

OPINION NO. 79-087**Syllabus:**

The maximum weekly compensation allowed under R.C. 4123.58 in cases of permanent total disability is as follows:

(1) an amount equal to 66 2/3% of the statewide average weekly wage if the combination of the employee's weekly workers' compensation amount and social security disability benefits received is equal to or greater than the statewide average weekly wage; and

(2) an amount equal to the statewide average weekly wage if no social security disability benefits are received, or if the combination of the employee's weekly workers' compensation amount and social security disability benefits received is less than the statewide average weekly wage.

To: William W. Johnston, Chairman, Industrial Commission of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, November 27, 1979

I have before me your predecessor's request for my opinion in which the following question is asked:

What is the maximum amount which may be paid to a permanent total disability case as a result of the amendment of R.C. 4123.58 by Sub. H.B. No. 714—the statewide average weekly wage or two-thirds of the statewide average weekly wage?

The resolution of your question necessitates an examination of R.C. 4123.58, which sets out the measure of workers' compensation benefits for an employee who has suffered a permanent and total work-related disability. Prior to its

amendment, R.C. 4123.58 provided that a disabled employee was entitled to 66 2/3% of his or her average weekly wage, but not more than an amount equal to 66 2/3% of the statewide average weekly wage as defined in R.C. 4123.62(C). This provision is now division (A) of R.C. 4123.58, and is subject to the exception found in R.C. 4123.58(B). The relevant portions of R.C. 4123.58 now provide:

(A) In cases of permanent total disability, the employee shall receive an award to continue until his death in the amount of sixty-six and two-thirds per cent of his average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event he shall receive compensation in an amount equal to his average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to The Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division. (Emphasis added.)

R.C. 4123.58(A) clearly provides that, in cases of permanent total disability, the maximum amount of weekly compensation is 66 2/3% of the statewide average weekly wage, except as otherwise provided in R.C. 4123.58(B). R.C. 4123.58(B) provides that the maximum amount of weekly compensation is the statewide average weekly wage if the weekly workers' compensation amount, when combined with disability benefits received pursuant to the Social Security Act, is less than the statewide average weekly wage. Clearly, "weekly workers' compensation amount" as used in R.C. 4123.58(B) refers to the award determined under R.C. 4123.58(A), before application of the exception set forth in R.C. 4123.58(B).

The only question raised by these provisions is whether R.C. 4123.58(B) is applicable when no social security disability benefits are received. It is my opinion that this question is answered in the affirmative by the final sentence of R.C. 4123.58(B), which states that the workers' compensation award is to be recomputed under that division if social security disability benefits terminate. There is no apparent reason for applying R.C. 4123.58(B) when social security disability benefits terminate, for whatever reason, and not applying it in a situation in which no social security disability benefits have ever been granted. This equitable result is consistent with R.C. 4123.95, which provides that R.C. 4123.01 to 4123.94 "shall be liberally construed in favor of employees and the dependents of deceased employees." Thus, I conclude that, if an employee is not receiving social security disability benefits, the number zero should be added to the weekly workers' compensation amount and, under R.C. 4123.58(B), since the total will be less than the statewide average weekly wage (it will, pursuant to R.C. 4123.58(A), be no greater than 66 2/3% of the statewide average weekly wage), the maximum amount of weekly compensation will be the statewide average weekly wage.

In light of the foregoing, it is my opinion, and you are hereby advised, that the maximum weekly compensation allowed under R.C. 4123.58 in cases of permanent total disability is as follows:

- (1) an amount equal to 66 2/3% of the statewide average weekly

wage if the combination of the employee's weekly workers' compensation amount and social security disability benefits received is equal to or greater than the statewide average weekly wage; and

(2) an amount equal to the statewide average weekly wage if no social security disability benefits are received, or if the combination of the employee's weekly workers' compensation amount and social security disability benefits received is less than the statewide average weekly wage.