Gallagher Sharp LLP

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WORKERS' COMPENSATION SHOP TALK

QUESTION: What is the impact of separate court appeals alleging "direct causation" and "substantial aggravation" theories for the exact same injury?

It is not unusual for a workers' compensation claimant to allege two separate, and in some cases contradictory, theories of recovery for the same exact injury. For example, if a claimant injures her back in a lifting injury and alleges a herniated disk as a result, it is not unusual for the same claimant to later claim that her pre-existing degenerative disk disease at the same level (which had purportedly "resolved") was in fact substantially aggravated by the same incident. In some cases, this claim comes by way of a separate C-86 motion which is allowed or denied in administrative proceedings. But what happens when both theories result in court appeals? Is consolidation of these claims required? And, can the claimant choose which theory to pursue, or must she present alternative theories to the jury? The Fifth District Court of Appeals recently considered this problem in a case involving one incident, one injury, and two separate theories of liability.

Henderson v. Canton City Schools, 2019-Ohio-610, involved a claimant who was injured at work on March 17, 2014. A workers' compensation claim was filed, which was allowed for bilateral shoulder sprains. The claimant subsequently moved for an additional allowance for a "partial thickness tear left supraspinatus" by direct causation. This request was denied at every level administratively, prompting an appeal to the Stark County Court of Common Pleas in July, 2015. That case was voluntarily dismissed without prejudice on April 4, 2016, with a right to refile within one year. Meanwhile, the claimant had filed a new administrative motion in July, 2015, alleging the same injury, but claiming that the tear was "substantially aggravated" by the March 17, 2014, injury. This motion was also denied at every administrative level, and appealed to the same common pleas court on January 25, 2016. During the four months when the cases were both in existence, the claimant never moved to consolidate them. The second appeal was also dismissed without prejudice, with a right to refile within one year, on September 29, 2016. The first case was re-filed on March 23, 2017, while the second was refiled on September 25, 2017. The first case was then voluntarily dismissed for a second time on February 21, 2018, which served as a dismissal with prejudice. At that point, the employer moved for summary judgment on the second case, alleging that claim was barred by the doctrine of *res judicata* because the "substantial aggravation claim" arose from the same incident, involved the same injury, and that the claimant could have presented a "substantial aggravation" theory in the first case but chose not to. The trial court agreed, granting summary judgment to the employer, prompting an appeal as of right to the Fifth Appellate District.

The Fifth District affirmed, finding that the two cases arose from the same transaction, and therefore the adjudication on the merits of the first case (by dismissing it a second time) barred prosecution of the second case. Applying the four-pronged test applicable to *res judicata* claims, the Court noted that the purpose was to "avoid re-litigation of a point of law or fact that was at issue in a prior action involving the same parties that was passed upon by a court of competent jurisdiction." *State ex rel. Kroger v. Indus. Comm.*, 80 Ohio St.3d 649 (1998). In the case at bar, there was a prior determination on the merits involving the same parties arising from the same transaction or occurrence, and therefore the only other point for consideration was whether the present action "raises claims that were or could have been litigated in the prior action." *Id.* The Court cited *Starkey v. Builders FirstSource Ohio Valley LLC*, 2011-Ohio-3278, in holding that a claimant is entitled to present a "substantial aggravation" theory in a R.C. 4123.512 appeal even if that theory was not presented administratively, and that "substantial aggravation" was not a separate cause of action even in cases where the Industrial Commission has considered it separately. Citing *Robinson v. AT&T*, 2003-Ohio-1513, the Court also held that advancing a new theory of causation in a case involving the same condition is not the same as claiming a new injury, and distinguished prior cases involving different injuries to the same body part. The Court also dismissed the claimant's argument that consolidation was not a remedy because it would have required the claimant to produce medical evidence that was contradictory, as the rules governing administrative appeals allow alternative theories and the only issue on appeal is whether a claimant is "entitled to participate" for the requested medical condition, not how it was caused.

Henderson certainly stands for the proposition that appeals to court involving the exact same injury must for practical purposes be consolidated. However, it is notable that the Court in *Henderson* did not extend its reasoning to situations involving similar injuries to the same body part, a situation still governed by *Ward v. Kroger*, 2005-Ohio-3560, which holds that appeals must be limited to the conditions contained in the administrative order.

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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