

From: Don Drinko
Date: Wed 4/2/2014 4:10 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is a claimant entitled to receive permanent total disability compensation in one claim based upon one condition while simultaneously receiving treatment and temporary disability compensation in another?

OAC 4123-2-34(D)(1)(f) stands for the proposition that a claimant may not receive permanent total disability compensation (PTD) in a claim while the condition in question has not reached maximum medical improvement (MMI). The basis for this rule is that, by definition, a condition that is not MMI is "temporary" and not permanent. Both the Tenth District Court of Appeals and the Supreme Court of Ohio have struggled to apply this seemingly simple rule to a variety of situations, and recently the Tenth District considered a case involving multiple claims, multiple conditions, multiple *mandamus* actions, and the issue of whether an award of PTD can be made in one claim while a claimant is receiving treatment and temporary total disability compensation in another.

State ex rel. Martin v. Springfield Township, 2014-Ohio-1186, involved a police officer with two separate claims from 1997: The first concerned a series of physical injuries and also included a psychological claim ("PTSD"); while the second involved only physical injuries. Worker's compensation claims were filed and the claimant did not return to work. In 2010, the claimant moved for PTD in the first claim based solely upon the allowed psychological condition. An SHO denied the request, based in part upon an "internally inconsistent" report from a psychologist hired by the BWC. The claimant appealed, and a writ of *mandamus* was eventually issued referring the matter back to the Commission for a new hearing. In the interim, the claimant sought and received additional treatment for his left knee in the second claim, which eventually resulted in knee surgery and an award of temporary total disability ("TTD") compensation. After these awards were made (and not appealed), the PTD application proceeded to hearing, and was again denied because the claimant's physical injuries in the second claim had not reached MMI, the claimant was receiving TTD in that claim, and was therefore by definition "temporarily" disabled. The claimant again filed a *mandamus* action in the Tenth District, and a magistrate made findings of fact and conclusions of law that a writ should be granted vacating this order, prompting an appeal by the Industrial Commission.

The Tenth District agreed with the magistrate that a writ of *mandamus* should be issued, and vacated the SHO order. The magistrate found that there was no evidence to dispute the fact that the claimant was permanently and totally disabled solely by the psychological condition in the first claim, and that the Commission misapplied Ohio administrative code 4121-3-34(D)(1)(f) when it denied the claimant's application for PTD compensation solely because other conditions in other claims had not reached MMI. The Commission's reliance on *State ex rel. Ferrell v Indus Comm.*, 2005-Ohio-3100, was misplaced, and in fact the Court held that *Ferrell* supported the claimant's contention that he was entitled to have his application heard based solely on the allowed psychological claim. In *Ferrell*, a claimant filed for PTD based upon physical conditions, all of which had reached MMI, but did not include in the application a psychological condition which had not reached MMI. The decision in *Ferrell* flatly rejected the proposition

that OAC 4121-3-34(D)(1)(f) requires a denial of PTD if all conditions are not MMI, so long as a single condition consists of “some evidence” of permanent disability. The Court also rejected the Commission's reliance upon *State ex rel. Johnson v. Indus. Comm.*, 2006-Ohio-5091, which involved the application of *res judicata*, because *Johnson* did not deal with the issue at bar. In this case, the claimant had clearly presented evidence that his psychological condition, in and of itself, precluded him from sustained remunerative employment, and it was an abuse of discretion to refuse to consider his claim.

The decision in *Martin* concerned a claimant with two claims, and the treatment and TTD were clearly awarded under the second claim. However, the Court's interpretation of *Ferrell* would seem to indicate the same result would hold if the treatments were provided under one claim. The proper inquiry is whether a claimant with multiple allowed conditions has produced evidence that any one of the allowed conditions had reached MMI and would, standing alone, be work prohibitive.

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.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com