

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

QUESTION: Has the Ohio Supreme Court weighed in on the issue of whether a claimant may receive an award of permanent total disability (PTD) compensation and permanent partial disability (PPD) compensation in the same claim?

Back in June, 2015, I reported on a Tenth District case, *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, which considered the issue of whether a claimant who was found to be permanent disabled due to one condition could still receive a PPD award arising from another allowed condition. (*Shop Talk*, 6/3/15) The Tenth District, construing the statute in favor of the claimant, found that while an award for the same injury would be barred, in instances where the claimant's PTD was clearly related to a separate condition, an award could stand. The employer in OPRS appealed that decision to the Ohio Supreme Court, and on December 6, 2016, the Court issued its decision on this issue, concluding that simultaneous awards of PPD and PTD in the same claim are improper.

As a reminder, *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, 2016-Ohio-8024, involved a claimant who suffered multiple injuries while employed as a home health care aide in 2003. A workers' compensation claim was filed, which was allowed for several physical conditions, as well as for "depression." On June 7, 2011, the claimant was granted PTD based solely on the psychological component of her claim. In August, 2013, the claimant filed a motion seeking PPD for the physical conditions only, and this matter proceeded to a series of hearings before the Industrial Commission. A DHO denied the motion, stating that it would be inappropriate to allow PPD and PTD for the same claim as a matter of law citing *State ex rel. Murray v. Indus. Comm.*, 63 Ohio St.3d 473 (1992), but an SHO vacated this order and allowed the compensation. The employer filed a *mandamus* action in the Tenth District Court of Appeals, who concluded that *State ex rel. Mosley v. Indus. Comm.*, 2014-Ohio-1710, which presented very similar facts, stood for the proposition that an award of PTD for one condition could coincide with a concurrent PPD award based upon another allowed condition. The employer filed an appeal to the Supreme Court of Ohio, which accepted the question of whether a claimant is barred from receiving permanent partial disability compensation for conditions that formed no part of a previous award of permanent total disability compensation.

The Supreme Court reversed, concluding that Ohio law does not support a claimant's right to concurrent compensation. The Court began with general discussion of the history of this issue, discussing the fact that nothing in the statutes or administrative rules support a claim for concurrent PPD and PTD compensation. (Noting that PTD compensation is intended to replace a loss of earning capacity, the Court chose not distinguish PPD compensation as being distinct.) The fact that neither statute expressly authorizes concurrent payment of this compensation was said to "evinced legislative intent to prohibit simultaneous receipt of these benefits." *Id.* at ¶16. The Court noted that in the past it had affirmed concurrent payment of compensation in different claims in very limited circumstances, such as in *Murray, supra*, or in cases involving death benefits and "loss of use." However, the Court concluded that in later decisions such as *Mosely*, lower courts have been confused by the interchangeable use of the terms "injury," "body part,"

and “condition,” resulting in an inconsistent application of the law. *Id. at ¶24*. It also noted that in some cases, the particular injury or basis for the PTD award is not contained in the record. Therefore, the Court felt it was needed to draw a bright line, and concluded that the Industrial Commission has no authority to award PTD and PPD compensation concurrently in the same claim. In a dissent, Justice Pfeifer cited the previous decisions allowing concurrent compensation in different claims, and the fact that there is nothing to distinguish those situations from the one at bar, where the awards are clearly for separate conditions.

With *Ohio Presbyterian*, the Supreme Court has seemed to settle the issue of whether an employee can receive PTD and PPD compensation in the same claim and in doing so simplified the management of claims in Ohio. There was simply no basis for allowing such compensation in the statutes, and to do so would have resulted in thousands of hearings concerning the basis of one award or another.

We at Gallagher Sharp wish all of you Happy Holidays and look forward to serving you in the New Year. 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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