Workers' Compensation Alert
Eastman & Smith Ltd.
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Burden of Proof for "Wear and Tear" Injuries

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On December 31, 1984, the Ohio Supreme Court decided *Village v. General Motors Corp.*, 15 Ohio St.3d 129, and changed the face of workers' compensation law. Until that date, there were two types of claims under Ohio law: injuries and occupational diseases. With some gray areas, we understood how to process and consider an occupational disease claim. Injuries were relatively simple. According to *Bowman v. National Graphics Corp.* (1978), 55 Ohio St.2d 222, relying on the "*Malone*" rule, an injury must be "the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place." *Village* overruled *Bowman* and held that "An injury which develops gradually over time as the result of the performance of the injured worker's job-related duties is compensable." *Village*, at 133. Despite the Court's specific statement that it was working within the definition of "injury," claimant's attorneys have had success in developing a third quasi-claim type, the "wear and tear" claim. Careful scrutiny of the *Village* decision provides employer's with a viable defense to the "wear and tear" claim that is often overlooked.

Village is the only law that establishes the compensability of "wear and tear' claims. In holding that an injury which develops gradually over time is compensable, the Court also said "Thus, we adopt the standards, analysis and cogent rationale contained in the dissent of Justice Sweeney in Bowman." *Id.* In *Bowman,* Justice Sweeney adhered to strictly enforcing the *Fassig* test to determine the compensability of an injury. He explained that the *Fassig* test required a worker to demonstrate that his duties subjected him to greater risks or dangers than the public in general for his claim to be compensable. If this evidence is not present, "causation between the job duties and the injury could not be established with certainty." *Bowman*, at 236. Therefore, the "standards," "analysis," and "rationale" from Justice Sweeney create a test of legal as well as medical sufficiency. When subsequently applying a similar legal sufficiency test regarding an occupational disease claim, the Supreme Court explained, "This would require a showing that the workplace exertion or cumulative workplace exertions are greater than those encountered in ordinary nonemployment life." *Brody v. Mihm* (1995), 72 Ohio St.3d 81, 84. The Supreme Court further explained the comparison is between the claimant's duties and what "the public in general" or "nonemployment life" occasionally do and not between a claimant's duties and what "the public in general" or "nonemployment life" constantly do. Id. It is the nature of the stress, not the nature of the consequence that goes to the legal sufficiency test.

Twenty-six years have passed since *Village* was decided. *Village* claims deserve special scrutiny to deter the inclusion of medically and legally insufficient claims. If there are any questions, be assured that the attorneys of Eastman & Smith Ltd. endeavor on a daily basis to represent the interests of the firm's clients to the fullest benefit provided under the law and would be pleased to help in any way possible.

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.