From: Don Drinko
Sent: Wed 7/3/2013 3:57 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: What is the evidentiary standard applied to an independent medical examiner examining a claimant with regard to a finding of "maximum medical improvement?"

When the BWC or an employer has a claimant examined by an independent physician for the purpose of assessing the extent of disability (most often to assess whether a claimant has reached "maximum medical improvement" or "MMI"), these reports are often attacked by claimant's counsel as failing to constitute "some evidence" upon which orders can be based. The basis for these attacks can include a failure to evaluate the correct body part, a failure to list all of the allowed conditions, or a failure to utilize the correct standard. The Supreme Court of Ohio recently decided a case involving an examination that was cut short due to unexplained complaints from the claimant, and whether the findings of the physician in that case constituted "some evidence" upon which to base a finding of MMI.

State ex rel. Coleman v. Schwartz, 135 Ohio St. 3d 423, 2013-Ohio-1702, originated with a 1984 claim. In 2009, after a court appeal, the claim was additionally allowed for "degenerative disc disease of the lumbar spine." The claimant subsequently moved for temporary total disability compensation based upon this new condition, and the BWC scheduled an extent of disability examination by a physician on December 31, 2009. While accepting the conditions and objective findings, the physician's report acknowledged that his examination was "limited" because of unexplained complaints of knee and ankle pain made by the claimant during testing. However, the physician added that he personally observed the claimant climbing "a flight of stairs at a rapid pace without any difficulty." The physician completed the report finding the claimant to be MMI, and the BWC filed a motion to terminate temporary total, which was granted. The claimant then filed a *mandamus* action alleging that the physician's report was deficient because he did not complete the examination to evaluate the low back condition that was the basis for the temporary total request, and therefore the report could not constitute "some evidence" upon which to base an order. The Tenth District Court of Appeals denied the writ, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that the abbreviated exam still constituted "some evidence" upon which the Industrial Commission could base its order. The Court noted that the report correctly listed the allowed conditions (including the new low back condition), the physician reviewed the pertinent medical records including multiple MRI's of the claimant's low back, and that he accepted all objective findings. The Court also specifically cited the doctor's own observations of the claimant moving about his office. The Court concluded that the report was "sufficiently reliable to constitute some evidence" to support the decision. *State ex rel. Shaffer v. Indus. Comm.*, 2004-Ohio-3838.

Does observing a claimant negotiating a flight of stairs alone constitute "some evidence?" Probably not, but when combined with a thorough review of the records, the Court chose not to substitute its judgment for the physician's. Further, I also suspect the decision had as much to do

with the fact that this was a 1984 claim for which the claimant sought temporary total disability compensation in 2009. 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.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com