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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: ARE MEDICAL OPINIONS HEARSAY? WHY ARE THEY ADMISSIBLE BEFORE THE INDUSTRIAL COMMISSION, BUT NOT AT TRIAL?

One of the difficulties in litigating workers' compensation claims comes with the dichotomy between what is admissible administratively, and what is admissible in court. As many of you know, the Rules of Evidence are treated as advisory before the Industrial Commission, and this is particularly true in the case of "hearsay" evidence, or out-of-court statements offered into evidence to prove the truth of the matter asserted. *Evid. R. 801(C)*. While this evidence is routinely offered and considered in administrative proceedings, its introduction into evidence at trial can constitute reversible error. Recently, the Second District Court of Appeals considered a case involving a motion for a new trial, the introduction of testimony from one physician about the medical opinions of another, the introduction of reports from physicians who were not testifying at trial, and the issue of whether this evidence was properly excluded in a workers' compensation appeal.

The facts of *Thomas v Bureau of Workers' Comp.*, 2016-Ohio-7246, are complicated, but can be summarized as follows: The claimant initially alleged that she was injured in the course of and arising from her employment on September 16, 2009. She filed a workers' compensation claim alleging "contusion of the left knee and left foot sprain," which was denied administratively. The claimant filed an appeal into Common Pleas Court, but subsequently dismissed that appeal without prejudice. While the first claim was dismissed, the claimant filed a second claim arising from the same incident, but alleging "substantial aggravation of pre-existing osteoarthritis." The second claim proceeded to administrative hearings wherein it was dismissed based upon *res judicata*. The original matter was then re-filed and proceeded to trial. A trial the claimant's attorney sought to cross-examine the employer's expert witness about the opinions of other doctors, who were not testifying at the trial, but whose opinions were discussed in his expert report. Additionally, the claimant sought to introduce a diagnosis contained on the claimant's FROI-1. In turn, the employer sought to introduce the expert report from its medical expert into evidence, as well as several hundred pages of documents from a 2007 workers' compensation claim filed by the claimant. The trial court excluded the testimony concerning the non-witness physicians as "hearsay," but permitted introduction of the expert report and prior claim records. The matter proceeded to trial resulting in a verdict for the employer. However, a second judge heard and granted a motion for a new trial due to "irregularities" in evidentiary rulings, prompting an appeal as of right by all parties to the Second District Court of Appeals.

The Second District affirmed in part and reversed in part, finding that the non-witness medical opinions were properly excluded as "hearsay" by the trial court, but that the expert report and claim records also contained inadmissible "hearsay" opinions and should have been excluded as well. The Court noted that the great weight of authority in Ohio holds that medical opinions and diagnoses from non-witness physicians constitute "hearsay," and are not admissible within the "business records" exception of Evid. R. 803(6). However, the court found that this was not

conclusive, and applied the 7-step inquiry set forth in *Hytha v Schwendeman*, 40 App.2d 478 (1974). These factors include: 1) record must have been a systemic entry kept in the records of a hospital or physician in the regular course of business; 2) the diagnosis must have been the result of a well-known and accepted objective testing; 3) the diagnosis must not have rested solely upon the subjective complaints of the patient; 4) the diagnosis must have been made by a qualified person; 5) the evidence sought to be introduced must be competent and relevant; 6) if the use of the record is for purpose of proving the truth of the matter asserted, it must be the product of the party seeking its admission; and 7) the record must be properly authenticated. The Court applied this analysis and concluded that the opinion testimony from non-witness physicians did not satisfy the requirements of *Hytha*, and was properly excluded. Additionally, the Court found that the diagnosis contained in the FROI-1 itself was also properly excluded. However, the Court did find that while the claimant could be cross-examined regarding her previous workers' compensation injury, the introduction into evidence of 250 pages of claimant's 2007 claim file, which contained diagnoses of non-witness physicians and the introduction of the employer's expert witness report, was in error. Therefore, the Court agreed that the claimant was denied a fair trial, and that a new trial was warranted pursuant to Civ. R. 59.

Thomas confirms that, at least in cases where a workers' compensation claim is appealed to court, opinion testimony of non-witness physicians is almost always "hearsay," and should be excluded. It is also clear that employers should never seek to introduce an expert witness report, particularly where it contains a summary of the records and opinions of non-witness physicians. Finally, while cross-examination of a claimant about a prior work injury is permissible (and often necessary) one should be careful to make sure that any records introduced do not contain "hearsay" evidence.

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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