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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can claimant in a persistent vegetative state obtain “loss of use” benefits for total loss of vision and hearing?

R.C. §4123.57(B) authorizes specific permanent partial awards for permanent “loss” of various body parts and functions arising from a work-related incident. Some determinations are fairly simple, such as the amputation of a limb, while others are more complex. Earlier this year, the Tenth District Court of Appeals was presented with a question arising from an application for “loss” of vision and hearing from a person in a persistent vegetative state who could respond to outside stimuli? Can a person in this situation be said to have suffered a “total” loss of vision and hearing?

Smith is a tragic case involving a claimant who suffered an inguinal hernia while moving a large item at work in 1995. While undergoing elective surgery to repair the hernia in 1996, there were complications and claimant suffered “anoxic brain damage,” leaving him in a persistent vegetative state requiring 24-hour care. He was determined to be PTD in 1998, and in 2004 the claimant sought and was granted “loss of use” awards for both of his legs and arms. In 2009 the claimant made a similar motion for the “total” loss of hearing in both ears and vision in both eyes. The claimant was examined by a physician, Dr. Ortega, in 2009, stated that while it “appeared” that the claimant had total loss of vision and hearing, there was no reliable way to determine if such was the case. (He noted that the pupils were responsive to light.) In opposition, the claimant submitted a report from his own physician, Dr. Hess, who concluded that the claimant’s brain could not process any signals received from the eyes or ears, effectively resulting in a total loss. An SHO denied the request for scheduled losses base upon a lack of medical support, prompting the claimant to file an original *mandamus* action in the Ohio Court of Appeals, Tenth Appellate District. A magistrate heard evidence, and recommended that the SHO order be affirmed.

The Tenth District reversed, holding that the report of Dr. Hess opining that there was a total loss of sight and hearing was “some evidence” of loss of use, and ordered that the matter be referred back for a new hearing. The Court first addressed the issue of “total” loss, referencing *Alcoa* and the standard of “practical” loss applied to physical injuries, and the statutory reference to less than total loss of vision (e.g., “legally blind”). The Court then addressed the findings of Dr. Hess, who concluded that although the claimant’s pupils were responsive to light and auditory nerve function, there was no evidence that he could process these responses in any way. The Court concluded that Dr. Hess’ findings could have been sufficient “proof” to show total loss of vision or hearing, as defined by statute, because “total” loss can be a clinical finding of less than 100%. The Court did find that Dr. Ortega’s reports were not contradictory, and that he should be permitted to reconsider his findings based on the “less than 100%” standard.

This case was unusual, if for no other reason than the fact that the Court rejected both the opinions of the SHO and of its own Magistrate, who concluded that the writ should be denied. If

you 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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