

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

Question: Will a refusal to participate in a vocational rehabilitation program bar a claimant from permanent total disability compensation?

A claimant who has suffered a serious injury that prevents him from returning to his previous position will often be offered vocational rehabilitation through the Industrial Commission's Rehabilitation Services Division. Recently, the Supreme Court of Ohio was presented with the case of a claimant who claimed his illiteracy was a proper basis for his refusal to participate in vocational rehabilitation, and whether this refusal should be a basis for denying compensation.

State ex rel. Gonzales v. Morgan, 2011-Ohio-6047, involved a claimant who was injured in 2003 and never returned to work. The claimant applied for permanent total disability compensation ("PTD") which was denied by the Industrial Commission. In its order, the Commission found that the claimant was physically capable of sedentary employment and had refused a referral to vocational rehabilitation. The Commission considered the claimant's nonmedical disability factors ("*Stephenson* factors") but emphasized the claimant's refusal to participate in vocational rehabilitation as a primary basis for its decision. It also found that despite the claimant's illiteracy, the claimant had a varied work history which showed his ability to learn new job skills and to work in different work environments. The claimant filed a *mandamus* action in the Tenth District Court of Appeals, claiming the Commission abused its discretion in denying PTD because there was no evidence that he would have benefitted from the vocational rehabilitation. The Tenth District found in favor of the Commission, and the claimant appealed to the Supreme Court.

The Supreme Court affirmed, finding that with regard to PTD, the relevant vocational inquiry is whether the claimant may return to the job market by using "past employment skills or those skills which may be *reasonably developed*." The Court added that it viewed permanent total disability compensation as "compensation of last resort," to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed, and it is not unreasonable to expect a claimant to participate in an return-to-work efforts (including vocational rehabilitation) to the best his or her abilities or to take the initiative to improve his reemployment potential. The Court left open the question of whether a failure to complete a program due to non-allowed medical conditions should also be the basis for a denial. See *State ex rel. Nissin Brake Ohio v. Indus. Comm.*, 2010-Ohio-6135.

The Court's unanimous decision illustrates that the Court was not willing to reward a claimant for not even *attempting* to better his employment prospects. If you have any questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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

Adam P. Sadowski, Esq.
Gallagher Sharp
420 Madison Ave., Suite 1250
Toledo, OH 43604
Direct Dial 419.241.4864
asadowski@gallaghersharp.com