

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

**QUESTION: Is a doctor's inability to describe the legal definition of "substantial aggravation" a valid basis for excluding his testimony at trial?**

A claimant's right to receive workers' compensation benefits for the aggravation of a preexisting condition was modified in 2006. The new statute required that a claimant demonstrate with objective evidence that an aggravation was "substantial." See *Pflanz v. Pilkington LOF*, 2011-Ohio-2670. However, this requirement is a legal definition, which in practice meant little to the physicians who provided care. Recently, the Second District Court of Appeals considered a case when a claimant's medical expert struggled to provide the legal definition of "substantial aggravation" during his testimony, and the question of whether this failure warranted the exclusion of his testimony at trial.

*Rowland v Buehrer*, 2017-Ohio-7096, involved a claimant who first injured her shoulder at work in January, 2011. She treated with a physician who diagnosed her with various sprains and strains, and also suspected that she had a rotator cuff tear. An MRI was recommended, but never performed, and the claimant returned to work. Four years later, the claimant again injured her shoulder at work, and an MRI revealed a full-thickness tear. The claimant moved to have the claim additionally allowed for "left shoulder supraspinatus tendon tear" which was ultimately allowed over the objections of the employer, who filed a notice of appeal to the court of common pleas. During his trial deposition, the claimant's treating physician testified that she in fact had a substantial aggravation of the previous 2011 tear, and cited the bases for his opinion. During cross-examination, the physician struggled with the legal definition of "substantial aggravation" and the effect of the 2006 change in law. The employer filed a motion *in limine* seeking to exclude the testimony of the doctor, arguing that the doctor failed to utilize the proper standard or to identify objective diagnostic findings, clinical findings, or objective test results to support the claim. The claimant argued that the physician is "not a lawyer and not required to utilize the legalese [the employer] sought to elicit during [his] testimony." The trial court granted the motion *in limine* and later granted summary judgment, finding that the doctor's failure to use the correct standard when testifying as to a "substantial aggravation" affected his testimony, and that "without an understanding of the statutory definition of "substantial aggravation" the testimony did not satisfy R.C. 4123.01 (C)." The claimant filed an appeal as of right to the Second District Court of Appeals.

The Second District reversed, holding that the doctor's testimony should not have been excluded and that therefore summary judgment was not warranted. The Court noted that there is not a "statutory definition" of "substantial aggravation" and that rather than rote definitions, the important information in medical testimony are the findings upon which the conclusions are based. The doctor in *Rowland*, a board-certified orthopedic surgeon, cited observations from the 2015 claim, including guarding and difficulty with overhead activity, as well as the MRI results as objective evidence of the tear. With regard to the 2011 injury, the doctor testified that while the claimant likely did have a tear at that time, the claimant responded well to treatment and returned to work, in stark contrast to the aftermath of the 2015 injury. The Court concluded that

the doctor's testimony satisfied the evidentiary standard, and the trial court abused its discretion in determining that the testimony should be excluded based upon the failure to use the "magic words" sought by the defendants.

*Rowland* has many lessons, not the least of which is the need for proper preparation of medical experts. The case is also instructive for any attorney preparing to cross-examine a physician on the meaning of "substantial aggravation." It is better to focus less on legal standards and more on the weight of the alleged objective findings.

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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