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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is reconsideration warranted when a Staff Hearing Officer's order fails to address a determination issue which was argued at the hearing?

When considering a permanent total disability ("PTD") application, evidence of the claimant's voluntary retirement must always be considered. *OAC 4128-3-34(D)*. Recently, the Supreme Court of Ohio affirmed a decision from the Tenth Appellate District, which concluded that a Staff Hearing Officer's failure to address the issue of the claimant's voluntary retirement in a Record of Proceedings constituted a "mistake of law" sufficient to justify a motion for reconsideration.

State ex rel. Mackey v. Ohio Dep't of Educ., 130 Ohio St.3d 108, 2011 Ohio 4910, involved an employee who suffered a back injury in 1985. A workers' compensation claim was filed and allowed for "herniated disc L4-5." Additional allowances followed for anxiety in 1998 and additional disc conditions in 2007. In the interim, the claimant retired from her position at the ODE in 2005 at age 65, after working for the employer for 36 years. There was no contemporaneous evidence that the retirement was injury related. In 2008, the claimant applied for PTD compensation, alleging she was unable to work because of the allowed conditions in the claim. The application proceeded to hearing before a Staff Hearing Officer ("SHO"), who granted the claimant's application. The employer filed a request for reconsideration, arguing that the SHO made a "mistake of law" by failing to address the issue of voluntary retirement in its order, despite the fact that it had been argued at length during the hearing. The ICO granted the motion, conducted a new hearing, and concluded that the claimant was not PTD because of the voluntary retirement and because she was capable of sedentary work. The claimant filed a *mandamus* action, but the Tenth District Court of Appeals denied the writ, prompting an appeal.

The Supreme Court affirmed the Tenth District's conclusion that the Industrial Commission correctly invoked its continuing jurisdiction under R.C. 4123.52 to correct what it termed a clear "mistake of law." The SHO's failure to address whether the claimant's retirement was voluntary or involuntary, despite the fact that the issue was mentioned at least 15 times in the transcript of the hearing, was a clear "mistake of law" because a claimant who voluntarily retires from the work force prior to becoming permanently disabled cannot receive PTD compensation. The Tenth District also held that the claimant had failed to produce sufficient medical evidence that her ability to perform her regular duties were impaired by the industrial injury at the time of retirement.

Perhaps the most significant lesson employers can learn from *Mackey* is the importance of securing a court reporter for significant hearings. The Tenth District opinion repeatedly mentions the transcript and the argument relating to "voluntary retirement," which was filed with

the motion. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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