

Court Rules Application for Scheduled Loss of Use Award is Required to Start Process of Determining Eligibility

by Mark A. Shaw and Garrett M. Cravener

The Ohio Workers' Compensation Act authorizes "scheduled loss" benefits, which are available to injured workers for the loss of, or loss of use of, a body part. The benefits are paid based upon the body part affected (e.g., finger, hand, foot, eye, etc.) according to a schedule listed in the statute. To illustrate, the statute provides that the loss of use of one's hand equates to 175 weeks of compensation. The purpose of a scheduled loss of use award is to compensate the injured worker for his or her reduced earnings capacity. As such, scheduled loss of use awards cease upon the injured worker's death because the reduction in earnings capacity is no longer present.

In *State ex rel. Sziraki v. Bur. Workers' Comp.*, Sziraki experienced a severe work-related injury on May 14, 1991. As a result of the injury, Sziraki lost the use of his limbs and lived in a near-vegetative state. Sziraki was unmarried and had no children; his next of kin was his mother.

In 2002, the Industrial Commission granted permanent total disability benefits pursuant to Ohio Revised Code 4123.58(C) based on Sziraki's loss of use of his arms and legs. The Bureau of Workers' Compensation (BWC) withheld payment of the award until it received a power of attorney or evidence of a court-appointed guardian for Sziraki. This issue was never resolved and Sziraki died in 2007.

Sziraki's mother was appointed as the administrator of Sziraki's estate. The estate filed a claim for death benefits with the BWC. The BWC allowed the estate's claim for accrued permanent total disability compensation from March 20, 2002 (based upon a report of the same date) until the date of Sziraki's death, and ordered payments for medical and funeral expenses. The estate appealed the BWC's order because the award did not include scheduled loss of use benefits for the loss of use of Sziraki's limbs. At no time was an application for scheduled loss of use benefits filed during Sziraki's lifetime.

On appeal, the Industrial Commission of Ohio (Industrial Commission) district hearing officer noted that Sziraki would have been eligible for 850 weeks of compensation under the scheduled loss of use statute but for Revised Code Section 4123.52(A), which limits retroactive payment to two years prior to the date of filing an application. On appeal, the staff hearing officer found that 104 weeks (i.e. two years) represented the amount of accrued scheduled loss of use benefits Sziraki might have received, but for his death.

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Sziraki's estate sought mandamus relief before Ohio's Tenth District Court of Appeals, arguing that 850 weeks of compensation should have been awarded because an application is not required in order for scheduled loss of use benefits to begin accruing. The Tenth District denied the request for mandamus relief, and the estate appealed to the Supreme Court of Ohio.

Sziraki's estate argued the BWC had a "duty" to award scheduled loss of use benefits during Sziraki's life – even in the absence of an application for such benefits – especially in light of Sziraki's inability to personally file an application and because he had no one acting on his behalf (no power of attorney and no court-ordered guardian). The estate pointed the Court to a BWC internal policy, no longer in existence, which provided that scheduled loss of use benefits may be paid "without application if medical evidence is provided that supports payment of the scheduled loss award." The parties did not dispute that Sziraki was medically qualified for scheduled loss of use benefits.

The BWC argued its internal policy was merely discretionary. The BWC further argued the statute required an application be filed requesting the loss of use award.

In a 4-3 decision, the Court agreed with the BWC. Even though the statute uses permissive language that an application "may" be filed – as opposed to mandatory language that an application "shall" be filed – the Court wrote that "the statute's use of the permissive term 'may' does not eliminate the necessity of an application as the vehicle for starting the process of determining eligibility for scheduled-loss benefits."

Employers should be aware Sziraki's estate requested reconsideration of the Court's decision. Therefore, a possibility exists the Court may reconsider this issue. Nevertheless, until a decision is made regarding the request for reconsideration, the Court's opinion in *Sziraki* provides guidance for employers dealing with requests for scheduled loss of use awards. Employers should keep in mind the processing of scheduled loss of use benefits is not required until a formal application has been filed. Moreover, the BWC is under no duty to process an application on its own accord. Sziraki also reminds employers the Ohio Workers' Compensation Act prohibits an award of compensation for a back period in excess of two years prior to the date of filing the application for compensation.

Please do not hesitate to contact [Mark A. Shaw](#) or [Garrett M. Cravener](#) at Eastman & Smith Ltd.'s Columbus office if you have any questions about how to manage and defend against a request for a scheduled loss of use award or visit our web site www.eastmansmith.com.

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