

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

Question: Does an award of permanent total disability (PTD) preclude an award of permanent partial disability (PPD) compensation for a separate injury in the same claim?

As has been noted in other cases, the Ohio Court of Appeals, Tenth Appellate District, has repeatedly noted that it considers permanent partial disability compensation ("PPD") to be in the nature of "an award for damages" for injuries sustained in the course of and arising from employment, while temporary total disability compensation ("TTD") and permanent total disability compensation ("PTD") are based upon the inability of an injured worker to engage in sustained remunerative employment. *State ex rel. Arberia, LLC v. Indus. Comm'n of Ohio*, 2014-Ohio-5351. Recently, the Tenth District was presented with a problem that will often recur in cases involving an award of PTD, to wit: whether a claimant is precluded from pursuing an award of PPD in the same claim for conditions that are not the basis for the PTD award.

State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm., 2015-Ohio-2122, involved a claimant who suffered multiple injuries to her lower back while employed as a home health care aide in 2003. A workers' compensation claim was filed, which was allowed for several low-back conditions, as well as for "depression." On October 1, 2010, the claimant filed an application for PTD based solely upon the psychological component of the claim, and following a hearing on June 7, 2011, the claimant was granted PTD. In August, 2013, the claimant filed an Application for the Determination of the Applicable Percentage of Permanent Partial Disability (C-92) seeking an award only for the physical injuries incurred. After a series of examinations assessing between 20% and 37% impairment, the claim proceeded to a hearing before a DHO, who held that the C-92 application was barred by the PTD award as a matter of law, citing *State ex rel. Murray v. Indus. Comm.*, 63 Ohio St.3d 473 (1992). The claimant moved for reconsideration, and an SHO vacated the DHO order and ordered a hearing on the merits, which resulted in a 33% award. After further appeals were denied, the employer filed a mandamus action before the Tenth District Court of Appeals, arguing that the previous award of PTD in the claim precluded a subsequent PPD award in the same claim. A magistrate found in favor of the claimant, prompting an objection by the employer.

The Tenth District affirmed the holding of the magistrate that the award of PTD did not preclude a PPD award for a different condition. The Court cited *State ex rel. Mosley v. Indus. Comm.*, 2014-Ohio-1710, which presented very similar facts to the case at bar. In *Mosley*, the claimant was injured and the claim was allowed for twenty-three (23) separate physical and psychological conditions. The claimant sought PTD compensation based solely on one allowed psychological condition ("organic personality syndrome"), and the award was granted. Subsequent applications for PPD compensation for other conditions were denied because the claimant was currently receiving PTD in the same claim, prompting a mandamus action to the Tenth District, which reversed. The Tenth District held in *Mosley* that because the psychological component was the only basis for the PTD award, additional PPD awards for physical conditions were not barred despite the fact that all conditions arose from the same industrial claim. In *Ohio Presbyterian*,

the employer contended that *Mosley* was not determinative because it contained an incorrect interpretation of *Murray, supra*, in which the court seemed to use the terms “injury” and “condition” interchangeably. The employer contended that the court in *Murray* never intended to allow claimants to receive PPD and PTD arising from the same incident, without regard to the allowed condition. The Court in the case at bar refused that interpretation and adopted the magistrate’s reading that while PPD and PTD cannot be received concurrently for the same condition, this does not extend to different conditions from the same work-related incident. *Mosley, supra*.

While *Ohio Presbyterian* seems to be a fair reading of *Mosley*, what is more disconcerting is the Court’s continued reference to permanent partial disability compensation as being “in the nature of damages for pain and suffering.” The concern is that this will ultimately lead to a steady and profound uptick in the awards, as has been seen in the area of scheduled loss compensation.

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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