From: Don Drinko
Date: Wed May 4, 2011, 4:39 p.m.

Gallagher Sharp Shop Talk: Workers' Compensation

Question: We were recently presented with an occupational disease claim, and I elected to obtain a record review. The results were not good. Do I have to turn the report over to the claimant's attorney if I do not intend to use the report at hearing? What if the case ends up in court?

In responding to this question, it is important to recognize a distinction between examinations and record reviews. Ohio Administrate Code § 4121-3-09(A)(5)(a) clearly requires that if the BWC or an employer requires the claimant to undergo a medical examination, a copy of the resulting examination report must be submitted to the Commission and to the claimant's attorney. However, the Code is silent as to reports generated from record reviews. If a report is to be submitted at a hearing, the OAC requires all parties to exchange "relevant information" in advance of the hearing. *R.C. 4123.511(G)(2); OAC § 4123-3-092.* "Relevant" is not defined, but is most commonly thought to include only evidence a party intends to submit at the hearing. It should also be noted that the Civil Rules and Rules of Evidence do not apply to IC hearings. Therefore, in the event that the report will not be introduced, there is no obligation to submit it to the claimant or his counsel, or to inform counsel of the record review at all.

Should the matter proceed to court, the "work-product" doctrine, which protects against discovery of documents prepared in "anticipation of litigation," would seem to control. *Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 429 (2009), citing Ohio Civil Rule 26(B)(3). The application of the "work-product" doctrine requires a two-step analysis: (1) whether the evidence was prepared in anticipation of litigation; and, (2) whether there has been a showing of good cause requiring discovery of the evidence. *Id.* The fact that a report was generated prior to a R.C. 4123.512 appeal to the common pleas court should not preclude application of the "work-product" doctrine. With no duty to disclose such evidence by the OAC and a valid argument for the "work-product" doctrine after the case is appealed to court, the troubling report should remain privileged.

Finally, a practice tip to employers and third-party administrators when it comes to hiring medical experts: take care to select physicians that are well qualified and willing to testify in court. It is frustrating, but exceedingly common, for attorneys retained to handle court appeals to identify physicians used administratively as experts, only to find out that the physician is unqualified to render the opinions offered or simply "does not do" court testimony.

If you have any questions, or would like to discuss this or any other workers' compensation issue, you can contact me or Adam Sadowski from our Toledo office. For those that are interested, Adam will be speaking at Gallagher Sharp's 27th Annual Spring Seminar on the topic of Workers' Compensation Subrogation on June 3, 2011 in Independence, Ohio. Most of you should have received invitations, but if you did not and are interested in attending, please contact Jeanne Kostelnik of my office by May 20, 2011.

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