

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

QUESTION: At what point can a doctor's report be deemed to have become "stale" and therefore not probative?

As workers' compensation claims age, so do the reports of doctors who have examined the claimant. Ohio courts, including the Supreme Court, have held that the "probative value of a medical report may be lessened by later changes in the claimant's condition, and the longer the time between the report and the disability alleged, the more likely this is to have occurred." *State ex rel. Menold v. Maplecrest Nursing Home*, 76 Ohio St.3d 197, 202 (1996). Recently, the Supreme Court was presented with a case involving a psychiatric report, a grant of subsequent treatment, and whether the Industrial Commission abused its discretion by relying upon a "stale" report in denying an application for permanent total disability.

State ex rel. Bailey v. Indus. Comm., 139 Ohio St.3d 295, 2014-Ohio-1909, involved an employee who filed four (4) workers' compensation claims between 1996 and 2003 and received a number of physical and psychiatric allowances, including "pain disorder" and aggravation of pre-existing dysthymia. In 2009, the claimant moved for permanent total disability ("PTD"), but the application was denied, at least in part, because of a report from Dr. Lee Howard, a psychologist who determined that the claimant's psychological conditions did not prevent him from working. The claimant subsequently sought and received an increase in his permanent partial disability compensation ("PPD") and obtained approval for additional psychotherapy. In 2011, the claimant filed a second PTD application, which was again denied based upon the report from Dr. Howard. The claimant then filed a *mandamus* action, claiming that the Industrial Commission had abused its discretion in relying upon Dr. Howard's report because it was "stale" and its findings were undercut by subsequent events and grant of additional compensation. The Tenth District denied the writ, concluding that the report was not "stale" as a matter of law, and that the Commission was within its discretion, prompting an appeal as of right to the Supreme Court.

The Supreme Court affirmed, finding that it was not an abuse of discretion for the Industrial Commission to rely upon Dr. Howard's report in denying PTD. The Court noted that the report was only two (2) years old, and while the probative value of the report can be lessened by subsequent changes in the claimant's condition, the content of the report at issue is more important than its age. *State ex rel. Hiles v. Netcare Corp.*, 76 Ohio St.3d 404 (1996). The approval of subsequent treatment by a managed care organization (MCO) did not alter the evidentiary value of a prior report, because it did not necessarily mean that the claimant's condition had worsened, but only that additional treatment was approved. The Court also noted in *dicta* that a subsequent PPD award was irrelevant to the issues presented and did not constitute a "repudiation" of Dr. Howard's findings, and that the Commission had actually cited a 2005 report in support of its decision to increase compensation.

When presented with a claim that a medical report has become "stale," *Bailey* should be utilized in arguing that the proper focus should be on the findings contained in the examination, the purpose of the report, and the extent to which those circumstances have changed. 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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