

From: Don Drinko
Sent: Wed 12/4/2013 4:16 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can medical evidence that has been previously rejected later be used to support a subsequent request for compensation?

Normally, medical evidence that was previously submitted and rejected may not be reconsidered in subsequent proceedings for the same compensation. *State ex rel. Zamora v. Indus Comm.* 45 Ohio St.3d 17 (1989). However, an exception exists to this rule when the evidence is considered for a different purpose, such as to corroborate information contained in a medical history. *State ex rel. Verbanek v. Indus. Comm.*, 73 Ohio St.3d 562 (1995). Recently the Supreme Court of Ohio was asked whether this exception extends further, to whether the IC can rely upon evidence previously rejected to support a request for a different type of compensation.

State ex rel. Kelsey Hayes Co. v. Grashel, Slip Op. No. 2013-Ohio-4959, involved a claimant who developed a respiratory disease in 2001. He received temporary total disability (“TTD”) compensation through May 2003, when he returned to work. In September 2004, he again stopped working, and ultimately retired in November, 2004. In early 2005, he requested TTD for the period immediately preceding his retirement, and produced a report and records from his treating physician, Dr. Pue. The employer obtained an IME which concluded that the claimant’s disability was caused by smoking and not the allowed conditions. The Industrial Commission agreed, and rejected the conclusions of Dr. Pue. Several months later, the claimant moved for permanent total disability (“PTD”) benefits, alleging that his retirement was a result of the allowed conditions. The only evidence submitted came from Dr. Pue, most of which was previously considered in support of TTD. PTD was granted, but the Tenth District Court of Appeals referred the matter back for reconsideration of whether the claimant had abandoned his employment in 2004. A second hearing was held, and PTD was again granted. The employer sought a writ of *mandamus*, arguing that the abandonment issue had been conclusively determined in 2005 with the rejection of TTD, and that the Industrial Commission had abused its discretion in granting PTD based upon the same medical evidence it had previously rejected. The Tenth District denied that writ, prompting an appeal.

The Supreme Court reversed the Tenth District, granted the writ, and ordered the Industrial Commission to issue a new order denying PTD. The Court found that the Commission had abused its discretion when it rejected its previous conclusion that the exacerbation of the claimant’s symptoms in 2004 were not related to the allowed conditions. No new contemporaneous evidence was presented, and the Court found that the Commission had rejected or did not consider the evidence adduced in 2005, when it conclusively held that the period of disability in 2004, which preceded his retirement, was caused by smoking. The Court also found that the exception to *Zamora* found in *Verbanek* did not apply because there were no statements to corroborate, only the opinions of Dr. Pue. The issue of abandonment had effectively been determined in 2005, and it was not within the discretion of the Industrial Commission to rely upon evidence that was previously rejected

Kelsey Hayes stands for the proposition that evidence rejected once cannot be revived later, even to support a different type of compensation. 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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