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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Is there a minimum number of hours required to be worked when determining whether a claimant can perform “sustained remunerative employment?”

Permanent total disability (“PTD”) is defined as “the inability to perform sustained remunerative employment due to the allowed conditions in the claim.” *OAC 4121-3-34(B)(1)*. Work is “sustained” if it consists of an ongoing pattern of activity, even if that work is part-time or occasional. *State ex rel. Schultz v Indus. Comm.*, 2002-Ohio-3316. Ohio Courts have traditionally considered that a minimum of four hours per day satisfies the requirement for “part-time” employment. See *State ex rel. DeSalvo v May Co.*, 10th Dist., App. No. 98AP-986 (June 29, 1999). Recently, the Supreme Court of Ohio considered a case involving a claimant who was not capable of working four hours on a continuous basis, and whether this fact should have rendered him “permanently and totally disabled.”

State ex rel. Bonnländer v Haman, 2017-Ohio-4003, involved a claimant who was injured in a motor vehicle accident in 1992. His workers’ compensation claim was allowed for numerous medical and psychological conditions, and the claimant returned to work at various positions through December, 2008. In 2014, the claimant applied for permanent total disability (“PTD”) compensation, alleging that he was permanently and totally disabled due to his psychological allowances. A physician who examined the claimant on behalf of the BWC concluded that he was capable of performing sedentary work, and a psychologist concluded that he was capable of working “part-time, up to four hours a day.” However, due to the nature of his psychological condition, “multiple breaks” would be necessary. The request proceeded to hearing, where an SHO concluded that the claimant was capable of “sustained remunerative employment” on a part-time basis, and therefore denied PTD. The claimant filed a *mandamus* complaint in the Tenth District, alleging that the Industrial Commission had abused its discretion because the BWC’s own doctors agreed that he could not work four continuous hours due to required multiple breaks. The Tenth District Court of Appeals affirmed the decision, prompting the claimant to appeal to the Supreme Court as of right.

The Court affirmed, concluding that “some evidence” supported the order denying PTD. The Court cited *DeSalvo* in stating that, while Ohio courts have long considered four or more hours a day the “standard” for part-time work as “sustained remunerative employment,” the statute grants the Industrial Commission substantial discretion in each case. There is no statutory or administrative authority for the interpretation that four or more continuous hours of work per day is required for “sustained remunerative employment,” and the evaluation of the weight and credibility of the evidence is left to the discretion of the Industrial Commission. In the past, the Court noted that it has specifically rejected applying a strict numerical analysis in PTD cases, and the duration and character of the activities involved must be evaluated on a case-by-case basis. In the end, the Court refused to apply a “bright line” requiring four or more hours, or four continuous hours, in order to constitute “sustained remunerative employment.”

Bonnlander certainly clarifies the issue of whether a claimant must be capable of working four or more hours a day in order to be found capable of “sustained remunerative employment.” Employers should be sure to request a thorough evaluation of the amount and type of work that can be performed by a claimant on a daily basis, and not simply angle for the “magic” four-hour standard.

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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