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Shop Talk: Workers' Compensation

QUESTION: In a court appeal, can a claimant seek conditions that were not part of the original order? What happens if the employer fails to object to these conditions?

It is axiomatic in Ohio that workers' compensation claims are not allowed for "an injury," but rather grant right to participate for a specific medical condition. The Supreme Court of Ohio has determined that the only medical conditions which can be appealed to court pursuant to R.C. 4123.512 are those which were presented to the Industrial Commission and subject to the order from which appeal has been taken. *Ward v Kroger Co.*, 106 Ohio St. 3d 35. Nonetheless, questions inevitably arise as to whether a court lacks subject matter jurisdiction over these conditions, thus rendering any verdict invalid *ab initio*, or whether an employer is required to object to the consideration of these conditions at trial.

Cosgrove v Omni Manor, 2016-Ohio-8481, concerned an employee who claimed to have injured her low back. A workers' compensation claim was filed alleging "lumbar sprain," which was contested by the employer, who maintained that no injury occurred. A DHO initially allowed the claim, and the claimant then filed a C-86 motion seeking several additional conditions, including herniated disks and spinal stenosis. The employer appealed the original allowance, and after a hearing the SHO vacated the DHO order and denied the claim in its entirety for "lumbar sprain." When the claimant appealed this order to common pleas court pursuant to R.C. §4123.512 she also included claims for both the lumbar sprain and disk conditions. In its Answer, the employer included an affirmative defense that the disk conditions were not properly before the Court and that the Court lacked subject matter jurisdiction, but the employer never did anything else to further this defense. The case proceeded to trial with a magistrate, and the jury was presented with verdict forms reflecting only the disk conditions, and not the lumbar sprain. The jury found the worker was entitled to participate for a herniated disc, and the magistrate finalized the verdict. It was only after the trial was concluded, when the Court was considering objections, that the employer asserted that the Court lacked subject matter jurisdiction over the allowed conditions because they were not adjudicated administratively. The trial court overruled the objections and affirmed the jury verdict, prompting an appeal as of right to the Seventh District Court of Appeals.

The Seventh District affirmed, finding that while the employer was correct that the disk conditions never should have been considered by the jury, the employer's failure to maintain the defense meant that it was waived. The Court rejected the employer's argument that that the trial court lacked subject matter jurisdiction, noting that the Supreme Court in *Ward* had not stated as much. Instead, the Court held that the consideration of a non-appealed condition was an affirmative defense that must be both asserted and maintained. While the employer in *Cosgrove* included the defense in its Answer, it was also incumbent upon it to also maintain the defense at trial, such as by filing for summary judgment or directed verdict, by filing motions *in limine*, or by objecting to the jury instructions. By failing to maintain its defense, and allowing the non-appealed conditions to go to the jury, the employer forfeited a valid defense based upon *Ward*.

Cosgrove stands for the proposition that, even when objectionable material is presented in the Complaint, it is incumbent upon an employer (and its counsel) to maintain those defenses leading to trial. Counsel in *Cosgrove* misread *Ward* and failed to maintain its defense, and thereby forfeited a valid argument.

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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