

## OPINION NO. 75-042

**Syllabus:**

The right to concurrent compensation, pursuant to R.C. 4123.58 as amended November 16, 1973, is a substantive right not available for retroactive application in light of Article II, Section 28 of the Ohio Constitution.

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**To:** Kenneth Krouse, Administrator, Bureau of Workmen's Compensation,  
Columbus, Ohio

**By:** William J. Brown, Attorney General, June 19, 1975

The request of your predecessor for my opinion reads as follows:

"As amended effective November 16, 1973  
the second paragraph of R.C. Section 4123.58  
is as follows:

'The loss or loss of use of  
both hands or both arms, or both  
feet or both legs, or both eyes,  
or of any two thereof, constitutes  
total and permanent disability, to  
be compensated according to this

section. Compensation payable under this section for permanent total disability shall be in addition to benefits payable under Division (C) of Section 4123.57 of the Revised Code. (Underscoring denotes the amendments made on November 16, 1973 to the language of this paragraph)

"I would appreciate your opinion as to whether the amendment of November 16, 1973 to the last paragraph of R.C. Section 4123.58 is substantive or procedural. Would the amendment apply to those injuries that occurred prior to November 16, 1973 as well as to those that have occurred since that date? For example, would a claimant who was injured and sustained an amputation of his hands prior to November 16, 1973 and who is being paid compensation for permanent total disability, but who has never received compensation for permanent partial disability for the bilateral amputation, now be entitled to an award under division (C) of Section 4123.57 to be paid concurrently with his permanent total compensation?"

Prior to the amendment emphasized in your request, a claimant sustaining amputation of one hand, for example, would receive permanent partial disability payments pursuant to R.C. 4123.57, whereas a claimant sustaining amputation of both hands would receive permanent total disability payments pursuant to R.C. 4123.58. However, the General Assembly amended R.C. 4123.58 on November 16, 1973 so that a claimant sustaining amputation of both hands could receive disability payments under R.C. 4123.57 and 4123.58.

The issue here is whether the amendment to R.C. 4123.58 applies retroactively so that a claimant whose injury occurred prior to the effective date of the amendment may nevertheless now be paid both permanent total (R.C. 4123.58) and permanent partial (R.C. 4123.57) disability benefits.

Article II, Section 28 of the Ohio Constitution prevents the passage of retroactive laws, but it has been construed not applicable to procedural laws. See e.g., State, ex rel. Holdridge v. Industrial Commission, 11 Ohio St.2d 175 (1967). Accordingly, the issue narrows to whether the amendment to R.C. 4123.58 is a substantive or a procedural enactment.

The test is one of determining whether a statute affects a substantive right or, instead, provides for rules of practice, courses of procedure or methods of review. If the latter, the constitutional provision does not apply and one must then determine whether retroactive application of a statute is otherwise precluded by R.C. 1.58 which deals with the effect of statutory reenactments, amendments and repeals. See, Gregory v. Flowers, 32 Ohio St.2d 48 (1972).

However, in this situation there is no need to turn to R.C. 1.58, because I conclude that the amendment to R.C. 4123.58 directly affects substantive rights and may not be applied retroactively.

The fact situation you hypothetically posed in your request is the same as the fact situation addressed in State, ex rel. Benton v. Columbus & Southern Ohio Electric Co., 14 Ohio St.2d 130 (1968). There the Court addressed R.C. 4123.58 prior to the amendment in question here, and held that it provided the maximum disability allowable. In rejecting the contention that benefits should be paid under both R.C. 4123.58 and R.C. 4123.57, the Court pointed out that the claimant had never come within the purview of R.C. 4123.57. That is to say that the claimant had no right to benefits under R.C. 4123.57 and 4123.58.

It is reasonable to conclude that the recent amendment to R.C. 4123.58 was enacted as a result of the Benton case, supra, where the Court had emphasized that the unjust result reached was "compelled by the imperceptiveness of the controlling legislation." The amendment is, then, legislation designed to establish a claimant's right to the higher maximum disability benefits not previously available and, as such, it creates a new substantive right. As stated by the Franklin County Court of Appeals in State, ex rel. Frank v. Keller, 3 Ohio App.2d 478 (1965),

"[T]he maximum amount of compensation to which a claimant is entitled is a substantive right and is governed by the statutory law in effect at the date of the injury." Id. at 430.  
(Emphasis added.)

See also, State, ex rel. Schmorsal v. Industrial Commission, 142 Ohio St. 477 (1944); Industrial Commission v. Kamrath, 118 Ohio St. 1 (1928); 1955 Op. Att'y Gen. No. 6120.

Accordingly it is my opinion, and you are so advised, that the right to concurrent compensation, pursuant to R.C. 4123.58 as amended November 16, 1973, is a substantive right not available for retroactive application in light of Article II, Section 28 of the Ohio Constitution.