From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When requesting a "loss of vision" award pursuant to R.C. §4123.57(B), what is the correct standard for pre-injury visual acuity -- corrected or uncorrected?

R.C. §4123.57(B) permits a statutory award for compensation for the "loss of sight of an eye" arising from a work-related injury. Percentage of vision "actually lost" is measured utilizing post-injury visual acuity without corrective measures (e.g., glasses, contacts, or surgery). But what is the correct measure of pre-injury visual acuity when the claimant has already undergone a corrective procedure?

The Supreme Court of Ohio recently considered this issue in *State ex rel. Lazy-Boy Furniture Galleries v. Thomas*, 126 Ohio St.3d 134, 2010-Ohio-3215. In that case, the Court was presented with a claimant who was afflicted with keratoconus in both eyes before being injured. This disease, which causes the cornea to thin and bulge, can significantly impair vision, and in some cases require corneal transplant. The claimant in *Thomas* had a cornea transplant in his left eye in 2005, correcting his vision from 20/200 to 20/50. On May 1, 2006, the claimant suffered a work-related injury which caused his vision in the eye to revert to 20/200. A second corneal implant was then inserted, returning his vision to 20/50. The claimant subsequently applied for a loss of vision award in his left eye under R.C. §4123.57(B). A District Hearing Officer granted the claimant's application, rejecting the employer's argument since the injured worker had a total (uncorrected) loss of vision in the left eye prior to the date of injury, he is not entitled to the statutory award. A Staff Hearing Officer reduced the award to 75 percent, but otherwise affirmed the DHO order. A *mandamus* action followed, but the Tenth District Court of Appeals affirmed and reinstated the 100 percent loss of vision award, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court affirmed the reinstatement of the award. In a case of first impression, the Court noted that uncorrected vision is a standard by which post-injury vision must be measured (*State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St.3d 229, 510 N.E.2d 356), but rejected the employer's argument that the same standard should apply to pre-injury vision. Such an interpretation would not only circumvent the reason for statutory awards but also defy common sense. The Court specifically rejected the application of *State ex rel. Waddle v. Indus. Comm.*(1993), 67 Ohio St.3d 452, which dealt with a pre-injury heart condition, as being too remote. In the end, the Court concluded that it would be unfair to ascribe less value because of the pre-injury surgical correction.

Essentially, the Court re-affirmed a well-established principle of workers' compensation law that you "take your worker as you find them," at least for purposes of 4123.57(B).

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com