

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

QUESTION: What was the result of the Ohio Supreme Court's recent decision to reconsider its holding in *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v Indus. Comm.* ("*Ohio Presbyterian I*")?

On December 14, 2016, I reported on the Ohio Supreme Court's decision in *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v Indus. Comm.*, 2016-Ohio-8024 ("*Ohio Presbyterian I*") in which it concluded that a claimant may not receive both permanent total disability ("PTD") compensation and permanent partial disability ("PPD") compensation in the same claim, even when the awards are based upon different conditions. The Court in that case concluded that the statutes do not support the right to concurrent compensation of that type, and that the absence of authorization in the statutes led to the conclusion that the Legislature did not intend to permit it. After that decision was issued, the injured worker moved the Court to reconsider its decision, arguing that the Industrial Commission alone has the authority to award compensation under R.C. 4123.58, R.C. 4123.57(A), and that Ohio law requires that workers' compensation statutes be construed liberally in favor of the payment of compensation. The Ohio Supreme Court granted the claimant's motion and reopened the case for further consideration, including oral argument with no additional briefing.

On September 14, 2017, the Court issued a second Order in the case, 2017-Ohio-7517 ("*Ohio Presbyterian II*") affirming their holding in *Ohio Presbyterian I* that an injured worker may not receive a PPD award when he is receiving PTD compensation. The Court began with the well-settled conclusion that only the Industrial Commission is responsible for making factual findings and that such findings will be disturbed only upon an abuse of discretion. *State ex rel. Cordell v Pallet Cos., Inc.*, 149 Ohio St. 3d 483. However, it was the application of Ohio law and not the application of fact to law that was at issue here. The Court also agreed that its workers' compensation statutes must be construed liberally in favor of the claimant, but the statutes must also support payment of the compensation requested. In the case at bar, the Court found that the language of the statutes is plain and unambiguous, and is "devoid of any language" authorizing the Industrial Commission to concurrently award both types of compensation in the same claim. The Court pointed out that "the General Assembly knows how to authorize the Commission to grant concurrent payments," as it did in matters involving scheduled loss benefits and PTD compensation. Counsel for the Industrial Commission argued that because the statutes do not specifically prohibit concurrent awards, a liberal construction in favor of the claimant provided the authority to award concurrent payments. However, the Court found that this argument ran afoul with prior decisions finding that a claimant may receive only those benefits specifically permitted by statute. The Court concluded by citing oft-cited maxim *expressio unius est exclusio alterius* ("the expressed inclusion of one thing implies the exclusion of the other"). The absence of specific authorization for concurrent payments required the conclusion that such payments are prohibited.

Ohio Presbyterian II seems to settle the issue once and for all that concurrent payments of PPD and PTD compensation is prohibited for the same claim. Interestingly, the Court made this

determination without resorting to an analysis of compensation itself, or reversing previous decisions permitting payment of both PPD and PTD arising from separate claims.

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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