

## WORKERS' COMPENSATION SHOP TALK

### QUESTION: What is the Claimant's Burden of Proof in a Permanent Total Disability (PTD) Claim?

Applications for permanent total disability ("PTD") in Ohio present a variety of issues, many of which are unique to those proceedings. One of these issues is whether a claimant is capable of "sustained remunerative employment" due solely to the allowed conditions. *OAC 4121-3-34(B)* Recently, the Tenth Appellate District considered a *mandamus* action arising from a PTD application, and considered two related issues: (1) How much work ability is too much for PTD purposes?; and (2) When non-allowed medical conditions are present in the same body parts, does the claimant have an obligation to prove that they are not the basis for her disability?

*State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm. of Ohio*, 2019-Ohio-1006, involved a long-term employee who had five (5) separate work-related incidents between 1995 and 2001. Workers' compensation claims were filed for each, resulting in allowed claims involving more than twenty (20) allowed conditions spread among several body parts, including the neck, shoulder, and back. In 2015 the claimant filed an application for PTD. The employer contested the application, submitting a report from a physician who found the claimant capable of "sustained remunerative employment" on a limited basis with restrictions. The employer's doctor also found that the claimant had several unrelated medical conditions, including age-related disk degeneration and osteoarthritis, which contributed heavily to her restrictions. The Industrial Commission appointed its own doctor, who opined that the claimant was permanently and totally disabled. This doctor found disability based upon the allowed conditions and the "cumulative effect" of multiple injuries and years of treatment, and while the claimant may have been able to perform limited sedentary activities for "a couple of hours" the severe physical restrictions on her upper extremities in particular would preclude work on a sustained basis. An SHO granted the application over the employer's objections, apportioning the award among the claims and citing the IC doctor's opinion that the claimant was incapable of "sustained remunerative employment," and therefore did not consider non-medical factors. This prompted a *mandamus* action by the employer to the Tenth Appellate District, where a magistrate recommended affirming the SHO order and the employer objected.

The Tenth District affirmed, finding that there was "some evidence" to support an award of PTD benefits. The Court flatly rejected the employer's arguments concerning "sustained remunerative employment" and that the IC doctor's opinion that the claimant may have been capable of working for a "couple of hours" should have precluded PTD. Citing *State ex rel. Bonnlander v. Harmon*, 2017-Ohio-4003, the Court stated that there is "no statutory or administrative authority" for the proposition that an ability to work four hours or more is the applicable standard for "sustained remunerative employment." The statement that the claimant could work "for a couple of hours at most" must be read in conjunction with other findings in the report, including

May 15, 2019

that the claimant could not raise her arms to shoulder level, and is not inconsistent with an inability to perform “sustained remunerative employment.” Additionally, while the Court noted the existence of several medical conditions affecting the same body parts, the IC doctor went to great lengths to specify that his findings were based entirely upon the residual effects of the allowed conditions, and therefore a reference to non-medical factors was neither appropriate nor necessary. The Court also flatly rejected the employer’s argument that the claimant essentially had the burden of demonstrating her disability was not related to non-allowed conditions. “The presence of one or more non-allowed conditions does not in itself destroy the compensability of the claim, and the claimant has no burden to prove that the non-allowed conditions are not the cause of disability.” *Id.*

*Honda* is necessarily fact-intensive, but reinforces two broad propositions: 1) When non-allowed conditions are present in the same body parts, it is not incumbent upon a claimant to prove a negative, i.e., that the non-allowed conditions are not the basis for her disability; and 2) A finding that a claimant is capable of a “few hours” of intermittent sedentary work does not preclude a finding that she is ultimately incapable of “sustained remunerative employment.”

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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