

From: Don Drinko
Sent: Wed 7/2/2014 4:26 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When presenting a claim for "substantial aggravation," what types of evidence may be presented to establish the existence of a pre-existing condition?

Ohio courts continue to refine the concept of "substantial aggravation" and what specifically constitutes "objective diagnostic findings, objective clinical findings, or objective test results." *R.C. §4123.01(C)(4)*. While it is established that pre-accident x-rays, MRIs, or other objective testing are not required, it remains somewhat vague as to what constitutes "objective clinical findings." Recently, the Ohio Court of Appeals, Tenth District, considered whether the testimony of the claimant that she was told about a pre-existing condition, when combined with her doctor's testimony, constituted "objective" evidence of a pre-existing condition.

Strickler v. Columbus, 2014-Ohio-1380, involved a claimant who worked for the Columbus Division of Police. In April, 2007, she suffered a right-knee injury when she slipped on some used shell casings and fell at a firing range. Her initial treatment was not successful, and she subsequently saw an orthopedic surgeon who diagnosed a number of conditions, including "substantial aggravation of pre-existing osteoarthritis right knee." A workers' compensation claim was filed, which was allowed in part, but denied for the alleged aggravation, prompting a court appeal. At trial, the employer took the position that the "aggravation" claim was invalid because the claimant did not have osteoarthritis before the fall. After the trial, the court denied the "substantial aggravation" claim based upon a lack of evidence of prior symptoms, lack of objective evidence of prior existence of the condition. The claimant then appealed as of right to the Tenth District Court of Appeals.

The Tenth District affirmed, finding that the trial court's conclusion was not against the manifest weight of the evidence. The Court noted that it was incumbent upon the claimant to produce some objective evidence - findings, symptoms, or tests - to support a conclusion that the substantially aggravated condition existed before the incident. While the evidence did not have to be from before the injury, it did need to objectively support the argument that it pre-existed the injury. *See Brate v. Rolls-Royce Energy Sys, Inc*, 2012-Ohio-4577; *Bohl v. Cassens Transp. Co.*, 2012-Ohio-2248. In this case, the claimant's doctor testified that he believed the symptoms were caused by a substantial aggravation of pre-existing osteoarthritis, but never explained why he held this position. No evidence of pre-existing pathology was introduced that went beyond the doctor's opinion, and in fact the only evidence produced was the testimony of the claimant, who said that after her 2007 MRI showed arthritis she was told "it just can't appear overnight, so [she] had to have it before." However, she could not identify who told her this. Had the claimant produced evidence of pathology, such as spurring or other objective degenerative changes, the outcome might have been different – but no such evidence was presented.

The difficulty of this decision is reflected in the strongly-worded dissent from Judge Tyaak, who felt the case was "relatively straight forward" and should have been allowed. 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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