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Gallagher Sharp Shop Talk: Workers' Compensation

Question: What is the impact of a new request for treatment on a physician's finding that a claimant has reached "maximum medical improvement?"

One basis for terminating temporary total disability compensation is a finding of maximum medical improvement ("MMI"), loosely defined as a stabilized treatment plateau from which no functional or physiological change can be expected. *O.A.C. §4123-3-32(A)(1)*. Recently, the Ohio Court of Appeals, Tenth Appellate District, was presented with a case involving a finding of MMI based upon a medical report that was issued before a request for additional treatment was approved, and whether that report could constitute "some basis" for a finding of MMI.

State ex rel. Barnett v. Comm., 2014-Ohio-311, involved a claimant who suffered multiple neck injuries in 2010, including multiple disc protrusions. The claimant treated conservatively through March, 2012, at which time she was recommended for surgery but deferred until she had lost some weight. At that point, her physician submitted a series of C-9s requesting physical therapy, pain management, injections, and an appointment with a dietician, all of which were denied by the employer. In April, 2012, the BWC ordered an extent of disability exam by a physician, Dr. Garcia, who subsequently issued a report stating that she was MMI "for the current treatment regimen," but stating that this issue could be re-evaluated if she elected to proceed with surgery. (Dr. Garcia was aware of the new C-9s, but stated they had been "denied.") Approximately one month later, the issue of the denied C-9s went to hearing, and a DHO reversed the order and allowed all of the treatment. Approximately one month after that decision, the BWC sought to terminate TTD based upon the findings of Dr. Garcia. In a series of hearings before the Industrial Commission, the claimant was found to have reached "MMI" based solely upon the findings of Dr. Garcia. The claimant then filed an action seeking a writ of *mandamus* before the Tenth District Court of Appeals. A magistrate issued findings of fact and conclusions of law finding that the writ should be granted, prompting an appeal by the Industrial Commission.

The Tenth District affirmed the magistrate's findings and ordered that a writ be issued, and temporary total be reinstated. The Court cited three primary bases for this decision: (1) The IC Orders reflect that the MMI findings were based solely upon the April, 2012 report from Dr. Garcia, which did not reflect that the new treatment was in fact allowed, and citing *State ex rel. Sellards v. Indus. Comm.*, 2006-Ohio-1058, found the medical opinion to be "premature"; (2) there was no medical evidence in the file to support a finding that the claimant was MMI after the new course of treatment, including no attempt to secure a supplemental report from Dr. Garcia; and (3) the SHO was aware of the new treatment, but apparently inferred that it was not successful, and therefore had inappropriately fashioned his own medical opinion instead of relying on the opinions of the physicians. *State ex rel. Valentine v. Indus. Comm.*, 2003-Ohio-1784.

The lesson to be gleaned from *Barnett* is that a motion to terminate compensation based upon MMI is not a static process. Claimant's counsel have learned that submitting a slew of new C-9s will can result in delays, and many hearing officers are only too happy to issue their own medical opinions. Employers should be sure to address subsequent C-9s, or seek continuances to obtain a supplemental report to do so. 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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