



## The Aggravation Standard

by Thomas J. Gibney and Garrett M. Cravener

Claimants argue that an employer must accept an employee as the employer finds him or her, even if the employee has a weakened condition that contributes to an injury. Courts have held that an injury for workers' compensation purposes includes an aggravation of a pre-existing condition and debate ensued regarding the proof necessary to establish a compensable aggravation. Prior to the passage of Amended Substitute Senate Bill 7 (SB 7), claimants argued they could satisfy their burden of proof with merely subjective assertions. That is, claimants sought and sometimes obtained workers' compensation benefits based on the mere assertion that the pre-existing condition became symptomatic as a result of work, even if objective medical evidence did not indicate an aggravation of the claimant's condition. Claimants also sought to hold employers liable to pay compensation and benefits not only for the alleged aggravation, but also for the pre-existing condition.

### Changes Made by SB 7

Senate Bill 7 enacted a clear standard of proof necessary to establish the aggravation of a pre-existing condition. The standard allows a claimant to be compensated for verifiable damage to his or her physiology or psyche. Employers accepted the standard with open arms, because it made clear the level of proof necessary to establish an aggravation of a pre-existing condition. The standard also clarifies the extent to which an employer may take its employees as it finds them.

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Under the new law, subjective complaints alone are insufficient to prove aggravation of a pre-existing condition. Instead, a pre-existing condition must be “substantially aggravated” by the injury. Proving a substantial aggravation requires verifiable evidence, which includes objective diagnostic findings, objective clinical findings or objective test results. The hearing officers’ manual for the Industrial Commission of Ohio was revised to reflect the new standard, requiring hearing officers to “cite in the order evidence which documents the substantial aggravation by objective diagnostic findings, objective clinical findings, or objective test results.” Objective medical evidence can take the form of diagnostic tests (e.g., MRIs or x-rays) before and after the alleged aggravation to demonstrate that a condition worsened.

The bill also requires that compensation and benefits cease after the aggravated condition returns to its pre-existing state. In other words, compensation and benefits should be paid only for the duration of the aggravation, not the duration of the pre-existing condition. Before SB 7, the standard to apply when a claimant’s aggravated condition returned to its pre-existing state was in dispute. There are two possible interpretations of SB 7’s impact on claims arising under the former law. According to the first interpretation, the General Assembly merely clarified its intent for claims arising under the former law. Under this interpretation, the General Assembly always intended that payments under aggravation claims should be only for the duration of the aggravation. According to the second interpretation, the General Assembly amended the language in order to create a different standard for claims arising under the new law. The debate regarding SB 7’s impact on this issue will continue until it is resolved by the courts.

## The Effects of SB 7

The amendments regarding substantial aggravation claims went into effect on August 25, 2006. (See “Court Finds SB 7 Prospective” on page 20 for more on this decision.) Since that time, numerous changes have emerged, such as:

**Conduct of Claimants’ Attorneys:** Hoping to return to the “good old days,” claimants’ attorneys have devised methods that try to erode the new substantial aggravation standard. Rather than bring a claim under the tougher substantial aggravation standard, claimants’ attorneys are attempting to find ways around it. This conduct has led to a significant decrease in the number of aggravation claims heard by the Industrial Commission.

One common approach used by claimants’ attorneys is to mislabel a substantial aggravation as something else. As an example, for the same set of circumstances, employers now see claims for “bulging disc” when they used to see claims for “aggravation of pre-existing disc disease.” This mislabeling should be addressed in every instance in order to prevent erosion of the new standard.

Another common approach by claimants’ attorneys is to create forms for doctors to fill out when examining the claimant, where the form contains check boxes that correlate to the language used under the new standard. For example, a question on the form provided by the claimant’s attorney will ask the doctor, “Was the claimant’s pre-existing condition ‘substantially aggravated’ by the injury?” Fortunately, there is no magic language that will result automatically in a finding of a substantial aggravation of a pre-existing condition. Accordingly, the use of such language and forms arguably should be disregarded by the Commission. It is strongly recommended employers utilize counsel that can effectively advocate and support the new standard whenever a claimant’s attorney attempts to find ways around it.

**Settlements:** Arguably, the heightened aggravation standard can make settlements with existing employees a more viable option. Under the old standard, employers were hesitant to settle claims with existing employees because they feared the employee could come back at some later date and succeed on an aggravation claim. However, with the new standard in place, employers may see more opportunities to settle claims with active employees.

**Jury Instructions:** Senate Bill 7 has made obsolete the jury instructions that are currently in place. The jury instructions were drawn from the Supreme Court of Ohio decision in *Schell v. Globe Trucking, Inc.*, which applied the old standard. The jury instructions provide the following: “Employers take their employees as they find them and assume the risk of having an employee’s pre-existing condition aggravated by some injury which would not hurt or bother a perfectly healthy person. It is not necessary for the employee to prove that the aggravation is substantial in order to participate in the Workers’ Compensation fund.”

Model instructions to replace those set forth in *Schell* have not been adopted yet. Courts will need to develop new jury instructions for substantial aggravation claims, which creates an opportunity for the parties and their lawyers to shape the new instructions.

## Conclusion

The SB 7 amendments regarding substantial aggravation require a claimant to provide verifiable evidence to prove damage to his or her physiology or psyche. However, as anticipated, claimants’ attorneys are devising methods to circumvent the new standard. Employers need to protect the new standard from possible erosion by fighting every mislabeled claim that they expect should be assessed under the new substantial aggravation standard.



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