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

QUESTION: What is the correct employer response when a claimant seeks multiple conditions which encompass the same condition?

According to the Merriam-Webster Medical Dictionary, "chondromalacia" is defined as the "abnormal softening of cartilage." This condition is often requested as a "flow through" to other injuries, most commonly in the knee. However, many physicians also describe this condition as a "type" of osteoarthritis, or a symptom of that condition, and questions can arise as to whether an allowance of "osteoarthritis" encompasses the presence of "chondromalacia." Recently, the Twelfth Appellate District considered a case involving this question, and whether a trial court abused its discretion in denying a claim for an analogous condition.

Hornschemeier v Buehrer, 2017-Ohio-7021, concerned a claimant who injured his right knee at work and filed a workers' compensation claim. The claim was allowed for a "sprained right knee, lateral meniscus tear right knee, and loose bodies right knee," but disallowed for "chondromalacia of the right knee." The claimant appealed this decision to the Clermont County Court of Common Pleas pursuant to R.C.§ 4123.512, but before this matter went to trial the Industrial Commission additionally allowed the claim for "osteoarthritis of the right knee." After a trial, a magistrate found that the claim should be additionally allowed for "chondromalacia." The trial court (in response to an objection by the BWC) refused to adopt the findings of the magistrate, concluding that the testimony of the claimant's orthopedic surgeon could only support a finding that "chondromalacia" and "osteoarthritis" were the same condition. The trial court therefore found that the doctrine of *res judicata* applied, and denied the claim of "chondromalacia." This prompted an appeal as of right to the Twelfth Appellate District.

The Twelfth District affirmed, finding that the burden was upon the plaintiff to produce evidence to prove his claim, and he failed to do so. The trial court first agreed the application of *res judicata* was inappropriate, but found no error in disallowing the claim for "chondromalacia." The only witnesses to testify during trial were the claimant and his orthopedic surgeon, and during testimony the surgeon testified that "chondromalacia is a form of arthritis." When asked to confirm that chondromalacia and arthritis are essentially the same thing, the surgeon replied "same thing, yeah." A distinction between the conditions was not discussed in testimony, and no medical records, testimony, or other evidence in the record clarified the distinction. Therefore, the only evidence before the trial court was that osteoarthritis and chondromalacia were the "same thing," and therefore the claimant failed to meet his burden of proof with regard to whether the condition was different.

From personal experience, I can attest that many orthopedic surgeons (and hearing officers) would disagree with the testimony of the orthopedic surgeon in *Hornschemeier*. However, the Court of Appeals correctly applied the standard, noting that the burden is upon the claimant to demonstrate that the requested condition is both present and distinct from other allowed conditions. Unfortunately, the only testimony presented by the claimant essentially undercut his claim.

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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