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Gallagher Sharp Shop Talk: Workers' Compensation

Question: What is the burden of proof in a “substantial aggravation” case? Can an affidavit from a treating doctor, in and of itself, create a genuine issue of material fact for trial?

In R.C. 4123.512 appeals to common pleas court, parties are permitted to file a motion for summary judgment asking the Court to find that there are no issues of material fact for trial, and even construing all evidence in favor of the non-moving party, the moving party is entitled to judgment as a matter of law. *Civ.R.56* While rare in the context of workers' compensation cases, the Ohio Court of Appeals, Sixth Appellate District was recently presented with a case involving a motion for summary judgment, competing affidavits from physicians on each side, and whether these affidavits in and of themselves create a genuine issue of material fact for trial.

Lake v. Anne Grady Corp, et al., 2013-Ohio-4740, involved a claimant who fractured her kneecap in a fall. Several months later, the claimant filed a motion seeking to have the claim additionally allowed for “substantial aggravation of pre-existing osteoarthritis, left knee.” The motion was granted by the BWC over the objection of the employer, and was affirmed administratively at every level, prompting a R.C. 4123.512 appeal by the employer to the Lucas County Common Pleas Court. Before trial, the employer moved for summary judgment pursuant to Civ. R. 56, arguing that the claimant could not prove her claim for “substantial aggravation” as a matter of law. The motion was supported by an affidavit from an IME physician who examined the claimant, reviewed her medical records on behalf of the employer, and opined that to a “reasonable degree of medical certainty” there was no objective evidence that the condition was “substantially aggravated.” In response, the claimant presented an affidavit from her own physician, an orthopedic surgeon, who cited unspecified x-rays, clinical findings, and subjective complaints in concluding that the “substantial aggravation” was causally related to the injury. The trial court sided with the employer and granted the motion for summary judgment, prompting an appeal as of right.

The Sixth District affirmed, finding that summary judgment was proper. The Court focused its review on the absence of “objective evidence” in the form of tests, clinical findings or other observable evidence of a “substantial aggravation,” as required by R.C. §4123.01(C)(4). The court reviewed several recent decisions on the issue, and rejected the claimant’s argument that the trial court had superimposed a “pre-injury test or diagnosis” on the claimant, and specifically rejected the need for a pre-injury test or diagnosis. The claimant’s problem was that her surgeon’s affidavit was a summary document, which referred to identifiable objective evidence (eg. x-rays, MRI results, or evidence of post-injury changes) but did not identify it. The doctor did not state which x-rays or clinical findings were relied upon, and no copies of this evidence were attached to his affidavit. The court concluded that “[m]erely stating that objective evidence exists is not in and of itself objective evidence. *Id.* at ¶ 30. Therefore, the claimant could not satisfy her evidentiary burden at trial.

As reflected by the cases discussed in the opinion, there appears to be some conflict on how courts handle this issue. I think *Lake* is certainly on the extreme end, although it is another tool that employers should consider in “substantial aggravation” cases. I also expect the Supreme Court of Ohio to weigh in on this issue soon. 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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