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INDUSTRIAL COMMISSION—AWARD OF PERMANENT PARTIAL DISABILITY—PAYMENTS MAY NOT COMMENCE UNTIL AFTER EXPIRATION OF FIFTY-TWO WEEKS FOLLOWING LAST PAYMENT OF TEMPORARY TOTAL COMPENSATION.

SYLLABUS:

Where an award of permanent partial disability has been made by the Industrial Commission, payments thereunder may not lawfully commence until after the expiration of fifty-two weeks following the last payment of temporary total compensation.

Columbus, Ohio, July 31, 1946

The Industrial Commission of Ohio
Columbus, Ohio

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 1465-80, Ohio General Code, as amended, effective September 4, 1941, provides in part as follows:

‘Sec. 1465-80. Partial disability compensation shall be paid 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 twenty-one dollars per week, nor a greater sum in the aggregate than four thousand dollars.

Not earlier than forty weeks nor later than fifty-two weeks after the date of the termination of the first period of temporary total disability following the injury or not earlier than forty weeks nor later than fifty-two weeks after the date of the injury in the absence of temporary total disability, the employee may file an application with the Industrial Commission for the determination of the percentage of his permanent partial disability resulting from the injury. After notice of such determination, the employee shall elect whether compensation on account of partial disability after the ex-

piration of such period of fifty-two weeks, shall be awarded under the provisions of this paragraph (a) or under the provisions of paragraph (b) hereof. Such election shall be made in accordance with such general regulations as the Industrial Commission shall prescribe and such election, once made, shall not be changed without the consent of the employer and the Industrial Commission. If such election is not made within thirty days after the receipt of notice of the determination of the percentage of disability or if such application for determination of the percentage of disability is not filed with the Industrial Commission before the expiration of such period of fifty-two weeks, the employee shall be deemed to have elected that compensation on account of partial disability after the expiration of such period of fifty-two weeks shall be awarded under the provisions of paragraph (b) hereof.

(b) In all cases included in the schedule in paragraph (c) hereof, and in all cases in which the employee has elected or is deemed to have elected that compensation on account of partial disability shall be awarded under the provisions of paragraph (b) hereof, the injury shall be deemed to have resulted in permanent partial disability. In all cases of permanent partial disability, except such as are subject to the provisions of paragraph (c) hereof, the Industrial Commission shall determine the percentage of disability of the employee, after taking into consideration the extent of the physical disability, the impairment of earning capacity and the vocational handicap of the employee, and the employee shall receive sixty-six and two-thirds per cent. of his average weekly wage, not to exceed a maximum of twenty-one dollars per week, for the number of weeks which equals such percentage of two hundred fifty weeks. Provided, that if the percentage of disability of the employee shall equal or exceed ninety per cent., compensation for permanent partial disability shall be paid for two hundred fifty weeks, but in no case shall an award of compensation for permanent partial disability be made where the percentage of disability is ten per cent. or less. * * *

(d) Compensation for partial disability under paragraphs (a), (b) and (c) hereof shall be in addition to the compensation paid the employee for the period or periods of temporary total disability resulting from the injury but the amount of compensation paid for partial disability under paragraph (a) hereof shall not

be in addition to the compensation paid for permanent partial disability under paragraph (b) or paragraph (c) hereof and the amount of compensation paid for partial disability under paragraph (a) hereof shall be deducted from the amount of compensation payable for permanent partial disability under paragraph (b) or paragraph (c) hereof but only one deduction shall be made if payments are made under both paragraph (b) and paragraph (c) for permanent partial disability involved in the same claim. The aggregate amount of compensation paid under paragraphs (a), (b) and (c) hereof shall not exceed the amount of six thousand dollars and in no event shall an employee who has elected to continue to receive compensation for impairment of earning capacity for more than fifty-two weeks as provided in paragraph (a) hereof be entitled to receive more than four thousand dollars under any one or more provisions of this section.'

Under the provisions of the foregoing section it has been the practice and policy of the Industrial Commission in cases where an award of permanent partial disability has been made, to commence the actual payment of such award at the expiration of fifty-two weeks following the last payment of temporary total compensation.

This policy has been questioned and litigation has been threatened to compel the Industrial Commission to begin such payments of an award of permanent partial compensation immediately upon the termination of the period of temporary total disability.

The following hypothetical case may serve to illustrate the problem. A claimant was injured on March 23, 1944, and received temporary total compensation until May 9, 1944. On May 23, 1945, he filed an application for determination of permanent partial disability under the foregoing section and the Commission found that his disability was 40% and made an award of permanent partial compensation on that basis on June 26, 1945. The actual payment of the award was commenced as of May 9, 1945. It is apparent that the claimant received no compensation over the interval between the termination of his temporary total compensation and the beginning of the payment of the permanent partial award. Claimant worked from May 10, 1944, to May, 1945, when he quit work due to his injury.

Your opinion is respectfully requested as to the propriety of this policy of the Commission in making payments of awards of this type under this section."

It is noted that the provisions of Section 1465-80, General Code, as set out in your communication are not those which are in effect today, such section having undergone further amendments since the period during which said provisions were effective. It is assumed, therefore, that the cases which give rise to your inquiry are to be governed by the law as quoted by you.

The primary rule to be applied in interpreting a statute is to ascertain and give effect to the intention of the Legislature, and such intention must be ascertained in the first instance from the language of the statute itself.

While the statute in question does not, in express terms, provide that payment on an award of permanent partial disability shall commence after the expiration of fifty-two weeks following the last payment of temporary total compensation, certain language therein would clearly seem to indicate that such was the legislative intent.

It will be noted that Section 1465-80, General Code, paragraph (a), in terms provides:

“Not earlier than forty weeks nor later than fifty-two weeks after the date of the termination of the first period of temporary total disability following the injury or not earlier than forty weeks nor later than fifty-two weeks after the date of the injury in the absence of temporary total disability, the employee may file an application with the Industrial Commission for the determination of the percentage of his permanent partial disability resulting from the injury. * * *”

There can scarcely be any misunderstanding about the meaning of the above language. In clear, unmistakable terms it is provided thereby that an application for the determination of permanent partial disability may not be filed earlier than forty weeks nor later than fifty-two weeks after the date of the termination of the first period of temporary total disability. This alone would seem to connote that payment for permanent partial disability should not commence until some time after the last day for filing an application for a determination thereof, to-wit, fifty-two weeks after the total temporary disability ends.

Such conclusion, it seems to me, is fortified not only by the language in the sentence following, but also by the end of the concluding sentence in said paragraph. In the former it is provided:

"* * * After notice of such determination, the employee shall elect whether compensation * * * after the expiration of such period of fifty-two weeks shall be awarded under the provisions of this paragraph, etc."

And again in the latter we find:

"* * * the employe shall be deemed to have elected that compensation * * * after the expiration of such period of fifty-two weeks shall be awarded etc."

Obviously, the determination of the percentage of permanent partial disability suffered in any case can not be made until application for such determination is filed. Since such application can not be filed earlier than forty weeks nor later than fifty-two weeks after the date of the termination of the period of temporary total disability or after the date of the injury in the absence of temporary total disability, it must follow that the determination and award thereunder can not be made until the expiration of such fifty-two weeks.

As above pointed out, the statute provides that "after notice of such determination" the employe shall elect whether compensation on account of partial disability "after the expiration of such period of fifty-two weeks" shall be awarded to him under paragraph (a) or paragraph (b) of the section.

Manifestly, payment of the award can not commence until after the employe elects on which basis the award is to be made, and such election can not, of course, be made until after a determination of permanent partial disability was made by the Commission, and since, as above stated, such determination can not in any event be made until the expiration of fifty-two weeks, it is inconceivable how payments made in accordance with such determination and election can commence prior to such time.

It is, therefore, my opinion that where an award of permanent partial disability has been made by the Industrial Commission, payments thereunder may not lawfully commence until after the expiration of fifty-two weeks following the last payment of temporary total compensation.

Respectfully,

HUGH S. JENKINS,
Attorney General.