

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

QUESTION: In a court appeal, is it necessary for the claimant to establish the precise date on which an injury occurred?

The date of injury (or "DOI") can be found on nearly every workers' compensation document, and the burden of proof is always on the claimant to establish the elements necessary to establish his claim. In court appeals, questions can sometimes arise as to whether an incident or injury occurred on a specific date, on another date, or developed over time. Recently, the Twelfth District Court of Appeals considered a case involving several jury questions during deliberations about a back injury, and whether the Court erred in instructing the jury that it need not determine that an injury happened on a particular date.

Cook v Admin., Bur. of Workers' Comp., 2017-Ohio-5849, involved a claimant who claimed to have been injured while bending over to paint on July 3, 2014. The claimant filed an application for workers' compensation benefits alleging "lumbar disc herniation," which was denied administratively. The claimant filed an appeal pursuant to R.C. 4123.512, and the complaint alleged that the injury occurred "on or about" July 3, 2014. The case proceeded to trial before a jury, and several doctors testified that the disc herniation was the result of the bending incident. However, a doctor retained by the employer stated that the claimant told him he was "uncertain" when his back pain began, and concluded that the disc herniation was not a result of the bending incident. During deliberations, the jurors directed several questions to the judge as to whether they had to be "certain" that the herniation happened on July 3, 2014 in order to find for the Plaintiff. After hearing arguments, the Court instructed the jury that "you need not be certain the injury happened on July 3, 2014." The jury found for the Plaintiff, prompting an appeal as of right to the Twelfth District Court of Appeals. The basis for the appeal was that the Court's response to the jury's questions concerning the alleged date of injury was erroneous, and that a motion for new trial should have been granted.

The Twelfth District affirmed, finding that the trial court did not err in instructing the jury that it need not find that the bending incident occurred on July 3, 2014. Noting that a trial court only has a duty to "instruct the jury as to the applicable law on all issues presented in the case that are supported by the evidence," the trial court properly relied on *Amie v. General Motors Corp.*, 69 Ohio App.2d 2011 (8th Dist.1980) in finding that the exact date of injury is not a necessary element of a workers' compensation claim. *Amie* involved an employee who alleged that an incident occurred on a specific date, but at trial the employer introduced records indicating that the claimant was not paid for the date in question. The court in *Amie* held that the payroll records were not conclusive, but merely circumstantial evidence of the worker's presence at the job site on the date the injury occurred. In the case at bar, there was evidence presented that the incident may have actually happened a day later, which was likely the basis for the jury's indecision. A fact is only "material" if it affects the outcome of the litigation, and the precise date of the claimant's injury was never a material fact at trial. A jury must only determine by a preponderance of the evidence whether the claimant was injured in the course of and arising

from his employment with the defendant-employer, and the precise date of injury is not a necessary element of the case.

As noted by the Court in *Cook*, evidence of an incorrect DOI is certainly probative as to whether the jury should find the claimant to be credible, and can be used to create doubt as to whether the injury actually occurred at work. One should also take note that the jury instructions must comport with the evidence presented at trial, so if the evidence points to an alternate theory of injury, an incorrect DOI may be said to be “material.”

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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