

**UPDATE ON OSHA AND
OHIO WORKPLACE SAFETY ISSUES**

TOP TEN OSHA CITATIONS

**OHIO SAFETY CONGRESS
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I. OSHA UPDATE AND DEVELOPMENTS

Nationwide and Ohio

General:

OSHA enforcement is way up in the Obama Administration.

- Late 2009: OSHA cites BP with \$87 million dollars in OSHA fines for failure to correct workplace hazards at BP's Texas City, Texas refinery. On August 12, 2010, BP settled the OSHA citation for \$50.6 million dollars. The proposed citations were a combination of failure to make citations for failure to abate hazards as agreed to in a 2005 OSHA settlement agreement with an additional 439 new willful violations assessed at over \$30 million dollars.
- March 2010: OSHA cites BP's Oregon, Ohio facility for more than \$3 million dollars in OSHA fines.
- March 18, 2010 – Toledo OSHA Office cites employer for \$55,000.00 in serious violations.
- March 17, 2010 – Toledo OSHA Office cites employer for \$91,000.00 in willful, serious violations.
- April 27, 2010 – Toledo OSHA Office cites employer with \$177,800.00 for willful and serious OSHA violations.
- April 28, 2010 – Cincinnati OSHA Office fines Lowe's \$110,000.00 for recordkeeping violations at its Cincinnati and Dayton stores.
- May 13, 2010 – Toledo OSHA Office cites Perrysburg contractor with \$45,500.00 in construction fall related OSHA penalties.
- May 20, 2010 – Toledo OSHA Office cites employer with \$201,500.00 in serious and repeat violations.
- July 16, 2010 – Toledo OSHA Office cites Kenton, Ohio employer \$214,500.00 for serious, willful and repeat OSHA violations.
- July 12, 2010 – Cleveland OSHA Office cites employer for \$69,000.00 for willful and multiple serious OSHA violations.
- August 9, 2010 – Toledo OSHA Office cites Johnson Controls \$70,000.00 for allowing employees to work on the roof of a Toledo facility with no fall protection.
- August 18, 2010 – Cincinnati OSHA Office cites U.S. Postal Service in Dayton, Ohio with \$225,000.00 in OSHA fines for electrical hazards and lockout/tagout.
- September 21, 2010 – Cincinnati OSHA Office cites Behar Dayton Thermal Products with six serious and two repeat OSHA violation totaling \$77,500.00. Citations included lockout/tagout and electrical hazards.

- September 29, 2010 – Columbus OSHA Office cites Columbus Refinery \$68,000.00 including one serious citation, two repeat violations and one failure to abate violation primarily related to failure to control the release of flammable liquids and vapors in the facility.
- October 4, 2010 – Cleveland OSHA Office cites Ohio Excavation Company with willful and serious citations totaling \$140,000.00 after one worker was killed and another seriously injured in an April 7, 2010 trench cave in.
- October 4, 2010 – Toledo OSHA Office cites Construction Company \$135,800.00 for exposing workers to trench hazards.
- October 5, 2010 – Cincinnati OSHA Office cites AK Steel \$53,000.00 for failing to record worker injuries and hearing loss.
- October 19, 2010 – Columbus OSHA Office cites U.S. Postal Service \$210,000.00 for willful violations for electrical and equipment hazards.
- November 8, 2010 – Toledo OSHA Office cites Steel Manufacturing Company \$143,000.00 for fall hazards and lack of protective gear.
- November 16, 2010 – Cleveland OSHA Office cites Cleveland Manufacturer \$149,250.00 for lockout/tagout violations.
- November 29, 2010 – Toledo OSHA Office cites Cooper Tire and Rubber Company \$213,500.00 for willful, serious and repeat violations.
- November 30, 2010 – Cincinnati OSHA Office cites Excavator \$49,000.00 for failure to provide trench protection.
- November 2010 – Cleveland OSHA Office cites Lorain Steel Manufacturing Company \$143,000.00 for fall hazard.
- December 6, 2010 – Cleveland OSHA Office cites Canto Steel Manufacturing \$156,000.00 for exposing workers to fall hazards and faulty equipment.
- December 6, 2010 – Toledo OSHA Office cites Tiffin, Ohio Woodworking Company \$60,000.00 for failure to provide safety equipment to employees working on electrical panels.
- December 10, 2010 – Columbus OSHA Office cites Marysville, Ohio Company \$91,500.00 after worker suffers permanent arm injury in industrial accident.
- December 15, 2010 – Toledo OSHA Office issues FAA with notice of unsafe conditions at Mansfield Airport.
- January 24, 2011 – Toledo OSHA Office cites Mansfield Roofing Contractor \$86,500.00 for failing to protect employees on residential roofing project from fall hazards.
- January 2011 – Cleveland OSHA Office cites Mansfield Company \$86,500.00 for fall protection.
- OSHA 2011 Budget: \$573 million dollars. Extra \$7.7 million dollars allocated for Federal OSHA Enforcement.

U.S. Secretary of Labor's Current Position on OSHA Enforcement

- February 16, 2011: Secretary of Labor Hilda Solis testified before the House of Representatives Committee on Education and Workforce about OSHA enforcement:

"While we work with the business community on minimizing the regulatory burden, I want you all to know that OSHA will continue to aggressively enforce our safety and health laws against those employers who refuse to play by the rules and who put profits above their workers' lives. Often, strong enforcement is the only option to get the attention of recalcitrant employers. Moreover, strong enforcement protects businesses by creating a fair market for them to compete in. The vast majority of employers in our nation care deeply for their employees and spend their hard earned revenue on running a safe workplace. We cannot sit by while they are forced to compete with employers who unlawfully cut corners on safety."

Ohio Fatalities 2010 as Reported to OSHA (through December 2010)

- January 13, 2010 – Guaranteed Finishing Unlimited, Inc., Cleveland, Ohio. Worker was taking a dip tank sample by hand with an 8 ounce plastic bottle. The automatic hoisting mechanism struck, caught and crushed him between the frame of the hoist mechanism and the dip tank transfer bar.
- January 20, 2010 – Brown's Trash Removal, Perrysville, Ohio. Worker had exited the cab of a truck. Worker ran across the street to collect garbage and was hit by a vehicle.
- February 3, 2010 – P.A.M. Transport, Inc., North Jackson, Ohio. Worker was found unresponsive after pulling a tractor trailer into the shop building.
- February 10, 2010 – Volunteers of America of Ohio, Cleveland, Ohio. Worker was assaulted by a homeless veteran.
- February 12, 2010 – Batzli Excavating Company, Inc., East Rochester, Ohio. Worker was emptying rock salt out of the back of his dump truck with a spreader. His arm was caught in the rotating auger distribution system.
- February 17, 2010 – Duncan Oil Co., South Charleston, Ohio. Worker was refilling above ground fuel oil tanks from a tank truck. He had walked behind the truck and bent over, his coat was caught in the power take-off.
- February 21, 2010 – Celina Aluminum Precision Technology, Inc., Celina, Ohio. Worker was troubleshooting a Makino, multi-axis, computer numerical controlled (CNC) machine; the machine activated and the worker's head was impaled by the tooling spindle.

- March 20, 2010 – Reed’s Salvage Corporation, Grafton, Ohio. Worker was accessing the area under a load and was crushed/struck by the scrap vehicle.
- March 31, 2010 – Advanced Composites, Inc., Sidney, Ohio. Worker was operating a forklift. She was caught/crushed between the forklift and a stack of palletized Gaylord boxes containing plastic pellets.
- April 7, 2010 – A Bagnoli & Sons, Inc., Hudson, Ohio. Two workers were working in a trench without trench protection and the trench collapsed. One worker fatality and one worker was hospitalized.
- May 2, 2010 – Nationwide Insurance, Union, Ohio. Worker was doing a roof inspection and fell.
- May 11, 2010 – Ferris Metal Processing, Brooklyn, Ohio. Worker was struck on the head by banding.
- June 17, 2010 – Lake Erie Construction Company, Canton, Ohio. Worker was working with a truck boom. The boom struck a power line and the worker was electrocuted.
- June 17, 2010 – PI & I Motor Express, Inc., Masury, Ohio. Worker was standing on top of a trailer load of pipes pulling the tarp up to cover the load. He fell over 10 feet from the top of the load, striking his head on the concrete floor.
- July 7, 2010 00 B&W Welding, Freemont, Ohio. Three workers were repairing two vertical support columns. During this activity the roof collapsed. One worker fatality and two workers were hospitalized.
- July 14, 2010 – Shelly and Sands, Columbus, Ohio. Worker was working on the roadway, milling a joint in front of a bridge, and was struck by a vehicle.
- July 25, 2010 – Guardsmark, LLC, Lima, Ohio. Worker was using a powered vehicle conducting a routine security inspection. The vehicle rolled over, pinning the worker.
- July 26, 2010 – Terik Roofing, Circleville, Ohio. Worker was using a forklift to move a small dumpster and did not lower the lift or turn it off. The lift moved forward and crushed him.
- July 28, 2010 – Solar Testing Labs, Inc., Richfield, Ohio. Worker was performing paving work activities outside the established work zone and was struck by a passenger motor vehicle.
- August 20, 2010 – Amberling Companies, Youngstown, Ohio. Worker fell from framing ladder.
- August 23, 2010 – Marzetti Company, Columbus, Ohio. Worker struck by forklift.
- August 24, 2010 – Worker struck by falling tree.
- August 26, 2010 – Simplex Grinnell, Akron, Ohio. Worker fell from 10 feet step ladder.
- September 7, 2010 – Rising Son, Ohio. Worker pulled into tree chipper machine.

- September 20, 2010 – AT&T Columbus, Ohio. Employee pinned between network junction box and work van.
- September 24, 2010 – John R. Jurgensen Co., Fairfield, Ohio. Paving employee killed when loaded dump truck backed over him.
- October 4, 2010 – Middletown Tree Service. Worker struck in head and died.
- October 21, 2010 – Busan Nissen Motor Cars, Cincinnati, Ohio. Worker fell from scaffolding and died.
- October 24, 2010 – Midwest Auto Transport, Clyde, Ohio. Wheel assembly exploded, killing employee. December 25, 2010 – Miller Graining Co., Attica, Ohio. Worker killed by falling branch.
- December 28, 2010 – Bontrager Excavating, Massillon, Ohio. Two employees were working in a 15/20 foot trench when trench walls collapsed. One worker rescued while the other employee was buried completely and died.
- November 10, 2010 – Allen Painting & Decorating, Cleveland, Ohio 44115.
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Most Frequently Cited Standards

The following were the top 10 most frequently cited standards in fiscal year 2009 (October 1, 2008 through September 30, 2009):

1. Scaffolding, general requirements, construction ([29 CFR 1926.451](#)).
2. Fall protection, construction ([29 CFR 1926.501](#)).
3. Hazard communication standard, general industry ([29 CFR 1910.1200](#)).
4. Respiratory protection, general industry ([29 CFR 1910.134](#)).
5. Control of hazardous energy (lockout/tagout), general industry ([29 CFR 1910.147](#)).
6. Ladders, construction ([29 CFR 1926.1053](#)).
7. Powered industrial trucks, general industry ([29 CFR 1910.178](#)).
8. Electrical, wiring methods, components and equipment, general industry ([29 CFR 1910.305](#)).
9. Electrical systems design, general requirements, general industry ([29 CFR 1910.303](#)).
10. Fall protection, training requirements ([29 CFR 1926.503](#)).

The following are the standards for which OSHA assessed the highest penalties in fiscal year 2009 (October 1, 2008 through September 30, 2009):

1. Fall protection, construction ([29 CFR 1926.501](#)).
2. Scaffolding, general requirements, construction ([29 CFR 1926.451](#)).
3. Control of hazardous energy (lockout/tagout), general industry ([29 CFR 1910.147](#)).
4. Excavations, requirements for protective systems, construction ([29 CFR 1926.652](#)).

5. Machines, general requirements, general industry ([29 CFR 1910.212](#)).
6. General duty clause ([Section 5\(a\)\(1\) of the OSH Act](#)).
7. Process safety management of highly hazardous chemicals ([29 CFR 1910.119](#)).
8. Ladders, construction ([29 CFR 1926.1053](#)).
9. Powered industrial trucks, general industry ([29 CFR 1910.178](#)).
10. Aerial lifts ([29 CFR 1926.453](#)).

TOP TEN

2010 Most Frequent Cited OSHA Regulations (through September 2010)

Construction

1. 29 CFR 1926.451 – Scaffolds
7,192 citations
\$7,322,409.00 penalties
2. 29 CFR 1926.501 – Fall Protection
6,746 citations
\$10,040,747.00 penalties
3. 29 CFR 1926.1053 – Ladders
3,415 citations
\$2,486,400.00 penalties
4. 29 CFR 1926.503 – Fall Protection Training
2,058 citations
\$1,345,641.00 penalties
5. 29 CFR 1926.20 – General Safety Regulations
1,719 citations
\$1,394,963.00 penalties
6. 29 CFR 1926.100 – Head Protection (helmets)
1,568 citations
\$989,136.00 penalties
7. 29 CFR 1926.1200 – Hazard communication
1,544 citations
\$587,890.00 penalties
8. 29 CFR 1926.651 – Excavations
1,347 citations
\$1,937,921.00
9. 29 CFR 1926.453 – Aerial Lifts
1,275 citations
\$1,334,102.00 penalties

10.29 CFR 1926.102 – Eye and Face Protection
1,274 penalties
\$750,547.00 penalties

General Industry

1. 29 CFR 1910.147 – Lockout/Tagout
2,460 citations
\$2,888,026.00 penalties
2. 29 CFR 1910.1200 – Hazard Communication
1,945 citations
\$689,936.00 penalties
3. 29 CFR 1910.212 – Machine Guarding
1,827 citations
\$3,125,231.00 penalties
4. 29 CFR 1910.305 – Electrical Wiring
1,699 citations
\$1,073,149.00 penalties
5. 29 CFR 1910.134 – Respiratory Protection
1,653 citations
\$963,836.00 penalties
6. 29 CFR 1910.178 – Powered Industrial Trucks
1,414 citations
\$907,590.00 penalties
7. 29 CFR 1910.303 – General Electric
1,336 citations
\$949,676.00 penalties
8. 29 CFR 1910.219 – Mechanical Power Transmission
1,132 citations
\$1,067,952.00
9. 29 CFR 1910.215 – Abrasive Wheels
805 citations
\$450,362.00 penalties
- 10.29 CFR 1910.132 – Personal Protective Equipment
781 penalties
\$549,494.00 penalties

LOCAL OSHA OFFICES

- **Columbus, Ohio OSHA Office**

- Columbus OSHA office is hiring new Compliance Officers.
- Columbus OSHA Compliance Officers are being pushed for more OSHA inspections and to travel to the outlying cities.
- OSHA offices are being pushed for more OSHA inspections, employee safety programs and higher penalties.
- Columbus OSHA Office has issued numerous six figure OSHA citations in the last 9 months.
- Columbus OSHA Office is expanding OSHA inspections far outside of Central Ohio – Marietta, Carrolton, McConnellsville, etc. OSHA is in Caldwell, Ohio today.

- **U.S. Solicitor of Labor**

- OSHA lawyers are given all the money/resources/support necessary to pursue OSHA cases.
- OSHA Policy under Obama Administration is aggressive OSHA enforcement.
- OSHA case load way up.

II. APRIL 22, 2010 OSHA COMPLIANCE DIRECTIVE: ADMINISTRATIVE ENHANCEMENTS TO OSHA'S PENALTY POLICIES

- **General OSHA Consensus:** OSHA penalties are too low to have an adequate deterrent affect.
- **History Reduction:**
 - Employer's history look back will go from 3 years back to 5 years back.
- **History Incentive:**
 - Employers with high gravity serious, willful, repeat or failure to abate violations will receive a 10% OSHA penalty increase.
- **Repeat Violations:**

Time period for OSHA repeat violations goes from 3 years to 5 years.

- **Informal Conferences:**

- Limits discretion of OSHA Area Directors to negotiate penalty reductions during informal conferences. Area Directors are limited to offering a 30% penalty reduction at the informal conference. OSHA can offer employers with less than 250 employees an additional 20% penalty reduction if they agree to retain an outside safety consultant.

- **Severe Violation Enforcement Program (SVEP) Violations:**

- Greater authority to issue higher OSHA citations.

- **Gravity Based Penalty:**

- Raised to between \$3,000 and \$7,000.

III. OSHA'S SEVERE VIOLATION ENFORCEMENT PROGRAM (SVEP) June 2010 (Effective date June 18, 2010)

OSHA has created an aggressive enforcement approach for employers with a history of indifference to the OSHA Act or with a history of willful, repeat violations or failure to abate violations.

High emphasis hazards are targeted, including fall hazards and hazards identified from National Emphasis Programs, including amputations, combustible dust, crystalline, silica, excavation/trenching, lead.

- All OSHA citations will require mandatory follow-up inspections
- Nationwide Inspections of related workplaces/worksites of the Employer
- Encourages Company Awareness of OSHA enforcement
- National News Releases
- Sending letters to Corporate Officers
- Additional requirements for employers as a condition to settlement with OSHA
- Employers must submit 300 logs
- No grouping of high hazard citations

IV. OHIO'S WORKPLACE SAFETY DEVELOPMENTS

- *Kaminski v. Wire Products* (March 23, 2010) and *Stetter v. RJ Corman Derailment Services, LLC* (March 23, 2010).

Ohio Supreme Court upholds constitutionality of Ohio's new Employer Intentional Tort Statute; Ohio Revised Code Chapter 2745.01

Result:

- Deliberate removal of any safety guard creates a rebuttable presumption that an Ohio employer deliberately intended to injure the employee
- No stop gap liability insurance coverage now for Ohio employers sued for a workplace intentional tort.
- O.R.C. 4123.931. State of Ohio BWC and Ohio Attorney General can pursue Ohio employer found responsible for an employer workplace intentional tort for all workers compensation benefits, etc., paid out. See O.R.C. 4123.931.

OSHA Developments:

1. OSHA Compliance Directive for Personal Protective Egypt in General Industry

Effective Date:	February 10, 2011
Directive No.:	CPL 02-01-050

New Compliance Directive clarifies what PPE must be paid for by the employer at no cost to employees and exceptions to employer pay.

2. OSHA Compliance Directive for Fall Protection for Residential Construction

Effective Date:	December 16, 2010
Directive No.:	STD-03-11-002
Enforcement Date:	On or after June 16, 2011

3. Cranes and Derricks in Construction – Final Rule 29 C.F.R. Section 1400-1442

**OHIO EMPLOYER LIABILITY FOR WORKPLACE
ACCIDENTS AFTER *KAMINSKI V. WIRE PRODUCTS*,
(2010) 125 Ohio St. 3d 250 and *STETTER v. R.J. CORMAN*
DERAILMENT SERVICES, (2010) 125 Ohio St. 3d 280 --
EMPLOYER INTENTIONAL TORT INSURANCE
COVERAGE FOR OHIO EMPLOYERS IS ALL BUT GONE**

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(MARCH 31, 2011)

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INTRODUCTION

Though it has been coming for years, 2010 saw the combination of Ohio Statutes and Court decisions virtually eliminate any type of insurance coverage available to Ohio employers for legal defense, settlement or indemnity for a workplace accident that causes death or injury to an employee.

Worse yet, even if an Ohio Employer is a complying employer under Ohio's Worker's Compensation Statute and pays worker's compensation premiums, an Ohio employer sued for a workplace intentional tort may be liable to the State of Ohio and the Ohio Bureau of Worker's Compensation to repay all worker's compensation benefits paid out to the widow/children of a deceased employee (*i.e.*, BWC death benefits – Ohio Revised Code Section 4123.59) or benefits to an injured employee (*i.e.*, medical expenses, temporary total compensation - O.R.C. Section 4123.56, permanent and total disability – O.R.C. Section 4123.58, etc.). See Ohio Revised Code Sections 4123.93 and 4123.931.

Further, in a multi-employer accident resulting in an employee injury or death, other employers sued for the accident/fatality may be able to sue the Ohio employer for contribution or indemnity in the event the Court or jury decides the employer committed a workplace intentional tort. See, Ohio Revised Code Sections 2307.22, 2307.25.

Ohio employers who get sued now for a workplace accident can no longer just send the lawsuit to an insurance company and expect it to go away. Ohio employers must now hire their own attorneys to defend these cases. These materials briefly outline these changes in the law.

I. OLD LAW: Allowed Insurance Coverage for Ohio Employer Intentional Torts: *Harasyn v. Normandy Metals, Inc. v. Fireman's Fund Insurance* (1990) 49 Ohio St. 3d 173

Ohio Public Policy did not prohibit an Ohio employer from purchasing insurance coverage for employee intentional tort lawsuits since the legal standard to hold the employer liable was not “direct intent” to injure but rather was where the employer's tortious act was an act performed with the knowledge that injury was “substantially certain to occur.” In other words, negligence or recklessness so egregious it was called an intentional tort – but shy of the employer directly intending to injure the employee.

A. Old Common Law Test to hold Ohio Employer Liable for Employer Intentional Tort:

Fyffe v. Jenos, Inc. (1991) 59 Ohio St. 3d 1159 and *Van Fossen v. Bobcock & Wilcox Co.* (1988) 36 Ohio St. 3d 100:

- (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within his business operation;
- (2) knowledge by the employer that if employees are required by virtue of their employment to be subjected to such dangerous process, procedure, instrumentality or condition, then harm to them would be a substantial certainty, and not just a high risk; and
- (3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his employment tasks.

B. New Ohio Employer Intentional Tort Statute; Ohio Revised Code Section 2745.01 (April 2005):

- (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur.
- (B) As used in this section, **“substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.**
- (C) **Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another** if an injury or an occupational disease or condition occurs as a direct result.
- (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation,

harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, contract, promissory estoppel or defamation.

CURRENT STATUS

Despite Ohio's Employer Intentional Tort Statute becoming effective April 7, 2005, many Ohio Courts ruled that Ohio's new Employer Intentional Tort Statute was unconstitutional, so the Statute was not applied to ongoing cases and the insurance issue did not come to the forefront until recently.

In March 2010, the Ohio Supreme Court in two related cases *Kaminski v. Wire Products* (2010) 125 Ohio St. 3d 250 and *Stetter v. R.J. Corman Derailment Services* (2010) 125 Ohio St. 3d 280, ruled that Ohio's new Employer Intentional Tort Statute was unconstitutional.

Now, insurance companies that sold Ohio Employers Stop Gap Employer Liability insurance policies are arguing that since, by statute, "substantially certain" is now defined as the employer acting with "deliberate intent" to cause an employee to suffer injury or disease, it is against public policy to insure for intentional acts and the insurance coverage is void. See, *Irondale Industrial Contractors, Inc. v. Virginia Surety Co., Inc.*, 2010 U.S. Dist. Lexis 129631 (N.D. Ohio, W.D.); *Thanakeo v. Congrind*, Case No. 07-CV-005803 (Franklin Cty. Common Pleas Court).

See also, *Simpson v. Internet and National Union Fire Ins. Co.*, 2007 U.S. App. Lexis 758 (6th Cir. 2007); *Penn Traffic Co. v. AIU Ins. Co.* (2003) 99 Ohio St. 3d 227. The Ohio Courts have also ruled that if there is no legal duty to indemnify an Ohio employer for a workplace intentional tort, there is no duty by the insurance company to provide a legal defense either.

CONCLUSION

Any Ohio employer now sued for a workplace accident or death must pay its own lawyers to defend the lawsuit and will be liable for any Court judgment out of the employer's own pocket if found liable for injury or death to an employee; in addition to possibly having to pay the Ohio BWC back for all benefits paid to the employee or widow.