

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

**QUESTION: Does the location and type of work affect whether a “good faith” offer of “suitable” light duty employment under Ohio Administrative Code 4121-3-32 (A)(6) has been made?**

I routinely advise my clients that it is better to have an employee “sorting paper clips” at work, rather than sitting at home collecting temporary total disability (“TTD”) compensation. However, claimant’s have recently taken to contesting whether light duty job offers made pursuant to OAC 4121-3-32 are actually made in “good faith,” or are simply intended to intimidate or embarrass the claimant. Recently, the Ohio Court of Appeals, Tenth Appellate District considered a case involving an injured worker who was offered a light duty position that placed him in a lunch room doing administrative work, and whether that job offer was “suitable” and made in “good faith” pursuant to OAC 4121-3-32.

*State ex rel. Pacheco v Indus. Comm.*, 2017-Ohio-8971, involved a claimant who suffered a “crushing” injury when his right foot was caught between two forklifts. The claimant received TTD compensation for a number of weeks before he was offered a “light duty” position that was within the physical restrictions set forth by his physician. The claimant worked doing administrative tasks at a table in the cafeteria of the facility where other employees would gather for several weeks before he complained that he could no longer perform the work. The claimant sought additional TTD compensation, which was contested by the employer based upon the light duty offer. The matter was sent back for a new hearing before an SHO, who again denied the request for additional TTD compensation, finding a “lack of persuasive medical documentation to support that [the claimant] could no longer perform his modified job duties.” The claimant filed a *mandamus* action to the Tenth District, where a Magistrate concluded that the light duty position in the cafeteria was within his restrictions and was therefore “suitable.” The claimant filed an objection, claiming (among other arguments) that the “job” assignment of simply sitting in the cafeteria as a display for his co-workers was a “good faith” offer or “suitable” work under the OAC job.

The Tenth District reversed, finding a lack of “some evidence” in the record that placing the claimant in the cafeteria to do menial work was “suitable employment offered in good faith pursuant to OAC 4121-3-32 (A)(6).” The Court rejected the argument that physical restrictions limited the distance in which he could be transported without assistance, finding that a desk job in a lunch room is “neither objectively suitable nor objectively in good faith without evidence that the work can actually be performed in such an environment.” The Court seemed to accept the claimant’s argument that he was put “on display” as a warning to other employees not to file workers’ compensation claims. The Court specified that the simple fact that the job was within the physical restrictions put forth by his physician was irrelevant, as “the treating physician does not decide whether the injured worker will accept an offer of employment.” *State ex rel. Scott v. Indus. Comm.*, 2008-Ohio-4104. The Court went on to determine that “web-based training and especially filing duties cannot suitably be performed in a lunch room absent other evidence to

prove that such an environment can accommodate the assigned work task.” The Commission abused its discretion in denying reconsideration of the SHO order.

The Court in *Pacheco* seems to have clearly usurped the Industrial Commission’s role of fact-finder, and instead used the “suitability” standard of OAC 4121-3-32 to strike down what appeared to have been a perfectly reasonable light-duty offer. In a strongly worded dissent, one of the Justices stated that the credibility and weight to be given to evidence are clearly within the discretion of the Industrial Commission as the fact-finder, and the record contained evidence that the light-duty assignment was within restrictions.

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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