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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: When Responding To An Employer's Motion For Summary Judgment, Under What Circumstances May A Trial Court Deny A Claimant's Motion For Additional Time Pursuant To Civ. R. 56(F)?

Workers' compensation appeals are usually poor candidates for summary judgment. The reason for this is the *de novo* nature of the proceedings, as well as the fact that a claimant will usually have in their possession a medical opinion creating an issue of fact for trial. When faced with a motion for summary judgment, one tactic often employed by claimants is to move for additional time to respond pursuant to Ohio Civ. R. 56(F). Recently, the Tenth District Court of Appeals was presented with a case involving a workers' compensation appeal, a denied Civ. R. 56(F) motion, and whether a failure on the part of the claimant to diligently pursue discovery was sufficient cause to deny the motion and grant summary judgment to the employer.

Fields v. Buehrer, 2014-Ohio-1382, arose from a C-86 motion to additionally allow a claim for complex regional pain syndrome ("CRPS"). The request was denied by a DHO based upon the opinions of two physicians who conducted IMEs of the claimant, but an SHO vacated this order and allowed the condition. After the IC refused further appeals, the employer filed a Notice of Appeal into the common pleas court pursuant to R.C. 4123.512. Shortly before factual discovery was to have been completed, the employer filed a motion for summary judgment alleging that the claimant's treating physicians did not apply the correct standard (as set forth in the *AMA Guides*, 5th Ed.) requiring the presence of 8 or more of 11 objective signs of CRPS. The employer supported its motion with an affidavit by one of the IME physicians, Dr. Steiman, stating that the claimant presented none of the criteria. In response, the claimant's attorney filed a Civ. R. 56(F) motion seeking additional time to respond to the motion, citing a need to get an affidavit from one of the treating physicians, who was on vacation, and to conduct depositions of other physicians, including Dr. Steiman. The motion also included an affidavit from the claimant describing her symptoms. Later, the attorney filed a memorandum *contra* seeking more time, and asking for the court to issue an order reducing the "unreasonable" deposition fee of Dr. Steiman. Ultimately, the trial court denied the claimant's Civ. R. 56(F) motion, struck the claimant's memorandum *contra*, and granted summary judgment to the employer, finding that the *AMA Guides* are the diagnostic standard and that the claimant had not produced evidence of the required "8 or more" indicators of CRPS. The claimant appealed to the Tenth District as of right.

The Tenth District affirmed, concluding that the trial court did not abuse its discretion in denying the claimant's Civ. R. 56(F) motion and granting summary judgment to the employer. The Court cited the fact that the claimant had 14 days to respond to the employer's motion for summary judgment, but their motion did not state why this amount of time was insufficient. For example, the claimant contended that she was unable to secure an affidavit from her treating physician because she was on vacation, but did not state why she was unable to secure the affidavit before the doctor went on vacation. The claimant also filed her 56(F) motion on the day before the discovery cut-off, but never explained why this discovery was not undertaken sooner. Another deposition was scheduled after the date for discovery had lapsed, but the claimant never

explained why it was not scheduled earlier. Similarly, the problem of the doctor's fee was never broached before the end of the discovery period. "Fields' lack of diligence in pursuing the additional discovery she needed, like depositions from Drs. Steiman and Perkins, militated against granting the Civ. R. 56(F) motion." *Id.* at ¶ 17. The Court also rejected the claimant's argument that the AMA issue was not presented until Dr. Steiman signed his affidavit (and that he did not write it himself), ultimately relying upon the fact that the claimant produced no evidence that she exhibited any of the characteristics of CRPS that she would have had to demonstrate at trial.

Fields is instructive on how employers should respond to Civ. R. 56(F) motions – when possible, they should be opposed as the stalling tactics they are. Employers facing claims for CRPS should also find support for the proposition that any medical evidence that does not incorporate the standard contained in the *AMA Guides* (5th Ed.) should not constitute "some evidence" of the condition.

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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