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Gallagher Sharp Shop Talk: Workers' Compensation

This week, we will discuss a very troubling opinion emanating from Ohio's Tenth District Court of Appeals on December 4, 2014, which may likely have a severe impact upon the risks of self-insured and state fund employers in Ohio who experience claims involving death, dismemberment, or severe injury. *State ex rel. Arberia, LLC v. Indus Comm.*, 2014-Ohio-5351, arose from a death claim, but considered the extent to which an employee who is severely injured and then dies four and one-half hours later, is entitled to "loss of use" awards under R.C. 4123.57(B).

Arberia involved a claimant who was injured in a fall at work on October 28, 2011. The claimant fell approximately 30 feet from a roof, landing on his head. Immediately after the accident, the claimant's pupils were dilated and blood and brain matter were coming from his nose as a result of a massive cerebral hemorrhage and multiple skull fractures. The claimant survived the fall, but died approximately four and one-half hours later at a hospital. A workers' compensation claim was filed, which was fully certified and death benefits were granted. The claimant's spouse then moved for an award for "loss of use" of the claimant's arms, legs, eyes, and ears pursuant to R.C. 4123.57(B). The motion was submitted to a physician, who agreed that even if the claimant had survived the fall, the catastrophic nature of the injury would have resulted in the claimant being in a "persistent vegetative state." The BWC then granted the motion, awarding 1,225 weeks of permanent partial compensation (\$959,175.00) for "loss of use," to be paid to the claimant's dependents in a lump sum in addition to death benefits. The employer appealed, contending that the "loss of use" award was not payable because the claimant only survived a short time, the order did not cite the evidence relied upon, the claimant's limbs were not "severed" as required by the statute, and that the award should have been limited to one week, the shortest period consistent with the survival of the claimant. The DHO affirmed the award, prompting an appeal by the employer. An SHO again affirmed the award, and after a refusal order was issued, the employer filed for a writ of *mandamus* in the Tenth District Court of Appeals. The matter was submitted to a magistrate, who issued an opinion affirming the award in part, but finding an abuse of discretion with regard to the award for "loss of use" of the arms and legs pursuant to R.C. 4123.60, and recommending that the matter be referred back to the Industrial Commission. Both parties filed objections to the magistrate's findings of fact and conclusions of law.

The Tenth District adopted the findings of fact and conclusions of law with respect to the "loss of use" awards, but rejected the findings that the award was not substantiated by the statute and affirmed the award of \$959,175.00. Initially, the Court noted that there was really no that the profound nature of the claimant's injuries resulted in the "loss of use" of his arms, legs, eyes, and ears, and that death was "not instantaneous" and therefore not limited by *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364. The only issues that remained were whether the claimant was entitled to compensation in a lump sum, and if so, whether it should be limited to the period of time prior to the claimant's death. There was no dispute that the claimant did not apply for "loss of use" benefits before his death, and R.C. 4123.60 states that if a "decendent would have been lawfully entitled to have applied for the award before his death, the administrator may... award and pay an amount, **not exceeding the compensation which the**

decedent might have received but for his death, for the period prior to the date of his death, to ... dependents of the decedent.” *Id.* The employer argued that the highlighted language limited payment to one week, the period prior to the date of his death, and not the entire amount prescribed by statute. The Tenth District disagreed, finding that the statute does not limit such recovery for three reasons: 1) the Supreme Court has repeatedly referred to “loss of use” and other types of permanent partial disability compensation as “akin to damages in a negligence case”; 2) the BWC is permitted to award damages in a lump sum under certain circumstances; and 3) “loss of use” awards are not duplicative of death benefits. *Arberia, supra*, at P. 20. The Court also noted that *State ex rel. Estate of McKenney v. Indus. Comm*, 110 Ohio St.3d 54, 2006-Ohio-3562, is distinguishable because the spouse in *McKenney* was deceased, but instructive in how Ohio courts have viewed permanent partial disability payments which should be based upon the lifespan of the spouse, dependent children, or other dependents and not the claimant. The Court noted that according to the language in the statute and the way it has been applied, it is irrelevant how many hours, days, or weeks the claimant survived to collect the full award because R.C. 4123.57(B) only requires that he would have been entitled to **any award** before he died. The Court concluded that any additional requirements “should not be grafted on to R.C. 4123.57(B)” because the statute has no text imposing them. The Court noted that it is the job of the General Assembly to limit awards to the period between the date of injury and death.

Simply put, *Arberia* is a profound manipulation of R.C. 4123.57 in order to justify benefits. The Court chose to ignore the plain language of the statute, and superimposed dicta in prior opinions to justify a windfall for claimants in virtually every death claim. I expect that there will be an appeal to the Supreme Court of Ohio, and it is my hope that the Supreme Court will apply the statute as it is written. 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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