

From: Don Drinko
Sent: Wed 4/22/2015 4:33 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: Is it an abuse of discretion for the Industrial Commission to refuse to apportion a permanent total disability award to multiple claims?

It is not uncommon for claimants to seek an additional allowance for depression arising from chronic pain. The issue becomes more complicated when that pain arises from injuries in multiple claims with multiple employers. Recently, the Supreme Court of Ohio was presented with an interesting case involving an award of permanent total disability ("PTD") arising from depression, and whether a PTD award can or should be apportioned to multiple claims.

State ex rel. Turner Constr. Co. v. Indus. Comm., Slip Opinion No. 2015-Ohio-1202, involved a claimant who was employed as a bricklayer. He had four workers' compensation claims between 1992 and 2007, the last occurring while the claimant was working for Turner. The 2007 claim was allowed for "thoracic sprain," and later for "major depressive disorder, single episode." In 2011, the claimant applied for PTD benefits in the 2007 claim based solely on depression. The application was granted by an SHO based upon reports from the claimant's psychiatrist and corroborated by a psychologist retained by the Industrial Commission that the claimant was totally disabled due to depression arising from chronic pain. The SHO acknowledged the previous claims, but based the decision on records submitted in the 2007 claim. Turner objected, asserting that the PTD award should be reallocated among all previous claims because the chronic pain causing depression came from multiple injuries. The SHO concluded that the inability to work was related solely to the psychological condition, which was only allowed in the 2007 claim. Turner filed a *mandamus* action alleging that the Commission's decision was an abuse of discretion, but the Tenth District affirmed the decision, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed, noting that the appeal essentially asked the Court to reweigh the evidence presented to the Industrial Commission when it considered adding the depression to the 2007 claim. The Court found that even if the condition was the result of pain from several claims, it is not the role of a reviewing court to assess the credibility of evidence, so long as the Industrial Commission's findings are based upon "some evidence." The 2007 claim was the only claim with an allowed psychological condition, and the order adding the condition to that claim was not appealed and became final. There was also no evidence that the claimant sought any psychiatric care before 2007. Because the employer failed to demonstrate an abuse of discretion, the award was affirmed.

Turner stands for the proposition that the time for an employer to assert that a condition should be apportioned among several claims is at the time the psychological condition was originally allowed. When that decision was not appealed, the Industrial Commission had no choice but to attribute PTD benefits to the only claim which included a psychological condition. 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