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The Pandora's Box of Loss of Use Benefits

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In Greek mythology, Pandora was given a large box and instructed by Zeus to keep it closed. Pandora had also been given the gift of curiosity and ultimately opened the box, releasing all of the evils, ills, diseases and burdensome labor not previously known to man. Although little discussed up to this point, the Ohio Supreme Court in December 2006, opened its own Pandora's Box in the context of loss of use benefits.

By way of background, Ohio's workers' compensation law provides for benefits when an employee suffers the loss of a limb, either by amputation or by complete loss of use, as a result of a workplace injury. For instance, if the employee loses one arm, he or she is entitled to 225 weeks of compensation; one leg, 200 weeks of compensation. If the employee loses both, he or she is entitled to 425 weeks. Compensation is paid at the highest rate for the year of injury, irrespective of the employee's average weekly wage. If the employee lost the complete use of his or her arm due to a workplace injury in 2009, he or she would be paid 225 weeks of compensation at a rate of $767 per week for a total award of $172,575. The loss of use of the leg would result in a total award of $153,400, and the loss of use of both would result in an award of $325,975 – no small potatoes.

What happens in the rare circumstance where an employee dies shortly after, and as a result of, the workplace injury, and during the brief period between the employee's injury and death, he or she suffers the complete loss of use of his

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or her arms or legs or both? Is the employee, or rather the employee's spouse or next of kin (the claimant), entitled to 225 weeks of compensation for the loss of each arm and 200 weeks of compensation for the loss of each leg? All told, for a 2009 injury, this would amount to an award of $651,950 if it is determined the employee lost the use of all four limbs before he or she died. And for the claimant, this award would be in addition to the weekly workers' compensation death benefits he or she would receive until his or her death or re-marriage (in the case of a surviving spouse).

In the past, the Industrial Commission (IC) interpreted the law as requiring the employee to experience "the physical suffering and hardship caused by the loss of a body part" before the claimant could establish eligibility for benefits based on that loss. In other words, the employee had to be aware that he or she had lost the use of his or her limb. The IC also interpreted the law as requiring "an actual sustained loss of use" so that the employee had the opportunity to perceive and experience the loss. Thus, in order for the claimant to be eligible for loss of use benefits, the employee had to survive the injury for an undetermined period of time, but at least long enough to experience the loss of use, and sometime during that period the employee had to become consciously aware of the loss. Ohio courts deferred to the IC's interpretation of the law.

Then along came *State ex rel. Moorehead v. Indus. Comm*. William Moorehead fell 16 feet from a scaffold lift, landing head first on concrete pavement. He was non-responsive after the fall. He died 95 minutes later without regaining consciousness. Moorehead's widow applied for loss of use benefits and submitted the reports of three physicians who concluded that, had Moorehead survived, he would have been a quadriplegic. The IC denied benefits, finding Moorehead did not sustain an actual loss of use because he was comatose and completely unaware of the loss for the 95 minutes before he died. Moorehead's widow challenged the IC's decision by requesting a writ of mandamus from the court of appeals. She requested the court order the IC to vacate its decision and issue a new order granting the loss of use benefits, but the court deferred to the IC's interpretation of the law and denied the writ. The court of appeals explained: "It could not have been the intent of the General Assembly … or the intent of the Ohio Supreme Court … to sanction an award of 850 weeks (more than 16 years) of workers' compensation benefits due to an alleged loss of use where the injured worker survived the industrial injury in an unconscious state for only a brief period and never actually experienced the disabling effects of quadriplegia."

On appeal, the Ohio Supreme Court disagreed. It noted the statute authorizing loss of use benefits does not specify a required length of time that an employee must survive before benefits become payable. The Court also noted the statute does not require the employee to be consciously aware of his or her loss of use in order to qualify for benefits. Thus, the Court concluded the IC erred in interpreting the law by adding requirements for eligibility that actually are not contained there. The Court indicated it is the job of the General Assembly to add these requirements to the statute if deemed advisable. Applying the current version of the law, the Court determined Moorehead's widow was entitled to loss of use benefits for Moorehead's quadriplegia for the 95 minutes between his injury and death.

The issue then became how many weeks of benefits Moorehead's widow should be paid for 95 minutes of quadriplegia. The Ohio Supreme Court decided not to address this issue, instead referring the matter back to the IC for a determination. However, the Court did offer the following guidance: "[The] determination should be made in light of all relevant statutes and precedent, including our recent decision in *State ex rel. Estate of McKenney v. Indus. Comm* . . . ." *McKenney* stands for the proposition that the loss of use statute anticipates the payment of benefits in weekly installments which cannot be claimed by an employee's heirs after his or her death (i.e. installments which become due after the date of death). Two justices in *Moorehead* went further, offering specific guidance to the IC. They concluded *McKenney* and the relevant statutes limited Moorehead's widow to one week of benefits because she could not receive more than Moorehead would have received for the period prior to his death. And because Moorehead only suffered the loss of use of his limbs for 95 minutes, he would have been entitled to only one week of benefits. Using the reasoning of the two justices, Moorehead's widow would have received $2,084 (one week of benefits for the loss of use of four limbs at the rate of $521 per week) instead of $442,850 for the 850 weeks of benefits she sought.

Upon referral back to the IC, two of the three members of the IC voted to award Moorehead's widow all 850 weeks of benefits anyway, although they did follow the Ohio Supreme Court's guidance in *McKenney* to the extent of requiring the award be paid in weekly installments and not a lump sum. This outcome likely resulted because Moorehead's employer was no longer actively participating in the claim at the time of the IC hearing, and the Bureau of Workers' Compensation, for whatever reason, agreed that if loss of use benefits were payable, Moorehead's widow was entitled to all 850 weeks.

So where does the analogy to Pandora's Box come in? Listen to the words of Justice Lundberg Stratton, one of the two concurring justices in *Moorehead*: "If [loss of use] benefits are awarded no matter how short the employee's survival, this will likely encourage the dependent of any employee who dies in close proximity to an industrial injury to file for [loss of use] compensation. Such an award would have unintended results that would be financially devastating for the State Fund or a self-insured employer." Fortunately, with most companies' recent emphasis on safety, deaths resulting from workplace accidents are becoming more rare. But in those instances where work-related deaths do occur, employers should now expect an employee's surviving spouse or other dependent will file not only for death benefits, but also will apply for loss of use benefits. With hundreds of thousands of dollars at stake, what does a claimant have to lose in pursuing both death benefits and loss of use benefits?

This is illustrated by the recent case of *State ex rel. Carter v. Indus. Comm*. Carter's children filed for loss of use benefits after Carter was shot and killed while working as a nightclub bouncer. Carter died three days after the shooting. In the interim, his right leg was amputated, he was sedated and chemically paralyzed. While there was no dispute Carter's children were entitled to loss of use benefits for the amputation of the right leg, they argued they also were entitled to benefits for the left leg and both arms because the chemically-induced paralysis caused a loss of use that was rendered permanent because it continued up to Carter's death. The IC denied loss of use benefits for these limbs, and Carter's children then requested a writ of mandamus from the Tenth District Court of Appeals in an effort to overturn the IC's decision. The Court denied the requested writ, finding the induced paralysis "was a temporary measure designed to aid in [Carter's] recovery," and there was no evidence his paralysis would have been permanent had he survived. While this outcome may seem obvious, Carter's children and their attorneys had to expend relatively little time and effort in their pursuit of a potential windfall of tens of thousands of dollars.

So what is the solution to this Pandora's Box now the box has been opened? The easiest solution probably would be a legislative one – revise the law to add the common sense pre-conditions previously required by the IC – an injured employee's survival for a prescribed period of time and the employee's actual awareness of the loss of use of his or her limbs. But since Ohio's current General Assembly and Governor's office are unlikely to take this approach, a legislative solution at this point is not very likely.

That leaves only practical solutions to be tried on a case-by-case basis. Settlement is always a practical solution, but the problem is a claimant receiving lifetime death benefits will be resistant to giving up those benefits as part of any settlement. And even if the claimant is willing to include death benefits in the settlement, the resulting settlement demand is likely to be exorbitant. So the solution may be to approach the claimant with the idea of settling everything associated with the employee's death other than the claimant's receipt of death benefits. Such a settlement would include any intentional tort claim, any penalty due to a violation of a specific safety requirement (VSSR) and any entitlement to loss of use benefits.

The other practical solution is to wisely and aggressively defend against an application for loss of use benefits in this context. First, as alluded to earlier, anticipate that a claimant will seek loss of use benefits anytime there is a work-related death, and immediately begin to prepare your defense accordingly. To be successful, the employer will have to show one of two things – either the employee did not survive the accident that killed him or her, or the accident did not result in the loss of use of his or her arms and legs. It is easier to prove the latter than the former because, theoretically, few, if any, deaths occur instantaneously. Even in the most catastrophic accident, it takes a couple of seconds for the

body's systems to shut down before death. Thus, applying *Moorehead* literally, even if the employee survives the accident for only a couple of seconds, the surviving spouse or other dependent would be entitled to loss of use benefits if he or she can show that during those couple of seconds, the employee had lost the use of his or her arms and legs.

To prove the accident did not cause the employee to lose the use of his or her limbs, immediately start a thorough accident investigation. This would include interviewing and taking statements from any witnesses who were with or observed the employee after the accident. Was the employee moving? If so, what body parts were moving? Even if witnesses only could testify they saw the employee slightly move his or her little finger, this testimony could be pivotal in establishing there was no loss of use. A good second step is to obtain the results of any autopsy. Generally, when a workplace accident results in death, an autopsy is ordered. Then contact the coroner who performed the autopsy to determine whether any of the autopsy findings suggest the employee had lost the use of his or her arms or legs. For instance, was there any damage to the spinal cord that would have resulted in paraplegia or quadriplegia? If not, ask the coroner for his or her assistance in preparing a brief report to be used at IC hearings.

In addition, enlist other doctors to review the autopsy results, as well as any EMS or hospital records generated as a result of the accident, to address both the issue of survival and whether the employee lost the use of his or her arms or legs before death. As to the former, despite the earlier discussion, a doctor may be able to opine that death was instantaneous. As to the latter, it may be beneficial to enlist the help of either a neurosurgeon or neurologist because the issue will likely be whether there was any damage to the spinal cord. Also, consider bringing your doctor to the hearing to testify live as to his or her review of the evidence and resulting conclusions. Live testimony is often far more powerful than just a written report. It also will counter the prospect of the claimant bringing his or her own medical expert to the hearing. With so much money at stake, it is worth paying a doctor for his or her time to attend the hearing.

Unlike Pandora, unless and until the General Assembly acts, we cannot close the box now that it has been opened. In light of *Moorehead*, an employer must anticipate the loss of use issue arising in every death claim and proactively pursue settlement, while at the same time preparing to aggressively defend the issue if attempts at settlement fail. This will give the employer the best chance of successfully defeating a claimant's attempt to obtain loss of use benefits that have the potential to devastate a company's financial bottom line.

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