R.C. 4123.56(F):
NO DIRECTION HOME

Getaway CLE
Workers' Compensation Seminar
Las Vegas, Nevada
May 20, 2022

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Statutory Text and Applicability

Effective September 15, 2020, entitlement to temporary total disability compensation and wage loss compensation is governed by R.C. 4123.56(F). The statute states:

> If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified. If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

The ostensible reason for the enactment of R.C. 4123.56(F) was to cure the chaos created by voluntary abandonment. It was a judicial creation, but courts are not supposed to legislate from the bench. There were exceptions and exceptions to exceptions. So the point was to replace the confusing quagmire of case law with a predictable standard. Unfortunately, although the motives for enacting R.C. 4123.56(F) were noble, the language selected has failed to alleviate the ailment. So, what are we to do? Is there any direction home?

Retroactive Versus Prospective Application

A threshold issue is whether R.C. 4123.56(F) applies to a claim and/or an application for temporary total or wage loss. The general rule is that workers' compensation rights are substantive rights governed by the law in effect on the date of the injury or diagnosis of the occupational disease. See, e.g., *State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St.3d 258, 2001-Ohio-34.

However, that is not always the case, and laws affecting the enforcement of those rights or rights that have not vested can apply even if enacted subsequent to the date the claim arises. See *id.*; *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137.

Another general rule is that statutes apply prospectively only, unless expressly made retroactive by the plain language of the statute. See R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 105 (1988). The reason for this maxim is that ex post facto laws, or laws that retroactively change or eliminate previously vested rights, are disfavored. See Art II, Section 28 of the Ohio Constitution; *Van Fossen*, 36 Ohio St.3d at 105. However, retroactive laws that affect only remedial or procedural rights, as opposed to substantive rights, are permissible. See S*tate ex rel. Slaughter v. Indus. Comm.*, 132 Ohio St. 537, 542 (1937). Accordingly, the proper test is to first determine whether the statute expressly states that it is to be applied retroactively; if it does not, then it can be applied prospectively only. See. R.C. 1.48; *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163. Only if the statute expressly states it should be applied retroactively should a court proceed to determine whether it affects substantive or merely procedural/remedial rights. See id. If the former, such application is unconstitutional under Art. II, Section 28 of the Ohio Constitution. If the latter, it can be applied retroactively. See *Van Fossen*, 36 Ohio St.3d at paragraphs one and two of the syllabus.

Uncodified section 3 of HB 8, the legislation that enacted R.C. 4123.56(F), says that the changes to R.C. 4123.56 "apply to claims pending or arising after the effective date of this section." Thus, because the new statute contains no language stating that it applies retroactively, it can be applied prospectively only. See R.C. 1.48. That conclusion has been reached several times by the Tenth District Court of Appeals: *State ex rel. Hamilton v. Indus. Comm.*, 10th Dist. Franklin No. 19AP-510, 2021-Ohio-1824, ¶ 27-29; *State ex rel. Ohio State Univ. v. Pratt*, 10th Dist. Franklin No. 19AP-603, 2021-Ohio-3420, ¶ 20-21; *State ex rel. Walmart v. Hixon*, 10th Dist. No. 19AP-323, 2021-Ohio-3802, ¶ 7, 49-53; *State ex rel. DeCapua Enterprises, Inc. v. Wolfe*, 10th Dist. Franklin No. 20AP-174, 2021-Ohio-3987, ¶ 63-67; *State ex rel. Quest Diagnostics, Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 20AP-246, 2022-Ohio-1093, ¶ 44-45. In each of these cases, the Tenth District adopted its magistrates' decisions which noted that nothing in R.C. 4123.56(F) says it is to be applied retroactively, and therefore if the injury and final Industrial Commission adjudication occur before September 15, 2020, R.C. 4123.56(F) does not apply. Moreover, these cases indicate that if R.C. 4123.56(F) were to be applied retroactively, such application would run afoul of Art. II, Section 28 of the Ohio Constitution, since temporary total is a substantive right governed by the law in place at the time of the injury in the claim and at the time the application for compensation is filed.

While it is clear that R.C. 4123.56(F) applies prospectively only, applying the statutory text itself is very difficult. However, before application is discussed it is first necessary to examine the three sentences that comprise the statutory text.

Statutory Analysis

In order to help understand R.C. 4123.56(F), it is best to examine each of its three sentences individually.

First Sentence

The first sentence states as follows: “[i]f an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified.” There are two clauses in this sentence and each requires analysis:

a) clause one: "unable to work" is a reference to temporary total and "suffers a wage loss" is a reference to wage loss compensation. The words "as a direct result of an impairment arising from an injury or occupational disease" refer to the well-established principle that temporary total and wage loss compensation are payable only if the loss of earnings is independently caused by the allowed conditions. See, e.g.,, *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993); *State ex rel. Ignatious v. Indus. Comm*. 99 Ohio St. 3d 285, 2003-Ohio-3627;

b) clause two: "provided the employee is otherwise qualified" is a reference to the other requirements for temporary total and wage loss derived from R.C. 4123.56(A) and (B), Ohio Adm.Code 4121-3-32, Ohio Adm.Code 4125-1-01, and applicable case law. In general, to be qualified for temporary total, a claimant cannot be working in any capacity, cannot be at MMI, cannot refuse a good faith job offer of light duty within his/her restrictions, and cannot be retired from the entire workforce (if no wages are to be earned, there is no need for wage replacement compensation). The wage loss qualifications depend on whether working or non-working wage loss is being sought and are set forth in the extremely detailed provisions of Ohio Adm.Code 4125-1-01.

Nothing in the first sentence of R.C. 4123.56(F) creates new law. It is simply a restatement of familiar standards and requirements.

Second Sentence

The second sentence states as follows: “[i]f an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section.” Again, there are references to temporary total and wage loss, but here the focus is on reasons unrelated to the allowed conditions. "Unrelated reasons" could be non-allowed or disallowed conditions, or other situations/circumstances apart from the work injury that directly result in the disability/wage loss.

Employers have always argued that something other than the allowed conditions are to blame for the claimant not working or suffering a wage loss. So, as a practical matter, the second sentence does not change the law either. The burden is still on the claimant to show that the allowed conditions independently cause the disability/wage loss. If something other than the allowed conditions are to blame, the claimant is not eligible for the compensation in question.

Third Sentence

The third sentence states that "[i]t is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section." This sentence clearly changes the law because it replaces three decades of

voluntary abandonment case law with the first two sentences of R.C. 4123.56(F). This fact is demonstrated by the fact that the Industrial Commission rescinded its voluntary abandonment policy statement (D5) following the passage of the new law.

So, we know from the first sentence of R.C. 4123.56(F) that the claimant must show a direct connection between the disability/wage loss and must be otherwise qualified to receive the compensation sought. And we know that if unrelated reasons directly cause the disability/wage loss, compensation is not payable. Lastly, voluntary abandonment case law cannot be cited to support or deny applications for temporary total/wage loss. Within this framework, the myriad factual scenarios created by the workforce must be adjudicated.

For a similar example of analysis of R.C. 4123.56(F), see the Brief of Industrial Commission of Ohio in *State ex rel. Huntington Bancshares, Inc. v. Taku*, 10th Dist. Franklin No. 21AP-54, a case which is presently pending before the Tenth District Court of Appeals.

Ambiguous Application

Although the language of R.C. 4123.56(F) seems straightforward, applying it to the facts of workers' compensation claims is anything but that. Ambiguities emerge immediately upon consideration of fact patterns common to temporary total and wage loss disputes. The initial question that arises is that of timing. Do we look at whether the claimant is not working or suffering a wage loss before the period of compensation in question, or only from the date that such compensation is sought? Consider the following hypothetical: Claimant Carl sustains a work injury to his knee but is able to continue working. Two months after the injury, his wife is diagnosed with cancer which requires him to take a leave of absence. He does not retire and plans to return to work, but temporarily stops working to deal with his wife's illness. One month into his leave of absence, he sees a physician who informs him that surgery is necessary to repair the allowed condition in his knee. Carl undergoes surgery then applies for temporar\y total from the date of surgery forward. Under R.C. 4123.56(F), is Carl entitled to compensation?

If we consider the period prior to surgery, the answer seems to be no. Prior to surgery, Carl was working notwithstanding the injury and went off work due to an unrelated reason, his wife's illness. However, if we consider the issue from the date of surgery forward, Carl is not able to work due to treatment for the allowed condition. R.C. 4123.56(F) does not tell us which period is the proper one upon which to focus. And, to complicate matters, R.C. 4123.56(F) forbids us from applying voluntary abandonment case law to make this determination.

The definition of ambiguous language is when the same words can be reasonably interpreted in different ways that lead to disparate results. See *State ex rel. Eberhart v. Indus. Comm.* 70 Ohio St.3d 649 (1994). R.C. 4123.56(F) is ambiguous, not so much because of what it says, but because of what it does not say. There does not appear to be one interpretation that is better than the other when it comes to which period is the proper one upon which to focus - both are reasonable interpretations.

When faced with an ambiguous statute, we turn to the rules of statutory construction to discern the intent of the Legislature. If the plain language of the law is clear, then the words must be applied as they are written. Words cannot not be inserted into the text, nor read out if present.

Only if a statute is ambiguous (i.e., capable of more than one reasonable interpretation), should the rules of statutory construction be applied. See, e.g., *Armstrong v. John R. Jurgenson Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237. The following are the general tenants of statutory construction:

> 1) that in enacting the law, it is presumed that the General Assembly intended to comply with the Constitutions of Ohio and the United States;
> 2) that the entire statute was intended to be effective;
> 3) that a just and reasonable result was intended when the circumstances surrounding the passage of the law are considered;
> 4) that a result feasible of execution was intended; and
> 5) that legislative history and laws upon the same or similar subjects be considered, along with administrative construction of the law.

See R.C. 1.47; R.C. 1.49.

We are also guided by the legislative mandate that R.C. 4123.56(F) be liberally construed in favor of injured workers and their dependents. See R.C. 4123.95. This mandate is not a suggestion or a tie-breaker. It is a requirement. If the Legislature required the law to be strictly enforced in favor of employers, would there be any hesitation in following that fiat?

If the foregoing principles are applied, the proper focus for adjudicating temporary total/wage loss disputes under R.C. 4123.56(F) seems to be from the time the compensation is sought. Consideration of prior periods brings into play the same issues that caused courts to create voluntary abandonment in the first place, and it makes little sense to head down that same road. Thus, the scope of the dispute is narrowed to whether the allowed conditions or unrelated reasons directly cause the disability/wage loss from the date compensation is sought, assuming the claimant is otherwise qualified to receive the compensation. Unfortunately, although this conclusion clarifies some matters, it does not answer other important questions that arise.

<u>Does Claimant Have To Be Working Prior To The Date Compensation Is Sought To Be "Otherwise Qualified"</u>

Does the second sentence of R.C. 4123.56(F) require compensation to be denied if the claimant is not working at the time compensation is sought? For all of the foregoing reasons, the answer should be a resounding no:

1) R.C. 4123.56(F) repeatedly refers to "this section". In Ohio, a statutory section is the law itself - in this case, R.C. 4123.56. Section R.C. 4123.56 covers two types of compensation: temporary total and wage loss. Therefore, in the phrase "not working or has suffered a wage loss", the words "not working" refer to temporary total and "suffered a wage loss" refer to wage loss. The statute does not mean or say that a claimant is barred from compensation if s/he is not working up until the time that compensation is sought. Words cannot be inserted into a statute that the legislature did not include. R.C. 4123.56(F) says "not working or suffered a wage loss" to cover both types of compensation in "this section" (R.C. 4123.56). It does not mean anything else;

2) the rules of grammar matter. It is axiomatic that in interpreting statutes, the paramount concern is legislative intent. To determine this intent, the words and phrases in the law are read in

context and "construed according to the rules of grammar and common usage." R.C. 1.42; *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960. A fundamental rule of grammar is that a comma is placed before the word "or" when it joins two independent clauses. However, if the clauses joined by the "or" are not independent, a comma is not used. See https://www.grammarly.com/blog/comma-before-or/.

Consider the following example:

Clause one: "If the speaker is misinformed"

Clause two: "If the speaker is drunk"

If you want to include both clauses in a sentence, you must use a comma before the word "or" because both clauses are independent:

"If the hearing officer is misinformed, or if the hearing officer is drunk".

However, if you shorten clause two so that it is no longer independent ("is drunk), you do NOT use a comma:

"If the speaker is misinformed or drunk".

Applying basic grammar rules to the second sentence of .56(F), it is apparent that the phrase "not working or has suffered a wage loss" does not contain two independent clauses. If the legislature had intended "not working" to be an independent clause, it would have placed a comma in front of "or", but it did not do so. Thus, is it illogical and improper to construe to words "not working" as an independent clause such that compensation is automatically barred if the claimant is not working at the time compensation is sought;

3) in pari materia construction. Laws regarding a common issue must be read together so they apply harmoniously. See *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581 (1995). R.C. 4123.56(D) states that if temporary total is paid at the same time as social security retirement, then the maximum rate is 2/3 of the statewide average weekly wage. If claimants were barred from receiving compensation because they were not working at the time compensation is sought, the legislature would not have contemplated temporary total being paid to someone who is receiving social security retirement benefits. That being the case, it is improper and illogical to construe R.C. 4123.56(F) to automatically bar compensation to a claimant who is not working at the time compensation is sought. Otherwise, R.C. 4123.56(D) and R.C. 4123.56(F) would not apply in pari materia; and

4) it was never the law, even in the voluntary abandonment case law, that a claimant had to be working up until the time that compensation was sought. See, e.g., *State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm.*, 139 Ohio St.3d 290, 2014-Ohio-1894.

Significantly, even though it is not necessary for a claimant to be working up to the time that compensation is sought, a claimant must still be "otherwise qualified" to receive temporary total or wage loss. And, if unrelated reasons result in the claimant's disability/wage loss as of the

date compensation is sought, then compensation must be denied. These determinations are for the Industrial Commission to make on a claim-by-claim basis as dictated by the facts, evidence, and testimony, within the hearing officer's discretion.

What If The Allowed Conditions And Unrelated Reasons Are Both Causes Of Claimant's Disability/Wage Loss?

Returning to the hypothetical involving Carl, it can be argued that both his allowed knee condition and his unrelated leave of absence are reasons he is not working as of the date he undergoes surgery. This scenario brings into play the concept of dual causation. The theory of dual causation applies to workers' compensation claims. See *Murphy v. Carrollton*, 61 Ohio St.3d 585 (1991). Dual causation means that there can be two independent causes for one result. As applied to the hypothetical, one reason Carl is off work on the date of surgery is his leave of absence due to his wife's illness. But undergoing surgery for the allowed conditions is also a cause for his disability from the date of surgery forward. Thus, another ambiguity arises.

For reasons that are unclear, Industrial Commission Policy S9 states that dual causation applies to the allowance of conditions, but not to disability determinations. It is unclear why this distinction exists. There is no law that supports such a distinction and decisions such as *Waddle* and *Ignatious* constitute Supreme Court authority that non or disallowed conditions are irrelevant if the allowed conditions are an independent cause of disability. Tellingly, S9 cites no authority for the proposition that dial causation does not apply to disability determinations.

An Industrial Commission policy is unenforceable if it contradicts controlling law. Moreover, because R.C. 4123.56(F) is ambiguous if both the allowed conditions and unrelated reasons directly cause the disability/wage loss, the rules of statutory construction and R.C. 4123.95 dictate that compensation should be granted in such a circumstance, assuming the claimant is "otherwise qualified".

Conclusion

The language of R.C. 4123.56(F), although facially easy to comprehend, becomes significantly ambiguous when applied to the facts of claims. The first two sentences of the statute set forth well-established propositions of law. No one can debate that, if otherwise qualified, a claimant is entitled to compensation if his/her disability/wage loss is directly caused by the allowed conditions. Similarly, it is beyond doubt that if unrelated reasons are the direct cause of a claimant's disability/wage loss, compensation is not payable. However, there are serious questions that arise when determining the timing of the inquiry. Should the focus be on the period prior to the date compensation is sought, or from the date it is sought only? And what is the proper way to adjudicate scenarios in which both the allowed conditions and unrelated reasons are causes of the claimant's disability/wage loss?

Although the foregoing analysis and reliance on the principles of statutory construction and the mandate of liberal construction codified in R.C. 4123.95 are instructive, the reality is that R.C.

4123.56(F) is being interpreted inconsistently. Until the Industrial Commission and/or the courts provide guidance, there is likely no direction home when it comes to the application of R.C. 4123.56(F).

Appendix

Brief of Industrial Commission of Ohio, *State ex rel. Huntington Bancshares, Inc. v. Taku*, 10th Dist. Franklin No. 21AP-54