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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When asserting "continuing jurisdiction" (R.C. 4123.52), to what extent must the Industrial Commission's order set forth the basis for its decision?

R.C. 4123.52 gives the Industrial Commission ("IC") continuing jurisdiction to modify compensation and treatment decisions, but only in limited situations. These include: (1) "new and changed" circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454. The order invoking this jurisdiction must also state the basis in a "clear and meaningful fashion." *Id.* The Supreme Court of Ohio was recently asked to apply these rules to a motion to terminate benefits based upon a videotape.

In *State ex rel. Lowe v. Cincinnati, Inc.*, 124 Ohio St.3d 204, 2009-Ohio-5864, an employee injured his left shoulder in 1998. In 2003, after (4) surgeries, he was awarded permanent total disability ("PTD") based, in large part, upon his testimony that ongoing symptoms and pain severely impaired the most basic activities. In 2005, his employer moved to terminate PTD based upon a 2004 surveillance video that showed the employee engaged in vigorous yard work, and a report from a doctor who had examined the employee in 2003, which stated that he had either had a "miraculous recovery" or had magnified his symptoms. In January, 2006, the IC issued an order invoking 4123.52 based upon the tape, and ordered a doctor to examine the employee and view the tape. In September, 2006, citing both medical reports, a Staff Hearing Officer ("SHO") for the IC issued an order terminating PTD. The order noted that the original award was largely based on the claimant's testimony regarding his symptoms, which were contradicted by tape and medical evidence. The employee sought a writ of *mandamus* from the Tenth District, claiming that the SHO had not sufficiently set forth "new and changed circumstances," and that the evidence did not support the termination of PTD. The request was denied, prompting an appeal as of right.

The Supreme Court affirmed, concluding that the SHO orders invoking 4123.52 and terminating PTD had sufficiently set forth specific "new and changed circumstances," and that these facts supported the termination of PTD. The Court discussed at length the *Nicholls* line of cases and its rejection of previous orders which cited only the "possibility of error" or which found changed circumstances after the fact. In this case, the SHO cited facts in discussing the extent to which the previous testimony conflicted with the videotaped activity, and the conclusions of the physician. The Court also dismissed the employee's concern about the SHO's use of the phrase "may have been," as "form over substance."

For any employer seeking to invoke "continuing jurisdiction," this case is an excellent example of how 4123.52 motions should be handled.

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