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Sent: Wed 1/25/2012 4:20 PM
Gallagher Sharp Shop Talk: Worker's Compensation

Question: Is a self-insured employer's decision to certify that an injury occurred in the "course and scope" of employment conclusive?

The Supreme Court of Ohio has held that, like decisions of the Bureau of Worker's Compensation, a self-insured employer's decision to certify a claim or condition is conclusive, and cannot be modified over the objection of a claimant that the certification was erroneous. *State ex rel. Baker Material Handling Corp v. Indus. Comm*, 69 Ohio St.3d 2001, 1994-Ohio-437. However, this decision must be read in conjunction with R.C. 4123.52, which grants the Industrial Commission continuing jurisdiction over all claims to modify decisions in limited situations. Recently, the Second Appellate District was asked to apply both of these principles in a case which began and ended with a drunk driving arrest.

Lane v. Bur. of Workers' Comp., 2012-Ohio-209, involved a truck driver who was arrested for drunk driving. The employer did not fire him, and instead put him to work in a non-driving capacity. After the claimant's license was reinstated and he returned to normal duties, he was again arrested for a drunk driving charge while off-duty. The arrest report reflected that during this second arrest, the claimant complained of pain in his left shoulder. The claimant decided not to inform his employer, but instead reported to work the following day, where several hours into his shift he claimed to have injured his left shoulder. A worker's compensation claim was filed and certified for left shoulder strain, and the claimant received benefits. During a routine license check, the employer learned of the second drunk driving charge and the police report referring to a left-shoulder injury, and filed a C-86 motion with the Industrial Commission asking it to assert continuing jurisdiction under R.C. 4123.52 to "correct a potential fraud and/or mistake of fact" and deny the claim. The Industrial Commission agreed to assert jurisdiction and denied the claim, prompting the claimant to file a R.C. 4123.512 appeal. In pretrial motions, the claimant cited *Baker* and asserted that the original certification was conclusive, and chose not to produce any substantive evidence. The trial court concluded that the issue of whether the Commission properly asserted continuing jurisdiction was not a "right to participate" issue, and could only be evaluated by a *mandamus* action. Because the plaintiff failed to produce any evidence on the "right to participate" issue, the court found in favor of the employer, leading to an appeal.

The Second District affirmed, noting that the issue the claimant was arguing was not the issue that was properly before the trial court. In order to litigate whether continuing jurisdiction due to fraud or mistake (the bases cited by the SHO) was properly invoked, the claimant should have filed a *mandamus* action asking for an order that the Commission had overstepped its legislative rights. The Court also distinguished *Lewis v. Trimble*, 79 Ohio St.3d 231, which did not involve any claim of fraud or "changed circumstances." Ultimately, the claimant had the burden of proof, and his failure to present any evidence on the "right to participate" was fatal to his case.

There are many lessons to be taken from *Lane*, most notably a lengthy discussion of the proper application of R.C. 4123.52. It is also notable that the employer in *Lane* did not merely rely on the failure to disclose the arrest, but also obtained new medical evidence reflecting the pre-

existing condition. (This was wise, as the employer's motion was denied by DHO, but vacated on appeal.) If you have any 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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