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## Workers' Compensation Alert

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### Redefining the Substantial Aggravation Standard

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In 2006, Senate Bill 7 revised the definition of "injury" found in O.R.C. 4123.01 to exclude pre-existing conditions unless the pre-existing condition was "substantially aggravated." Prior to Senate Bill 7 an aggravation did not have to be of any particular magnitude nor was there any concrete guidance on what constituted proof of an aggravation. Instead, claimants could establish an aggravation merely by alleging their symptoms were worse after the injury than they were before. Senate Bill 7 was passed in an effort to curtail the ever rising number of aggravation claims. O.R.C. 4123.01(C)(4) now requires evidence of a substantial aggravation in the form of "documented objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation." But what does this mean? Employers have waited nearly five years but it appears that what may be the first decision by an Ohio Court of Appeals has finally been issued.

On March 31, 2011, the Sixth District Court of Appeals issued its decision in *Smith v. Lucas Cty.*, 2011-Ohio-1548. Ms. Smith sustained head, neck, back and arm injuries after she slipped and fell on the ice. Ms. Smith eventually underwent an MRI which revealed that she had Chiari malformation, a congenital condition. Prior to her injury, Ms. Smith never had an MRI and was unaware that she had the Chiari malformation. Nevertheless, because the condition clearly pre-existed, she requested the additional allowance of "aggravation of pre-existing variant of Chiari malformation." The condition was denied by the Industrial Commission and claimant appealed to common pleas court. The Lucas County Common Pleas Court granted summary judgment in favor of the BWC and the employer finding that Ms. Smith had "failed to provide the statutorily mandated objective findings or results" to document the condition prior to the incident and therefore, did not establish a substantial aggravation.

The Sixth District agreed that summary judgment was appropriate but disagreed with the lower court's holding that the claimant had to provide objective "before and after" test results. Instead, the court stated "[i]f appellant had provided sufficient documentation of her symptoms preceding the injury, substantial aggravation could have been established." Ms. Smith failed to present any evidence of her symptoms or condition prior to her injury, therefore, judgment in favor of the employer was appropriate.

So what constitutes proof of a substantial aggravation? According to the Sixth District, the claimant must provide evidence that the condition pre-existed, but that evidence does not have to be objective. This holding ignores the requirement that O.R.C. 4123.01(C)(4) also states: “subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.” Therefore, in the face of the claimant submitting only subjective evidence of a substantial aggravation, the astute workers’ compensation practitioner should stress the last sentence of O.R.C. 4123.01(C)(4) and argue that claimant has not established a substantial aggravation.

If you have any questions regarding this or any other workers' compensation or labor and employment law issue, please contact any member of the Labor and Employment Section at 419-241-6000 or visit our website at [www.eastmansmith.com](http://www.eastmansmith.com).

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