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

Question: Can a medical report contradicting an earlier report constitute "new and changed circumstances" warranting an exercise of "continuing jurisdiction"?

R.C. §4123.52 vests the Industrial Commission with "continuing jurisdiction" to revisit prior orders. This jurisdiction is not unlimited, and can be exercised only when one of the following apply: 1) "new and changed" circumstances; 2) fraud; 3) clear mistake of fact; 4) clear mistake of law; or 5) error by an inferior tribunal. *State ex rel Nicholls v. Indus. Comm (1998),* 81 Ohio St.3d 454, 692 N.E.2d 188. The Supreme Court of Ohio recently considered whether "new and changed circumstances" includes a medical report repudiating earlier findings by the same physician.

State ex rel. Knapp v. Indus. Comm., 134 Ohio St.3d 134, 2012-Ohio-5379, involved a claimant who injured his arm in 2008. The claim was allowed for "forearm contusion," and the claimant received approximately six (6) months of temporary total compensation based upon C-84s prepared by his treating physician, Dr. Knapp. In February, 2009, the employer had the claimant examined by a physician who determined that the claimant had reached "maximum medical improvement" with regard to the contusion. This information was provided to Dr. Knapp, who replied on March 6, 2009 with a hand-written note stating that the contusion had likely reached MMI "prior to his initial visit with me," but that other conditions (since disallowed) were still disabling the claimant. After TT was terminated, the employer moved the Industrial Commission to exercise its "continuing jurisdiction" to vacate all of the previously awarded TT based upon the March 6th note. A Staff Hearing officer agreed, and issued an order vacating those awards. The claimant filed a *mandamus* action in the Tenth District Court of Appeals, arguing that the March 6th "repudiation" was not a valid basis for continuing jurisdiction, and the Tenth District Court of Appeals agreed, prompting an appeal as of right.

The Supreme Court affirmed, finding that the March 6th "repudiation" letter was not "new and changed circumstances" sufficient to justify "continuing jurisdiction" under R.C. §4123.52. First, the Court noted the seeming randomness of the March 6th note and its reference to events occurring before Dr. Knapp saw the claimant for the first time, making it inherently unreliable. There was also no evidence that Dr. Knapp performed a "fresh" review of the file or a new examination before writing the note, and no records reflecting he actually held these beliefs prior to that date, information which would have been "new." The Court also found that even if taken at face value, the "new" information (that the contusion had resolved) was readily discoverable by the employer in the exercise of due diligence.

Knapp is an excellent example of bad facts resulting in difficult decisions. The Court bends over backwards throughout the opinion to distinguish medical contradictions from "new" evidence. This is likely because medical conditions are rarely static – symptoms get better and they get worse – and to allow these situations to amount to "new and changed circumstances" would overwhelm the system, despite the fact that the employer's request in *Knapp* was reasonable.

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

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