

From: Don Drinko

Sent: Wed 4/18/2012 4:12 PM

Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is evidence that a claimant was selling illegal drugs enough to terminate permanent total disability on the basis that it constituted sustained remunerative work?

A claimant that has been awarded permanent total disability compensation ("PTD") will be required to pay back any benefits considered an overpayment. Recently, the Supreme Court of Ohio was presented with the case of a claimant that was ordered to repay benefits he received while he was selling narcotics and the question arose as to whether such activity could be considered sustained remunerative work.

State ex rel. McNea v. Indus. Comm. of Ohio, 2012-Ohio-1296, involved a claimant who was a police officer when he was injured in 2004. PTD was awarded as none of the parties knew that the claimant was being secretly investigated by his own department for the suspected illegal sale of narcotics. Over the course of the investigation, it was shown that the claimant made four recorded sales to informants between October 1, 2005, and December 23, 2005, netting the claimant \$6,200. The claimant was indicted and pled guilty to four felony charges and on September 4, 2007, was sentenced to three years in prison. The BWC moved the commission to terminate PTD and to declare the past PTD compensation an overpayment. Ultimately, the commission found that all compensation paid after the claimant's first confirmed drug sale on October 1, 2005, constituted an overpayment and that while the drug sales were illegal, such activity can amount to sustained remunerative employment. The claimant filed a *mandamus* action with the Ohio Court of Appeals, Tenth Appellate District, which affirmed the findings of the commission and the claimant appealed to the Supreme Court.

The Supreme Court affirmed, finding that the question was whether the claimant *at any time during the receipt of PTD compensation*, was (1) doing sustained remunerative work, (2) medically capable of sustained remunerative employment, or (3) engaged in activities medically inconsistent with the alleged disability. While "sustained" has not been defined for workers' compensation purposes, remunerative activity does not have to occur on a regular or daily basis to be considered sustained and any "ongoing pattern" of activity can be categorized as sustained activity. The commission did not abuse its discretion in concluding that the claimant was medically capable of sustained remunerative work by his selling of narcotics and that he was not entitled to PTD compensation.

While the facts of the case are interesting, I would have been surprised if the Court came to any other conclusion, not simply because it is the right legal decision, but any contrary ruling would

only be rewarding a claimant that is also a convicted felon and “dirty cop.” 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