From: Don Drinko
Sent: Wed 10/18/2017 4:28 PM

Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When are findings in a medical report considered to be "stale"? Can conclusions contained in a medical report concerning a separate issue be argued in another hearing?

Most claims before the Industrial Commission involve numerous hearings concerning multiple issues, and many of those hearings involve medical reports. The findings contained in those reports are sometimes used in subsequent hearings to support portions of an argument, but questions often arise as to when those findings are useful. Recently, the Tenth District Court of Appeals considered a case involving a permanent total disability ("PTD") application, a medical report that was submitted earlier regarding another issue, and whether the consideration of that evidence was an abuse of discretion.

State ex rel. Hettinger v Industrial Commission, 2017-Ohio-7899, involved a claimant who was injured in 2008. His workers' compensation claim was recognized for a variety of right shoulder conditions, as well as adjustment disorder and "chronic surgical pain syndrome." In November, 2015, the claimant filed an application for PTD based upon his chronic pain. The claimant was 43 years of age, a high school graduate, and able to read and write. The claimant's medical included a psychiatric report which concluded that the claimant had reached MMI with regard to the psychological conditions and was incapable of work. A second psychiatric report submitted in the context of a temporary total disability ("TTD") application was also considered and relied upon for the conclusion that the claimant was capable of returning to his former position. The claimant's PTD application was ultimately denied, prompting the claimant to file a *mandamus* action in the Tenth District Court of Appeals. A magistrate's decision concluded that there was no abuse of discretion, and the claimant filed an objection to those conclusions citing, among other things, the Staff Hearing Officer's consideration of a report that was allegedly "stale" and which was submitted for reasons other than the PTD application.

The Tenth District affirmed, finding that the consideration of the TTD report was not an abuse of discretion. Ohio Administrative Code 4121-3-34 (C)(1) permits the Commission to consider reports from medical examinations that are conducted within 24 months of the filing of a PTD application. The examination in question was well within that time frame, and therefore was not "stale" under Industrial Commission rules. The Court found that it was also not significant that the psychiatrist examining the claimant had done so in the context of the TTD application. "If relator is capable of returning to his former position of employment, he is capable of sustained remunerative employment." For those reasons, the Industrial Commission had not abused its discretion. The Court also rejected claimant's contention that a failure to mention the claimant's psychological report was not an abuse of discretion, as the Commission is not required to identify evidence it found unpersuasive.

While limited to PTD applications, the OAC provision referenced in *Hettinger* above is also applicable to other situations involving parallel examinations. For example, very often you will find evidence in permanent partial disability ("PPD") examinations which is helpful in other

issues. It is good practice to review all medical reports, including those for other issues, when preparing for a hearing.

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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