriplegia.” *Borrillo Report*, p. 3; *Autopsy*, p. 1-2.

Dr. Hogya's staunch view that the Decedent did not actually lose the use of his limbs or eyes because he never regained consciousness to experience disability serves to confirm that he is unfamiliar with the controlling legal standards, and his resulting conclusions are thus valueless. The Ohio Supreme Court considered in *Moorehead* whether for purposes of a scheduled loss claim an injured decedent must “consciously perceive and experience the physical suffering and hardship caused by the loss of use of a body part in the period between the injury and death.” *Moorehead*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203 at ¶3. The court held that this was not a requirement of the statute:

When “the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. R.C. 4123.57(B) does not say that compensation is dependent upon a claimant's conscious awareness of his or her loss, whether resulting from amputation or paralysis. Rather, where the requisite physical loss has been sustained, the statute directs that scheduled loss compensation shall be paid. (Emphasis added.)

*Id.* at ¶ 18; see also *Industrial Commission Order, In re: Mennet*, attached at Apx., pp. 0001-3. An expert witness must not be permitted to provide testimony founded upon an erroneous understanding of the law, particularly a controlling Supreme Court precedent. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 19-22.


Finally, confirmatory diagnostic testing of the Decedent's nerve function below the neck, besides being impossible within the a three-minute discernable span of survival, is not necessary to prove a loss of use of his limbs. In *State ex rel. White v. U.S. Gypsum Co.*, 10th Dist. Franklin No. 87AP-336, 1988 WL 99335 (Sept. 22, 1988) the Tenth District Court of Appeals held that when insufficient evidence is the basis for a denial of the claim and the medical records indicate a loss of use, a claimant has demonstrated the loss of use for the purposes of seeking compensation. *Id.* at \*1-2. Neither as a matter of law, nor as a matter of the medical evidence, did these Claimants need to prove that the Decedent's spinal injuries resulted in an actual and total cutoff of nervous connection between his brain and his appendages. The fact that portions of the Decedent's cervical spine had been fractured and that the joint between his skull and spinal cord had been dislocated was sufficient. *Autopsy*, p. 1-2. The hearing officers were tasked with determining *loss of use* of the Decedent's arms and legs, not loss of feeling or residual nerve activity. It is enough that the available medical evidence found in the Autopsy shows that the Decedent's spinal injuries "no doubt" resulted in quadriplegia. *Borrillo Report*, p. 3. The absence of the confirmatory evidence that Dr. Hogle would have preferred to see in support of loss of use cannot be a legitimate basis for denying the C-86 Motion, as his expectation of unquestionable scientific proof is neither realistic nor necessary in for a valid *Moorehead* claim.



CONCLUSION

For the foregoing reasons, the order of November 1, 2018, should be reconsidered, the Order of the Staff Hearing Officers should be vacated, and the C-86 Motion should be granted.

Respectfully Submitted,

  
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BEFORE THE INDUSTRIAL COMMISSION OF OHIO

RE: TRAVIS GELHAUSEN, deceased,  
C/O SABRINA J. GELHAUSEN, child and TAYLOR ALLOWAY

Claim No. 17-202032

EMPLOYER'S BRIEF IN OPPOSITION TO CLAIMANT'S MOTION FOR RECONSIDERATION

On 10/26/2018, the Claimants filed an appeal to the Staff Hearing Officer order issued 10/13/2018. This appeal was refused by the Industrial Commission pursuant to a decision issued 11/1/2018. The Claimants filed a Motion for Reconsideration of this decision on 11/9/2018. The Self-Insured Employer, Waste Management of Ohio, Inc., hereby urges the Industrial Commission to deny the Claimants' motion as it fails to meet the Reconsideration Guidelines set forth in I.C. Resolution R18-1-06.

For the Industrial Commission to grant a request for Reconsideration of an order issued pursuant to R.C. 4123.511(E) refusing to hear an appeal from a decision of a Staff Hearing Officer issued under R.C. 4123.511(D), the moving party must establish one or more of the following: (1) new and changed circumstances, (2) evidence of fraud, (3) clear mistake of fact in the Staff Hearing Officer's order, (4) a clear mistake of law of such character that remedial action should follow, and/or (5) an error by the Hearing Officer rendering the order defective. A review of the Staff Hearing Officer's order from the hearing on 10/1/2018, however, clearly establishes that the Claimants have failed to establish any of the requisite criteria to allow the Industrial Commission to invoke its powers of continuing jurisdiction over this matter.

The Claimants argued in their Brief that the DHO and SHO were unjustified in their decision not "to consider uncontradicted lay witness testimony" that Mr. Gelhausen was breathing after the motor vehicle accident that unfortunately ended his life. This decision,

however, does not constitute a mistake of fact, mistake of law, or an error rendering the order defective. The courts have long recognized that the Industrial Commission, including its District and Staff Hearing Officers, has the discretion and responsibility to evaluate the weight and credibility of the evidence when rendering decisions. In the instant matter, both the DHO and SHO evaluated the evidence and determined that the medical opinions of Dr. Hoga in his reports dated 8/2/2018 and 6/30/2018 were more persuasive regarding what is clearly a medical issue than the purported observations by a lay witness contained in an affidavit. This non-medical bystander merely observed movements in Mr. Gelhausen's torso which she described as "breathing." This "breathing" was NOT OBSERVED by any of the attendant medical personnel and this witness has no medical qualifications whatsoever to render any opinion that what she observed represented life-sustaining respirations. Of particular significance is the fact that following the crash, none of the medical responders observed ANY signs of life. The medical responders never detected a pulse and they made no attempts whatsoever to resuscitate Mr. Gelhausen. Given the foregoing, the Staff Hearing Officer did not err in his refusal to rely upon the lay witness affidavit by Ms. Szapowal such as to support the Claimants' Request for Reconsideration.

Claimants have also argued that the employer's expert opinions by Dr. Hoga are "unreliable", "internally inconsistent" and representative of a "Misunderstanding of the Controlling Legal Standards." These assertions are likewise without merit and are based upon blatant misinterpretations and misrepresentations of Dr. Hoga's analysis of the medical evidence and medical conclusions. Dr. Hoga's opinions address two primary issues relating to requests for schedule loss awards in claims resulting in death. First, while the case of

*Moorehead v. Indus. Comm.*, 112 Ohio St. 3d 27, 2006, holds that there is no required length of time of survival before scheduled loss benefits can be paid; later clarifying decisions upheld the Industrial Commission's requirement that to qualify, the decedent must actually survive for a "discernible period of time." See, *State ex rel. Sagraves v. Indus. Comm.*, 10<sup>th</sup> Distr. No. 10AP-1030, 2012-Ohio-1010 and *State ex rel. Wallace v. Indus. Comm.*, 10<sup>th</sup> Dist. No. 11AP-897, 2013-Ohio 1015. According to Dr. Hogya, the ONLY evidence that Mr. Gelhausen survived the crash for a "discernible period of time" is from a lay witness. Given the extent of the injuries described on the autopsy report, however, Dr. Hogya concluded in his MEDICAL opinion that what she observed were more likely reflexive agonal respirations rather than "adequate respiration to sustain oxygenation." Noting how easy it is to confuse agonal respirations with ordinary respirations, Dr. Hogya points out that this confusion is the reason that "the American Heart Association no longer recommends checking for breathing as part of a layperson's CPR." As noted above, no medical provider documented ANY signs of life in Mr. Gelhausen following the accident including a pulse, life-sustaining respirations, or brain activity.

The second issue addressed by Dr. Hogya is whether Mr. Gelhausen actually suffered the permanent loss of use of the extremities and vision such as to qualify for an award of compensation had it been established that he did in fact survive for a discernible period of time. In his reports, Dr. Hogya explains that not all individuals who survive the type of injuries sustained by Mr. Gelhausen will experience a complete loss of use. Mr. Gelhausen was never conscious to follow the commands of a medical provider as part of a physical examination and assessment of the residual functioning of his brain, spinal cord, and spinal nerves. With this, the only objective medical evidence for an examiner to opine on this matter is the autopsy

report. Noting that "autopsy results are not synonymous with a physician's assessment", Dr. Hoga asserts that "not all individuals that survive traumatic atlanto-axial subluxation have complete loss of use of the upper extremities" and "[e]ven severe spinal cord injuries on detailed imaging studies may appear to suggest quadriplegia yet on examination there may be signs of partial function." The reliance upon Dr. Hoga's medical opinions by the District and Staff Hearing Officers does not represent a mistake of fact or law. Likewise there is no evidence that the reliance upon these reports renders their orders defective by virtue of error. Claimants have not asserted fraud or new and changed circumstance in their request for Reconsideration.

Based upon the foregoing, the Self-Insured Employer, Waste Management of Ohio, Inc., respectfully requests that the Claimants' Motion for Reconsideration be refused as it fails to meet the requirements of I.C. Resolution R18-1-06.

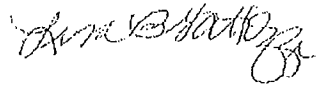
*Respectfully submitted,*

A handwritten signature in black ink, appearing to read "Lisa B. Gattozzi", with a stylized flourish at the end.

Lisa B. Gattozzi  
Attorney for Employer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon  
Plevin & Gallucci, LPA, Attorneys for Claimant, 55 Public Square, Suite 2222, Cleveland, OH  
44113, by ordinary U.S. Mail, postage pre-paid the 19<sup>th</sup> day of November, 2018.



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Lisa B. Gattozzi

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

-----  
TRAVIS GELHAUSEN,

Claimant,

and

Claim No. 17-202032

WASTE MANAGEMENT OF OHIO, INC.,

Employer.  
-----

INDUSTRIAL COMMISSION HEARING  
TUESDAY, FEBRUARY 5, 2019  
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A hearing before the Industrial Commission of Ohio, taken before me, Sarah Lane, Notary Public within and for the State of Ohio, 30 West Spring Street, Columbus, Ohio, commencing at 1:08 p.m. the day and date above set forth.

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On behalf of the Employer.



1 MR. BAINBRIDGE: We are here today on  
2 the injured worker's appeal -- application of  
3 reconsideration, I should say.

4 Let's begin with introductions, beginning  
5 with the injured worker.

6 MR. ELZEER: I'm Brad Elzeer on behalf  
7 of Plevin & Gallucci for Travis Gelhausen.

8 MR. DUFFY: Troy Duffy from Plevin &  
9 Gallucci.

10 MR. BAINBRIDGE: Duffy?

11 MR. DUFFY: Duffy.

12 MR. BAINBRIDGE: Okay. Thank you.  
13 And you've been before us before.

14 For the employer?

15 MR. PERRY: Brian Perry from  
16 Dinsmore & Shohl on behalf of Waste Management.

17 MR. BAINBRIDGE: Harry?

18 MR. PERRY: Perry, with a "P."

19 MR. BAINBRIDGE: Okay. Let's begin  
20 with jurisdiction. We'll hear the jurisdiction,  
21 take that under advisement, then we'll hear the case  
22 on the merits.

23 Mr. Elzeer, it's your move here.

24 MR. ELZEER: Thank you.

25 We are asking you to invoke continuing

1 jurisdiction and grant our motion filed on May 2nd  
2 of 2018 requesting the scheduled loss of both the  
3 right arm, the left arm, right leg, left leg, and  
4 both eyes. For the record, we did withdraw the  
5 request for the hearing loss.

6 We are asking you to rely upon  
7 Dr. Borillo's reports. The first one was dated  
8 July 3rd of 2018. It's online 7/5 of '18, and  
9 there's an addendum from 9/8 of 2018 and that's  
10 online 9/28 of 2018. Also, we are asking you to  
11 rely upon the definition of death by the medical  
12 examiner Thomas Gilson. That's on line 4/10 of  
13 2018. That was mechanical asphyxiation, which I'll  
14 get into. And we are asking you to rely upon the  
15 witness statement of Jolene Szapowal.

16 This is a horrific injury resulting in  
17 Mr. Gelhausen's death. He was driving a Waste  
18 Management truck back on October 18th of 2017. The  
19 accident occurred --

20 MR. BAINBRIDGE: Remember, we're on  
21 jurisdiction now.

22 MR. ELZEER: Oh, on jurisdiction?

23 MR. BAINBRIDGE: Yeah.

24 MR. ELZEER: Okay. I'm sorry.

25 MR. BAINBRIDGE: Start on -- tell us

1           why you think we have the jurisdiction.

2                       MR. ELZEER: There's multiple mistakes  
3           of fact here with regards to the application of the  
4           Moorehead case and based on -- relying upon  
5           Dr. Hoggia's report, specifically that the cause of  
6           death was mechanical asphyxiation. As I mentioned,  
7           and according to Revised Code 313.19, that's  
8           actually listed in the footnote, that would be --  
9           the medical examiner's opinion would be considered a  
10          legal cause of death unless it's rebutted, and the  
11          employer's doctor hasn't even attempted to rebut  
12          that.

13                      As a matter of fact, if you look at  
14          Dr. Hoggia's reports, the two reports on file from  
15          6/30 and 8/2, he doesn't even list the cause of  
16          death: Mechanical asphyxiation. And without  
17          listing the cause of death in either report, I don't  
18          know how you can comply with State ex rei. Wallace  
19          that says a non-examining physician has to accept  
20          the findings of the examining doctor. Clearly,  
21          Thomas Gilson was the only examining doctor on  
22          10/18/2017 and yet that report was accepted as the  
23          basis to deny or allow the motion.

24                      Now, as far as Moorehead is concerned, we  
25          believe that basically that should have been relied

1       upon on either aspect of Moorehead. Specifically  
2       under Moorehead there is no requirement that  
3       consciousness be required as a prerequisite to  
4       getting an award. However, if you take a look at  
5       Dr. Hoggia's reports, in four different places he  
6       says the reason he believes that the conditions  
7       should be denied are because the claimant was not  
8       conscious and could not appreciate the scheduled  
9       loss of the arms, legs, or the eyes.

10       Furthermore, what the employer argued at  
11       the last hearing in the transcript, the second point  
12       of Moorehead specifically says there's no  
13       requirement that the injured worker survive for any  
14       extended period of time. But that's actually what  
15       the employer argued based on Dr. Hoggia's report on  
16       page 20 of the transcript from the hearing -- the  
17       staff hearing lines 2 through 10.

18       Here's what the employer argued.

19       "Dr. Hoggia, you know, notes, and I think  
20       appropriately, that while the injuries were severe,  
21       not all of those types of injuries will result in a  
22       loss of use, and sometimes we're talking about  
23       permanent scheduled losses, some time needs to pass  
24       to see whether or not an injured worker has actual  
25       permanent residuals as a result of their injuries,

1 and in this case Mr. Gelhausen's death prevented  
2 that."

3 So the employer's actually arguing the  
4 opposite of what the Supreme Court said in the  
5 second prong of Moorehead. So based upon  
6 Dr. Hoggia's two reports, the employer's arguing two  
7 specific areas of law contrary to what the Supreme  
8 Court said.

9 Furthermore, if -- we believe there's a  
10 mistake of fact. If you take a look at what  
11 Dr. Hoggia says in his reports, claimant sustained  
12 agonal -- he said that what the witness witnessed,  
13 this Jolene Szapowal, she witnessed, in his opinion,  
14 agonal respirations.

15 Well, agonal respirations -- I have two  
16 definitions online. Agonal respirations are just  
17 abnormal patterns of breathing; labored breathing  
18 accompanied by strange vocalizations and myoclonus.  
19 The duration of agonal respirations can be as brief  
20 as two breaths or last up to several hours.

21 So Dr. Hoggia is saying that is what he had,  
22 but on the one hand he's saying it was an  
23 instantaneous death, but he's also saying Travis  
24 Gelhausen had these agonal respirations. And  
25 although Ohio law doesn't distinguish between

1 ordinary respirations and agonal respirations,  
2 Dr. Hogya is trying to do just that.

3 And just to show you the absurd result we  
4 would have, according to the definition these  
5 breaths could last up to several hours. Using  
6 Dr. Hogya rationale, someone breathing for several  
7 hours with these agonal respirations would be  
8 considered instantaneously dead. We believe there  
9 is a problem there.

10 Also, according to Dr. Hogya, he actually  
11 says in his definition of -- in his definition of  
12 agonal respirations, agonal respirations are  
13 inadequate patterns of breathing associated with  
14 extreme psychological distress -- physiological  
15 distress, excuse me. This is on page three of his  
16 addendum from August 2nd.

17 Well, he's implying that the claimant was  
18 still alive, even though he's trying to say that  
19 this was an instantaneous death because dying people  
20 do have extreme physiological distress. Dead people  
21 do not have extreme physiological distress. Despite  
22 that, this report was relied upon and it is  
23 internally inconsistent.

24 Based upon those reasons, we believe there  
25 is jurisdiction based upon multiple mistakes of fact

1 and mistakes of law.

2 MR. BAINBRIDGE: Mr. Perry, your  
3 thoughts on jurisdiction?

4 MR. PERRY: Yes, sir.

5 I think that the place to start is probably  
6 with the Industrial Commission's order that accepted  
7 this for reconsideration. I don't believe that it  
8 adequately apprises of what the perceived error was.  
9 The only explanation on the order, which was mailed  
10 1/21, indicates that it's alleged that the staff  
11 hearing officer erred in the application of State  
12 ex rel. Moorehead and then it gives the citation to  
13 the facts of this case. And it doesn't -- that  
14 could mean many, many different things, as  
15 Mr. Elzeer has touched on already. I don't believe  
16 that that has adequately put our parties on notice  
17 as to what the issue is here today.

18 Secondly, I think that it's fairly clear  
19 that there is no basis for reconsideration here. I  
20 think this would have been a far different situation  
21 had the Industrial Commission chosen to accept this  
22 for a standard third level hearing, which was not  
23 the case here. You had a district hearing officer  
24 who heard all the same evidence and arguments, found  
25 that this injured worker did not survive this

1. accident.

2. You then have the staff hearing officer's  
3. order, which again went through all of this evidence  
4. and found not only that the claimant had not proven  
5. that Mr. Gelhausen survived the accident but they  
6. had also failed medically to prove that there was a  
7. loss of use of the arms or the legs. And pursuant  
8. to the Industrial Commission's policy, F4, there was  
9. no evidence of an injury to the eyes which resulted  
10. in a loss of vision.

11. You then have an appeal filed with an  
12. extensive memo basically asserting all of  
13. Mr. Elzeer's arguments. That was reviewed by two  
14. hearing officers, and the Industrial Commission  
15. refused that appeal. Basically, he re-filed the  
16. same memorandum and just added on that the appeal  
17. had been refused, and the Industrial Commission  
18. accepted that for a potential hearing and here we  
19. are today.

20. So I think the first question is under the  
21. Gobich case. Gobich says that it's not sufficient  
22. for the Industrial Commission to attempt to invoke  
23. continuing jurisdiction based upon a disagreement  
24. with the interpretation of the evidence. I think  
25. that's essentially what Mr. Elzeer just went



1 through, was his interpretation of the evidence.

2 In the Gobich case, which is an Ohio  
3 Supreme Court case, 2004 Ohio 5990, the Supreme  
4 Court said that the Industrial Commission must  
5 specify -- not only show that there was a mistake of  
6 fact or a mistake of law, if that's what's being  
7 relied upon, but that the mistake must also be  
8 clear. I think in this case it begs the question  
9 when you have, essentially, four hearing officers  
10 who have looked at this already, did not find an  
11 error; now for the Industrial Commission to come in  
12 just based upon a suggestion, which is essentially  
13 the same material that was submitted in support of  
14 the third level appeal, that there's grounds for  
15 reconsideration. We don't believe that that's  
16 accurate.

17 The staff hearing officer, again, found  
18 that Mr. Gelhausen did not survive the accident.  
19 Mr. Elzeer -- I think if you listen to his argument,  
20 he's arguing that there was a clear mistake of fact  
21 or law by Dr. Hoggia and that's not the standard.  
22 What they have to show is that there is a clear  
23 mistake of law by the staff hearing officer, and  
24 there's been no indication as to what that was.

25 The staff hearing officer did not say that

1 the claimant or the decedent had to be aware of the  
2 loss of use. That clearly is not the law under  
3 Moorehead, and you will find that absolutely nowhere  
4 in the staff hearing officer's order. The staff  
5 hearing officer did specifically find that Moorehead  
6 does not require survival for a required length of  
7 time, but goes on to find that based upon the  
8 medical evidence in this file that the claimant has  
9 failed to prove that Mr. Gelhausen did, in fact,  
10 survive the accident.

11 That's consistent with the Industrial  
12 Commission precedent that's been upheld in two  
13 cases, and I am sure we'll talk about that in detail  
14 a little further in, but the Industrial Commission  
15 has indicated that although Moorehead does not  
16 require survival for a specific period of time, it  
17 does require proof there was survival, which the  
18 Industrial Commission has defined as a discernable  
19 period of time. And the Sagraves case and the  
20 Wallace case both stand for the proposition at the  
21 Industrial Commission's discretion and establishing  
22 that standard was upheld.

23 So you don't have a situation here -- I'm  
24 sure we'll get into Dr. Hoggia's report, but if  
25 Dr. Hoggia mistakenly said that this man wasn't aware

1       that he had lost the use, that had nothing to do  
2       with his ultimate conclusion that the staff hearing  
3       officer relied upon which is that there's  
4       insufficient proof here that Mr. Gelhausen survived  
5       this accident. We're going to get into it, again,  
6       I'm sure, but the only piece of evidence they're  
7       relying upon is an affidavit from a lay witness who  
8       couldn't even get close enough to the claimant  
9       because of the fact he was actually trapped in this  
10      wreckage.

11             By the time the police arrived, they  
12      specifically say in their police report that the  
13      people on the scene said this gentleman was trapped  
14      and unresponsive. They then attempted to talk to  
15      Mr. Gelhausen, also found that he was unresponsive,  
16      and couldn't be removed from the wreckage without  
17      the means of mechanical tools, and ultimately they  
18      extricated him. There was no attempt at  
19      resuscitation because it was clear that he had  
20      already passed away.

21             So there is abundant support for each and  
22      every finding that the staff hearing officer made  
23      and the order which was mailed October the 13th of  
24      2018.

25             We don't believe there's evidence of a

1 clear mistake of fact or a clear mistake of law, and  
2 we would ask the Industrial Commission to, after  
3 reviewing this, find they do not have continuing  
4 jurisdiction to attempt to alter that order.

5 MR. BAINBRIDGE: Okay. Thank you.  
6 Any rebuttal, Mr. Elzeer?

7 MR. ELZEER: What the employer  
8 essentially is saying is that there's no mistake of  
9 fact, there's mistake of law by the hearing  
10 officers, even though they relied upon a report from  
11 Dr. Hogya that completely has the law and the facts  
12 incorrect.

13 Now, the employer specifically argued here  
14 today -- touched on the affidavit that the witness  
15 wasn't able -- capable of getting close enough to  
16 the decedent. That's not true. I know we're going  
17 to get into it, but she specifically said in her  
18 statement that she rubbed his leg for three minutes  
19 until she witnessed him seize and then he expired.  
20 She was -- unlike the employer argued, she was right  
21 there trying to comfort the decedent.

22 The employer said -- also mentioned hearing  
23 memo E4 with regards to the eyes. On page 26 of the  
24 transcript from the staff hearing the employer  
25 argued there's no evidence that the eyes were

1 injured and, in fact, it's my understanding they  
2 were donated for organ donation.

3 Well, the fallacy of that argument is --  
4 and I just submitted the research yesterday;  
5 hopefully it made it to the file -- there's no such  
6 thing as a complete eye donation. The only thing  
7 they use of the eye is the cornea and the rest goes  
8 to medical research.

9 And the question was asked of that  
10 research: Can a blind person donate their eyes?  
11 And the answer is yes, as long as the cornea isn't  
12 damaged. So that rebuts the employer's argument  
13 that, well, these eyes were donated, there can't be  
14 any loss at the time of the injury with respect to  
15 that.

16 So we believe there's multiple mistakes of  
17 fact and mistakes of law that the hearing officers  
18 relied upon, and counsel touched on the DHO's order.  
19 I know that's not at issue, but the DHO and the SHO  
20 failed to accept the witness statement showing -- a  
21 layperson's witness statement showing that this  
22 individual was alive. That's the difference between  
23 the Sagraves' case that the employer is trying to  
24 argue and the Wallace case which they're arguing.

25 Here we have a live witness which both the

1 DHO and the SHO failed to give any credibility to.  
2 And the DHO actually said in an order, well, as a  
3 result of there not being a medical provider there,  
4 this was essentially an instantaneous death. I'm  
5 not really sure what an essentially instantaneous  
6 death is, but the SHO picked up on that and he says  
7 we're going to rely on Dr. Hoggia's reports which  
8 talked about these agonal respirations.

9 The agonal respirations show that, you  
10 know, that Mr. Gelhausen was living, albeit only for  
11 three minutes.

12 MR. BAINBRIDGE: Okay. Let's take the  
13 jurisdiction measure under advisement. Let's move  
14 on to the merits.

15 And, again, Mr. Elzeer, you're the moving  
16 party on the merits.

17 MR. ELZEER: Okay. Thank you.

18 This horrible incident happened on  
19 October 18th, 2017 around 11:18 a.m. Mr. Gelhausen  
20 was a Waste Management truck driver. He was coming  
21 west on Brigham Road. He was going at a significant  
22 amount of speed turning onto Chagrin Road and he  
23 rolled the truck, it hit a stop sign, went through a  
24 guardrail, and struck a tree. According to the  
25 witness statement, he was alive.

1           She was right behind him. He was alive for  
2           about three minutes, according to Jolene Szapowal.  
3           She specifically said that she went to try to  
4           comfort him, she rubbed his leg, and then after  
5           approximately three minutes he expired.

6           Now, I know the employer doesn't want to  
7           accept that statement from Jolene Szapowal without  
8           contemporaneous medical treatment right there;  
9           however, the law does allow a lay witness'  
10          testimony, specifically Morrissey versus the  
11          Industrial Commission, 98 Ohio Appeals 213.

12          It says the testimony of lay witnesses is  
13          admissible on the issue of proximate cause where  
14          proof of such issues is not strictly within the  
15          field of scientific knowledge. Under Fox versus the  
16          Industrial Commission, 77 Ohio Appeals 350, it says  
17          witnesses are permitted to testify with regard to  
18          matters that are within their knowledge and which  
19          are familiar to the average person.

20          Well, clearly, breathing is familiar to the  
21          average person and, you know, that's not confined to  
22          medical knowledge only. And, actually, the employer  
23          agreed with that in the transcript at the last  
24          hearing.

25          On page 24, lines 15 through 20, the

1 employer argued, "Yes, we can recognize the act of  
2 breathing." They then added a qualifier. "But in a  
3 traumatic situation with a person trapped in a  
4 vehicle, do we have the expertise to evaluate that  
5 respiration to determine whether or not that is  
6 life-sustaining?"

7 Well, that's a red herring. The issue is  
8 not whether this respiration was life-sustaining;  
9 the question is whether or not the person was  
10 breathing or whether it was an instantaneous death.  
11 And you do have Dr. Borillo's report saying that,  
12 you know, I reviewed the witness statement and  
13 clearly this individual, Mr. Gelhausen, was alive  
14 for at least three minutes according to the  
15 statement.

16 And he acknowledged -- and I'll get into  
17 Dr. Hogya's report, but he acknowledged that,  
18 Dr. Hogya says, well, these are agonal respirations.  
19 But agonal respirations are respirations of somebody  
20 who has a poor prognosis, according to Dr. Borillo,  
21 but they're still respirations of somebody who's  
22 alive.

23 Now, the Ohio law doesn't differentiate  
24 between ordinary and agonal respirations, but, you  
25 know, that's what Dr. Hogya is trying to do here.



1           Now, I submitted the definition of agonal  
2           respirations online and it's basically breathing.  
3           It's an abnormal pattern of breathing, labored  
4           breathing, gasping, accompanied by strange  
5           vocalizations and myoclonus. The duration of agonal  
6           respirations can be as brief as two breaths or last  
7           up to several hours. In this case, it was three  
8           minutes.

9           So we do have not only the witness  
10          statement, but we have Dr. Borillo specifically in  
11          his report saying there's no doubt Travis Gelhausen  
12          survived this injury, albeit for only a few minutes.

13          Now, the other thing we have is the  
14          definition according to the -- Thomas Gilson, who  
15          did the autopsy, and it specifically says that the  
16          cause of death is mechanical asphyxia. It goes on  
17          to say there's blunt force injuries to the head, the  
18          neck, trunk, the extremities, cutaneous soft tissue,  
19          and skeletal injuries. He says that the death in  
20          this case -- the end result was mechanical asphyxia  
21          with other conditions, as I just mentioned.

22          In addition to that, there was numerous  
23          other findings -- external findings. There was  
24          hemorrhage of the left frontal temporal scalp.  
25          There were multiple scattered lacerations over the

1 right lateral orbit and temple, about two and a half  
2 inches by a half inch by another half inch, which  
3 contradicts what the employer is arguing, that  
4 there's no eye injury.

5 There were contusions over the neck. There  
6 was hemorrhage subluxation of the anterolateral  
7 axial vertebrae. There was a hemorrhagic fracture  
8 at the superior aspect of the C4 vertebral body with  
9 a fascia hemorrhage and a number of other findings.  
10 There's 13 different findings of abrasions and  
11 contusions of the legs and thorax.

12 Now, the definition of asphyxia according  
13 to Wikipedia, which I know the employer doesn't like  
14 also, but it's a condition with a severely deficient  
15 supply of oxygen to the body that arises from  
16 abnormal breathing. There are many circumstances  
17 that can induce asphyxia, all of which are  
18 characterized by the inability of the individual to  
19 acquire sufficient oxygen for an extended period of  
20 time. Asphyxia can cause coma or death.

21 I think the key words in there are the  
22 inability of the individual to acquire oxygen or  
23 breathe for an extended period of time. The mere  
24 definition of the cause of death listed by the --  
25 Thomas Gilson, the medical examiner, shows that this

1 was not an instantaneous death. I know the employer  
2 doesn't like this definition and in a prior  
3 transcript asked that it not be relied upon, but  
4 this is the third hearing and they have yet to  
5 provide any medical evidence or any evidence  
6 whatsoever showing that you can have an  
7 instantaneous mechanical asphyxiation.

8 I think research --

9 MS. GILLMOR: I'm wondering why you  
10 didn't look for a different source for your  
11 definition, because I don't like Wikipedia either.  
12 By definition of Wikipedia, it can't be relied on  
13 and certainly there must be somewhere in the world  
14 another definition of breathing.

15 MR. ELZEER: Yeah. I didn't look for  
16 others. I just went with the most easily  
17 accessible. But I did find research with mechanical  
18 asphyxiation from medical providers and so forth,  
19 and the general consensus is anywhere from two to  
20 four minutes it takes to die.

21 And Dr. Marcellus Galbreath who is a  
22 retired internal medicine physician from the  
23 University of Cincinnati, he says about three  
24 minutes for mechanical asphyxiation. And that's  
25 entirely consistent with what the witness said,

1 three minutes here.

2 So, you know, you do have the definition of  
3 death which shows that it was not instantaneous, you  
4 have Dr. Borillo's two reports, and you also have  
5 the witness statement from Ms. Jolene Szapowal. And  
6 then even though Dr. Hoggia tries to say that this is  
7 instantaneous, once again, he leaves out the  
8 definition of the cause of death: Mechanical  
9 asphyxiation.

10 In both reports he never lists it once. I  
11 don't know why he did that. I can only guess that  
12 if he included the definition of mechanical  
13 asphyxiation he would have a hard time reconciling  
14 his opinion of an instantaneous death with this  
15 cause of death. However, the fact that he didn't do  
16 that, you know, I would point out that I don't  
17 believe it complies with the State ex rel. Wallace  
18 from 1979, 55 Ohio State 5D -- 57 Ohio State 55, a  
19 1979 case. This is online as of 9/28.

20 It specifically says if a non-examining  
21 physician fails to accept the findings of the  
22 doctors or assumes the role of the Industrial  
23 Commission, which we believe that Dr. Hoggia has done  
24 both, that medical opinion is rendered and does not  
25 constitute evidence to support a subsequent order of

1 the Commission. And I'll leave that up to the  
2 employer to make that argument, but I don't know how  
3 they can argue credibly that the *doctor who doesn't*  
4 even list the cause of death is accepting the  
5 findings, the most important finding I would argue,  
6 by the medical examiner listing what actually caused  
7 this death.

8 So as far as whether the individual  
9 survived it, we believe there's multiple evidence  
10 from the witness statement, from Dr. Borillo's  
11 reports, to the medical examiner's definition --  
12 cause of death of mechanical asphyxiation.

13 Moving on to --

14 MR. BAINBRIDGE: Let me ask you a  
15 question here at this junction before you divert to  
16 something else.

17 MR. ELZEER: Sure.

18 MR. BAINBRIDGE: What evidence do you  
19 have for loss of vision other than lacerations about  
20 the eyes and about the facial area?

21 MR. ELZEER: Dr. Borillo's reports.  
22 He took a look at this and he concluded that even  
23 absent the cornea, there was a scheduled loss. He  
24 does specifically say excluding the cornea that was  
25 listed for donation, and that would have been in his

1 first report.

2 MR. BAINBRIDGE: Is that due to the  
3 donation -- the extraction for the donation?

4 MR. ELZEER: Well, the cornea can be.  
5 Even if a person doesn't have vision, the cornea can  
6 be given to somebody else so they do get sight back.  
7 Again, even a blind person can do that.

8 So we are relying upon Dr. Borillo's  
9 reports from 7/3 and 9/8 showing that, you know,  
10 based upon the fractured orbit that there was a  
11 scheduled loss in both eyes.

12 MS. TAYLOR: He had fractured orbits?

13 MR. ELZEER: Yeah. It said --

14 MS. TAYLOR: If you find it, show it  
15 to me.

16 MR. ELZEER: Okay.

17 MS. TAYLOR: I didn't notice the  
18 fractured orbits.

19 MR. ELZEER: There's a list of 13  
20 different findings. Let me see what Dr. Borillo  
21 says. I'll read you what he lists exactly.

22 Bilateral orbital roof injuries consistent  
23 with fractures and acute hemorrhage were also found  
24 on autopsy. The eyes were enucleated, presumably  
25 for organ donation, to a reasonable degree of

1 medical certainty. Loss of the visual apparatus,  
2 excluding the cornea, occurred. Bilateral loss of  
3 use of the eyes was also substantiated.

4 So that's what I was referring to.

5 MS. TAYLOR: All right. Thanks.

6 MR. BAINBRIDGE: Go ahead.

7 MR. ELZEER: Now, turning to  
8 Dr. Hoggia's report. In his definition he  
9 specifically says in his report the definition of  
10 death is the cessation of three things: Breathing,  
11 brain function, and heart function.

12 Now, the employer argued at the last  
13 hearing, well, you shouldn't rely upon our witness  
14 statement at all because she didn't test the pulse  
15 and her not being a medical provider she wasn't able  
16 to test the brain function. But that's really a red  
17 herring because she did witness the breathing.  
18 Unless all three are present, according to even the  
19 employer's own doctor, there's not a death. And  
20 here, you know, clearly Mr. Gelhausen was breathing,  
21 albeit for a short time, three minutes.

22 Now, Dr. Hoggia, when he looks at this, he  
23 says he's -- in his opinion these agonal  
24 respirations -- excuse me, not the agonal  
25 respirations -- he looks at this and, you know, he

1 believes that there was instantaneous death,  
2 contrary to the definition of these agonal  
3 respirations.

4 As far as, you know, turning to the  
5 scheduled losses in each of the questions, I won't  
6 read every one, but in every single one he  
7 specifically asks is there sufficient evidence of  
8 scheduled loss of the right arm, left arm, right and  
9 left legs, and the eyes. Every single one he  
10 specifically said, "No, there's insufficient  
11 evidence" because and then he went on to say because  
12 the injured worker was not capable of appreciating  
13 the scheduled loss.

14 I know the employer at the last couple  
15 hearings said, well, that's merely a medical  
16 observation, but then that begs the question: Why  
17 put that in your report as a reason to deny that?  
18 That's the first reason he says that the reason it  
19 should be denied is insufficient evidence because he  
20 didn't appreciate the nature of the loss, which is  
21 completely contrary to the Moorehead decision.

22 And then you have the employer arguing at  
23 the last hearing that some time has to be present to  
24 pass to see whether or not the injured worker has  
25 permanent residuals as a result of this injury, and



1 in this case Mr. Gelhausen's death prevented that.

2 But, again, in Moorehead the mere  
3 definition -- the Court went on to say: We  
4 therefore cannot condone the condition or  
5 requirement that the worker survived for an extended  
6 period of time left unspecified. That's what the  
7 employer's arguing: Some time they have to survive.  
8 You know, the Court says, as we know all know, it's  
9 an issue left better to the general assembly. Even  
10 though the employer doesn't believe there's any  
11 mistake of fact or law, they're relying upon a  
12 report that's based upon all kinds of mistakes of  
13 fact and law.

14 Based upon that, we are asking that you  
15 rely upon the evidence I mentioned before,  
16 specifically Dr. Borillo's reports. We are asking  
17 that you grant the scheduled loss of both arms, both  
18 legs, and both eyes for loss of vision, and should  
19 you do so, there's powers of attorney on file from  
20 5/2 and from 5/30. We're asking you to honor the  
21 powers for both accrued and future compensation, and  
22 we would also ask that they would be paid  
23 concurrently, because I don't think there's anything  
24 in the law preventing it. I know it's up to the  
25 Bureau's discretion.

1 MR. BAINBRIDGE: Thank you.

2 Mr. Perry, your thoughts on the merits of  
3 the case.

4 MR. PERRY: Thank you, Mr. Bainbridge.

5 I think the place to start -- I think  
6 fundamentally what Mr. Elzeer is confusing is that  
7 he's saying that survival of the accident is just  
8 the same as saying that there was not instantaneous  
9 death, and those are two entirely different things.  
10 And he makes a lot of, what I would consider, straw  
11 man arguments where they'll take one comment out of  
12 context and then try to twist it. He's doing that  
13 with Dr. Hogg's report. Oddly, he's doing it with  
14 arguments of counsel at the staff hearing which has  
15 absolutely nothing to do with the issue before you  
16 today, which is the staff hearing officer's order.

17 The Industrial Commission speaks through  
18 its orders and, frankly, I think, and this has been  
19 touched on already, literally what was filed  
20 yesterday was not even the result of a Google  
21 search; it was a copy of a Google search. I don't  
22 think that's research. I don't think that's  
23 something that any legal body could rely upon, and  
24 that's exactly what he did. He has a habit right  
25 before hearings he does Internet research and he

1 dumps it into the file.

2 Another thing I'd like to point out is at  
3 the staff hearing Mr. Elzeer faxed Industrial  
4 Commission orders four days after the staff hearing  
5 directly to the staff hearing officer, which, again,  
6 we object to. This notion that you can dump stuff  
7 in the claim file of little or no precedential value  
8 or to do so after the hearing on the merits has been  
9 held, we find, very objectionable and I'd like to  
10 put that on the record.

11 I think, again, getting to this issue of  
12 mechanical asphyxiation, the only person who talks  
13 about that is this Thomas Gilson who is the medical  
14 examiner for Cuyahoga County, and he did not perform  
15 an examination of Mr. Gelhausen. There is an  
16 autopsy in the file, and you can see that the  
17 autopsy was performed by a Dr. Amanda Spencer, who  
18 completed the autopsy on March the 15th, 2018.

19 Dr. Spencer does not say anything in her  
20 autopsy report about mechanical asphyxiation. For  
21 some reason, Dr. Gilson on the cover sheet says the  
22 cause of death is mechanical asphyxia and he also  
23 lists blunt force injuries of the head, neck, trunk,  
24 and extremities with a couple other explanatory  
25 phrases that he puts in there.

1           What I think is odd is that Mr. Elzeer, his  
2           evidence on mechanical asphyxia, is, again, Internet  
3           research that he did and put in the file prior to  
4           one of these hearings. There's no doctor, including  
5           Dr. Borillo, you have nothing -- we have no idea  
6           what Thomas Gilson meant when he said "mechanical  
7           asphyxia." He doesn't explain it. The doctor who  
8           actually performed the autopsy doesn't say it and  
9           doesn't find it, and Dr. Borillo doesn't define what  
10          is mechanical asphyxiation.

11          So what you have is Mr. Elzeer who wants to  
12          tell you based on literally what is a comment from  
13          someone purporting to be a doctor who replied to a  
14          question that was on an Internet form of some sort,  
15          that is the evidence that he is asking you to rely  
16          upon, and, again, we simply don't think that that's  
17          appropriate.

18          If you look at what the actual evidence  
19          that the staff hearing officer did have, you can  
20          start with this affidavit from the lay witness. And  
21          I would emphasize a couple things about that.

22          Number one, there was no indication that  
23          Ms. Szapowal -- and I apologize, I'm not sure how to  
24          pronounce that name. She's never been present at  
25          any of the hearings. No one's ever had the

1 opportunity to cross-examine her. All we have from  
2 her is an affidavit. There's no indication she has  
3 any medical training whatsoever.

4 The other interesting thing I think must be  
5 pointed out is that you are talking about a claim  
6 where the date of the accident and the death was  
7 October the 18th of 2017. You then have an  
8 affidavit from Ms. Szapowal, presumably taken by  
9 Mr. Elzeer's office, that is dated April 30th of  
10 2018. So basically they're asking her six months  
11 after the fact to swear out an affidavit as to what  
12 she recalls seeing at that time.

13 And I think it's important to actually look  
14 at what she actually says in her affidavit because  
15 Dr. Borillo takes liberties, particularly in his  
16 addendum report, with what she actually says in  
17 this. She basically says she saw the accident  
18 happening, she approached the garbage truck, and she  
19 could only see Mr. Gelhausen from his ribs to his  
20 knees, and that in her opinion, she could see that  
21 he was still breathing. And she never observed him  
22 move his arms or legs, which I think is very  
23 different than saying he was incapable of moving his  
24 arms and legs, and she indicates that her estimate  
25 was that she saw what presumably was his chest

1 moving up and down, I think is what she's trying to  
2 say, for approximately three minutes, and she rubbed  
3 his leg in an effort to comfort him.

4 That is the only evidence on file. And  
5 both the hearing officers, I think quite correctly,  
6 found that that is not reliable proof of survival of  
7 the accident for a discernable period of time, which  
8 again is what the Industrial Commission has  
9 required. I think if you go back and you look at  
10 the police reports from the investigation -- there's  
11 a report on file from the Gates Mills Police  
12 Department. That report is dated 10/19.

13 It's signed on 10/20, but the investigating  
14 sergeant indicates that witnesses at the scene state  
15 that: The driver Travis James Gelhausen was trapped  
16 inside the cab and was not responsive. We then  
17 approached the truck but were unable to get a  
18 response from the driver, discovered there was no  
19 way to remove Gelhausen without the assistance of  
20 mechanical tools. They called in the fire  
21 department, paramedics were on the way. By the time  
22 they cut him out from the wreckage to get to him,  
23 there was absolutely no indication there was even  
24 any effort at resuscitation because, unfortunately,  
25 he had already passed away.

1           So you have Dr. Hoggia's report and, again,  
2           I think this is where Mr. Elzeer takes some  
3           liberties. What Dr. Hoggia says, if you actually  
4           read his report, is for a medical doctor to declare  
5           death the medical doctor has to confirm that there's  
6           been a cessation of three things: Breathing,  
7           heartbeat or pulse, and brain function. And he's  
8           explaining that that's why there was a gap between  
9           the time the accident happened at 11:18 and the time  
10          that the coroner actually called the time of death,  
11          which was sometime shortly after noon. I believe it  
12          was 12:08 or thereabouts.

13          Mr. Elzeer then gets very focused on the  
14          agonal respirations. I think Dr. Hoggia explained  
15          that quite clearly in his report. In his first  
16          report he indicates that he did not find there was  
17          evidence of survival by a discernable period of  
18          time. He says what's described by Ms. Szapowal is  
19          what is known as agonal respirations, which is an  
20          inadequate pattern of breathing associated with  
21          extreme physiological distress, and I think this is  
22          key.

23          It can be thought of as more of an  
24          automatic response to the last remnants of the  
25          brainstem. It can easily be confused for ordinary

1        respiration by a layperson with an indication or  
2        belief that there's a pulse, when, in fact, it  
3        doesn't indicate there would actually be a pulse.  
4        Essentially, it's a situation where because there is  
5        some movement in a body, it doesn't mean that there  
6        has been survival, so that's what he's saying.

7                He goes on to indicate that there's a  
8        finding on the autopsy of what's referred to as an  
9        atlantoaxial subluxation, which in some cases can  
10       cause various degrees of paralysis, but in this case  
11       there's no indication in Dr. Högya's opinion that  
12       there would have been a complete loss of use of the  
13       arms or legs as a result of that.

14               With respect to the vision, I think he  
15       probably does a better job in the second --  
16       Dr. Borillo's report. When this motion was filed,  
17       it literally had nothing attached to it other than  
18       the witness' affidavit and the coroner's report. It  
19       wasn't until just before the DHO hearing that  
20       Dr. Borillo's report was filed, so Dr. Högya's  
21       report was actually prepared before Dr. Borillo's  
22       original report.

23               And Dr. Borillo relies upon the fact that  
24       there is evidence of orbital fractures on the  
25       autopsy, and Dr. Högya points out that there



1        basically is no evidence of actual damage to the  
2        globe, which is the actual working part of the eye.  
3        And I don't want you to get caught up or confused by  
4        the fact that the eyes were enucleated. They were  
5        removed so the corneas could be donated, but that  
6        has nothing to do with the facts of this.

7                Dr. Hogya is saying in his addendum report  
8        there is no indication of actual damage to the globe  
9        of the eyes and there's no indication that the  
10       orbital fracture would have resulted in a complete  
11       loss of vision.

12               I won't address the loss of hearing because  
13       that sounds like that was never really pursued at  
14       any of the other hearings.

15               You then have Dr. Borillo's report where he  
16       basically says brief breathing amounts to survival,  
17       and in this case he's relying on the fact that  
18       there's no evidence of decapitation, no evidence of  
19       a crush injury to the head. Again, this is not the  
20       standard. The standard the Industrial Commission  
21       has set forth and which has been upheld by the 10th  
22       District Court of Appeals in at least two cases is  
23       that there has to be proof of survival by a  
24       discernable period of time.

25               So if you accept Dr. Borillo's report, he

1 would seem to be suggesting that any accident which  
2 results in death but does not involve a crush injury  
3 to the head or decapitation would presumably  
4 automatically entitle someone to these awards, and I  
5 simply don't think that's appropriate.

6 I want to bring your attention to  
7 Dr. Borillo's addendum report. He is attempting to  
8 question Dr. Hogg's opinion in part by making  
9 comments about what the breathing activity was that  
10 was observed, and I think this is quite important  
11 because Dr. Borillo then says in his addendum report  
12 that Mr. Gelhausen's breathing was not shallow, it  
13 was not needed, a stethoscope, to hear, rather, it  
14 was characterized as audible and characterized by  
15 Dr. Hogg as agonal.

16 There is absolutely no support whatsoever  
17 in the record for the idea that this was audible  
18 breathing, yet you cannot get that. Ms. Szapowal in  
19 her affidavit says that she saw that he was  
20 breathing. Again, she doesn't explain that. We  
21 don't know what that really means. I'm assuming she  
22 saw his chest moving up and down to some extent for  
23 what she estimated was three minutes. She makes no  
24 comment whatsoever about being able to hear him  
25 breathing and, of course, there's no indication she

1 checked for a pulse or was able to check for a  
2 pulse, which is very important.

3 The difference in this case from Moorehead  
4 is that in Moorehead it was undisputed that the  
5 decedent had survived for 90 minutes following the  
6 accident. That difference alone makes Moorehead  
7 completely inapplicable to this case. In Moorehead  
8 there was also -- it was undisputed in the medical  
9 evidence that there was a loss of use and paralysis  
10 based on the autopsy. That's not the case here.

11 Nowhere in the autopsy report does the  
12 coroner or the examining medical examiner indicate  
13 that there was paralysis or would have been  
14 paralysis, and Dr. Hoggia very explicitly states that  
15 even with people who are documented on MRIs to have  
16 injuries that would appear to result in paralysis,  
17 very frequently there is some level of function and  
18 you simply cannot tell based upon this evidence that  
19 there was any such loss of use in terms of that.

20 There are two cases I'd like to make sure  
21 that the Commission takes a careful look at. The  
22 first case in particular is the Sagraves case from  
23 2012. That involved a gentleman who was working  
24 behind a garbage truck when essentially he was  
25 crushed by a car that ran into the back of the

1 garbage truck. The Industrial Commission denied the  
2 benefits for the loss of use, finding that there was  
3 a lack of evidence to support a finding that he had  
4 survived for a discernable period of time and that  
5 there was a lack of evidence that he suffered a  
6 permanent loss of use of the legs. The 10th  
7 District upheld that determination in that case  
8 which is 2012 Ohio 1010.

9 I think other facts, if you read the  
10 Magistrate's decision from that case, there was an  
11 indication that there was potentially up to nine  
12 minutes between the time they received the call and  
13 the time that the deputy arrived on the scene. They  
14 also relied upon the fact, in part, that there was  
15 no medical efforts to intervene or resuscitate by  
16 the people who showed up on the scene, which is  
17 exactly the case here. By the time they arrived, it  
18 was quite evident that Mr. Gelhausen had passed  
19 away.

20 The other case is the Wallace case: 2013  
21 Ohio 1015. It's also a 10th District case. This  
22 also involved a motor vehicle accident where the  
23 decedent was ejected. The paramedics arrived on the  
24 scene and bystanders there were actually performing  
25 mouth-to-mouth resuscitation. Paramedics did not

1 find a pulse, but the evidence reveals that the EMS  
2 provided an airway and actually heard some lung  
3 sounds that they detected. There was almost an  
4 hour-long effort of resuscitation which raised, at  
5 some points, what they called some cardiac activity,  
6 but there was never an indication of a pulse.

7 On that fact pattern, the Industrial  
8 Commission found that there was insufficient  
9 evidence that that gentleman had survived that  
10 accident, and that was upheld by the 10th District  
11 Court of Appeals.

12 This is a case where you're asked to rely  
13 upon a layperson who's estimating without being able  
14 to do anything other than touch this gentleman's  
15 leg. She's thinking six months after the fact she  
16 may have seen his chest moving up and down for three  
17 minutes. You have Dr. Hoggia who indicates that is  
18 basically just the final sounds of the body that's  
19 expiring after a trauma such as that, that's been  
20 experienced here, and there's no indication to  
21 believe there was a pulse present at that period of  
22 time.

23 Two other quick things. The Vargo case,  
24 which is an Ohio Supreme Court case from 1987, 34  
25 Ohio State 3d 27, specifically holds the coroner's

1 report as nonbinding and irrebuttable presumption.  
2 Here, again, you have no explanation whatsoever from  
3 Gilson, who is the person who signed the cover page,  
4 as to what's even meant by mechanical asphyxiation.  
5 You have nothing from Dr. Borillo that explains  
6 that, so I think really that's another thing that  
7 just simply is no evidence to support.

8 Lastly, I don't think you'd ever get to  
9 this, but since we are on the record and this  
10 potentially could end up in the Court of Appeals, I  
11 would also like to point out our belief that a loss  
12 of use award in a case like this would be limited to  
13 one week of benefits. That's based on 4123.57 and  
14 4123.60 of the Ohio Revised Code.

15 4213.57(B) specifically says that if  
16 there's an award for scheduled loss that's been made  
17 prior to death, that the dependents would be  
18 entitled to unpaid installments which are accrued or  
19 to accrue if no award is made prior to the death but  
20 the decedent sustained a loss of the member by  
21 severance, then there would be an entitlement to the  
22 entire award. That's clearly not the case here.

23 4123.60 says if a decedent would have  
24 lawfully been entitled to apply for the award at the  
25 time of death, the administrator may pay the award

1       that the decedent might have received but for the  
2       death -- and here's the critical phrase -- for the  
3       period of time prior to the date of his death.

4               So here we're talking about literally based  
5       upon Ms. Szapowal's estimate, she's thinking there  
6       was three minutes. We don't believe that that's  
7       actually proof of survival based upon the prior  
8       Industrial Commission orders and the decisions in  
9       the Wallace case and the Sagraves case, but clearly  
10      that wouldn't justify an award for the 600-plus  
11      weeks that Mr. Elzeer has been requesting.

12             So, again, we believe that the staff  
13      hearing officer's order was correct, we don't  
14      believe there was sufficient grounds to justify  
15      continuing jurisdiction, and we'd ask you to affirm  
16      the staff hearing officer's order.

17             MR. BAINBRIDGE: Thank you. Any  
18      rebuttal without being repetitive?

19             MR ELZEER: As far as the two cases  
20      that are relied upon, the Sagraves and the Wallace  
21      case, the distinguishing factor is we have a lay  
22      witness here in addition to medical evidence. In  
23      those two cases there was no evidence, either  
24      medical or lay testimony, saying that the injured  
25      worker -- to prove that the decedent survived the

1 injury for any period of time.

2 In here, again, the employer doesn't want  
3 to accept it, but Dr. Hogya specifically says, well,  
4 you can take these estimates as a grain of salt due  
5 to the stressful emergency nature of the situation,  
6 yet he never talked to her, he never interviewed  
7 her, and yet he's trying to attack the witness as to  
8 what she actually saw. And counsel argued that the  
9 testimony was she may have seen him, you know,  
10 breathe. That's not what she said. She  
11 specifically said: I rubbed his leg, tried to  
12 comfort him, and he was breathing for about three  
13 minutes.

14 So the last thing I want to point out are  
15 two key pieces of evidence that are in Dr. Hogya's  
16 report that the employer is asking you to rely upon  
17 and one that's not. The employer completely glossed  
18 over the fact that Dr. Hogya in two reports doesn't  
19 even mention the cause of death. We do believe  
20 that's relevant.

21 And then finally, on five different  
22 occasions on pages three and four of his report he  
23 clearly uses the rationale, well, these awards  
24 should be denied because the injured worker was  
25 unconscious and has an inability to appreciate the



1 loss.

2 Thank you.

3 MR. BAINBRIDGE: All right. Thank you  
4 all, both of you. You've been very, very thorough  
5 in your presentations.

6 MS. TAYLOR: I just want to -- you  
7 brought the court reporter?

8 MR. ELZEER: We did.

9 MS. TAYLOR: Make sure you file a copy  
10 with the Commission and provide a copy to Mr. Duffy  
11 as well.

12 MR. ELZEER: Should she file three  
13 copies?

14 MS. TAYLOR: No, just one.

15 MR. BAINBRIDGE: Again, thank you for  
16 your thoroughness and your well-presented arguments.

17 MR. ELZEER: Thank you.

18 MR. PERRY: Thank you.

19

20 - - -

21 (Hearing concluded at 1:56 p.m.)

22

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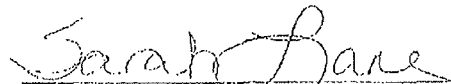
## 1 C E R T I F I C A T E

2 State of Ohio, )  
3 County of Cuyahoga. ) SS:

4  
5 I, Sarah Lane, a Notary Public in and for  
6 the state of Ohio, do hereby certify that this  
7 hearing was by me reduced to stenotypy in the  
8 presence of said parties, afterwards transcribed by  
9 means of computer-aided transcription, and that the  
10 foregoing is a true and correct transcript so given  
11 as aforesaid.

12 I do further certify that this hearing was  
13 taken at the time and place as specified in the  
14 foregoing caption, and that I am not a relative,  
15 counsel, or attorney of either party, that I am  
16 not, nor is the court reporting firm with which I  
17 am affiliated, under a contract as defined in Civil  
18 Rule 28 (D), or otherwise interested in the outcome  
19 of this action.

20 IN CLAIMANT WHEREOF, I have hereunto set my  
21 hand and affixed my seal of office at Cleveland,  
22 Ohio, this date of February 12, 2019.

23   
24 Sarah Lane, Notary Public  
25 My commission expires December 18th, 2021.

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## ORC Ann. 4123.52

Archived code versions

Current through File 48 of the 134th (2021-2022) General Assembly; acts signed as of September 30, 2021.

### **§ 4123.52 Continuing jurisdiction of commission.**

- (A) The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of medical benefits being provided under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last medical services being rendered or the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor.
- (B) Notwithstanding division (A) of this section, and except as otherwise provided in a rule that shall be adopted by the administrator, with the advice and consent of the bureau of workers' compensation board of directors, neither the administrator nor the commission shall make any finding or award for payment of medical or vocational rehabilitation services submitted for payment more than one year after the date the services were rendered or more than one year after the date the services became payable under division (I) of section 4123.511 of the Revised Code, whichever is later. No medical or vocational rehabilitation provider shall bill a claimant for services rendered if the administrator or commission is prohibited from making that payment under this division.
- (C) Division (B) of this section does not apply to requests made by the centers for medicare and medicaid services in the United States department of health and human services for reimbursement of conditional payments made pursuant to section 1395y(b)(2) of title 42, United States Code (commonly known as the "Medicare Secondary Payer Act").
- (D) This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.
- (E) This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.
- (F) The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.
- (G) The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be

received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

## History

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GC § 1465-86; 103 v 72(88), § 39; 114 v 26; 115 v 423; 118 v 410; 122 v 268; Bureau of Code Revision, 10-1-53; 132 v H 268 (Eff 12-11-67); 137 v H 876 (Eff 7-26-78); 137 v H 1282 (Eff 1-1-79); 141 v H 238 (Eff 7-1-85); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45; 148 v H 611. Eff 6-14-2000; 151 v S 7, § 1, 6-30-06; 2011 HB 123, § 101, eff. July 29, 2011; 2020 hb81, § 1, effective September 15, 2020.

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End of Document

## ORC Ann. 4123.57

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### **§ 4123.57 Partial disability compensation.**

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Partial disability compensation shall be paid as follows.

Except as provided in this section, not earlier than twenty-six weeks after the date of termination of the latest period of payments under section 4123.56 of the Revised Code or twenty-six weeks after the termination of wages in lieu of those payments, or not earlier than twenty-six weeks after the date of the injury or contraction of an occupational disease in the absence of payments under section 4123.56 of the Revised Code or wages in lieu of those payments, the employee may file an application with the bureau of workers' compensation for the determination of the percentage of the employee's permanent partial disability resulting from an injury or occupational disease.

Whenever the application is filed, the bureau shall send a copy of the application to the employee's employer or the employer's representative and shall schedule the employee for a medical examination by the bureau medical section. The bureau shall send a copy of the report of the medical examination to the employee, the employer, and their representatives. Thereafter, the administrator of workers' compensation shall review the employee's claim file and make a tentative order as the evidence before the administrator at the time of the making of the order warrants. If the administrator determines that there is a conflict of evidence, the administrator shall send the application, along with the claimant's file, to the district hearing officer who shall set the application for a hearing.

If an employee fails to respond to an attempt to schedule a medical examination by the bureau medical section, or fails to attend a medical examination scheduled under this section without notice or explanation, the employee's application for a finding shall be dismissed without prejudice. The employee may refile the application. A dismissed application does not toll the continuing jurisdiction of the industrial commission under section 4123.52 of the Revised Code. The administrator shall adopt rules addressing the manner in which an employee will be notified of a possible dismissal and how an employee may refile an application for a determination.

The administrator shall notify the employee, the employer, and their representatives, in writing, of the tentative order and of the parties' right to request a hearing. Unless the employee, the employer, or their representative notifies the administrator, in writing, of an objection to the tentative order within twenty days after receipt of the notice thereof, the tentative order shall go into effect and the employee shall receive the compensation provided in the order. In no event shall there be a reconsideration of a tentative order issued under this division.

If the employee, the employer, or their representatives timely notify the administrator of an objection to the tentative order, the matter shall be referred to a district hearing officer who shall set the application for hearing with written notices to all interested persons. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to rules of the industrial commission.

(A) The district hearing officer, upon the application, shall determine the percentage of the employee's permanent disability, except as is subject to division (B) of this section, based upon that condition of the employee resulting from the injury or occupational disease and causing permanent impairment evidenced by medical or clinical findings reasonably demonstrable. The employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage, but not more than a maximum of thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of

section 4123.62 of the Revised Code, per week regardless of the average weekly wage, for the number of weeks which equals the percentage of two hundred weeks. Except on application for reconsideration, review, or modification, which is filed within ten days after the date of receipt of the decision of the district hearing officer, in no instance shall the former award be modified unless it is found from medical or clinical findings that the condition of the claimant resulting from the injury has so progressed as to have increased the percentage of permanent partial disability. A staff hearing officer shall hear an application for reconsideration filed and the staff hearing officer's decision is final. An employee may file an application for a subsequent determination of the percentage of the employee's permanent disability. If such an application is filed, the bureau shall send a copy of the application to the employer or the employer's representative. No sooner than sixty days from the date of the mailing of the application to the employer or the employer's representative, the administrator shall review the application. The administrator may require a medical examination or medical review of the employee. The administrator shall issue a tentative order based upon the evidence before the administrator, provided that if the administrator requires a medical examination or medical review, the administrator shall not issue the tentative order until the completion of the examination or review.

The employer may obtain a medical examination of the employee and may submit medical evidence at any stage of the process up to a hearing before the district hearing officer, pursuant to rules of the commission. The administrator shall notify the employee, the employer, and their representatives, in writing, of the nature and amount of any tentative order issued on an application requesting a subsequent determination of the percentage of an employee's permanent disability. An employee, employer, or their representatives may object to the tentative order within twenty days after the receipt of the notice thereof. If no timely objection is made, the tentative order shall go into effect. In no event shall there be a reconsideration of a tentative order issued under this division. If an objection is timely made, the application for a subsequent determination shall be referred to a district hearing officer who shall set the application for a hearing with written notice to all interested persons. No application for subsequent percentage determinations on the same claim for injury or occupational disease shall be accepted for review by the district hearing officer unless supported by substantial evidence of new and changed circumstances developing since the time of the hearing on the original or last determination.

No award shall be made under this division based upon a percentage of disability which, when taken with all other percentages of permanent disability, exceeds one hundred per cent. If the percentage of the permanent disability of the employee equals or exceeds ninety per cent, compensation for permanent partial disability shall be paid for two hundred weeks.

Compensation payable under this division accrues and is payable to the employee from the date of last payment of compensation, or, in cases where no previous compensation has been paid, from the date of the injury or the date of the diagnosis of the occupational disease.

When an award under this division has been made prior to the death of an employee, all unpaid installments accrued or to accrue under the provisions of the award are payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee, and if there are no children surviving, then to other dependents as the administrator determines.

**(B)**For purposes of this division, "payable per week" means the seven-consecutive-day period in which compensation is paid in installments according to the schedule associated with the applicable injury as set forth in this division.

Compensation paid in weekly installments according to the schedule described in this division may only be commuted to one or more lump sum payments pursuant to the procedure set forth in section 4123.64 of the Revised Code.

In cases included in the following schedule the compensation payable per week to the employee is the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code per week and shall be paid in installments according to the following schedule:

For the loss of a first finger, commonly known as a thumb, sixty weeks.



For the loss of a second finger, commonly called index finger, thirty-five weeks.

For the loss of a third finger, thirty weeks.

For the loss of a fourth finger, twenty weeks.

For the loss of a fifth finger, commonly known as the little finger, fifteen weeks.

The loss of a second, or distal, phalange of the thumb is considered equal to the loss of one half of such thumb; the loss of more than one half of such thumb is considered equal to the loss of the whole thumb.

The loss of the third, or distal, phalange of any finger is considered equal to the loss of one-third of the finger.

The loss of the middle, or second, phalange of any finger is considered equal to the loss of two-thirds of the finger.

The loss of more than the middle and distal phalanges of any finger is considered equal to the loss of the whole finger. In no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

For the loss of the metacarpal bone (bones of the palm) for the corresponding thumb, or fingers, add ten weeks to the number of weeks under this division.

For ankylosis (total stiffness of) or contractures (due to scars or injuries) which makes any of the fingers, thumbs, or parts of either useless, the same number of weeks apply to the members or parts thereof as given for the loss thereof.

If the claimant has suffered the loss of two or more fingers by amputation or ankylosis and the nature of the claimant's employment in the course of which the claimant was working at the time of the injury or occupational disease is such that the handicap or disability resulting from the loss of fingers, or loss of use of fingers, exceeds the normal handicap or disability resulting from the loss of fingers, or loss of use of fingers, the administrator may take that fact into consideration and increase the award of compensation accordingly, but the award made shall not exceed the amount of compensation for loss of a hand.

For the loss of a hand, one hundred seventy-five weeks.

For the loss of an arm, two hundred twenty-five weeks.

For the loss of a great toe, thirty weeks.

For the loss of one of the toes other than the great toe, ten weeks.

The loss of more than two-thirds of any toe is considered equal to the loss of the whole toe.

The loss of less than two-thirds of any toe is considered no loss, except as to the great toe; the loss of the great toe up to the interphalangeal joint is co-equal to the loss of one-half of the great toe; the loss of the great toe beyond the interphalangeal joint is considered equal to the loss of the whole great toe.

For the loss of a foot, one hundred fifty weeks.

For the loss of a leg, two hundred weeks.

For the loss of the sight of an eye, one hundred twenty-five weeks.

For the permanent partial loss of sight of an eye, the portion of one hundred twenty-five weeks as the administrator in each case determines, based upon the percentage of vision actually lost as a result of the injury or occupational disease, but, in no case shall an award of compensation be made for less than twenty-five per cent loss of uncorrected vision. "Loss of uncorrected vision" means the percentage of vision actually lost as the result of the injury or occupational disease.

For the permanent and total loss of hearing of one ear, twenty-five weeks; but in no case shall an award of compensation be made for less than permanent and total loss of hearing of one ear.

For the permanent and total loss of hearing, one hundred twenty-five weeks; but, except pursuant to the next preceding paragraph, in no case shall an award of compensation be made for less than permanent and total loss of hearing.

In case an injury or occupational disease results in serious facial or head disfigurement which either impairs or may in the future impair the opportunities to secure or retain employment, the administrator shall make an award of compensation as it deems proper and equitable, in view of the nature of the disfigurement, and not to exceed the sum of ten thousand dollars. For the purpose of making the award, it is not material whether the employee is gainfully employed in any occupation or trade at the time of the administrator's determination.

When an award under this division has been made prior to the death of an employee all unpaid installments accrued or to accrue under the provisions of the award shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

When an employee has sustained the loss of a member by severance, but no award has been made on account thereof prior to the employee's death, the administrator shall make an award in accordance with this division for the loss which shall be payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee and if there are no such children, then to such dependents as the administrator determines.

**(C)** Compensation for partial impairment under divisions (A) and (B) of this section is in addition to the compensation paid the employee pursuant to section 4123.56 of the Revised Code. A claimant may receive compensation under divisions (A) and (B) of this section.

In all cases arising under division (B) of this section, if it is determined by any one of the following: (1) the amputee clinic at University hospital, Ohio state university; (2) the opportunities for Ohioans with disabilities agency; (3) an amputee clinic or prescribing physician approved by the administrator or the administrator's designee, that an injured or disabled employee is in need of an artificial appliance, or in need of a repair thereof, regardless of whether the appliance or its repair will be serviceable in the vocational rehabilitation of the injured employee, and regardless of whether the employee has returned to or can ever again return to any gainful employment, the bureau shall pay the cost of the artificial appliance or its repair out of the surplus created by division (B) of section 4123.34 of the Revised Code.

In those cases where an opportunities for Ohioans with disabilities agency's recommendation that an injured or disabled employee is in need of an artificial appliance would conflict with their state plan, adopted pursuant to the "Rehabilitation Act of 1973," 87 Stat. 355, 29 U.S.C.A. 701, the administrator or the administrator's designee or the bureau may obtain a recommendation from an amputee clinic or prescribing physician that they determine appropriate.

**(D)** If an employee of a state fund employer makes application for a finding and the administrator finds that the employee has contracted silicosis as defined in division (Y), or coal miners' pneumoconiosis as defined in division (Z), or asbestosis as defined in division (BB) of section 4123.68 of the Revised Code, and that a change of such employee's occupation is medically advisable in order to decrease substantially further exposure to silica dust, asbestos, or coal dust and if the employee, after the finding, has changed or shall change the employee's occupation to an occupation in which the exposure to silica dust, asbestos, or coal dust is substantially decreased, the administrator shall allow to the employee an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change, and for a period of one hundred weeks immediately following the expiration of the period of thirty weeks, the employee shall receive sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from the change of occupation but not to exceed a maximum of an amount equal to fifty per cent of the statewide average weekly wage per week. No such employee is entitled to receive more than one

allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which the employee is employed in an occupation in which the exposure to silica dust, asbestos, or coal dust is not substantially less than the exposure in the occupation in which the employee was formerly employed or for any period during which the employee may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from silicosis, asbestosis, or coal miners' pneumoconiosis. An award for change of occupation for a coal miner who has contracted coal miners' pneumoconiosis may be granted under this division even though the coal miner continues employment with the same employer, so long as the coal miner's employment subsequent to the change is such that the coal miner's exposure to coal dust is substantially decreased and a change of occupation is certified by the claimant as permanent. The administrator may accord to the employee medical and other benefits in accordance with section 4123.66 of the Revised Code.

(E) If a firefighter or police officer makes application for a finding and the administrator finds that the firefighter or police officer has contracted a cardiovascular and pulmonary disease as defined in division (W) of section 4123.68 of the Revised Code, and that a change of the firefighter's or police officer's occupation is medically advisable in order to decrease substantially further exposure to smoke, toxic gases, chemical fumes, and other toxic vapors, and if the firefighter, or police officer, after the finding, has changed or changes occupation to an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is substantially decreased, the administrator shall allow to the firefighter or police officer an amount equal to fifty per cent of the statewide average weekly wage per week for a period of thirty weeks, commencing as of the date of the discontinuance or change, and for a period of seventy-five weeks immediately following the expiration of the period of thirty weeks the administrator shall allow the firefighter or police officer sixty-six and two-thirds per cent of the loss of wages resulting directly and solely from the change of occupation but not to exceed a maximum of an amount equal to fifty per cent of the statewide average weekly wage per week. No such firefighter or police officer is entitled to receive more than one allowance on account of discontinuance of employment or change of occupation and benefits shall cease for any period during which the firefighter or police officer is employed in an occupation in which the exposure to smoke, toxic gases, chemical fumes, and other toxic vapors is not substantially less than the exposure in the occupation in which the firefighter or police officer was formerly employed or for any period during which the firefighter or police officer may be entitled to receive compensation or benefits under section 4123.68 of the Revised Code on account of disability from a cardiovascular and pulmonary disease. The administrator may accord to the firefighter or police officer medical and other benefits in accordance with section 4123.66 of the Revised Code.

(F) An order issued under this section is appealable pursuant to section 4123.511 of the Revised Code but is not appealable to court under section 4123.512 of the Revised Code.

## History

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GC § 1465-80; 103 v 72(85), § 33; 107 v 161; 108 v Ptl, 313; 114 v 26; 117 v 113; 119 v 565(576); 120 v 449; 121 v 660; 122 v 268(720); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 932 (Eff 1-23-63); 130 v 926 (Eff 10-1-63); 132 v H 331 (Eff 10-31-67); 132 v H 268 (Eff 12-11-67); 133 v H 680 (Eff 11-25-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 662 (Eff 10-31-75); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v H 138 (Eff 7-27-79); 141 v S 307 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 144 v H 297 (Eff 7-26-91); 145 v H 107 (Eff 10-20-93); 147 v H 363 (Eff 6-30-97); 147 v S 45; 148 v H 180. Eff 8-6-99; 151 v S 7, § 1, eff. 6-30-06; 2012 HB 487, § 101.01, eff. Sept. 10, 2012; 2013 HB 59, § 101.01, eff. Sept. 29, 2013; 2016 sb27, § 1, effective April 6, 2017; 2017 hb27, § 101.01, effective September 29, 2017; 2021 hb75, § 6, effective September 28, 2021.

## ORC Ann. 4123.60

Archived code versions

Current through File 48 of the 134th (2021-2022) General Assembly; acts signed as of September 30, 2021.

### **§ 4123.60 Persons eligible for death benefits; limitations.**

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Benefits in case of death shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents as the administrator of workers' compensation determines. The administrator may apportion the benefits among the dependents in such manner as he deems just and equitable. Payment to a dependent subsequent in right may be made, if the administrator deems it proper, and operates to discharge all other claims therefor. The dependents or person to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support, in compliance with the finding and direction of the administrator.

In all cases of death where the dependents are a surviving spouse and one or more children, it is sufficient for the surviving spouse to apply to the administrator on behalf of the spouse and minor children. In cases where all the dependents are minors, a guardian or next friend of such minor dependents shall apply.

In all cases where an award had been made on account of temporary, or permanent partial, or total disability, in which there remains an unpaid balance, representing payments accrued and due to the decedent at the time of his death, the administrator may, after satisfactory proof has been made warranting such action, award or pay any unpaid balance of such award to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case. If the decedent would have been lawfully entitled to have applied for an award at the time of his death the administrator may, after satisfactory proof to warrant an award and payment, award and pay an amount, not exceeding the compensation which the decedent might have received, but for his death, for the period prior to the date of his death, to such of the dependents of the decedent, or for services rendered on account of the last illness or death of such decedent, as the administrator determines in accordance with the circumstances in each such case, but such payments may be made only in cases in which application for compensation was made in the manner required by this chapter, during the lifetime of such injured or disabled person, or within one year after the death of such injured or disabled person.

An order issued by the administrator under this section is appealable pursuant to section 4123.511 of the Revised Code but is not appealable to court under section 4123.512 of the Revised Code.

### **History**

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GC § 1465-83; 103 v 72(87), § 36; 108 v Ptl, 313; 114 v 26; Bureau of Code Revision, 10-1-53; 128 v 743(763) (Eff 11-2-59); 136 v S 545 (Eff 1-17-77); 145 v H 107 (Eff 10-20-93); 147 v S 45.

## ORC Ann. 4123.64

Archived code versions

Current through File 48 of the 134th (2021-2022) General Assembly; acts signed as of September 30, 2021.

### **§ 4123.64 Commutation to lump sum.**

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(A)The administrator of workers' compensation, under special circumstances, and when the same is deemed advisable for the purpose of rendering the injured or disabled employee financial relief or for the purpose of furthering his rehabilitation, may commute payments of compensation or benefits to one or more lump-sum payments.

(B)The administrator shall adopt rules which set forth the policy for awarding lump sum payments. The rules shall:

- (1)Enumerate the allowable purposes for payments and the conditions for making such awards;
- (2)Enumerate the maximum reduction in compensation allowable;
- (3)Enumerate the documentation necessary to award a lump-sum payment;
- (4)Require that all checks include the claimant as a payee, except where the check is for the payment of attorney's fees in accordance with section 4123.06 of the Revised Code, in which case the attorney shall be named as the only payee on the check;
- (5)Require a fully completed and current application including notary and seal; and
- (6)Specify procedures to make a claimant aware of the reduction in amount of compensation which will occur.

(C)An order of the administrator issued under this section is appealable pursuant to section 4123.511 of the Revised Code but is not appealable to court under section 4123.512 of the Revised Code.

### **History**

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GC § 1465-87; 103 v 72(88), § 40; 107 v 162; Bureau of Code Revision, 10-1-53; 128 v 743(765) (Eff 11-2-59); 136 v S 545 (Eff 1-17-77); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45.

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## OAC Ann. 4123-3-15

Archived code versions

This document is current through updates effective September 15, 2021.

### **4123-3-15. Claim procedures subsequent to allowance.**

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(A)Requests for subsequent actions when a state fund claim has not had activity or a request for further action within a period of time in excess of twenty-four months.

(1)The bureau shall consider a request for subsequent action in a claim in the following situations:

(a)Where the employee requests that the bureau or commission modify or alter an award of compensation or benefits that has been previously granted; or

(b)Where the employee requests that the bureau or commission grant a new award of compensation or to settle the claim; or

(c)Where the claimant requests that the allowance of a disability or condition not previously considered; or

(d)Where the claimant dies and there is potential entitlement for accrued benefits or payment of medical bills, or the decedent's dependent is requesting death benefits due to relatedness between the recognized injury and death.

(e)Except for a medical issue relating to a prosthetic device or durable medical equipment as designated by the administrator, the bureau, in consultation with the MCO assigned to the claim, shall issue an order on a medical treatment reimbursement request in a claim which has not had activity or a request for further action within a period of time in excess of twenty-four months as follows:

(i)The MCO shall refer a medical treatment reimbursement request in a claim which has not had activity or a request for further action within a period of time in excess of twenty-four months to the bureau for an order when the request is accompanied by supporting medical evidence dated not more than sixty days prior to the date of the request, or when such evidence is subsequently provided to the MCO upon request (via "Form C-9A" or equivalent). The bureau's order shall address both the causal relationship between the original injury and the current incident precipitating the medical treatment reimbursement request in a claim and the necessity and appropriateness of the requested treatment. The employer or the employee or the representative may appeal the bureau's order to the industrial commission pursuant to section 4123.511 of the Revised Code.

(ii)The MCO may dismiss without prejudice, and without referral to the bureau for an order, a medical treatment reimbursement request in a claim which has not had activity or a request for further action within a period of time in excess of twenty-four months when the request is not accompanied by supporting medical evidence dated not more than sixty days prior to the date of the request and such evidence is not provided to the MCO upon request (via "Form C-9A" or equivalent).

(2)Requests which require proof shall conform to the standards required by paragraph (C) of rule 4123-3-09 of the Administrative Code and rules 4123-5-18 and 4123-6-20 of the Administrative Code.

(a)Medical evidence is required to substantiate a request for temporary total disability.

(b) Medical evidence is required to substantiate the allowance of a disability or condition not previously considered.

(3) In state fund cases, upon a request for subsequent action under paragraph (A)(1) of this rule, the bureau shall, upon notification, inform the parties to the claim of the pending action prior to issuing a decision. Upon request, the bureau shall provide a copy of the request and proof to the employer and the claimant, and their representatives, where applicable. Requests in self-insuring employers' cases shall be submitted to the self-insuring employer which shall accept or refuse the matters sought.

(4) The bureau or commission may require the filing of additional proof or legal citations by either party or may make such investigation or inquiry as the circumstances may require.

(5) A state fund employer shall, upon receipt of notification of the request, notify the bureau of any objection to the granting of the relief requested. Such notification must be filed within the time as required by the rules of the bureau and industrial commission.

(6) Such requests shall be determined with or without formal (public) hearing as the circumstances presented require. If the request is within the jurisdiction of the bureau and the matter is not contested or disputed, the bureau shall adjudicate the request in the usual manner. In all other cases, the request shall be acted upon by the industrial commission's hearing officer or as otherwise required by the rules of the commission, depending on the subject matter.

(7) Failure by the employee to furnish information as specifically requested by the bureau or commission shall be considered sufficient reason for the dismissal of the request. If the employer fails to furnish any information requested by the bureau or commission, the request may be adjudicated upon the proof filed.

(B) "Application for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability" pursuant to division (A) of section 4123.57 of the Revised Code in state fund and self-insured claims.

(1) An "Application for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability" shall be completed and signed by the applicant or applicant's representative and shall be filed with the bureau of workers' compensation. An application for an increase in permanent partial disability must be accompanied by substantial evidence of new and changed circumstances which have developed since the time of the hearing on the original or last determination. The bureau shall dismiss an unsigned application. Except where an additional condition has been allowed in the claim and the request is for an increase in permanent partial disability based solely on that additional condition, the bureau shall dismiss a request for an increase in permanent partial disability filed without medical documentation. Whenever the applicant or applicant's representative leaves a question or questions in the application form unanswered, the bureau shall contact the applicant and applicant's representative to obtain the information necessary to process the application. Should the applicant or applicant's representative inform the bureau that the failure to provide the information necessary to process the application is beyond the applicant's control, the bureau shall take appropriate action to obtain such information.

(2) Upon the filing of the application for either of these requests, the application shall be referred to the bureau for review and processing. The bureau shall send notice of the application to the employer and the employer's representative, unless the employer is out of business. The employer shall submit any proof within its possession bearing upon the issue to the bureau within thirty days of the receipt of the claimant's application.

(3) The bureau shall contact each applicant for a determination of the percentage of permanent partial disability to schedule an examination by a physician designated by the bureau. If the applicant fails to respond to the bureau's attempt to schedule the examination or fails to appear for the examination, the bureau may dismiss the application as provided in rule 4123-3-15.1 of the Administrative Code. The examining physician shall file a report of such examination, together with an evaluation of the degree of

impairment as a part of the claim file. The bureau shall send a copy of the report of the medical examination to the employee, the employer, and their representatives.

(4) Upon receipt of the examining physician's report, the bureau shall review the medical evidence in the employee's claim file and shall make a tentative order as the evidence at the time of the making of the order warrants. If the bureau determines that there is a conflict of evidence, the bureau shall forward the application, along with the claimant's file, to the industrial commission to set the application for hearing before a district hearing officer.

(5) Where there is no conflict of evidence, the bureau shall enter a tentative order on the request for percentage of permanent partial disability and shall notify the employee, the employer, and their representatives, in writing, of the tentative order and of the parties' right to request a hearing. Unless the employee, the employer, or their representative notifies the bureau, in writing, of an objection to the tentative order within twenty days after receipt of the notice thereof, the tentative order shall go into effect and the employee shall receive the compensation provided in the order. In no event shall there be a reconsideration of a tentative order issued under this division.

(6) If the employee, the employer, or their representatives timely notify the bureau of an objection to the tentative order, the bureau shall refer the matter to a district hearing officer who shall set the application for hearing in accordance with the rules of the industrial commission. Upon referral to a district hearing officer, the employer may obtain a medical examination of the employee, pursuant to the rules of the industrial commission.

(7) Where the application is for an increase in the percentage of permanent partial disability, no sooner than sixty days from the date of mailing of the application to the employer and the employer's representative, the applicant shall either be examined, or the claim referred for review by a physician designated by the bureau. Such period may be extended or the processing of the application suspended by the bureau for good cause shown. If the bureau has determined that the employer is out of business the bureau will not mail the application and may process the application without waiting the sixty day period. The bureau physician shall file a report of such examination or review of the record, together with an evaluation of the degree of impairment, as part of the claim file. Either the employee or the employer may submit additional medical evidence following the examination by the bureau medical section as long as copies of the evidence are submitted to all parties.

(8) After completion of the review or examination by a physician designated by the bureau, the bureau may issue a tentative order based upon the evidence in file. If the bureau determines that there is a conflict in the medical evidence, the bureau shall adopt the recommendation of the medical report of the bureau medical examination or medical review.

(9) The bureau shall enter a tentative order on the request for an increase of permanent partial disability and shall notify the employee, the employer, and their representatives, in writing, of the nature and amount of any tentative order issued on the application requesting an increase in the percentage of the employee's permanent disability. The employee, the employer, or their representatives may object to the tentative order within twenty days after the receipt of the notice thereof. If no timely objection is made, the tentative order shall go into effect. In no event shall there be a reconsideration of a tentative order issued under this division. If an objection is timely made, the bureau shall refer the matter to a district hearing officer who shall set the application for a hearing in accordance with the rules of the industrial commission. The employer may obtain a medical examination of the employee and submit a defense medical report at any stage of the proceedings up to a hearing before a district officer.

(10) Where an award under division (A) of section 4123.57 of the Revised Code has been made prior to the death of an employee, the bureau shall pay all unpaid installments accrued or to accrue to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee, and if there are no such children surviving, then to such other dependents as the bureau may determine.

(C) Payment of permanent partial disability pursuant to division (B) of section 4123.57 of the Revised Code (scheduled loss) in state fund and self-insured employer claims.



(1)The bureau or self-insuring employer will determine the payment of scheduled loss for a loss by amputation or for a loss of use upon the motion of a party for such award. To determine the payment of the award, the bureau or self-insuring employer may review the medical evidence in the file, may request additional medical information from the parties, or may refer the claimant for an examination by a physician designated by the bureau or self-insuring employer.

(2)The bureau shall enter an order on or the self-insuring employer shall make a decision on the payment of scheduled loss and shall notify the employee, the employer, and their representatives, in writing, of the order or decision. The parties have a right to appeal the order or contest the decision pursuant to section 4123.511 of the Revised Code.

(3)Upon an order for the payment of scheduled loss for a loss, the bureau or self-insuring employer shall calculate such award pursuant to the statutory schedule of division (B) of section 4123.57 of the Revised Code. The bureau or self-insuring employer shall pay the award to the claimant in weekly payments as provided in division (B) of section 4123.57 of the Revised Code.

(4)Where a scheduled loss has been ordered but not paid prior to the death of an employee, upon application, the award is payable to the surviving spouse, or if there is no surviving spouse, to the dependent children of the employee, and if there are no such children surviving, then to such other dependents as the bureau may determine.

## **Statutory Authority**

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### **Effective:**

7/1/2019.

### **Five Year Review (FYR) Dates:**

4/8/2019 and 07/01/2024.

### **Promulgated Under:**

119.03.

### **Statutory Authority:**

4121.12, 4121.121, 4121.30, 4121.31, 4123.05.

### **Rule Amplifies:**

4121.121, 4123.57, 4123.65

### **Prior Effective Dates:**

10/09/1976, 01/16/1978, 08/22/1986 (Emer.), 11/08/1986, 07/16/1990, 11/01/2004, 02/10/2009, 10/12/2010, 07/11/2013, 04/01/2014, 06/18/2018.

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## OAC Ann. 4123-3-37

Archived code versions

This document is current through updates effective September 15, 2021.

### **4123-3-37. Lump sum advancements.**

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(A)The administrator of the bureau of workers' compensation, under special circumstances, may commute an award of compensation to a lump sum payment when the administrator determines that the advancement is advisable for the purpose of providing the claimant or the surviving spouse financial relief or for furthering the claimant's rehabilitation.

(1)The bureau may grant a lump sum advancement to a claimant only from an award of compensation made pursuant to section 4123.58 of the Revised Code or from division (A) or (B) of section 4123.57 of the Revised Code.

(2)The bureau may grant a lump sum advancement to a surviving spouse only from an award of death benefits made pursuant to section 4123.59 of the Revised Code. However, the advancement shall not exceed the amount of death benefits payable to the surviving spouse over a two-year period.

(3)The bureau shall not grant a lump sum advancement to a surviving dependent from an award of compensation made pursuant to division (B) of section 4123.57 of the Revised Code.

(4)The bureau shall not grant a lump sum advancement in a claim where the allowance of the award of compensation made pursuant to section 4123.58 of the Revised Code or from division (A) or (B) of section 4123.57 of the Revised Code is on appeal under section 4123.511 of the Revised Code or an appeal to court.

(5)The industrial commission has exclusive jurisdiction over an application for a lump sum advancement for the payment of attorney fees incurred in securing an award. The bureau shall refer such applications to the industrial commission to adjudicate.

(B)A claimant or the surviving spouse shall file an application requesting a lump sum advancement with the bureau.

(1)The application shall be fully completed and notarized.

(a)The claimant or surviving spouse shall provide proof that there are special circumstances for the lump sum advancement and that the lump sum advancement is advisable for the purpose of providing financial relief or for furthering the claimant's rehabilitation.

(b)The bureau may dismiss an application for a lump sum advancement where the claimant or surviving spouse has not provided proof of special circumstances and proof of financial relief or for furthering the claimant's rehabilitation.

(2)The bureau shall review the application and utilize whatever methods the bureau determines to be appropriate, consistent with general insurance principles, to evaluate the claim for a lump sum advancement.

(3)For a lump sum advancement from an award of compensation made pursuant to section 4123.58 of the Revised Code or from an award of death benefits pursuant to section 4123.59 of the Revised Code, if the bureau determines that the lump sum advancement is advisable, the bureau shall calculate the net present value of the lump sum advancement on the remaining compensation payable to the claimant or benefits payable to the spouse. The bureau shall determine the amount of the biweekly rate reduction and the terms of such reduction. The administrator shall fix a specific time for the reduction of

the biweekly rate of compensation to offset the lump sum advancement depending upon the time period that the claimant or surviving spouse has selected for the offset of the lump sum advancement, when applicable. Once a claimant or surviving spouse has selected a time period for the offset of the lump sum advancement, the claimant or surviving spouse may not change the time period. The bureau shall include the net present value of the lump sum advancement in determining the reduction of the biweekly rate of compensation.

(4) For a lump sum advancement of an award made pursuant to division (A) or (B) of section 4123.57 of the Revised Code, if the bureau determines that the lump sum advancement is advisable, the bureau shall calculate the net present value of the lump sum advancement on the remaining weeks of compensation payable to the claimant and in determining the amount to be paid to the claimant for the lump sum advancement.

(5) In determining the net present value of a lump sum advancement, the bureau shall use the discount factor as periodically established by the bureau.

(6) The bureau shall issue an order approving or disapproving the application. If the bureau approves the application, the order shall advise the claimant or surviving spouse of the amount of reduction of compensation and the terms of the lump sum advancement.

**(C) Maximum rate reduction in compensation.**

(1) No lump sum advancement shall be approved that will result in a rate reduction of more than one-third of the biweekly rate of compensation, except where the advancement is for compensation under division (A) or (B) of section 4123.57 of the Revised Code. The bureau shall not include an advancement for attorney's fees in accordance with section 4123.06 of the Revised Code in the calculation of the maximum rate reduction limitation.

(2) The bureau may approve no more than two concurrent lump sum advancements in a claim in addition to an advancement for attorney fees that the industrial commission has granted in accordance with section 4123.06 of the Revised Code.

(3) Upon the recoupment of the lump sum advancement in accordance with the terms of the order and agreement, the bureau shall remove the rate reduction due to the lump sum advancement and reinstate the claimant's rate of compensation or the surviving spouse's benefits.

(D) The lump sum advancement warrant shall include the claimant or the surviving spouse as a payee, except where the warrant is for the payment of attorney's fees in accordance with section 4123.06 of the Revised Code, in which case the attorney shall be named as the only payee on the warrant.

## **Statutory Authority**

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**Promulgated Under:**

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