

WORKERS' COMPENSATION SHOP TALK

QUESTION: Is Farm Work Active or Passive When Considering Eligibility for Temporary Total Disability Compensation?

Temporary total disability (TTD) compensation is intended to compensate an injured worker for lost earnings incurred while an industrial injury heals. *State ex rel. Pierron v. Indus. Comm.*, 2008-Ohio-5245. However, there can be no lost earnings, or even the potential for lost earnings, once the injured worker has left the active workforce, and a loss of “passive earnings” such as investment income does not trigger the right to receive TTD. Recently, the Supreme Court of Ohio considered an appeal from the Tenth Appellate District, which reversed a finding of the Industrial Commission and held that a claimant’s income from work on her family farm was not “passive” income, and therefore entitled her to receive TTD compensation when she became totally disabled.

State ex rel. Vonderheide v. Multi-Color Corp., Slip Opinion No. 2019-Ohio-1270, concerned a claimant who was injured in 1992. She had a knee replacement in 2001, and in 2002 she began receiving Social Security retirement benefits. In 2003, she started, but did not complete, a vocation rehabilitation program. In the ensuing years, the claimant supported herself by working on her family tobacco farm, where she drove a tractor, tended cows, stripped tobacco leaves, and cut hay. At the end of each year, her husband would give her a portion of the farm’s net profits. When her husband died in 2009, she sold the cows and leased the farm out to others, but still cut grass and picked up trash, and her income varied from year to year. In 2012, she underwent another surgery and requested TTD compensation. The Industrial Commission denied the request, finding that she had failed to meet her burden of establishing that she remained in the active workforce, and that her farm income constituted a “passive investment.” The claimant sought a writ of *mandamus*, and the Tenth District reversed, finding that the Commission’s decision was not based upon “some evidence” and therefore constituted an abuse of discretion. The Commission appealed as of right to the Supreme Court.

The Supreme Court reversed, finding that there was “some evidence” upon which the Industrial Commission could rely that the claimant’s activities, at least after 2009, did not make her a member of the “active” workforce, and therefore she was not eligible for TTD compensation. The Court took note of the “inherent differences” in farm work, but objected to the Tenth District’s decision to base its findings on a study from the Department of Labor Current Population Survey (“CPS”) detailing the way it counts farm workers. “The Tenth District erred when it created a new standard to determine whether farm workers are in the active workforce based upon whether the CPS survey would count them as employed.” This definition was much too broad, including people who “worked” as little as one hour a week, and included unpaid “family workers” working on a family-owned farms. More importantly, the Court noted the inconsistent income, lack of correlation between work and income, the decision to receive

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retirement benefits, and the lack of active engagement on the farm after her husband died as “some evidence” upon which the Industrial Commission could have relied in making its ruling. Where TTD is involved, it is inherent that a claimant demonstrate that they will, “on account of their work, receive earnings that will be lost due to their industrial injury.” *Pierron, supra*, at 9.

Certainly, the Tenth District sought to make a point in *Vonderheide* about the different nature of farm work, but by adopting an extremely broad definition of “active workforce,” the Supreme Court felt that it had reached too far.

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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