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1. INDUSTRIAL COMMISSION, ONLY—VESTED WITH JURISDICTION TO HEAR AND DETERMINE APPLICATION FOR PERCENTAGE OF PERMANENT PARTIAL AWARD—SECTION 4123.57 (B) RC.
2. NO AUTHORITY FOR INDUSTRIAL COMMISSION TO REFER APPLICATION TO REGIONAL BOARD OF REVIEW FOR HEARING AND DETERMINATION.
3. PAYMENT OF PERMANENT PARTIAL AWARDS—SECTION 4123.57 (B) RC—CLAIMS WHERE INJURY OCCURRED PRIOR TO OCTOBER 5, 1955—NOT TO BE MADE UNDER SECTION 4123.57 RC, AMENDED, EFFECTIVE OCTOBER 5, 1955.

SYLLABUS:

1. Only the Industrial Commission is vested with the jurisdiction to hear and determine an application for percentage of permanent partial award under division (B) of Section 4123.57, Revised Code.

2. There is no authority for the Industrial Commission to refer such an application to a regional board of review for hearing and determination.

3. Payment of permanent partial awards under division (B) of Section 4123.57, Revised Code, in claims wherein the injury occurred prior to October 5, 1955, are not to be made under the provisions of Section 4123.57, Revised Code, as amended effective October 5, 1955.

Columbus, Ohio, December 29, 1955

Hon. Joseph J. Scanlon, Administrator
Bureau of Workmen's Compensation, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion reading as follows:

> "Your attention is directed to the provisions of Amended Substitute House Bill No. 700, passed by the recent General Assembly on June 24, 1955, and effective October 5, 1955. This inquiry is directed more specifically to the type of claim known as a "percentage permanent partial' under Section 4123.57 R. C.
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> "Answers to the following queries are desired as promptly as possible, in the interest of expediting the business of the Bureau of Workmen's Compensation:
>
> "(1) Is jurisdiction to hear and determine this type of claim vested in
>
> (A) The Administrator; and/or
> (B) The Industrial Commission; and/or
> (C) The Regional Boards of Review?
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> "We should like to be advised further as to whether or not there is overlapping jurisdiction with respect to hearing and determination of this type of claim in any or all of these branches of the Bureau.
>
> "(2) May this type of claim be referred by the Administrator and/or the Industrial Commission to a Regional Board of Review to hear and determine?
>
> "(3) Is payment of an award for permanent partial disability in this type of claim based on an injury occurring prior to October 5, 1955 to be made under the provisions of Section 4123.57 R. C., as amended effective October 5, 1955?"

A consideration of the first portion of your inquiry requires an examination of Section 4123.57, Revised Code, which provides in part as follows:

> "(A) In case of injury resulting in partial disability, the employee shall receive sixty-six and two-thirds per cent of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of forty dollars and twenty-five cents per week, nor a greater sum in the aggregate than seven

thousand five hundred dollars. If any claimant who is entitled to receive compensation under division (A) of this section has received such compensation for any period after forty weeks after the date of the termination of the latest period of temporary total disability following the injury, or after forty weeks after the date of the injury in the absence of temporary total disability, and, in other cases, if application is made therefor after any such period of forty weeks, *the industrial commission shall determine the percentage of permanent physical disability resulting from the injury and shall notify the employee of such determination.* The employee shall elect whether compensation on account of partial disability shall thereafter be awarded under division (A) or under division (B) of this section. Such election shall be made in accordance with such general regulations as the commission prescribes and such election, once made, shall not be changed.

"(B) The determination of the employee's permanent physical disability shall be based upon that pathological condition of the employee resulting from the injury and causing permanent physical impairment evidenced by medical or clinical findings reasonably demonstrable but if such fiindings are based solely upon the testimony of the claimant without corroboration by objective medical findings the commission shall cause a medical advisory board to determine whether the employee is physically disabled and the determination of the medical advisory board including its determination if any of the percentage of permanent physical disability of the employee shall be binding upon the commission. The award made under this division (B) shall be that part of eight thousand and fifty dollars which is the percentage of the employee's permanent physical disability resulting from the injury determined as aforesaid. Such award shall be paid prospectively in weekly installments of sixty-six and two-thirds per cent of the average weekly wage not to exceed a maximum of forty dollars and twenty-five cents per week, the first payment being for the week following allowance of the award under this division (B) pursuant to the employee's election of such award, provided the industrial commission, under special circumstances when the same is deemed advisable in the best interest of the claimant, may commute such payments. In the event compensation is commuted for the purpose of paying fees for services rendered in the prosecution of a claim the commission shall, after hearing, fix the amount of such fees. Subject to section 4123.52 of the Revised Code, the commission shall consider any application for modification of an award for permanent partial disability and the proof submitted in support of such application. Except upon application for reconsideration, review, or modification which is filed within eight days after the date on which notice of such award is mailed to the employee and the employer, in no instance

shall the commission modify its former order unless it finds that the physical condition of the claimant resulting from the injury has so progressed as to have increased the percentage of physical disability. When an award under this division of this section has been made prior to the death of an employee, all unpaid installments accrued or to accrue under the provisions of the award are payable to the widow, or if there is no widow surviving, to the dependent children of such employee." (Emphasis added.)

It is to be noted that division (A) specifically provides:

"* * * the industrial commission shall determine the percentage of permanent physical disability resulting from the injury and shall notify the employee of such determination. * * *"

It is also to be noted that the last sentence of division (A) provides that the employee's election to take under division (A) or division (B) "* * * shall be made in accordance with such general regulations as the commission prescribes. * * *"

Your attention is invited to the following language found in division (B):

"The determination of the employee's permanent physical disability shall be based upon that pathological condition of the employee resulting from the injury and causing permanent physical impairment evidenced by medical or clinical findings reasonably demonstrable but if such findings are based solely upon the testimony of the claimant without corroboration by objective medical findings the commission shall cause a medical advisory board to determine whether the employee is physically disabled and the determination of the medical advisory board including its determination if any of the percentage of permanent physical disability of the employee shall be binding upon the commission. * * *"

This division also provides that the commission may commute a prospective award. These last two provisions were first enacted as a part of Amended Substitute House Bill No. 700, effective October 5, 1955.

Division (B) also provides, as formerly, that the commission shall consider any application for modification of an award for permanent partial disability.

Section 4123.57, Revised Code, also provides:

"The commission shall refer to the state rehabilitation center or to the bureau all claimants respecting whom the commission

believes that an inquiry into the possibilities of vocational rehabilitation should be made.

> "In all cases arising under division (C) of this section, if the state rehabilitation center or the bureau determines that an artificial appliance will be serviceable in the vocational rehabilitation of the injured employee, the commission may by unanimous vote pay the cost of such artificial appliance out of the surplus created by division (B) of section 4123.34 of the Revised Code."

The plain import of the statute is that awards under Section 4123.57, Revised Code, are within the jurisdiction of the industrial commission and this is gathered from those provisions as a part of Amended Substitute House Bill No. 700 as well as those provisions which existed prior to the amendment.

An examination of the statutes pertaining to the authority and duties of the administrator reveals that no provisions are made therein granting to him the jurisdiction to hear and determine applications for such awards. Section 4121.121, Revised Code, enunciates in some detail the various duties for which the administrator is responsible but prefaces this enunciation with the general statement that "The administrator of the bureau of workmen's compensation shall be responsible for the discharge of all *administrative* duties imposed upon the industrial commission in chapter 4123, of the Revised Code * * *." (Emphasis added.) The imposition of administrative obligations does not encompass the obligation to hear and determine applications for determination of percentage of permanent partial disability benefits which, by the terms of Section 4123.57, Revised Code, are specifically assigned to the industrial commission.

In 2 Corpus Juris Secundum, 56, "administrative" is defined as follows:

> "* * * Commonly the word has been defined as ministerial; pertaining to administration, particularly, having the character of executive or ministerial action; and, when particularly applied to official duties connected with government, executive, a ministerial duty; one in which nothing is left to discretion.
>
> * * * Usually the word is said to be synonymous with 'executive' and 'ministerial,' and has been distinguished from 'executive,' 'judicial' and 'legislative.'"

The industrial commission has been held to be a quasi-judicial body. State, ex rel. Kilgore v. Industrial Commission, 123 Ohio St., 164 (172). The determination of an application for percentage of permanent partial

disability benefits involves more than an administrative or ministerial act. It is part of the quasi-judicial function of the commission because it involves an evaluation of medical findings and an appraisal of disabilities in relation to a recognized injury. In no portion of Section 4121.121, Revised Code, is there specific provision for the acccomplishment of this determination by the administrator and it is manifest that it cannot be termed an administrative duty within the general meaning of that term.

It is also to be noted that division (B) of Section 4123.57, Revised Code, requires that a medical advisory board be constituted in a claim where the claimant's pathological condition is without the corroboration of objective medical findings. Section 4123.151, Revised Code, provides for medical advisory boards and that section does not limit the use of such boards to determinations under division (B) of Section 4123.57, Revised Code. For our present consideration, however, the important provision of Section 4123.151, Revised Code, is that medical advisory boards can only be constituted when a request for such board is made by a regional board of review or the commission. It is thus apparent that the administrator is without authority to summon such a board and since such a board is essential to the determination of certain claims under division (B) of Section 4123.57, Revised Code, it follows that such lack of authority lends support to the conclusion that the administrator is without authority to hear claims under division (B) of Section 4123.57, Revised Code.

The remaining provisions dealing with powers and duties of the administrator are found in Sections 4123.512 and 4123.515, Revised Code. Under these statutes the administrator is charged with the duty of determining the compensability of any claim as it is filed with the bureau of workmen's compensation. No provision is specifically made therein for the consideration of applications for percentage of permanent partial benefits. These sections outline the mode of handling original applications for compensation and are clearly distinguishable from requests for partial disability compensation provided for in Section 4123.57, Revised Code.

With regard to the alternative portion of your first question which is concerned with the jurisdiction of the regional boards of review to hear and determine this type of claim, reference is made to Section 4123.14, Revised Code. The statute creates five regional boards of review and provides in part as follows:

> "Two members of a board shall constitute a quorum for the transaction of business. Each member shall devote full time to his duties as a member of the board. The powers and authorities which are vested in the industrial commission in chapter 4123 of the Revised Code may be exercised by a regional board of review or a member thereof to the extent necessary for the discharge of the duties of such board or its members.

It is apparent that the powers and authorities thus granted are limited to those "necessary for the discharge of the duties" placed upon such boards. The positive duties imposed upon these boards are set forth in Sections 4123.516 to 4123.518, Revised Code. Section 4123.516, Revised Code, specifically provides that these boards shall hear appeals from decisions of the administrator in which either the claimant or the employer is dissatisfied with such decision. Section 4123.517, Revised Code, provides for pre-hearing and disposition by the boards of such appeals. This appears to be the extent of the positive duties imposed upon such boards.

The above enumerated statutes, in describing the claims jurisdiction of the regional boards of review, extend their authority only to a consideration of appeals of disputed claims. By the terms of Section 4123.516, Revised Code, these appeals consist only of requests for review of the administrator's decisions made either by the claimant or the dissatisfied employer. No provision is made for consideration by the boards of claims originating from any other source.

An examination of the applications for the determination of percentage of permanent partial benefits, provided for in Section 4123.57, Revised Code, reveals that they differ materially from the disputed claims assigned to the jurisdiction of the regional boards of review. Such applications are made only after the original injury claim has been recognized and either medical benefits or temporary total compensation paid thereon. The application essentially requests a determination of the extent of disability by arriving at a percentage of permanent disability resulting from the injury. Appeals before the boards, on the other hand, are concerned with the initial determination of the compensability of a claimed injury or certain disabilities.

As previously pointed out, the administrator has no jurisdiction to consider the type of claims of which inquiry is made. Since the jurisdiction of the regional boards of review extends only to appeals from decisions

of the administrator it would follow that the boards are also precluded from considering these claims.

It is therefore my opinion that only the industrial commission is vested with the jurisdiction to hear and determine an application for percentage of permanent partial award under division (B) of Section 4123.57, Revised Code, and that no such authority is conferred upon the administrator of the bureau of workmen's compensation or the regional boards of review. In the light of this conclusion, it is manifest that there is no over-lapping jurisdiction with respect to hearing and determining this type of claim in any or all of the above branches of the bureau.

Your second inquiry is concerned with whether this type of claim may be referred by the administrator or the industrial commission to a regional board of review for hearing and determination.

At the outset, it is clear that the administrator has no power to refer an application for the determination of percentage of permanent partial disability to a board of review for the reason that the administrator is not clothed with the authority to hear and determine such claims, nor is he given any directory authority with regard to such claims.

As has been previously indicated, the function of a board of review is to determine a disputed claim. Section 4123.14, Revised Code, also provides in part as follows:

> "Two members of a board shall constitute a quorum for the transaction of business. Each member shall devote full time to his duties as a member of the board. The powers and authorities which are vested in the industrial commission in chapter 4123 of the Revised Code may be exercised by a regional board of review or a member thereof to the extent necessary for the discharge of the duties of such board or its members."

It therefore appears that the powers and authorities of the commission may be exercised only in the discharge of the duties of the board. The board is not under a statutory duty to hear applications for determination of percentage of permanent partial disability. The statutory duties of the board relate only to the hearing of appeals from the determinations of the administrator as provided in Sections 4123.515 to 4123.518, inclusive, of the Revised Code.

Under former Section 4123.14, Revised Code, repealed by Amended Substitute House Bill No. 700, effective October 5, 1955, which provided

for four boards of claims there was specific statutory provision for referring claims for compensation or benefits to the board of claims by the commission. Under the statutes now existing there is no such specific authority vested in the commission to make referrals of applications to determine the percentage of permanent partial disability. Furthermore, there is no implication of general authority within the commission to make such a referral to a board of review. I am impelled to the conclusion that the boards are restricted to hearing appeals on disputed claims from the administrator's determination, and it is, therefore, my opinion that no statutory authority exists for the industrial commission to refer an application for partial disability compensation to a regional board of review for hearing and determination.

Your third and last question makes inquiry with regard to the manner of payment of an award for permanent partial disability in a claim based on an injury occurring prior to October 5, 1955.

Inasmuch as only division (B) of Section 4123.57, Revised Code, as amended effective October 5, 1955, includes any provision with regard to prospective payments, the consideration of this inquiry will be limited to that section of the statute which deals with awards based on a percentage of an employee's permanent disability. A restriction in this manner would seem to be indicated by reason of that language in this section which requires that "such awards shall be paid prospectively * * *." The awards to which reference is obviously made are those based on the percentage of permanent physical disability.

That part of division (B) of Section 4123.57, Revised Code, which relates to the prospective payment of an award is an amendment to Section 4123.57, Revised Code, and is included in Amended Substitute House Bill No. 700, effective October 5, 1955.

The filing of an application for compensation with the industrial commission constitutes a proceeding within the terms of Section 1.20, Revised Code, Section 26, General Code. Industrial Commission v. Vail, 110 Ohio St., 304; State, ex rel. Slaughter v. Industrial Commission, 132 Ohio St., 537; State, ex rel. Longano v. Industrial Commission, 135 Ohio St., 165; State, ex rel. Thompson v. Industrial Commission, 138 Ohio St., 439.

Section 1.20, Revised Code, provides as follows:

> "When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or pro-

> ceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The quoted statute aids in the construction of Section 28, Article II, of the Constitution of Ohio, which prohibits the passage of retroactive laws by the General Assembly.

It has been held that the constitutional inhibition against the passage of retroactive laws relates to matters of substance and not to matters of remedy. In the case of State, ex rel. Slaughter v. Industrial Commission, 132 Ohio St., 537, the Court said, in the third paragraph of the syllabus:

> "Section 28, Article II, of the Ohio Constitution, prohibiting the passage of retroactive laws, has application to laws disturbing accrued substantive rights, and has no reference to laws of a remedial nature providing rules of practice, courses of procedure or methods of review."

It is therefore apparent that if prospective payment of awards under division (B) of Section 4123.57, Revised Code, is a matter of substance, prospective payment should not be made as to claims wherein the injury was sustained prior to October 5, 1955. The second and third paragraphs of the syllabus in the case of Industrial Commission v. Kamrath, 118 Ohio St., 1, are as follows:

> "The provisions of the General Code relating to compensation of injured employees or the dependents of killed employees in force at the time the cause of action accrues are the measure of the right of such employees and dependents to participate in the state insurance fund.
>
> "The cause of action of an injured employee accrues at the time he receives an injury in the course of his employment."

If prospective payment of awards under division (B) of Section 4123.57, Revised Code, is a matter of remedy, Section 1.20, Revised Code, has a further application. Attention is invited to the provision therein that an amendment which relates to the remedy does not affect pending actions unless so expressly provided.

Division (B) of Section 4123.57, Revised Code, merely states in part as follows:

> "* * * The award made under this division (B) shall be that part of eight thousand and fifty dollars which is the percentage of the employee's permanent physical disability resulting from the injury determined as aforesaid. Such award shall be paid prospectively in weekly installments of sixty-six and two-thirds per cent of the average weekly wage not to exceed a maximum of forty dollars and twenty-five cents per week, the first payment being for the week following allowance of the award under this division (B) pursuant to the employee's election of such award, provided the industrial commission, under special circumstances when the same is deemed advisable in the best interest of the claimant, may commute such payments. * * *"

The above quoted language clearly establishes that payments made pursuant to this statute, growing out of injuries occurring subquently to the enactment, shall be paid prospectively. However, the statute fails to make express provision with regard to its application to pending proceedings or causes of action which arose prior to the amendment. A discussion and construction of the word "expressly" as it is used in Section 1.20, Revised Code, appears in 37 Ohio Jurisprudence, 433, Section 183 (Statutes,) and reads as follows:

> "The General Saving Law is not applicable where the amending or repealing law clearly manifests a different intention—that is, where there is express provision in the repealing or amending law. However, where there are, in the opinion of the legislature, sufficient reasons for a departure from the policy of the General Saving Law, it is declared that the departure shall be expressed in the amendatory or repealing statute. The word "expressly," as used in the statute, carries its usual and customary meaning—to wit, clear, definite, plain, and direct If the intention of the legislature is to give to such repealing or amending act a retroactive effect, such intention must not be left to inference or construction. * * *"

After construing the language in Section 4123.57, Revised Code, in the light of Section 1.20, Revised Code, it is concluded that the provision pertaining to prospective payment of awards does not apply to the payment of awards based on injuries which occurred prior to the effective date of the amendment.

Therefore, in specific answer to your inquiry, it is my opinion that:

1. Only the Industrial Commission is vested with the jurisdiction to hear and determine an application for percentage of permanent partial award under division (B) of Section 4123.57, Revised Code.

2. There is no authority for the Industrial Commission to refer such an application to a regional board of review for hearing and determination.

3. Payment of permanent partial awards under division (B) of Section 4123.57, Revised Code, in claims wherein the injury occurred prior to October 5, 1955, are not to be made under the provisions of Section 4123.57, Revised Code, as amended effective October 5, 1955.

Respectfully,
C. WILLIAM O'NEILL
Attorney General