

From: Don Drinko

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

**Question: Do "clinical" findings of decreased range of motion constitute "objective evidence" to prove a substantial aggravation?**

Defending "aggravation" claims was supposed to be made easier for employers by the passage of Am. SB 7 in 2006. The adoption of the "substantial aggravation" standard, which requires a claimant to put forth objective evidence to support the claim, was intended to weed out slight aggravations of chronic, long-term conditions. Recently, the Ohio Court of Appeals, Third Appellate District was asked to consider whether "clinical findings" of decreased range of motion were sufficient objective evidence to satisfy the current standard.

*Bohl v. Cassens Transport Co.*, 2012-Ohio-2248, involved a claimant who injured his neck when a chain slipped while securing a load on a trailer. A workers' compensation claim was filed and allowed for "cervical strain," but when the claimant sought to have the claim additionally allowed for a "substantial aggravation of pre-existing degenerative arthritis of the cervical spine," the employer objected based upon a significant history of spondylosis and bone spurs. The additional allowance was allowed administratively, and the employer appealed to the Seneca County Court of Common Pleas. At trial, the claimant's physician opined that the claimant suffered a substantial aggravation of his cervical disc disease, and cited the fact that the claimant did not heal after several months of treatment. Further, evidence was produced that showed the claimant still had a decreased range of motion. After the claimant finished presenting evidence, the employer moved for a directed verdict, arguing that the claimant failed to produce objective evidence documenting the alleged substantial aggravation. The trial court denied the motion and rendered a verdict in favor of the claimant, prompting an appeal.

The Third District affirmed, concluding that while it did not agree with the trial court that the claimant's expert's opinion alone was sufficient, the evidence taken as a whole was sufficient for the claimant to prove his case. While the employer argued that the claimant's expert's testimony failed to reference objective diagnostic findings, clinical findings, or test results as required, the expert's medical reports that were admitted into evidence contained "objective" clinical findings demonstrating a decreased range of motion even after several months of treatment. The court concluded that these findings would allow a rational trier of fact to conclude that the claimant suffered a substantial aggravation of pre-existing degenerative arthritis of the cervical spine.

The issue in these cases is the amount of effort expended and the degree that ROM is measured. I expect an appeal, and that this issue will eventually be considered by the Supreme Court of Ohio. If you would like to submit a question to Shop Talk, 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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