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**Gallagher Sharp Shop Talk: Workers' Compensation**

This week, we will consider an opinion issued by the Supreme Court of Ohio on July 21, 2016, that materially changes the way courts in Ohio must interpret R.C. 4123.90, Ohio's workers' compensation discrimination statute. *Onderko v. Sierra Lobo Inc.*, Slip Opinion No. 2016-Ohio-5027, involved an employee who filed a workers' compensation claim that was denied administratively and not appealed, and whether the same employee could successfully sue his employer for workers' compensation retaliation under R.C. 4123.90. Previous cases from other districts had held that in order to proceed on a workers' compensation retaliatory discharge claim, it was incumbent upon the discharged employee to prove he was actually injured at work.

*Onderko* arose from an injury that was alleged to have occurred at work on August 9, 2012. On that date, the claimant claimed that his right knee began to hurt while moving furniture, but he did not report it. On the way home from work, he stopped at a gas station where his knee "gave out" while stepping off a curb. The claimant went to an emergency room for treatment, but never mentioned any prior symptoms at work. The next day, he was referred to an orthopedic surgeon, to whom he related that he injured the same knee six (6) weeks before, and that his symptoms increased until the knee gave out. (Like many statements in this case, the claimant alleged that the surgeon's notes were mistaken.) The claimant then sought "light-duty" from his employer, but initially denied that the injury occurred at work. When the light duty request was denied, the claimant filed a workers' compensation claim alleging his right knee was actually injured at work. The employer contested the claim based upon a failure to report a work-related injury and discrepancies in his statements to his treating physicians, and the BWC denied the claim. A BWC doctor subsequently reviewed the records and concluded that the claim should be allowed, prompting the BWC to vacate its initial order and issue a new order allowing the claim. The employer appealed, and at hearing a District Hearing Officer issued an order denying the claim in its entirety based upon the conflicting accounts. When the claimant failed to appeal this decision, it became final. The employer subsequently terminated the claimant for his "deceptive" attempt to obtain workers' compensation benefits.

On March 8, 2013, the claimant filed a lawsuit under R.C. 4123.90, alleging he was fired for pursuing his workers' compensation claim. The employer filed a motion for summary judgment arguing that, in the absence of a valid work-related injury, no action for retaliation can exist under R.C. 4123.90, and that *res judicata* prevented the claimant from re-litigating the claim. The claimant alleged that it was the filing of a workers' compensation claim that triggers statutory protections, and that it was not necessary for the claim to be allowed. The trial court granted summary judgment to the employer, but on appeal the Sixth District reversed, finding that it is not necessary for a claimant to successfully prove that an injury occurred at work to invoke the protections of R.C. 4123.90. The Sixth District held that requiring the employer to prevail on the underlying claim "would have a chilling effect on the exercise of his or her rights because the employee could be forced to choose between a continuation of employment and the submission of a workers' compensation claim." The court specifically based its decision, in part, on the fact that the employer offered "no other grounds to justify.....termination." The Supreme Court of Ohio accepted the employer's discretionary appeal, which had two propositions of law:

1) As an element of establishing a *prima facie* case for retaliatory discharge under R.C. 4123.90, a plaintiff must prove he suffered a workplace injury; and 2) As a matter of law, an employee who fails to appeal a decision of the Industrial Commission that his injury is not work-related cannot bring a R.C. 4123.90 retaliation claim based upon the claimed injury.

The Supreme Court affirmed the decision, and reversed the 5th District's decision in another case, *Kilbarger v. Anchor Hocking Glass Co.*, 120 Ohio App.3d 332, holding that the elements of a *prima facie* case for retaliatory discharge under R.C. 4123.90 do not include proof that the claimant was injured on the job, and because proof of a work-related injury is not required, failure to appeal a denial of a workers' compensation claim does not foreclose a R.C. 4123.90 claim. The Court looked at the language of the statute and its stated purpose, to prevent retaliation for asserting the right to file a claim. The Court also discussed its holding in *Wilson v. Riverside Hosp.*, 18 Ohio St.3d 8, which involved an allowed workers' compensation claim, and which dealt only with proper pleading and not burdens of proof. In the case at bar, it was undisputed that the claimant was fired for pursuing workers' compensation benefits, and the plain language of the statute states that a claim "hinges on the employer's response to the plaintiff's pursuit of benefits, not the award of benefits." It is the pursuit of benefits that must be protected, and therefore the ultimate success is not an issue. The Court goes on to state that its holding does not suggest that fraudulent or false claims are not a valid basis for termination, but no fraud charges or investigation was initiated in this case. In a strongly-worded dissent, Justice O'Donnell noted that the majority ignored an entire clause of the statute ("...for an injury or occupational disease which occurred in the course of and arising out of his employment") in bending over backwards to make this ruling.

*Onderko* signals a significant departure from the language of R.C. 4123.90, in that it ignores the requirement that an injury occur "in the course of and arising out of" the claimant's employment. If a claim is denied, by definition it did not occur in the course of employment. Employers are left with no recourse when a claim is fraudulently filed and denied, and employers discipline these claimants at their peril. 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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