

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a claimant argue “aggravation” in common pleas court if it is not argued administratively?

Can a claimant change course in a R.C. §4123.512 appeal, and put forth an argument that was not made administratively? Recently, the Supreme Court of Ohio affirmed a decision from the First Appellate District, which concluded that it is inconsequential whether a claimant argued that his medical condition was directly caused by an incident, or an aggravation of a pre-existing condition, because that argument goes to the element of causation and not to the “right to participate.”

Starkey v. Builders Firstsource Ohio Valley, 130 Ohio St. 114, 2011-Ohio-3278, involved an employee who was injured in September 2003. A workers' compensation claim was filed and allowed for “sprain hip & thigh, left; sprain lumbosacral; enthesopathy of left hip; tear left hamstring; glenoid labrum tear of left hip; venous embolism deep vein thrombosis left leg; and degenerative joint disease left hip.” In December 2005, the claimant moved to amend his claim to include “degenerative osteoarthritis” of the left hip. The additional condition was allowed administratively as a new condition, and the employer appealed to the Hamilton County Court of Common Pleas. At trial, Starkey's treating physician testified that the claimant did suffer from pre-existing degenerative osteoarthritis of the left hip, but that his work-related injury “directly aggravated” his pre-existing osteoarthritis. (Note: This case pre-dated “substantial aggravation.”) When the claimant rested his case the employer moved for dismissal, arguing that a claimant may seek to participate in the workers' compensation fund in the common pleas court only for those conditions addressed in the administrative order, and the claimant asserted a new condition on appeal, that of aggravation of degenerative osteoarthritis. The trial court granted the employer's motion, finding that “a claim for aggravation of a pre-existing condition is a claim separate and distinct from a claim for that underlying condition itself, and administrative action on one claim does not trigger jurisdiction to consider the other.” The claimant appealed, and the First Appellate District reversed, finding that the claimant had presented a claim for the same medical condition, both administratively and in common pleas court and that by arguing aggravation, the claimant merely changed the mode of “causation.” The employer sought a discretionary appeal with the Supreme Court of Ohio, which was allowed.

The Supreme Court affirmed, finding that claimants must submit a medical diagnosis of an injury at the administrative level to prevail. The claimant is also required to establish a causal connection between the documented physical harm and the industrial injury. Ohio law recognizes direct causation, aggravation of a pre-existing condition, repetitive trauma, and “flow-through” causation. Ultimately, the claimant is not required to advance a specific theory of causation at the administrative level and the failure to do so will not prevent the introduction of new evidence on causation provided it relates to the same medical condition.

This reasoning presents a departure from past practice, where claimants had to “pick their poison” with regard to whether the alleged injury was an aggravation or a new injury. This

decision leaves all doors open for a claimant at trial and it will make it more difficult for employers to defend such claims. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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