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**Workers' Compensation Shop Talk**

**Question: Can a claimant who is receiving permanent total disability compensation be compelled to undergo a medical exam based upon "improvement" detected through undercover surveillance?**

The Industrial Commission maintains "continuing jurisdiction" over all claims, and may re-visit a claim or issue in cases of: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) an error by an inferior tribunal. R.C. 4123.52 *State ex rel. B&C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St. 3d 538, 541-542. Recently the Supreme Court of Ohio was faced with a question concerning a claimant who was on permanent total disability for psychological conditions: Can "remarkable" improvement, captured through surveillance evidence, constitute "new and changed circumstances" warranting a new exam?

*State ex rel. Rohr v. Industrial Commission of Ohio*, 126 Ohio St. 3d 259, 2010-Ohio-3756, involved a claimant who was injured at work, and in 2004 was deemed permanently and totally disabled based primarily upon diagnoses of "major depressive episode, recurrent, moderate severity" and "dysthymic disorder." During the PTD process, the claimant was examined by several doctors, each of whom made findings of "slurred speech, a noticeably flat affect, and memory problems." Concentration also was noted to be impaired. In 2007, based in part upon reports from co-workers, the employer retained an investigator to conduct surveillance on the claimant, which noted marked improvement in symptoms. The employer used this evidence in a motion seeking a new psychological exam. The claimant objected, but an SHO noted that the video evidence demonstrated "remarkable" improvement when contrasted with the prior findings, and ordered a new exam. The claimant again objected, but reconsideration was denied, and a mandamus action in the Tenth Appellate District affirmed the SHO, prompting an appeal as a right.

The Supreme Court affirmed, stating that the Industrial Commission is exclusively responsible for evaluating evidentiary weight and credibility. The Court also relied on what was described as "significant" changes in the claimant's presentation and memory. In response to the claimant's argument that the changes were not "significant," the Court pointed out that this position could be argued later to the Industrial Commission.

This case is a fairly straightforward application of R.C. 4123.52, but I include it because psychological claims are notoriously difficult to defend, and many employers are now seeing a substantial increase in the number of permanent total applications related solely to psychological conditions. If nothing else, *Rohr* highlights the need to obtain a thorough exam, including observations of the claimant's demeanor and habits, so that this information can be reconciled (or refuted) later.

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