

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Gina M. Rademacher,	:	
Relator,	:	
v.	:	No. 02AP-932
Mariott Management Services Corp.	:	(REGULAR CALENDAR)
and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on May 29, 2003

Weisser and Wolf, and *Lisa M. Clark*, for relator.

Squire, Sanders & Dempsey L.L.P., and *Michael Soto*, for
respondent Mariott International, Inc.

Jim Petro, Attorney General, and *Lisa R. Miller*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Gina M. Rademacher, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying relator's application for temporary total disability compensation and to find she is entitled to the requested compensation.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In the decision the magistrate concluded “relator is not entitled to [temporary total disability] compensation for the requested time period because, inasmuch as she never returned to any employment following her abandonment of her former position of employment, relator has not sustained any loss of earnings. Instead, relator removed herself from workplace, for reasons unrelated to her industrial injury, and did not attempt to return to any work prior to the time that she actually resumed employment as an Avon sales representative. As such * * * relator does not fall under those circumstances whereby a claimant would be entitled to receive [temporary total disability] compensation.” (Magistrate’s Decision, ¶33.) Accordingly, the magistrate determined the requested writ should be denied.

{¶3} Relator has filed an objection to the magistrate’s conclusions of law, raising an issue not submitted in the original briefs to the magistrate. Specifically, relator contends that although the magistrate found relator had been released to light duty employment on February 10, 1997 and had abandoned her job on February 11, 1997, the magistrate could not properly determine relator was released to light duty on February 10, 1997, as relator previously was found to be entitled to temporary total disability on that date. Accordingly, relator asserts that res judicata prevented her from being released to light duty on February 10, 1997.

{¶4} Initially, we note the record does not contain the commission order granting temporary total disability compensation from December 18, 1996 to February 10, 1997. As a result, the record does not disclose on what evidence the commission relied in awarding that compensation. More significantly, however, the issue is whether the record contains evidence that relator had been released to light duty work when she abandoned her job on February 11, 1997. Whether she was released to work on February 10, 1997, she undisputedly was released to work on February 11, 1997. Because she voluntarily abandoned her position of employment on February 11, 1997 at a time she was able to re-enter the workforce but did not, she may not recover temporary total disability

compensation for the period of her unemployment beginning February 11, 1997. Relator's objection to the magistrate's decision is overruled.

{¶5} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, the requested writ is denied.

*Objection overruled;
writ denied.*

TYACK and KLATT, JJ., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Gina M. Rademacher,	:	
	:	
Relator,	:	
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v.	:	No. 02AP-932
	:	
Marriott Management Services Corp.	:	(REGULAR CALENDAR)
and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 6, 2003

Weisser and Wolf, and *Lisa M. Clark*, for relator.*Squire, Sanders & Dempsey L.L.P.*, and *Michael Soto*, for
respondent Marriott International, Inc.*Jim Petro*, Attorney General, and *Lisa R. Miller*, for
respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶6} Relator, Gina M. Rademacher, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied her application for temporary total

disability ("TTD") compensation and ordering the commission to find that she is entitled to the requested compensation.

Findings of Fact

{¶7} 1. Relator sustained a work-related injury on July 1, 1996, and her claim was originally allowed for: "left knee contusion; left shoulder sprain/strain; cervical sprain/strain; left shoulder impingement syndrome; left medial femoral condyle osteochondral defect." By order dated December 3, 1997, relator's claim was additionally allowed for: "patellofemoral degenerative joint disease of the left knee." By order dated May 18, 2000, relator's claim was additionally allowed for: "aggravation of patellofemoral degenerative joint disease of the left knee."

{¶8} 2. Following her injury, relator was off work. She received some TTD compensation including from December 18, 1996 to February 10, 1997.

{¶9} 3. By letter dated December 18, 1996, respondent Marriott International, Inc. ("employer"), wrote relator's then treating physician Edward J. Berghausen, M.D., concerning the possibility of relator returning to a transitional light-duty position.

{¶10} 4. Dr. Berghausen released relator to light-duty employment as of February 10, 1997.

{¶11} 5. On February 11, 1997, relator contacted her supervisor and informed him that she was resigning from her employment because she was moving out of town due to an employment opportunity available to her husband.

{¶12} 6. On July 21, 1998, relator filed a motion seeking payment of TTD compensation from May 4, 1997 through July 6, 1997; October 17, 1997 through November 29, 1997; and December 30, 1997 through August 1, 1998. Relator's application was supported by C-84s from Steven H. Fried, M.D., and Joseph C. Randolph, M.D., as well as the office records of Dr. Fried.

{¶13} 7. Relator's application was heard before a district hearing officer ("DHO") on January 19, 1999, and resulted in an order denying the request based upon the employer's evidence showing that relator had quit her job effective February 11, 1997 because her husband had an employment opportunity out of town. The DHO concluded

that this constituted a voluntary abandonment of her employment and that she was not entitled to TTD compensation after the date she quit her job.

{¶14} 8. Pursuant to relator's appeal, the matter was heard before a staff hearing officer ("SHO") on March 4, 1999, and resulted in an order denying relator the requested period of TTD compensation because relator had voluntarily abandoned her former position of employment effective February 11, 1997, when she quit her job because her husband had an employment opportunity out of town.

{¶15} 9. Further appeal was refused by order of the commission mailed March 19, 1999.

{¶16} 10. Relator filed a subsequent request for TTD compensation on December 1, 2000, seeking TTD compensation from August 2, 1998 through August 24, 2000. The motion was supported by the C-84 from Dr. Randolph as well as his medical records which show that the patella femoral degenerative joint disease of the left knee and the need for additional surgery which was ultimately performed September 22, 2000.

{¶17} 11. Relator's motion was heard before a DHO on July 13, 2001 and was granted. The DHO concluded that res judicata did not apply as relator was requesting a later period of TTD compensation. The DHO also found that relator had returned to work on August 24, 2000 as an Avon sales representative.

{¶18} 12. Upon appeal, the matter was heard before an SHO who issued an order dated November 26, 2001, which vacated the prior DHO order and denied TTD compensation as follows:

{¶19} "The Staff Hearing Officer finds that at the time of the claimant's separation from employment in this claim, she had the capacity to perform restricted employment. The Staff Hearing Officer further finds that the claimant's stated reason for terminating her employment was unrelated to this industrial injury.

{¶20} "Therefore, the Staff Hearing Officer finds that the claimant abandoned her employment, as found by prior order of the Industrial Commission, and is not eligible to receive further payment of temporary total compensation. The Staff Hearing Officer finds that the issue is res judicata and the claimant's request for the payment of temporary total compensation is denied.

{¶21} "This order is based on the medical reports of Dr. Berghausen, the affidavit of Chuck Butler dated 1/12/99 and the prior orders of the Industrial Commission in this file."

{¶22} 13. Further appeal was refused by order of the commission mailed December 22, 2001.

{¶23} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law

{¶24} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶25} In the past few years, the Ohio Supreme Court has re-examined the standard to be applied to determine whether or not TTD compensation is available to claimants who, after sustaining a work-related injury, leave their former position of employment and ultimately take new employment. The court has held that those claimants have not voluntarily abandoned the entire workforce and can receive TTD compensation if they again become disabled. Specifically, in *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, the court held as follows in the syllabus:

{¶26} "When a claimant who is medically released to return to work following an industrial injury leaves his or her former position of employment to accept another position of employment, the claimant is eligible to receive temporary total disability compensation

pursuant to R.C. 4123.56(A) should the claimant reaggravate the original industrial injury while working at his or her new job."

{¶27} Following *Baker*, the court decided *State ex rel. Staton v. Indus. Comm.* (2001), 91 Ohio St.3d 407, 410, wherein the court upheld the commission's order denying the claimant TTD compensation on the basis that the claimant had retired from his employment for medical reasons which were unrelated to the allowed conditions in the claim. The court noted as follows:

{¶28} "For years, voluntary departure from employment was the end of the story, and harsh results sometimes followed. Claimants who left the former position of employment for a better job forfeited TTD eligibility forever after. In response, *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, * * * declared that voluntary departure to *another job* no longer barred TTD. It retained, however, the prohibition against TTD to claimant's [sic] who voluntarily abandoned the *entire labor market*. Thus, the claimant who vacates the work force for non-injury reasons not related to the allowed condition and who later alleges an inability to return to the former position of employment cannot get TTD. This, of course, makes sense. One cannot credibly allege the loss of wages for which TTD is meant to compensate when the practical possibility of employment no longer exists." (Emphasis sic.)

{¶29} The court also decided *State ex rel. David's Cemetery v. Indus. Comm.* (2001), 92 Ohio St.3d 498, 501-502, wherein the claimant sustained a work-related injury and then, four days later, voluntarily quit his job and eventually took other employment. The commission awarded the claimant TTD compensation and the employer challenged the commission's order. Part of the employer's argument focused on the fact that the claimant had voluntarily quit his position of employment. In this regard, the court stated as follows:

{¶30} "* * * Its first argument focuses on the fact that claimant quit his job at David's Cemetery after he was hurt. This argument is founded on early voluntary abandonment cases such as *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, * * * and *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, * * * cases that have since been clarified by our recent decision in *State ex*

rel. Baker v. Indus. Comm. (2000), 89 Ohio St.3d 376 * * *. *Baker* explained that the critical abandonment in evaluating TTC eligibility was abandonment of the entire work force, not simply abandonment of the former position of employment. This did not occur here. Other cases cited by David's Cemetery, such as *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401 * * *; *State ex rel. McClain v. Indus. Comm.* (2000), 89 Ohio St.3d 407 * * *; and *State ex rel. Smith v. Superior's Brand Meats* (1996), 76 Ohio St.3d 408, * * * are not dispositive, because they deal with employment discharge, not a voluntary quit."

{¶31} Later, in *State ex rel. Schack v. Indus. Comm.* (2001), 93 Ohio St.3d 247, the claimant sustained a work-related injury and then later left that employment pursuant to a negotiated settlement agreement. The claimant later took another job and then moved for TTD compensation, alleging that he was no longer able to perform that job because of his industrial injury. The commission had argued that *Baker II* did not apply because it was not another employment opportunity that had motivated the claimant to quit his job. On the other hand, the claimant had argued that, so long as his decision to leave his former position of employment was followed by another job, as opposed to abandonment of the entire labor market, then *Baker* controls. The court agreed and stated that *Baker* returns the focus of analysis to the disabling affects of the claimant's injury rather than upon a claimant's decision to leave the job at which he or she was injured.

{¶32} In the present case, it is clear that relator left her former position of employment at a time when she had been released to light-duty employment for reasons unrelated to the work-related injury. Specifically, relator left her former position of employment in order for her husband to pursue an out-of-town employment opportunity. Upon review of the record, it is apparent that relator did not return to work between the time she left her former position of employment on February 11, 1997, and the time that she returned to work as an Avon sales representative on August 24, 2000. The record contains evidence that relator gave birth to her second child in 1997 and to a third child in 1999. (Stip. 56, 67.) During this time period, relator's federal income tax returns indicate

that relator was employed as a homemaker and that the only income reported on the tax returns was from her husband.

{¶33} Under the specific facts of this case, relator is not entitled to TTD compensation for the requested time period because, inasmuch as she never returned to any employment following her abandonment of her former position of employment, relator has not sustained any loss of earnings. Instead, relator removed herself from the workplace, for reasons unrelated to her industrial injury, and did not attempt to return to any work prior to the time that she actually resumed employment as an Avon sales representative. As such, even though the Ohio Supreme Court has re-examined the standard for payment of TTD compensation to a certain extent, relator does not fall under those circumstances whereby a claimant would be entitled to receive TTD compensation.

{¶34} Based upon the foregoing, relator has not demonstrated that the commission abused its discretion in denying her application for TTD compensation and relator's request for a writ of mandamus should be denied.

/S/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE