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

Question: When work rules prevent "light-duty" employees from working overtime, does this in and of itself constitute a basis for a "working wage loss" claim?

There are two elements to establishing a claim for "working wage loss." *R.C. §4123.56(B)(1).* In order to prevail, it is incumbent upon a claimant to establish (1) an actual reduction in wages; and (2) a causal relationship between the allowed condition and the wages lost. *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993). Recently, the Tenth District Court of Appeals was presented a case involving a police officer whose "restricted duty" status precluded her from working overtime, and whether that rule justified a claim for "working wage loss" compensation.

State ex rel. Cleveland v. Indus. Comm., 2015-Ohio-2165, involved an officer who slipped on ice and was injured. A workers' compensation claim was filed, which was allowed for a number of soft tissue conditions. After 6 months, the claimant's physician found that the claimant could return to work in a "light-duty" position with physical limitations, but no limitation on the number of hours she could work. At the time she returned, a General Police Order declared that officers on "restricted duty" were prohibited from working overtime. There was no dispute that before her injury, the claimant regularly worked overtime and that overtime pay was included in the calculation of her AWW. The claimant subsequently sought and received an award of "working wage loss compensation," to replace a portion of the wages she lost by virtue of her inability to work overtime. The City objected, and ultimately filed a *mandamus* action in the Tenth District Court of Appeals, arguing that a general rule prohibiting overtime for all officers on "restricted duty" was the cause of the wage loss, rather than the claimant's specific allowed conditions. A Magistrate sided with the claimant, prompting an objection from the employer.

The Tenth District affirmed the Magistrate's finding that the "working wage loss" award was warranted. The Court cited a previous decision by the Supreme Court of Ohio in *State ex rel. Jordan v. Indus. Comm.*, 2004-Ohio-2115, which also dealt with a restricted duty overtime and wage loss. The Court in *Jordan* noted that if overtime was offered but declined, or if it was not offered for reasons unrelated to the injury, there is no basis for wage loss. However, if the employer "singled out" the claimant because of his injury, a causal relationship existed between the injury and wage loss. A subsequent case, *State ex rel. Daimler Chrysler v. Indus. Comm.*, 2007-Ohio-5093, found that a claimant who had returned to a different position with less opportunity for overtime was not entitled to wage loss because lack of overtime was "simply a matter of fluctuation in hours available in different departments." In the case at bar, the City argued that *DaimlerChrysler* was controlling, but the Court disagreed, finding that the claimant's "restricted duty" status was solely based upon her injuries and was the sole cause of her inability to receive overtime. The Court also rejected the employer's arguments that the policy was based upon a need to reserve its limited overtime budget and that these issues were waived by the union, noting that "no agreement by [a union] to waive an employee's right to workers' compensation" is valid.

This case constitutes fair warning to any employer who restricts overtime for employees in restricted or "light duty" positions. Courts (or at least the Tenth District) have recognized that "working wage loss" claims will result if a claimant's injury status is the sole cause of such a restriction.

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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