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Gallagher Sharp Shop Talk: Workers' Compensation

Last week, we discussed a case involving a request for compensation that was initially allowed, but later vacated, and whether a finding of fraud is required before a claimant can be terminated. This prompted several inquiries as to the definition of fraud in Ohio, and how a finding of fraud comes about. Perhaps not coincidentally, one week later the Supreme Court of Ohio issued a new decision considering a similar set of facts, and whether the Industrial Commission was correct in finding that a claimant committed fraud.

State ex rel. Perez v. Indus. Comm., Slip Op. No. 2016-Ohio-5084, concerned a claimant who was injured in 2002, and filed a workers' compensation claim. The claim was allowed for several physical and psychological conditions, and the claimant sought and received temporary total disability compensation (TTD) intermittently for several years. Prior to his injury, the claimant owned and operated an auto repair business. At some point in 2011, the BWC received a tip that the claimant was working at the shop while receiving TTD. The BWC Special Investigations Unit ("SIU") conducted an investigation and documented that the claimant was working at the shop, but could not substantiate that he was being paid. In November, 2012, SIU received another tip that the claimant was working, this one including customer names and additional information. After developing more evidence, the BWC filed a motion seeking to have an overpayment declared, and for a finding that the claimant fraudulently concealed his work to receive TTD benefits. The Industrial Commission declared an overpayment of TTD and found that the claimant had committed fraud, citing the fact that the claimant had performed scheduling, purchased parts, and processed payments at the shop. The claimant then filed a *mandamus* action seeking to overturn the finding, and while the Eleventh District affirmed the overpayment, it issued an order compelling the Industrial Commission to vacate the finding of fraud based upon an absence of evidence of intent. Both parties then filed appeals as of right to the Supreme Court of Ohio.

The Supreme Court reversed and reinstated the fraud finding, concluding that the claimant had performed "work" (defined as "labor exchanged for pay") while receiving TTD, and that he had "knowingly misrepresented material facts." First, the Court discussed previous decisions involving ownership of a business, and found that the claimant was engaged in more than "minimal and unpaid activities." The Court concluded that his activities were income-producing for his business, and not merely passive. With regard to the fraud finding, the Court noted that the Industrial Commission's findings of fact must be respected absent an abuse of discretion, and there was sufficient evidence to justify a finding of fraud. For example, the claimant represented to the Commission on numerous occasions that he was not working, and alleged to a physician that he "rarely left his home and spent most of his time watching TV or with his dogs." For this reason, the Industrial Commission cannot be said to have abused its discretion.

Perez provides guidance as to what constitutes fraud in Ohio, and in particular how the Industrial Commission should deal with claimants who operate businesses while on TTD. The key determining factors are whether a claimant's activities are passive or active, and whether the actions are income-producing as opposed to promoting "good will." *Perez* also points out that

indicators of fraud can often be found in statements made to physicians as well as to the employer or BWC. 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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