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

QUESTION: WHEN A PERMANENT TOTAL DISABILITY AWARD IS ALLOCATED AMONG SEVERAL CLAIMS, IS THE INDUSTRIAL COMMISSION REQUIRED TO EXPLAIN THE ALLOCATION?

It is well-accepted under Ohio law that an award of permanent total disability ("PTD") compensation – the "compensation of last resort" under Ohio law – may be allocated between one or more claims. However, the basis for the allocation muse be consistent with the medical evidence. *State ex rel. Hay v. Indus. Comm.*, 52 Ohio St.3d 99 (1990) This decision can be complicated when claims involve different employers, or employers who are no longer in business. Recently, the Supreme Court of Ohio was presented with a case involving a PTD award allocated among three (3) claims with two (2) different employers, and the extent to which the Industrial Commission must explain the basis for the allocation.

State ex rel. Penske Truck Leasing Co. L.P. v Indus. Comm., 153 Ohio St. 3d 133, 2018-Ohio-2153, involved a claimant who applied for PTD based upon three (3) workers' compensation claims for injuries she sustained as a truck driver. In 2001, the claimant suffered a "cervical strain," while in 2004 she sustained a "lumbosacral sprain/strain, left rotator cuff sprain/strain, and adhesive capsulitis left shoulder." In 2007, while working for a different employer, she sustained a "sprain of neck, sprain left shoulder, disc bulge with compression at the C5-C7 disc levels and recurrent depressive psychosis – severe." The claimant filed for permanent total disability compensation in January, 2014, and a BWC doctor recommended allocation, but his report did not specify amounts. At hearing, a Staff Hearing Officer apportioned the cost of the award among the three (3) claims as follows: 9% to the 2001 claim, 13% to the 2004 claim, and 78% to the 2007 claim. The first employer filed a *mandamus* action in the Tenth District Court of Appeals, arguing that the award should be vacated because there was no evidence to support allocating <u>any</u> cost to the 2001 claim, and the order did not provide a rationale for the amount allocated to the 2004 claim. The Court of Appeals sustained the objections, issuing a *writ of mandamus* ordering the Industrial Commission to vacate the award and enter an amended order. This prompted an appeal as of right by the IC to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that the SHO order lacked a basis for the specific allocations of the award. "All matters effecting the rights and obligations of a claimant or an employer merit an explanation sufficient to inform the parties and potentially a reviewing Court of the basis for … the decision." *State ex rel. Yellow Freight Sys., Inc. v Indus. Comm.*, 71 Ohio St. 3d 139 (1994). There was no justification for the percentages cited in the order, which did not seem to be based upon any numerical findings of the physicians, and there was no basis for allocating any part of the PTD award to the 2001 claim beyond a permanent partial award. The Industrial Commission cited the expert reports as "some evidence" of its award, but the Industrial Commission speaks only through its orders, and thus a Court must be able to review evidence identified in the order as the basis for the decision. *Id.* Because the order did not sufficiently explain the allocation, a referral back to the Industrial Commission was warranted.

As in many other things, the allocation of PTD awards is often a negotiated affair, with larger percentages requested for firms where the claim is no longer in the experience or which are out of business, as opposed to the merits. However, the Industrial Commission may not merely cite a medical report as "some evidence" of an allocation without explaining the basis for that allocation.

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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