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

QUESTION: Is an employer's medical report, which determined that a claimant has reached "maximum medical improvement" (MMI), sufficient evidence to find that a claimant is not entitled to temporary total disability compensation (TTD) at all?

When an employer makes the decision to get an independent medical examination or record review, perhaps the most important question to consider is the subject matter of the report. Often times, if a report does not address all of the relevant issues presented, it can be excluded as not constituting "some evidence" on a given issue. Recently, the Ohio Court of Appeals, Tenth Appellate District, considered a case involving a period of temporary total disability compensation (TTD), and whether the opinions of the employer's doctor constituted "some evidence" upon which the Commission could base a complete denial of compensation.

State ex rel. Medina v. Industrial Comm., 2016-Ohio-173, involved a nurse who slipped and fell on June 18, 2013. The claimant filed a workers' compensation claim, which was allowed for "sprain / strain right jaw." On February 24, 2014, the claimant changed doctors, and the new doctor completed a series of MEDCO-14s indicating the claimant was totally disabled from February 20, 2014 to February 28, 2015. In response, the employer had the claimant examined by a physician on July 29, 2014, who issued a report finding that the claimant's allowed condition had reached MMI, but offered no opinion on TTD to that point. The employer appealed the BWC's grant of TTD, and a DHO denied the TTD, finding that the claimant's evidence did not support the conclusion that the period of disability was related to the allowed condition. The claimant appealed, but an SHO affirmed, specifically mentioning the report of the employer's doctor. The injured worked filed an appeal as of right to the Ohio Court of Appeals, Tenth Appellate District, and a magistrate issued findings vacating the termination. The employer filed an objection to these findings with the Court.

The Court overruled the objection and adopted the findings of the magistrate, determining that the administrative orders must be vacated because they were not supported by "some evidence." The Court stated that the magistrate had considered the correct legal issue: whether there is "some evidence" in the record to support the Commission's denial of TTD. The Court concluded that the employer's doctor's report was not "some evidence" to deny TTD because, by admission, the employer's doctor never offered an opinion relating back to the first day of TTD, but instead only offered an opinion on MMI. The Court concluded that "speculation" about what the doctor believed was causing the period of TTD is not evidence upon which the Commission could rely. Because the employer's doctor's report did not constitute "some evidence" to deny her request for TTD, the matter must be referred back. The Court did agree with the employer that the Commission could use the employer's doctor's report if it becomes relevant as to when, if at all, the injured worker reached MMI.

Clearly, the employer's doctor in *Medina* failed to consider the appropriate question: "Was the claimant temporarily and totally disabled"? Employers who go through the expense of obtaining

an examination should be careful to craft a letter presenting the questions it would like the doctor to address, or risk a finding that it is not "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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