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

QUESTION: It appears a claimant's attorney may have "suggested" changes to an expert report that was subsequently submitted at hearing. Can this information be used to discredit the report before the Industrial Commission?

The practice described in this week's question is not uncommon among claimant attorneys, and to a lesser extent the defense bar. Recently, the Eighth Appellate District considered a case arising from a workers' compensation attorney who allegedly utilized this practice. Specifically the question arose of whether a writ of prohibition should issue to preclude the Industrial Commission from considering a memo of "proposed changes" that ultimately found their way into a doctor's report.

Liebe v. Indus. Comm., 2014-Ohio-4082, originated with a work-related incident that resulted in five (5) injuries, only three (3) of which were initially allowed. On appeal, the claimant's attorney, Mike Gruhin, submitted an expert report from a physician (Dr Haely) in support. After the DHO Order was affirmed, a *de novo* court appeal followed, and during discovery the employer found a "draft" report from Dr. Haely and a memo containing proposed changes from Mr. Gruhin. A review of the final report reflects that all of the "proposed changes" were incorporated verbatim into the final report. Mr. Gruhin contended that the "proposed changes" memo was work product, while the employer contended it constituted unethical conduct. The employer, citing "newly discovered evidence" pursuant to R.C.§4123.52, brought the issue before the Industrial Commission, which concluded that memo damaged the credibility of the physician and denied all conditions. After an appeal, the claimant settled the workers' compensation claim, but Mr. Gruhin proceeded with an action seeking a writ of prohibition to exclude use of the "proposed changes" memo, arguing that the settlement did not render the issue moot and that the memo was work product. The employer filed a motion for summary judgment which was granted, prompting an appeal as of right.

The Eighth District Court of Appeals affirmed, finding that the writ of prohibition was moot when the claimant settled her case, and that the dismissal should stand. The dismissal eliminated the first element required for a writ of prohibition: that the respondent be about to exercise judicial or *quasi-judicial* power. *State ex rel. Largent v. Fisher,* 43 Ohio St.3d160 (1989). When the claimant settled her claim, there could be no further proceedings before the Industrial Commission, and therefore no further consideration of the "proposed changes" memo. Mr. Gruhin's speculation that the BWC could commence fraud proceedings against the claimant was just that -- speculation. The Court noted that claimant had adequate remedy to the prohibition against use of privileged materials. The Court noted the likely reason for Mr. Gruhin's insistence on going forward was his desire to have the "proposed changes" memo declared to be work product, so as to prevent its use in subsequent proceedings such as a professional liability case.

Unfortunately, practices such as those at issue in *Liebe* rarely come to light until a matter is appealed. Employer's counsel should make it a practice to carefully review all reports for subtle changes or multiple versions, pursue additional records if discrepancies are found, and take the opportunity to thoroughly review the physician's hard file before conducting a deposition. 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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