

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

**QUESTION: Is it permissible to request depositions of fact witnesses prior to a workers' compensation hearing?**

Hearings before the Industrial Commission of Ohio are governed by §4121-3-09 of the Ohio Administrative Code (OAC). That provision states that the “free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for Commission proceedings” *OAC 4121-3-09(A)(2)*. R.C. §4123.09 also provides that the Commission “may cause depositions of witnesses...to be taken.” Recently, the Supreme Court of Ohio considered an employer’s appeal from a decision by the Tenth District Court of Appeals which, among other issues, addressed whether the Industrial Commission’s refusal to permit the employer to conduct pre-hearing depositions of fact witnesses, was reversible error.

*State ex rel. RL Carriers Shared Services LLC v Indus. Comm.*, 2017-Ohio-5833, concerned an employee who suffered an injury in 2001. A number of physical and psychological conditions were allowed, prompting the claimant to file an application for permanent total disability (“PTD”) compensation in 2015. Prior to the hearing, the employer filed a motion with the Industrial Commission seeking permission to conduct depositions of two (2) “fact” witnesses, including the claimant’s spouse a former co-worker. The Commission denied the employer’s motion and went on to award PTD. The employer appealed to the Tenth District Court of Appeals claiming, among other things that the Industrial Commission had erred in denying its motion for depositions, citing *OAC4121-3-09(A)*. The Tenth District affirmed the Industrial Commission’s findings, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed, finding that the award of PTD benefits was supported, and that pre-hearing depositions of fact witnesses was not permitted. While R.C. §4123.09 mentions “deposition,” OAC §4123.09 only addresses the deposition of a physician hired by the BWC or Commission who has issued a report. The OAC does not authorize conducting depositions of the “fact witnesses” or treating physicians before a hearing. The Court dismissed the citation to the “free pre-hearing exchange of information” in OAC 4121-03-09(A)(2), noting that the section does not mention fact depositions, and the Court declined to create a legal duty to grant requests that are not provided for in the statute. In affirming the decision, the Court also affirmed that there is no due process right to discovery at administrative hearing cases, and particularly no constitutional right to take depositions. *State ex rel. LTV Steel v Indus. Comm.*, 140 Ohio App. 3d 680 (Tenth District, 2000).

In declining to recognize a right to pre-hearing fact depositions, the Supreme Court in *R.L. Carriers* came down in favor of a streamlined administrative process. However, employers should feel free to use transcripts from depositions or sworn statements under oath obtained in other cases, including personal injury claims or intentional tort proceedings, or to obtain sworn testimony by affidavit.

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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