From: Don Drinko
Sent: Wed 5/17/2017 4:19 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When does an intervening incident which requires additional treatment constitute a new injury, as opposed to a "setback" in the original claim?

Nearly every employer has experienced a situation where an employee is injured, receives treatment and improves, then suffers a "setback" resulting from an off-the-job incident. Often, the claimant will seek to have treatment arising from the "setback" paid under his original claim, alleging that the "setback" was in fact a continuation of the original injury. Recently, the Tenth District Court of Appeals considered an appeal brought by an employer who contesting a request for a second shoulder surgery arising from a new rotator cuff tear arising from two incidents that occurred during work with a new employer, and the issue of whether the Industrial Commission abused its discretion in finding that the second surgery was not the result of a new injury.

State ex rel. Daily Servs., LLC v Indus. Comm., 2017-Ohio-2771, began with a work-related injury which occurred on October 16, 2013. The claimant sustained injuries to his right shoulder, and a workers' compensation claim was allowed for several conditions, including "tear supraspinatus, right; tear subscapsularis, right." An MRI taken on April 29, 2014 revealed a variety of tears, fraying, and hypertrophic changes in the shoulder, and the claimant underwent arthroscopic surgery on July 15, 2015. After a course of physical therapy, the claimant returned to light duty work with another employer in November, 2015, but immediately noted "increased soreness and clicking" in the shoulder after lifting a 20 lb bag of dog food. The claimant's shoulder remained relatively stable until January 13, 2016, when he experienced pain after mopping a floor. A second MRI performed on February 3, 2016, revealed a new full–thickness tear in the shoulder near the site of the previous repair. The surgeon completed a C-9 requesting a second surgery, which was contested by the employer. A peer review physician reviewed the file and concluded that the request met the *Miller* criteria, finding that while the claimant "did reasonably well" following the first surgery, he later "developed pain and decreased range of motion in his right shoulder." The employer produced its own file review by a physician who concluded that the claimant had "two new injuries following the [original] work-related injury" and that the second surgery was a direct result of those incidents. The Industrial Commission approved the surgery over the employer's objection, finding no new claims had been filed as a result of the "exacerbating incidents" in November, 2015 and January, 2016." The employer filed an original *mandamus* action in the Tenth District Court of Appeals.

The Tenth District found no "clear legal right to relief," and affirmed the finding that the second surgery should be paid under the original claim. Citing *State ex rel. Miller v Indus. Comm.,*71 Ohio St. 3d 229 (1994), the Court found that while the employer asserted that the claimant had sustained "new" injuries, evidence was lacking that these incidents were sufficient on their own to cause the new tear. While it is not disputed that an "intervening" injury can break a causal connection between incident and treatment, the IC has discretion to determine whether or not events which occur actually constitute "intervening injuries." In this case, lifting a bag of dog food or mopping a floor did not amount to intervening "injuries" such as a fall or motor vehicle accident might be. The Court noted that it is common knowledge that surgery can leave repaired

tendons in a "compromised state" making it more difficult for an injured worker to perform "ordinary tasks."

The Court in *Daily Servs.* relied upon the nature of the activity, rather than the findings of the second MRI and subsequent surgery, in concluding that no new injury had occurred. Employers faced with this situation must be sure to document both the nature of the incidents and the objective physical in presenting cases of "intervening injury" to the Industrial Commission.

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
GALLAGHER SHARP, LLP
1501 Euclid Avenue - 6th Floor
Cleveland, OH 44115
Direct Dial: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com