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### **Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: Must a claimant provide objective evidence of the existence of a pre-existing condition before a workplace incident to prove that a condition was “substantially aggravated” by the incident?**

The defense of “aggravation” claims was supposed to be made easier for employers by the passage of SB 7 in 2006. Certainly, the “substantial aggravation” standard has helped but employers continually encounter problems in defending such claims. Recently, the Ohio Court of Appeals, Sixth Appellate District was asked to consider a central question in these cases: Whether “substantial aggravation” requires objective medical evidence showing the pre-existing condition both before and after the workplace incident?

*Smith v. Lucas County*, 2011-Ohio-1548, involved a claimant who was injured when she slipped on a wet floor, sustaining injuries to her head, neck, wrist, and elbow. A workers' compensation claim was filed and allowed, but when the claimant sought to have the claim additionally allowed for a “displaced disc at C6-7 and aggravation of pre-existing Chiari malformation,” the employer objected. Both additional allowances were denied administratively and the hearing officer noted that appellant had a long history of severe migraine headaches and that there was evidence that appellant was having memory problems prior to her injury. The claimant appealed to the common pleas court where an issue arose as to the “substantial aggravation claim.” The employer maintained that it was entitled to summary judgment because there was no objective evidence to show that the condition worsened after her work injury. The trial court agreed and granted summary judgment because “there was no testing or diagnostic procedure to document the condition prior to the accident, appellant failed to provide the statutorily mandated objective findings or results” to make a “substantial aggravation” claim and the claimant appealed.

The Sixth District affirmed, concluding that the trial court was correct in finding that the claimant must document the extent of her symptoms before, as well as after the incident in order to succeed on a “substantial aggravation” theory. The claimant’s argument that the condition had not been discovered until the post-accident MRI was unsuccessful. The court stated that if the appellant “had provided sufficient documentation of her symptoms preceding the injury, substantial aggravation could have been established. Such evidence would not necessarily require objective ‘before’ and ‘after’ findings or results.” But the appellant only provided an affidavit from her current physician that based his findings of earlier symptoms on the history he received from the appellant. Appellant failed to provide any information such as records or a statement from her prior treating physician. The objective testing only showed the existence of the Chiari malformation and provided an explanation for appellant’s current symptoms, but did not establish that the condition was “substantially aggravated” by the work-related incident. Simply put, appellant failed to provide sufficient evidence to show that the condition worsened after her workplace injury as required by RC 4123.01(C)(4) and RC 4123.54(G) and summary judgment was appropriate for the employer.

*Smith* is a rare victory for employers seeking to argue that “substantial aggravation” requires a baseline test, or at a minimum objective evidence showing previous symptoms. (Thank you to Anna Hlavacs for suggesting this case.) If you have any specific question, or would like to discuss this or any other workers’ compensation issue, you can contact me or Adam Sadowski from our Toledo office.

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