

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

QUESTION: When considering a request for a lump sum payment pursuant to R.C. § 4123.57(B), what medical evidence is required to support a “loss of use?”

Ohio R.C. § 4123.57(B) provides a schedule of compensation payable to an employee who has suffered a “loss of use” of a specified body part. The claimant bears the burden of showing the loss of use is both “complete and permanent.” This law, which was originally formulated to compensate for amputations, has become much more liberally interpreted in recent years. The Supreme Court of Ohio has held that a loss of use award requires only a loss “for all practical purposes.” *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 2004-Ohio-3166. Recently, the Tenth Appellate District considered a case involving an award for “loss of use” of a claimant’s left arm, and whether the medical evidence provided was sufficient to support that award.

State ex rel. Huntington Natl. Bank v. Lapinta, 2017-Ohio-8544, involved a claimant who was injured while working as a sponsored volunteer at a Habitat for Humanity project in 2006. She suffered a fall and broke both bones in her left forearm, which required surgical reduction. The claimant had complications, including the development of “Volkman’s Ischemic Contracture” (a “claw-like” deformity) and underwent a second surgery in 2007. A workers’ compensation claim was filed, which was allowed for “left radius and ulna chef fracture, Volkman’s Ischemic Contracture,” and several additional psychological conditions. In 2011, the claimant made an application for a scheduled “loss of use” award for her left arm pursuant to R.C. § 4123.57(B) based upon a report from her treating physician concluding that the claimant had sustained a “total and permanent loss of use” of her left arm. This report, which contained no objective findings, was originally supplied to a disability insurance carrier. In response, the employer produced a medical report reflecting that range of motion at the shoulder and elbow was normal, and that the claimant “does not demonstrate a degree of loss of function, motion, or other nervous system or musculoskeletal system loss that creates an equivalent to an amputation or complete paralysis,” citing the *Alcoa* standard. A DHO granted the award, over the objection of the employer who claimed that the medical evidence supplied by the claimant did not contain objective findings or cite the correct standard, and that a reliance upon claimant’s own self-serving testimony was error. When an SHO affirmed the award, the employer brought a *mandamus* action before the Tenth Appellate District.

The Tenth District affirmed the “loss of use” award, concluding that there was no abuse of discretion and that the file contained “some evidence” to support the award. The pivotal question in any “loss of use” analysis is how much function remains, and it was not fatal for the treating physician to omit the “all practical purposes” language. Taken collectively, the Court found that the reports and office notes from the treating physician included sufficient objective observations and findings, and while the notes did not detail the claimant’s functional capacity, her doctor was clearly aware of her condition, having treated her for several years. The report cited a “complete inability to lift anything with her left arm, to perform fine finger movements with her left hand, to perform ...coordinated movements or to push and pull with her left arm.” While the claimant’s own testimony would not have been sufficient on its own, the fact that this

testimony comported with the objective findings in the report made it pertinent. Finally, rejecting the employer's report was justifiable, because the medical evidence from the treating physician provided a sufficient basis for finding a "loss of use" of the left arm.

Huntington National Bank reflects the more recent view of "loss of use" awards post-*Alcoa*. The critical issue in these cases is "how much function remains," and that function need not be equivalent to amputation or paralysis. A careful employer will consider an IME that takes into account both total and functional capacity in evaluating these requests.

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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