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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can doing “work” on a barter system constitute “working” for the purpose of terminating Permanent Total Disability (PTD) compensation?

Under Ohio law, permanent total disability (PTD) compensation cannot be paid when there is evidence of (1) actual sustained remunerative employment, (2) a physical ability to do sustained remunerative employment, or (3) activity so medically inconsistent with the claimed disability as to impeach the medical evidence underlying the award. *State ex rel. Lowe v Cincinnati, Inc.*, 2009-Ohio-5864. There have been some conflicting decisions involving what constitutes “sustained remunerated employment” and whether that description includes work performed in exchange for goods, services, or other non-monetary compensation constitutes “work.” Recently, the Tenth Appellate District considered a case involving a PTD recipient who performed work at a race track in exchange for the forgiveness of certain fees and other consideration, and whether this activity constituted “work.”

State ex rel. Seibert v Indus. Comm., 2016-Ohio-8335, involved a claimant who began receiving PTD compensation in 2007 for conditions related to his low back. In 2013, the Special Investigations Department (“SID”) of the BWC initiated an investigation based upon the claimant’s application for a groomer’s license. In the course of that investigation, it was learned that the claimant worked at Lebanon Raceway 3 to 5 days a week as a groomer/owner in exchange for a waiver for barn and rental fees and other costs. It was also discovered that he co-owned horses and split winnings. The BWC filed a C-86 Motion seeking to terminate PTD, to declare an overpayment on benefits paid since 2009, and also to declare a finding of fraud. The claimant contended that the “in-kind” work did not constitute “sustained remunerative employment,” and further that there was no evidence of an intent to commit workers’ compensation fraud. The matter proceeded to hearing, where an SHO determined that the work performed precluded PTD, declared an overpayment, and found that fraud had occurred. The claimant brought a *mandamus* action in the Tenth Appellate District, where a magistrate agreed with the termination of PTD but rejected the finding of fraud, essentially finding that the claimant was merely be ignorant of the law. Both parties filed objections, which were considered by the Tenth District.

The Tenth District affirmed the finding that the claimant was “working” while receiving PTD, but found that “some evidence” also existed to support a finding of fraud. The Court cited evidence that the claimant had been working at the track for 4-5 years and that the work he performed there would normally be compensated by an owner. This “barter system” resulted in a reduction of the claimant’s fees, which were akin to wages. The Court also cited the receipt of prize earnings for horses he owned or co-owned, and his own statement to investigators that he worked at the track. With regard to the fraud allegation, the Court concluded that the claimant was informed in letters from the BWC that he was not permitted to work, and had a duty to disclose to the BWC that he was grooming horses. The Court rejected the magistrate’s decision that there was a “lack of intent,” and distinguished the Supreme Court’s decision in *State ex rel. McBee v. Indus. Comm.*, 2012-Ohio-2678, wherein a claimant helped his wife’s business but was

not paid. In this case, the evidence clearly reflected that the claimant was “compensated” for his work.

Seibert confirms that “work” that would normally be compensated that is performed in exchange for goods or services still constitutes “sustained remunerative employment” in the eyes of the BWC. What if the claimant had merely been grooming his own horses without the bartered reduction in fees? At least according to the magistrate, it is unlikely that PTD would have been terminated at all.

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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