

From: Don Drinko
Sent: Wed 8/21/2013 4:16 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can “addendums” or supplemental medical reports stand on their own as evidence when the underlying report is defective?

When examining medical reports, it is always advisable to review the allowed conditions cited by the physician, because it is well established that a report that does not consider all allowed conditions cannot constitute “some evidence” upon which the Industrial Commission can rely. *State ex rel. Richardson v. Quarto Mining Co.*, 73 Ohio St.3d 358 (1995). Recently, the Supreme Court of Ohio was presented with the question of whether an “addendum” to a flawed medical report can stand on its own as evidence, or whether it must be disregarded.

State ex rel. Kish v. Kroger Co., 135 Ohio St.3d 451, 2013-Ohio-1931, involved a claimant who injured her left ankle in 1990. Over the ensuing twenty (20) years, she developed several additional medical conditions that were attributed to this incident, including “reflex sympathetic dystrophy, depression, and fracture/dislocation of the left elbow with compartment syndrome.” In 2009, the employer sought to have the claimant examined by a physician to assess the need for additional treatment. The examination occurred, and a report was issued on March 5, 2009 concluding that no further treatment was appropriate. However, that report failed to include “compartment syndrome” as an allowed condition. (The report did include an allowance for “early complications of trauma.”) At hearing, the claimant was successful in securing additional treatment, presumably at least in part by citing this defect in the report. The claimant subsequently sought a “loss of use” award for her left arm, and the same doctor on behalf of the employer wrote two (2) addendums to his original report addressing this issue. The SHO affirmed the DHO denial, basing the decision on the addendums. The claimant then sought a writ of *mandamus* before the Tenth District, alleging that the Industrial Commission had abused its discretion in relying upon the addendums because the underlying report was fatally flawed. The Tenth District affirmed, prompting an appeal as of right to the Supreme Court.

The Court affirmed, finding that the second and third “addendum” reports stood on their own and constituted “some evidence” to support the Commission’s decision. The Court rejected the claimant’s argument that a defect in the underlying report should somehow contaminate the addendums, noting that the addendums concerned different issues and were not simply corrective in nature. At least one of the reports also noted that the claimant revealed to the examining physician that she had been diagnosed with “compartment syndrome,” and that the physician’s inclusion of “early complications of trauma” could be associated with this condition. Finally, the Court rejected the argument that the original report had been previously rejected by the Commission (and thus was barred by *res judicata*), finding that the addenda stood on their own as evidence, although they cited the physical findings noted in the earlier report.

Kish stands for the proposition that addendum reports can stand on their own as evidence, and refer back to physical findings and observations noted in previous reports. Should you find a report with a defect such as the failure to list an allowed condition, an addendum should be

strongly considered. 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.

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