

**From:** Don Drinko  
**Sent:** Wed 6/13/2018  
**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: Is the BWC limited to a two (2) year “look back” period in seeking to recoup overpayments made as a result of incorrect wage calculation?**

R.C. § 4123.52 governs the “continuing jurisdiction” of the BWC, and contains a provision which governs applications to correct wage calculations. As part of that statute, the Industrial Commission cannot award compensation owed for an incorrect wage calculation for a period in excess of two (2) years from date of an application. Recently, the Supreme Court of Ohio considered a case involving a claimant who had his wages recalculated downward after a period of eighteen (18) years, and whether the BWC was limited to the same two (2) year limitations period set forth in R.C. § 4123.52.

*State ex. rel. Witt v Indus. Comm.*, 2018-Ohio-1693, concerned a claimant who suffered multiple injuries in an automobile accident in 1997. The BWC calculated the AWW and FWW and ultimately paid benefits totaling nearly \$200,000. In 2015, the claimant sought and was granted PTD, but in the process the BWC discovered that the original wages were miscalculated by nearly \$100, and issued an order to recoup overpaid benefits over the full eighteen (18) year period. The claimant appealed, stating that the BWC was unreasonable in its eighteen (18) year delay in re-calculating his benefits, and that the BWC should be limited by the two (2) year period set forth in R.C. § 4123.52. At hearing, the BWC argued that it was not subject to the two (2) year limitation, that it could exercise continuing jurisdiction as it saw fit, and cited *State ex. rel. Drone v Indus. Comm.*, 2017-Ohio-554. A DHO affirmed the BWC’s order and directed that overpayments be recouped from future benefits. An SHO reached a new calculation, but otherwise affirmed. The claimant sought *mandamus* in the Tenth District Court of Appeals, where a magistrate determined that the BWC did not have statutory authority to exceed the two (2) year period and recommended a *writ of mandamus*. The Tenth District rejected the magistrate’s conclusion, finding that the two (2) year limitation governed only situations where an application was filed, but the BWC may *sua sponte* exercise its continuing jurisdiction to correct a mistake. The claimant filed an appeal to the Supreme Court as of right.

The Supreme Court affirmed, finding that the claimant had failed to demonstrate a clear legal right to relief. The Court began by affirming the BWC’s absolute authority to exercise continuing jurisdiction to adjust previously paid compensation beyond the two (2) year “look back” period, stating that the BWC did not need to file an application to correct the mistake. Citing *Drone*, which concerned a mistake in favor of the claimant, the Court determined that the statute of limitations set forth in 4123.52 is not triggered unless an application to modify is filed. Because the BWC did not file an application to modify wages, but instead asserted continuing jurisdiction, the two (2) year limitation period was never triggered. The fact that *Drone* involved underpayments, while *Witt* involved overpayments, made no difference. The Court also dismissed a laches defense, in which the claimant argued that the BWC’s eighteen (18) year delay in recalculating his wages was unreasonable. The Court noted that the claimant failed to raise this issue before the Commission or in his Complaint and therefore waived this defense.

*Witt* is simply the alternate side of *Drone*, which held that long-standing mistakes corrected by the BWC were not subject to the two (2) year statute of limitations. It should be noted that applications to modify brought by claimants or employers remain subject to the two (2) year limitation period contained in R.C. § 4123.52.

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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