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

Question: Should a self-insured employer consider wages earned from part-time jobs with other employers in calculating an employee's AWW and FWW?

The calculation of the average weekly wage ("AWW") and full weekly wage ("FWW"), the basis upon which benefits are awarded by the BWC, are set forth in R.C. 4123.61. However, the statute requires that the calculation must do "substantial justice" to the claimant, and claimants often move the BWC to exclude periods of unemployment, sickness, strike, or other circumstances beyond their control. The Supreme Court of Ohio was recently presented with a variation on this argument: It was asked whether the "substantial justice" provision of R.C. 4123.61 can require that an employer include wages earned from a second job with a different employer in calculating AWW and FWW?

State ex rel. FedEx Ground Package System, Inc. v. Indus. Comm., 126 Ohio St.3d 37, 2010-Ohio-2451, involved a part time FedEx employee who was injured in the course and scope of his employment. At the time, the claimant also worked a second job with another employer which paid higher wages, and operated a "side" business. When calculating AWW and FWW, FedEx used only his FedEx wages. The claimant then moved the Industrial Commission to modify these amounts to incorporate his part-time wages. Citing the "special circumstances" provisions of R.C. 4123.61, a DHO granted the motion, a decision that was affirmed on appeal. FedEx filed a *mandamus* action in the Tenth Appellate District, which upheld the recalculation, prompting an appeal as of right.

The Supreme Court affirmed the inclusion of the additional wages from the claimant's part-time job, stating that to do otherwise would fail to do "substantial justice" to the claimant. *State ex rel. Logan v. Indus.Comm.* 1995), 72 Ohio St.3d 599. The Court rejected FedEx's arguments that requiring employers to include income from other jobs or businesses would discourage claimants from continuing to work their second jobs if medically able, and that it would be unfair to compel an employer to pay more in workers' compensation benefits than the claimant earned while working. The Court found no statutory basis for excluding part-time wages from other employers, noting that R.C. 4123.61 contemplated all wages. The Court also noted that including wages paid by prior employers sometimes results in payments which are more than the claimant's actual wages, and that R.C.4123.56(A) expressly prohibits temporary total disability payments when work within the physical limitations of the employee is made available "by the employer or another employer." Therefore, an employee who is physically capable of working his second job but chooses not to cannot receive TTD.

Employers faced with the same situation presented to FedEx should be particularly vigilant in requiring requisite proof of wages. While the statute requires "substantial justice," it also precludes a "windfall" to the claimant. Employers should consider preparing proposed calculations before the hearing, or at least be prepared to address these issues at hearing.

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