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

**Question:** **If an employer gets an IME report, can statements made by the doctor in that report be used as admissions against the employer at trial?**

Most employers understand the risks inherent in obtaining an IME: first and foremost, that the independent doctor may relate a condition. Many employers still do obtain examinations by independent third-party doctors, and the Industrial Commission rules require that these reports be turned over to the claimant, whether or not they are used at hearing. The Ohio Court of Appeals, Eighth Appellate District, was recently presented with the question of whether the opinions contained in an IME report can be admitted into evidence at trial as an "admission" against the employer, even when the doctor is not called to testify.

*Szulinski v. Kellison & Co.*, 2014-Ohio-111, involved a claimant who slipped in a parking lot while taking something to his car. A workers' compensation claim was filed alleging several conditions, and the employer contested the claim as not occurring within the course and scope of employment. A DHO allowed the claim over the objection of the employer, at which time the employer obtained an IME, a report from which was filed with the IC. On appeal, an SHO reversed the DHO Order and denied the claim, finding the injury occurred during a "personal errand." The claimant filed a court appeal, and the matter proceeded to a bench trial at which the Plaintiff sought to introduce the employer's IME report as medical evidence of a causal relationship, despite the fact that the IME doctor was not called to testify at trial. The employer strenuously objected to the admission of the report as hearsay, and that it would not have an opportunity to cross-examine the doctor, but the trial court found that it was an "admission of a party opponent" under Evid.R.801(D)(2). The bench trial resulted in a finding that the requested conditions were compensable, prompting an appeal by the employer and Administrator.

The Eighth District affirmed, finding that the IME report was properly admitted and considered by the trial court as evidence of a causal relationship. The Court concluded that the IME was obtained by the employer, conducted by a physician of its choosing, and thus was a "statement by a person authorized by [the employer] to make a statement concerning the subject. *Evid.R.801(D)(2)(c).* The Court then cited a series of cases, including *Wasinski v. BWC*, 2009-Ohio-2615, for the proposition that the report may have also been admissible under the "business records exception" contained in Evid.R.803(6). The Court rejected the appellant's contention that it could not cross-examine the doctor, stating it would be "akin to a party cross-examining itself." Finally, the Court found that because the case was framed only on a "zone of employment" basis (citing only the opening statements) the doctor's opinions were secondary to the ultimate issue at trial, as presented by the parties.

*Szulinski* is a troubling opinion on several levels. Certainly, the opinions of an IME doctor often align with that of the employer, but often do not. Employers must be cognizant of the fact that statements contained in IME reports may be used against them at trial, and should address the issue of admissibility via a motion *in limine*. 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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