

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

Question: Can ambiguous statements justify the exclusion of an expert medical report?

It is likely that we have all received reports from independent medical examinations where the results are less than ideal. Occasionally, a physician's report will contain a typo, a misstatement of fact, or a conflicting diagnosis. Can errors contained in an expert report justify the exclusion of this evidence from consideration at a hearing? Late last year, the Supreme Court of Ohio was presented with a case which presented that question: When do errors justify excluding an expert report in its entirety?

State ex rel. George v. Indus. Comm., 130 Ohio St.3d 400, 2011-Ohio-6036, involved a claimant who injured his right shoulder at work. A workers' compensation claim was filed, and surgery on the right shoulder was performed in 2004, after which the claimant seemed to make a complete recovery. In 2008, the claimant returned to his doctor with renewed right shoulder complaints, prompting the physician to file a request for additional allowances and a second surgery. The employer had the claimant examined by two (2) physicians, both of whom concluded that the conditions and surgery were unrelated to the industrial injury. There was no dispute that one of the expert reports contained several factual errors, including incorrect dates, and misstated the course of treatment. The requested conditions and surgery were disallowed, prompting the claimant to bring a *mandamus* action, and the 10th District Court found "troubling inconsistencies" in the IME report which should have disqualified it from evidentiary consideration, and ordered the matter returned for further proceedings. The employer appealed as of right to the Supreme Court of Ohio.

The Supreme Court reversed, finding that the Court of Appeals had erred in finding that mistakes in the IME report affected the "evidentiary viability" of the doctor's opinion. Citing *Eberhardt v. Flxible Corp.* and *State ex rel. Lopez v. Indus. Comm.*, the Court noted that the Industrial Commission alone is responsible for assessing the credibility of evidence, so long as that it is not equivocal or inconsistent. "Equivocation" is when a doctor "repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify [a position.]" *Id.* The Court contrasted this with an "ambiguity" which concerns statements that are capable of more than one meaning. Ambiguous statements that are later clarified may be relied upon, while equivocal statements may not. The Court also stressed that even misstatements of fact do not justify exclusion when they concern non-essential questions. In *George*, the Court found that errors were present but that they did not relate to the central question at issue: whether additional surgery on the claimant's right shoulder arose from the industrial injury. At best, the inconsistencies in the report were ancillary to the opinion requested.

In reviewing reports from doctors for adverse parties, opinions that are equivocal (e.g., contradict with office notes, other opinions) should always be challenged. In your own IMEs, opinions that are ambiguous should be clarified where possible with supplemental reports. If you 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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