

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

QUESTION: Is it possible to obtain an allowance for a “substantial aggravation” of pre-existing post-traumatic arthritis without pre-incident objective testing?

Since the law changed in October, 2006, Ohio courts have struggled with the definition of “objective evidence” in claims alleging “substantial aggravation” of a pre-existing condition. Several courts have held that the statutory requirement of “objective diagnostic findings, objective clinical findings, or objective test results” anticipates pre-incident testing, or at a minimum pre-incident objective findings. Recently, the Ohio Court of Appeals, Eighth Appellate District, considered a case involving an employee with a 30-year history of knee problems who brought a claim for “substantial aggravation,” and whether a lack of pre-incident testing would serve to bar the claim.

Haynik v. Sherwin-Williams Co., 2014-Ohio-1620, involved a 62-year-old employee who fell twice while working for the employer. He continued to have pain in his left knee, and eventually sought treatment from an associate of a physician who had re-constructed the claimant’s left knee approximately thirty (30) years prior. The x-rays showed substantial degenerative conditions, and the claimant was diagnosed with osteoarthritis in the knee. However, the surgeon also found a “nodule” in the knee, which after arthroscopy turned out to be a fragment of fractured cartilage. The claimant filed a claim alleging a “substantial aggravation of pre-existing post-traumatic arthritis” based upon the fragment. In response, the employer submitted a report from a doctor who opined that there was no objective evidence that a substantial aggravation had been sustained in the falls. The matter proceeded to trial, where the employer twice moved for a directed verdict, but both motions were denied. The jury returned a verdict in favor of the claimant, prompting an appeal as of right by the employer. The basis for the appeal was that the claimant failed to offer any objective evidence (*i.e.*, objective diagnostic findings, objective clinical findings, or objective test results) evidencing a “substantial aggravation,” as required by RC 4123.01(C)(4).

The Eighth District affirmed the jury verdict and rejected the employer’s contention that a lack of pre-incident objective testing was fatal to the claim. The Court cited *Gardi v. Lakewood City Schools*, 2013-Ohio-3436, an earlier case where it concluded that there is “no language anywhere in the statute that requires the pre-existing condition to be medically documented prior to the work-place injury.” In the case at bar, the claimant presented records documenting a displaced piece of cartilage, the presence of which was evidence that a “substantial aggravation” had occurred. Viewing the evidence most strongly in favor of the claimant, the Court could not say that reasonable minds could reach only one conclusion, in favor of the employer. The Court also rejected the employer’s contention that the verdict was against the manifested weight of the evidence, stressing the presumption in favor of the finder of fact.

Haynik is more proof that, at least in Cuyahoga County, the statutory requirements for “substantial aggravation” will not include pre-incident testing or other objective clinical findings

in order to proceed. 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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