

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

**Question: Can the Industrial Commission assert “continuing jurisdiction” to reinstate a finding of fraud vacated by an SHO based upon an incorrect factual finding?**

Temporary total disability (“TTD”) benefits are paid in lieu of wages to injured workers, but only if they are totally disabled and not working. *R.C. §4123.56(A)* Persons who work while receiving TTD are committing fraud, and subject to the declaration of an overpayment and prosecution. In a recent decision, the Ohio Court of Appeals, Tenth Appellate District, was presented with a case that concerned a finding of fraud on the part of a claimant who was working while receiving TTD, but ultimately decided based upon whether the Industrial Commission had the power to assert “continuing jurisdiction” to overturn a factual finding with which it disagreed.

*State ex rel. Henegar v. Trinity Home Builders, Inc.*, 2013-Ohio-3339, involved a claimant who was injured in 2001, and was disabled and receiving TTD for significant periods between 2001 and 2010. In 2011, the BWC’s Special Investigation Unit (“SIU”) was notified by a claims consultant that the claimant had returned to work. SIU gathered evidence, including medical records reflecting his return to work and wage information from his job as a part-time cashier, and contacted the claimant. There was no dispute that the claimant lied to SIU about the date he had started work, and had told at least two IME doctors that he had not worked since 2008. The BWC filed a motion with the Industrial Commission seeking to have an overpayment declared and for a finding of fraud. A DHO hearing the motion made both such findings, but on appeal an SHO affirmed the overpayment but declined to make a finding of fraud, citing: 1) that the claimant volunteered the information to an investigator before knowing that SIU was aware of it; 2) that no person seeking to defraud the BWC would tell his doctor he was working while on TTD; and 3) that his psychologist testified that his ongoing pain and psychiatric conditions made him prone to short term memory loss. The BWC’s first appeal was refused, but the Industrial Commission agreed to hear a motion for reconsideration, after which it issued an order asserting continuing jurisdiction based upon a “clear mistake of law regarding intent,” including a “flawed evaluation of facts resulting in an incorrect legal determination.” The Industrial Commission reinstated the fraud finding, prompting the claimant to file a *mandamus* action to the Tenth District Court of Appeals.

The Tenth District adopted the findings of fact of its Magistrate, but rejected her conclusions of law, and vacating the Industrial Commission’s reinstatement of the fraud finding. The Court acknowledged that it might have “decided differently” on the issue of intent to deceive the BWC based upon the evidence submitted, but concluded that the SHO’s decision was based upon a factual determination based upon the evidence submitted. Whatever is to be said of the SHO’s decision, the Court concluded that it was not a “clear mistake of law.”

*Henegar* is yet another example of process outweighing the facts: While it was clear that the claimant lied to the BWC with the intent to defraud, the Court concluded that a feeling that the SHO had improperly evaluated the facts was not a basis. While the SHO’s conclusions were ludicrous, they were based upon facts, and therefore there was no basis for “continuing

jurisdiction.” If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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