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Sent: Wed 10/2/2013 4:30 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: When can the opinion of an expert witness be excluded as equivocal? What is the difference between equivocal, contradictory, and ambiguous opinions?

It is well established that, both administratively and in court appeals, equivocal medical opinions are not evidence, and have no probative value. *State ex rel. Eberhardt v. Flxible Corp*, 70 Ohio St.3d 649 (1994) "Equivocation occurs when a doctor repudiates an earlier opinion, renders contradictory or uncertain opinions, or fails to clarify an ambiguous statement." *Id.* Recently, the Twelfth District Court of Appeals was presented with the question of whether a psychiatrist's opinions regarding proximate cause were equivocal, or were satisfactorily clarified.

Phipps v. Internatl. Paper Co., 2013-Ohio-3994, arose from a 1984 slip and fall. The claimant filed a workers' compensation claim, which was eventually allowed for 13 conditions affecting the claimant's left foot, left humerus, left elbow, right distal radius, lumbosacral region, and both knees, resulting in several surgeries, including two total knee replacements. In January, 2011, the claimant moved to have the claim additionally allowed for the condition of "Depressive Disorder NOS." This motion was denied administratively, and the claimant filed a court appeal pursuant to RC 4123.512. At trial, each side presented testimony from a psychiatrist, who both agreed that she had the condition, but differed on the issue of proximate cause. While the claimant's expert causally related the 2011 diagnosis solely to the 1984 injury, the employer's psychiatrist would not make such a leap. He testified that the claimant was "strongly predisposed" to depression due to family history and life experience, and that she likely would have developed depression notwithstanding the industrial accident. Under cross-examination, he did not dispute that chronic pain from the accident could have "played a role" in the development of the condition. On redirect he declined to say that the condition would have arisen "but for" her industrial injury. After the jury found for the employer, the claimant appealed, arguing that the expert's testimony was contradictory, and therefore should have been excluded.

The Twelfth District disagreed, and affirmed the trial court's decision. The court noted that the claimant had the burden of proving proximate cause, and that the employer's expert's testimony was not "equivocal" because he consistently testified that the claimant would have had depressive disorder regardless of the industrial accident. While acknowledging that chronic pain associated with the work-related injuries may have "played a role," he consistently refused to say that the chronic pain was a proximate cause of the condition, which was the issue on which he was called to testify. The court also rejected the claimant's "dual causation" argument, pointing out that the psychiatrists presented completely different theories of causation, and that the claimant's psychiatrist did not even consider non-industrial causes. Therefore, the jury was free to choose the employer's position.

Phipps stands for the proposition that testimony is not equivocal merely because the conclusion is not definitive - the employer's expert could not reject the possibility that chronic pain contributed to the condition, but could state that he could not say it proximately caused the

condition. Because there can be more than one proximate cause of a condition, this was a fine line the trial court was asked to walk.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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