LawTrends

A publication of Eastman & Smith Ltd.

EASTMAN & SMITH LTD.
ATTORNEYS AT LAW
Established 1844

November 2009
volume 7 number 3

Tips for Defending the PTD Application

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Ohio law provides lifelong compensation for permanent total disability (PTD) to an injured worker who is unable to perform sustained remunerative employment as a result of the allowed conditions in his or her workers' compensation claim. PTD compensation is paid at 66 2/3% of the injured worker's average weekly wage, up to a maximum of $767.00 per week for an injury occurring in 2009, with a minimum weekly compensation rate of $383.50. If the worker were to begin receiving PTD compensation today for an injury occurring earlier this year, he or she lives 30 more years and compensation is paid at the maximum rate, the worker would receive $1,196,520 over the course of his or her lifetime. Thus, an award of PTD compensation can be a costly proposition for a self-insured employer (or its excess insurance carrier) or the state fund in the case of a state-funded employer.

In determining whether an injured worker is unable to perform sustained remunerative employment, consideration is given not only to current employment skills, but also to skills that reasonably may be developed. The Ohio Supreme Court has said that PTD compensation is "compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed." The Court has also said that "[a]n award of [PTD] compensation should be reserved for the most severely disabled workers and should be allowed only when there is no possibility of re-employment."

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Unfortunately, either due to employers or the Bureau of Workers' Compensation inadequately defending PTD applications, the failure of the Industrial Commission (IC) to adhere to the Ohio Supreme Court's high threshold for PTD eligibility, or some other reason, the IC grants the vast majority of PTD applications. In 2005, 60.5% of PTD applications were granted. In 2006, 61.3% of PTD applications were granted and in 2007, 62.5% were granted. In 2008, the upward trend continued. Of 1,985 PTD applications decided by the IC last year, 65% were granted. Given these statistics, it is clear that now more than ever, in order to defeat a PTD application, the full arsenal of PTD defenses must be considered and, where applicable, the evidentiary foundation for those defenses put into place prior to the PTD hearing.

The first line of defense is the medical evidence. Section 4121-3-34 of the Ohio Administrative Code, the IC's PTD rule, requires that a PTD application be accompanied by supporting medical evidence based on an examination performed within 24 months of the filing of the application. Upon receiving notice of the filing of the application, the employer has 60 days within which to submit its own medical evidence. The employer should choose a physician to examine the injured worker who it is confident can give an accurate, yet conservative, assessment of the worker's ability to engage in sustained remunerative employment. The employer also should consider having a different physician review the injured worker's medical records and prepare a report addressing the same issue. Preferably, the reviewing physician will have examined the worker in the recent past on a different issue. The IC also will schedule its own medical examination on the PTD issue. Of course, if the claim is allowed for a psychological condition, the employer and the IC will need psychological or psychiatric evaluations as well.

Often, the injured worker's medical evidence simply states that he or she is PTD and unable to perform any type of sustained remunerative employment. If the IC's staff hearing officer, the initial adjudicator of the PTD application, adopts this opinion in its entirety, the application will be granted without any discussion of the worker's vocational factors. Thus, it is important to undermine the credibility of the injured worker's medical evidence by challenging its substance and the accuracy of its foundation.

Likewise, it is important the employer be able to convince the staff hearing officer that the injured worker is medically capable of at least sedentary work, which is defined as the ability to exert up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. Sedentary work involves mostly sitting, but also may involve walking or standing for occasional brief periods, and is the lowest formal classification of the physical demands of work. Sedentary work that can only be performed part-time, or at least four hours per day, is considered sustained remunerative employment, and the injured worker need not be capable of the full range of sedentary jobs.

If the injured worker cannot perform at least sedentary work due to the medical impairment resulting from the allowed conditions, the staff hearing officer will find the worker is PTD without considering his or her vocational factors such as age, education or work experience. If, however, the staff hearing officer finds that despite the medical impairment resulting from the allowed conditions, the injured worker still is able to perform at least sedentary work, the hearing officer then will consider the worker's vocational factors as they relate to his or her ability to return to the workplace.

Once the employer gets beyond the hurdle of the medical evidence, it still must show the injured worker's medical impairment resulting from the allowed conditions, when combined with the worker's relevant vocational factors, does not preclude the performance of sustained remunerative employment. The employer should enlist the services of a vocational specialist to evaluate the injured worker's vocational factors in light of the medical impairment related to the allowed conditions. The purpose of this evaluation is to establish that the vocational factors can be viewed in a positive light, and despite the injured worker's medical impairment, there are still jobs in the local or regional economy that the worker has the skills, ability and physical capacity to perform.

While the employer's vocational assessment hopefully will persuade the staff hearing officer that the injured worker has the background to perform some type of work, the hearing officer is not required to accept the findings or rely upon the report of either party's vocational expert. Theoretically, and legally, the IC itself is deemed to be the ultimate vocational expert and can perform its own analysis of the injured worker's vocational factors without the assistance of any other vocational expert.

In addition to medical and vocational defenses, ORC 4123.58, the statute governing PTD compensation, and Section 4121-3-34 of the Ohio Administrative Code, the IC's PTD rule, identify a number of defenses that an employer may be able to use in defending against a PTD application. The rule contains two common sense defenses. The PTD application must be denied if the staff hearing officer finds the injured worker currently is engaged in sustained remunerative employment, or is medically able to return to the former position of employment. The former is often discovered through the use of surveillance. The latter generally would be based on the medical opinion of the employer's and/or the IC's doctors. In either case, the injured worker's motive for filing the PTD application deserves a great deal of scrutiny.

Both the statute and the rule provide that PTD compensation cannot be awarded where the injured worker's inability to perform sustained remunerative employment is due to impairments resulting from non-allowed conditions. The presence of a disabling non-allowed condition does not preclude the award, but the injured worker must show the allowed conditions independently prevent sustained remunerative employment. Thus, where non-allowed conditions are present, the nature of the injured worker's disability requires heightened medical scrutiny.

Further, PTD compensation cannot be awarded where the inability to perform sustained remunerative employment is due solely to the injured worker's age or aging. While age must be considered as one part of the injured worker's vocational profile, it cannot be the overriding reason why he or she is unable to work. The age defense especially is relevant in situations where a prior PTD application has been denied, the injured worker later files a second application and the medical impairment and vocational factors have remained the same (with the exception of the worker's age).

Both the statute and the rule provide PTD compensation is not appropriate where the injured worker has voluntarily abandoned the workforce for reasons unrelated to the allowed conditions. This defense is most often applicable when the worker has voluntarily retired without any intention of re-entering the workforce in any capacity. However, the defense also may apply in situations where the injured worker was terminated from the former position of employment for reasons unrelated to the allowed conditions, and the evidence shows there has been no attempt to find new employment. Thus, the manner in which the injured worker left the workforce, and whether there is any indication of an intention to return, can be crucial in a PTD determination.

The statute codifies a principle found in numerous Ohio Supreme Court decisions that requires an injured worker to make every effort to enhance his or her re-employment potential before a PTD finding is appropriate. The statute provides that an injured worker who does not put forth such effort ("has not engaged in educational or rehabilitative efforts to enhance the employee's employability") cannot be awarded PTD compensation. Given that PTD compensation is "compensation of last resort, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed," this requirement is not unreasonable. The Ohio Supreme Court has said "it is not unreasonable to expect a claimant to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve reemployment potential" before considering the avenue of applying for PTD compensation. The Court also has said that an injured worker is not excused from making the effort to improve re-employment potential simply because the allowed conditions are not permanent yet. This "failure to enhance" defense often is available in the PTD setting because the mindset of many injured workers is they are too injured to ever return to work and they fail to consider that they have an obligation to enhance their re-employability.

The rule contains two other defenses that are not found in the statute. An injured worker will not be considered PTD where he or she "is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment . . . where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker." If the employer has the capacity and willingness to make such a job offer, it likely will ensure defeat of the PTD application. However, the employer must be careful to make the offer in writing and be sure it is sufficiently detailed. The rule also provides that an injured worker is not PTD if the allowed conditions have not reached maximum medical improvement – in other words, have not become permanent yet.

In view of the significant financial ramifications of a lifetime PTD award, and the IC's recent history of granting most PTD applications, it is crucial the employer properly defend against a PTD application and give itself the best chance of prevailing at the PTD hearing. Experienced legal counsel who know and can effectively present all of the available defenses usually play a vital role in effectuating a successful outcome.

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