

From: Don Drinko
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Question: **When an appeal is accepted by the full Industrial Commission, must each commissioner be present for an order to be issued?**

Like the Supreme Court, the full Industrial Commission refuses to hear the vast majority of appeals directed to it. Most often, these appeals result in a refusal order, which permits an appeal to court pursuant to R.C. 4123.512 unless the order is one regarding the extent of disability. If the Industrial Commission does elect to hear your appeal, these hearings will normally take place at the Columbus office of the Industrial Commission, and are presided over by the three (3) Commissioners - each of whom will cast a vote. See R.C. §4123.511. Recently, the Tenth District Court of Appeals decided a *mandamus* case which considered a very narrow but interesting question: Is a party deprived of due process of law when an absent commissioner votes after a hearing has occurred, based upon information relayed to him by an employee who was present and took notes?

State ex rel. Sophia Stevens v. Indus. Comm., 2013-Ohio-2448, concerned a claimant who applied for PTD benefits. After an SHO granted the benefits, the Administrator filed a motion for reconsideration which was accepted, and a hearing was conducted on July 15, 2010. One of the commissioners, Kevin Abrams, was absent from that hearing, but nonetheless voted after the fact to vacate the SHO order and deny the claimant's application for PTD compensation. (The decision was 2-1 in favor of vacating PTD.) Commissioner Abrams stated, in an addendum to the order, that he "discussed this matter" with a Staff Hearing Officer who attended the hearing, and "reviewed all the evidence in the claim file." After this order was issued, the claimant filed an original *mandamus* action alleging, among other things, that the failure of Commissioner Abrams to attend the hearing deprived her of due process of law under *State ex rel. Ormet Corp. v. Indus Comm.* 54 Ohio St.3d 102 (1990), because his vote was not based upon the evidence. A magistrate recommended that the court issue a *writ of mandamus* ordering the Commission to vacate the portion of its order determining that the claimant is not PTD, prompting objections from other the commissioners.

The Tenth District overruled both of the commissioners' objections, and fully adopted the magistrate's findings of fact and conclusions of law with regard to the due process argument. The magistrate cited another case, *State ex rel. Sigler v. Lubrizol Corp*, 2011-Ohio-4917, where the court applied *Ormet*, holding that when a commissioner (Abrams again) who failed to attend a July 28, 2009 hearing, deprived the claimant of due process of law when that commissioner later voted to exercise continuing jurisdiction and vacate a PTD award. Again, in that case, Commissioner Abrams indicated he had discussed the matter with an individual who attended the hearing and who summarized the testimony, evidence, and arguments presented via handwritten notes. The Court vacated the order in *Sigler* because it found the testimony of the claimant at the hearing was vital to the claim, and in particular, the issue of whether the claimant had credibly made efforts at rehabilitation. The Tenth District held in *Sigler* that a commissioner who votes on the issue should have been in a position to "evaluate Sigler's credibility on these issues, not rely on the impressions and notes of a commission employee and that employee's summaries of what occurred." Similarly, the magistrate in *Stevens* found *Sigler* to be controlling, and further found that the claimant's credibility at the July 15, 2010 hearing was key to the commission reaching a decision on the merits

of the PTD application. The order itself also referenced specific points about which the claimant testified. Because Commissioner Abrams was not present, he could not weigh the credibility and value of the claimant's testimony. The remedy prescribed by the magistrate and adopted by the Court was to vacate the order and conduct a new hearing on the claimant's PTD application with all three commissioners present and participating, or conduct the additional hearing with a sufficient record of proceedings such that the necessary credibility determinations can be made.

The Court's adoption, without further comment of the magistrate's findings in *Stevens* and which are very critical of any possibility of evaluating credibility without actually witnessing testimony, reflect the Court's belief that for claimants and employers to receive a fair hearing, the commissioners must be physically present. (There is some discussion of whether a transcript would be a suitable substitute, but it appears that may not be sufficient.) Certainly all of these issues would be avoided if the Industrial Commission could formulate a hearing schedule whereby all commissioners (and most notably Commissioner Abrams) could be available.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me.

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