

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

QUESTION: You received an order in which the hearing officer offers a medical opinion, instead of simply considering the medical evidence. What is the most appropriate response in this situation?

While most hearing officers base their opinions on the medical evidence presented, at times you will encounter one who will go further, and offer his or her own medical opinions. The best way to address this problem is to ask the Industrial Commission to assert its "continuing jurisdiction" to correct these mistakes of law. *R.C. §4123,52; State ex rel Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990. Recently, the Tenth District Court of Appeals considered just this situation, as well as the question of whether an unsupported medical opinion should be vacated when other evidence may support it.

State ex rel Robertson v. Indus. Comm., 2014-Ohio-2417, involved a claimant who injured her shoulder at work. The claim was allowed for "left-shoulder bursitis" but disallowed for a number of other shoulder conditions. The claimant eventually underwent surgery, and when considering a request for temporary total disability ("TTD") compensation arising from the surgery, an SHO found that the claimant was entitled to TTD since the post-operative diagnosis of "left-shoulder impingement" was "another name for bursitis." At the request of the employer, the Industrial Commission exercised its continuing jurisdiction based upon mistakes of fact and law, and vacated the SHO order as unsupported by the medical evidence. A *mandamus* action ensued, and a magistrate for the Tenth District Court of Appeals made findings of fact, and recommended that the Industrial Commission's Order be vacated and the SHO order reinstated because, notwithstanding the unsupported opinion, the opinion was irrelevant because the operative notes reflected a "bursectomy and acromioplasty." The employer and Industrial Commission filed timely objections to the magistrate's findings.

The Tenth District rejected the magistrate's recommendation, and affirmed the decision to vacate the order. Simply put, the Court found an SHO's decision must be based upon medical evidence, and there was no medical evidence to support the conclusion that "bursitis" was another name for "impingement." In fact, the file contained medical evidence provided by the employer that this was not the case. With regard to whether the mistake was irrelevant, the Court found that once the exercise of continuing jurisdiction takes place, the Industrial Commission is free to make any decision that is supported by the evidence. In this case, the employer provided medical evidence that the surgery was for a non-allowed condition, and the additional TTD was not warranted. The Court noted that it was the Industrial Commission, and not the Court, who is the exclusive evaluator of the weight and credibility of evidence. *State ex rel LTV Steel Co. v. Indus. Comm.*, 88 Ohio St.3d 284 (2000).

Robertson presents a good example of how an employer should handle an SHO opinion that purports to offer an unsupported SHO medical opinion. The request for reconsideration will normally follow a refusal order, and should cite the statute. 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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