

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

**Question:** At trial, is evidence of previously allowed conditions in a workers' compensation claim admissible in a trial for a new condition? What about evidence of previously denied conditions?

Evidentiary issues inherently make difficult law, because a trial court is usually given great latitude in determining what is and is not admitted in court. Recently, the Ohio Court of Appeals, Fifth Appellate District, was presented with a case involving an allowed workers' compensation claim, a request for additional allowance which went to trial, and whether evidence of allowed conditions and/or conditions which were denied and not appealed were admissible in a jury trial. The case also gives some instruction on how one court believes these issues should be handled.

*Vogelmeier v. Ohio Power Co.*, 2014-Ohio-5175, involved a claimant who filed a workers' compensation claim in 2007 for an injury in the course of and arising from his employment. The claim was allowed for "left shoulder sprain, chest wall strain, and left dorsal strain." The claimant subsequently sought to have the claim additionally allowed for all of the following conditions: "left shoulder rotator cuff syndrome, left shoulder impingement, substantial aggravation of pre-existing acromioclavicular joint arthropathy, substantial aggravation of pre-existing left shoulder synovitis, substantial aggravation of pre-existing left shoulder capsulitis, substantial aggravation of pre-existing left shoulder bursitis, left shoulder slap tear, C3-4 herniated nucleus pulposus, C 4-5 herniated nucleus pulposus, C 5-6 disc protrusion, C 6-7 disc protrusion, and dysthymic disorder," all of which were denied. In 2012, the claimant again sought to have his claim additionally allowed for "disc herniation/protrusion at T5-6, T7-8, and T8-9." This request was initially rejected by a DHO, but that decision was reversed by an SHO, who allowed the conditions. The employer appealed this decision to the Knox County Common Pleas Court pursuant to R.C. 4123.512, and the matter proceeded to trial. Prior to the trial, the claimant filed a motion *in limine* seeking to prevent the mention of any of the numerous denied conditions, which was granted by the trial court. The jury returned a verdict in favor of the claimant, prompting an appeal by the employer arguing that admission of previously allowed conditions, while excluding the conditions that were denied, was an abuse of discretion.

The Fifth District disagreed, finding that the admission of previously allowed conditions was relevant to the inquiry, but the denied conditions were properly excluded. Evid R. 402 governs relevance, and declares that virtually all relevant evidence is admissible, and that it is best to rely upon the sound discretion of the trial court, who is in the best position to analyze the impact of evidence on a jury. *State v. Taylor*, 39 Ohio St.3d 162 (1988). In the context of workers' compensation appeals, the court found that evidence of previously allowed conditions is "inherently relevant to establish the background for the further allowances he sought." The court also determined that the employer had failed to preserve the error, because its attorneys failed to file a motion *in limine* seeking to have evidence of the prior conditions excluded, and failed to object at trial. The trial court also did not abuse its discretion in excluding the evidence of previously denied

conditions, which concerned other body parts and therefore had little, if any, relevance and could confuse the jury. The employer's attorneys also failed to preserve its appeal on this issue, as the evidence was not proffered outside of the presence of the jury.

*Vogelmeier* capably demonstrates the “shotgun” approach to additional allowances employed by many claimants, and is important in two ways. First, if an employer will seek to admit or exclude certain evidence, the best way to do this is by motion *in limine*, which is simply a pretrial motion asking the trial judge to rule on evidentiary issues before the trial begins. (It is also good practice to know who will be ruling on your motion *in limine* – if your case will be transferred to a visiting judge, it may be best to have that visiting judge rule on trial motions.) In *Vogelmeier*, the claimant sought and received an evidentiary ruling, while the employer did not do so and failed to object in order to “make a record.” Second, when dealing with a “shotgun” approach, it is best to develop medical evidence which will render the admission of previously denied conditions relevant.

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.

Donald G. Drinko, Esq.  
Certified Workers' Compensation Specialist,  
Ohio State Bar Association  
Gallagher Sharp  
1501 Euclid Avenue  
Cleveland, OH 44115  
Direct: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)

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