

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                                  |   |                    |
|----------------------------------|---|--------------------|
| State of Ohio ex rel.            | : |                    |
| MedAmerica Health Systems Corp., | : |                    |
|                                  | : | No. 11AP-904       |
| Relator,                         | : |                    |
|                                  | : |                    |
| v.                               | : | (REGULAR CALENDAR) |
|                                  | : |                    |
| Sherry Brammer and Industrial    | : |                    |
| Commission of Ohio,              | : |                    |
|                                  | : |                    |
| Respondents.                     | : |                    |

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D E C I S I O N

Rendered on September 27, 2012

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*Dunlevey, Mahan & Furry, Abigail K. White, and Douglas S. Jenks, for relator.*

*E.S. Gallon & Associates, and Joan B. Brenner, for respondent Sherry Brammer.*

*Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, MedAmerica Health Systems Corp., 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 that denied relator's motion to retroactively terminate the temporary total disability ("TTD") compensation being received by respondent, Sherry Brammer ("claimant"), and to enter an order denying said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶ 3} In its first objection, relator argues that the magistrate's decision was contrary to the Supreme Court of Ohio's decision in *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587. Relator points to the court's statement in *Eckerly* that the key aspect in all TTD cases is that the industrial injury must remove the claimant from his or her job, and this requirement cannot be satisfied if the claimant had no job at the time of the alleged disability. Pursuant to *Eckerly*, relator asserts, claimant in this case was not eligible for TTD at the time of her surgery in June 2010 because she was unemployed for reasons unrelated to her claim; that is, she was unemployed based upon her voluntary decision to leave her employment with TelePerformance due to her non-allowed back condition.

{¶ 4} However, *Eckerly* is distinguishable in several respects. In *Eckerly*, the worker was permitted to return to his former position of employment with no restrictions but then voluntarily abandoned his former position when he was fired for unexcused absenteeism. He subsequently voluntarily abandoned the entire workforce. In the present case, claimant did not voluntarily leave her former position of employment with relator; rather, she was terminated for reasons related to the allowed conditions in her claim. Although she was terminated from her job with relator for absenteeism while working light duty under the restrictions defined in her industrial claim, she testified that most of the absences were due to her industrial injury, which was corroborated by her doctor, Michael Herbenick, M.D., and the finding by the Ohio Department of Job and Family Services that she was entitled to unemployment benefits because her discharge was without cause. Thus, her departure from her employment with relator was involuntary, unlike the employee's voluntary abandonment in *Eckerly*.

{¶ 5} In addition, *Eckerly* clearly does not stand for the proposition that TTD is precluded when a worker involuntarily abandons her former position of employment but then voluntarily departs a subsequent position of employment with another employer,

which is the case here. To the contrary, as we recently found in *State ex rel. Cline v. Abke Trucking, Inc.*, 10th Dist. No. 10AP-888, 2012-Ohio-1914, ¶ 14-15, a voluntary abandonment of subsequent employment does not relate back and transform an involuntary departure from the original employer into a voluntary departure so as to render the employee ineligible for TTD compensation. *Id.* at ¶ 15.

{¶ 6} Furthermore, the present case is distinguishable from *Eckerly* in that claimant in the present case did not abandon the entire workforce. Claimant here attempted to work for a subsequent employer within her work restrictions but could not continue because of a non-allowed back injury, and there is no evidence that she intended to abandon the entire workforce at this point. *See Cline* at ¶ 14-15 (that the claimant, after involuntarily abandoning employment with his original employer, voluntarily abandoned his employment with his subsequent employer does not demonstrate abandonment of or an intent to leave the entire workforce). No cases addressing complete abandonment of the workforce by a claimant do so in terms of treating a voluntary departure from a subsequent employer as a TTD-preclusive event. *Id.* at ¶ 15. This differs from a voluntary departure from the employer against whom the claim is brought. *Id.*

{¶ 7} We also note that, in *Cline*, we rejected the same broad interpretation urged by relator here that *Eckerly* stands for the proposition that no claim for TTD can be allowed if the claimant is unemployed at the time of the alleged disability. We found in *Cline* that the decision in *Eckerly* did not turn on the momentary unemployment of the claimant but, rather, the claimant's complete abandonment of the workforce. We rejected the interpretation that any period of subsequent unemployment would prevent any possibility of a claim for TTD compensation involving the original employer. *Cline* at ¶ 17. For these reasons, we find *Eckerly* inapplicable to the current case. Relator's first objection is without merit.

{¶ 8} Relator argues in its second objection that the magistrate erred when she found that claimant did not voluntarily abandon the workforce merely because she was physically unable to return to her former position of employment when she quit her job at TelePerformance. Relator asserts that a worker can still be found to have voluntarily abandoned the workforce after leaving a light-duty job, even though the claimant remains physically incapable of returning to her former position. Relator cites *State ex rel. Adkins*

*v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, and *State ex rel. Apostolic Christian Home, Inc. v. King*, 10th Dist. No. 08AP-1078, 2009-Ohio-5670, to support its assertion.

{¶ 9} We find *Adkins* and *King* distinguishable. In *Adkins* and *King*, the injured workers accepted modified light-duty work at their present employers but were later fired for violating their employers' attendance policies. In both cases, we found that where an injured worker returns to the employer to work in a modified light-duty capacity, it is possible for that worker to voluntarily abandon that light-duty position if the worker was physically capable of performing it at the time of his or her voluntary abandonment. However, in the present case, claimant did not voluntarily abandon her modified light-duty work at her original employer. She voluntarily departed reduced-duty work at a subsequent employer, which neither *Adkins* nor *King* addressed. Claimant's voluntary departure from TelePerformance did not alter the fact that she had involuntarily abandoned her light-duty job with relator based upon her allowed conditions. The import and significance of her employment with TelePerformance was to demonstrate that she had not intended to abandon the entire workforce. See *Cline* at ¶ 14-15 (that the claimant, after involuntarily abandoning employment with his original employer, voluntarily abandoned his employment with his subsequent employer evinces his attempt to remain employed and not abandon the workforce). Therefore, we find neither *Adkins* nor *King* addresses the circumstances present in the current case. Relator's second objection is overruled.

{¶ 10} Relator argues in its third objection that the magistrate erred when she found that TTD benefits were not barred pursuant to *State ex rel. Hildebrand v. Indus. Comm.*, 10th Dist. No. 10AP-625, 2011-Ohio-3787. Relator asserts *Hildebrand* and the present case are factually similar in all relevant aspects. Relator points out that claimant, like the worker in *Hildebrand*, sustained a work injury, was unable to return to her former position of employment, returned to a light-duty job, and quit her light-duty job for reasons unrelated to the allowed conditions. Relator adds that the only "minor distinction" between the two cases is that the worker's light-duty job in *Hildebrand* was with the original employer, while claimant's here was with a different employer. However, this "minor distinction" sufficiently differentiates *Hildebrand* from the present case, for

the same reasons discussed under relator's first and second objections. All of the cases cited by relator address a voluntary abandonment from employment with the original employer and not a voluntary departure from a subsequent employer after involuntarily abandoning employment with the original employer, which were the circumstances in the present case. This distinction is significant, as we made clear in *Cline* that TTD is precluded based upon "a claimant's voluntary departure from employment *with an employer against whom the claim for TTD compensation was originally brought*." (Emphasis added.) *Cline* at ¶ 15. Further, a claimant will be ineligible for TTD "due to voluntary departure from the employment position *in which the injury occurred*." (Emphasis added.) *Id.* Because *Hildebrand* does not involve the same circumstances that are present in the current case, we find it does not compel a different outcome in this case. Relator's third objection is overruled.

{¶ 11} Relator argues in its fourth objection that the magistrate erred when she characterized the issue of whether claimant voluntarily abandoned her job with TelePerformance as a factual issue not appropriate for review on mandamus. Relator argues that there was no dispute that claimant voluntarily abandoned her job with TelePerformance, but the dispute arises from the application of law to the undisputed facts. We agree that the underlying legal issue is whether claimant's voluntary departure from TelePerformance barred TTD. However, we fail to see any error in the magistrate's statements or analysis, in this regard. The magistrate did not state that the issue of whether claimant's voluntary departure from TelePerformance barred TTD was a factual issue, contrary to relator's claim. The magistrate merely indicated that voluntary abandonment cases are very fact specific, and factual determinations are best left to the commission. This is a correct statement of law. *See State ex rel. Allied Wheel Prods., Inc. v. Indus. Comm.* 166 Ohio St. 47, 50 (1956) (the determination of disputed factual situations is within the final jurisdiction of the commission); *Cline* at ¶ 16 (the inquiry into whether a claimant has abandoned the workforce entirely is necessarily fact intensive). Therefore, relator's fourth objection is overruled.

{¶ 12} Relator argues in its fifth objection that the magistrate erred when she stated that relator failed to timely argue before the commission that claimant's excessive absences from her job with relator were not due to the allowed conditions in her claim

and that relator first raised the issue in its objections to the deputy commissioner's order. Relator claims, to the contrary, that it argued that claimant had voluntarily abandoned her job with relator prior to the hearing before the deputy commissioner. Although relator concedes that there is no record of the hearing before the deputy commissioner, to prove it did argue such at the deputy commissioner hearing, it points to the fact that it filed claimant's disciplinary record with the commission prior to the hearing.

{¶ 13} However, the magistrate did not find that relator had waived this argument by failing to argue it before the commission. The magistrate clearly acknowledged that relator raised the issue at the administrative level, thereby preserving it for review on mandamus. Importantly, the magistrate concluded that the record provided some evidence to support the commission's finding that claimant's excessive absenteeism was due to the allowed conditions in her claim, and, thus, the commission did not abuse its discretion when it found her departure from her employment with relator was involuntary. Therefore, we find the magistrate committed no error in this respect. Relator's fifth objection is overruled.

{¶ 14} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule relator's objections and adopt the magistrate's findings of fact and conclusions of law as our own. Relator's request for a writ of mandamus is denied.

*Objections overruled; writ denied.*

SADLER and CONNOR, JJ., concur.

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## APPENDIX

### IN THE COURT OF APPEALS OF OHIO

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|                                  | : |                    |
| Sherry Brammer and Industrial    | : |                    |
| Commission of Ohio,              | : |                    |
|                                  | : |                    |
| Respondents.                     | : |                    |

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#### MAGISTRATE'S DECISION

Rendered on May 22, 2012

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*Dunlevey, Mahan & Furry, Abigail K. White, and Douglas S. Jenks,*  
for relator.

*E.S. Gallon & Associates, and Joan B. Brenner,* for respondent  
Sherry Brammer.

*Michael DeWine, Attorney General, and John R. Smart,* for  
respondent Industrial Commission of Ohio.

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#### IN MANDAMUS

{¶ 15} Relator, MedAmerica Health Systems Corp., 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 relator's motion to retroactively terminate the temporary total disability ("TTD") compensation being received by respondent Sherry Brammer ("claimant") and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

{¶ 16} 1. Claimant sustained a work-related injury on May 31, 2008, and relator certified her claim for the following conditions: "right shoulder supraspinatus sprain/strain."

{¶ 17} 2. Following the injury, claimant was able to return to work with restrictions of lifting no greater than five pounds as well as no repetitive or overhead lifting.

{¶ 18} 3. In the Fall of 2008, claimant's treating physician, Michael A. Herbenick, M.D., released her to return to work without restrictions.

{¶ 19} 4. Medical records as well as claimant's testimony indicate that, after she returned to work without restrictions, her shoulder symptoms increased.

{¶ 20} 5. In February 2009, Dr. Herbenick again placed restrictions on claimant's ability to work. Claimant returned to work with relator.

{¶ 21} 6. Dr. Herbenick completed a C-9 form requesting surgery to repair claimant's rotator cuff on February 13, 2009.

{¶ 22} 7. Relator denied the request for surgery because claimant's allowed condition did not warrant surgical intervention.

{¶ 23} 8. Relator terminated claimant for excessive absenteeism on March 5, 2009.

{¶ 24} 9. Claimant would later testify that the majority of her absences following her work-related injury were due to progressing shoulder pain. Relator has never timely argued that claimant's absences were not due to the allowed conditions in her claim.<sup>1</sup>

{¶ 25} 10. Claimant applied for and received unemployment compensation following her termination.

{¶ 26} 11. On November 30, 2009, claimant began working for TelePerformance doing technical work for AT&T. At this time, claimant still had restrictions relating to her shoulder. This job was a sedentary position.

{¶ 27} 12. In a letter dated December 29, 2009, Dr. Herbenick opined that claimant's workers' compensation claim should be additionally allowed for "partial thickness rotator cuff tear and impingement" of her right shoulder. (This is the condition for which Dr. Herbenick originally sought authorization for surgery.)

{¶ 28} 13. Claimant filed a motion seeking the additional allowance of partial thickness tear of the rotator cuff and impingement, and the matter was heard before a district hearing officer ("DHO") on March 3, 2010.

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<sup>1</sup> Relator would raise this issue in its objections to the deputy's order and again raises it now before this court.



{¶ 29} 14. The DHO denied claimant's motion.

{¶ 30} 15. Claimant's appeal was heard before a staff hearing officer ("SHO") on April 15, 2010. The SHO vacated the prior DHO order and determined that claimant's claim should be additionally allowed for: "right shoulder partial rotator cuff tear with impingement." The order was based on the December 29, 2009 report of Dr. Herbenick.

{¶ 31} 16. Relator's further appeal was refused by order of the commission mailed May 8, 2010.

{¶ 32} 17. Relator filed an appeal in the common pleas court; however, relator subsequently dismissed that appeal.

{¶ 33} 18. In the meantime, while working for TelePerformance, claimant began experiencing an increase in her pre-existing low back condition. (Claimant's workers' compensation claim is not allowed for a low back condition.)

{¶ 34} 19. Due to the low back condition, claimant's family physician, Dr. Dixie Mullenix, advised claimant to discontinue her work with TelePerformance.

{¶ 35} 20. Claimant left her employment with TelePerformance on February 28, 2010. Claimant would apply for and receive unemployment compensation.

{¶ 36} 21. Now that claimant's claim was allowed for a rotator cuff injury and impingement, Dr. Herbenick completed a second C-9 form dated April 23, 2010, requesting surgery.

{¶ 37} 22. Relator approved the request, and claimant underwent right arthroscopic rotator cuff repair and subacromial decompression surgery on June 7, 2010.

{¶ 38} 23. Dr. Herbenick completed a C-84 certifying that claimant was temporarily and totally disabled beginning June 7, 2010, the date of surgery.

{¶ 39} 24. Relator began paying claimant TTD compensation.

{¶ 40} 25. On October 4, 2010, relator filed a motion asking the commission to retroactively terminate claimant's TTD compensation and to declare an overpayment beginning June 7, 2010, arguing that claimant was disabled due to an unrelated medical condition and not working prior to the surgery.

{¶ 41} 26. Relator's motion was heard before a DHO on November 4, 2010. The DHO denied relator's motion, cited *State ex rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627, and stated that claimant did "not have the burden to prove that an unrelated condition is not solely disabling when there is sufficient evidence that the Injured Worker suffers from an independently disabling condition related to his or her claim."

{¶ 42} Relator argued that claimant's departure from her job with TelePerformance due to a non-allowed condition constituted a voluntary abandonment. The DHO disagreed. Specifically, the DHO noted that there was no evidence that claimant voluntarily abandoned her employment with relator. Thereafter, claimant secured other employment and, unfortunately, was required to leave that employment due to a non-allowed back condition. The DHO noted that claimant testified that she attempted to look for other employment; however, she was unsuccessful in doing so. Noting that claimant's claim was additionally allowed for the partial rotator cuff tear with impingement, and finding that the surgery was due to allowed conditions, the DHO concluded that there was no persuasive evidence that claimant voluntarily abandoned the entire job market and that she was entitled to TTD compensation.

{¶ 43} 27. Relator's appeal was heard before a SHO on December 16, 2010. The SHO concluded that relator did not meet its burden of proving that the commission could apply continuing jurisdiction and retroactively terminate claimant's TTD compensation. Specifically, the SHO stated:

The presence of a non-allowed condition in claim for temporary total disability compensation does not in itself destroy compensability of claim, but the Injured Worker must meet the burden of showing that allowed condition independently caused the disability; allowed conditions cannot combine with non-allowed medical conditions to produce temporary total disability. State ex rel. Bradley v. Industrial Commission (1997), 77 Ohio St.3d 239. The Industrial Commission cannot compensate workers unless their disability results exclusively from allowed condition. State ex rel. Chrysler Corp. v. Industrial Commission (1998), 81 Ohio St.3d 158. For receipt of Temporary Total Disability Compensation all the Injured Worker must show is a causal relationship between disability and the allowed conditions; it is not required to "prove a negative," i.e., the Injured Worker is not required to prove another condition is not disabling. State ex rel. Ignatious v. Ind. Comm. (2003), 99 Ohio St.3d 285.

The Employer has not come forward with evidence that the allowed condition, which required surgical intervention in 06/07/2010, does not disable the Injured Worker independent of any non-industrial condition. Even though disability is at issue, the Self-Insuring Employer has not submitted C-84 or Medco-14 forms upon which they have been paying disability, such that the Industrial Commission can evaluate whether the allowed condition disables the Injured Worker based upon the treating physician's certification of disability.

{¶ 44} 28. Relator appealed and the matter was heard before a commission deputy on April 13, 2011. The deputy concluded that relator did present evidence which would permit the commission to exercise its continuing jurisdiction and consider relator's motion. However, the deputy ultimately determined that relator's motion should be denied. Specifically, the deputy stated:

The Deputy finds the Injured Worker was temporarily and totally disabled due to the allowed conditions and related surgery commencing 06/07/2010. This finding is based on the records from Michael A. Herbenick, M.D., including the 06/16/2009 office note, the 12/29/2009 report, the 02/10/2010 C-140, the 06/07/2010 operative report, the 07/15/2010 office note, and the 09/09/2010 C-84, as well as the "Statement of Facts" filed 01/06/2011, indicating that the self insuring Employer approved the surgical request from Dr. Herbenick, per C-9 dated 04/23/2010, and voluntarily began paying the Injured Worker temporary total disability compensation effective 06/07/2010 based on a C-84 received by the Employer, but not filed with the Commission.

Further, the Deputy finds the Injured Worker did not voluntarily abandon her former position of employment, did not abandon the entire workforce, and did not voluntarily abandon her last employment with Tele Performance. The receipt of unemployment compensation by the Injured Worker after her termination from her former position of employment along with the testimony of the Injured Worker that her absences from her former position of employment were due to her allowed conditions, is accepted as proof that the Injured Worker did not voluntarily abandon her former position of employment with the named Employer. The return to work in November of 2009 with a new Employer is accepted as evidence that the Injured Worker did not intend to abandon the entire workforce after leaving the named Employer. Finally, the removal from the new job was due to unrelated medical issues, as supported by the testimony of the Injured Worker and the various records from Dixie R. Mullennix, M.D. Those records include, but are not limited to, the undated questionnaire, filed 10/04/2010, and the office notes dated 02/01/2010 and 04/21/2010. The Deputy finds no evidence that the Injured Worker limited her earnings by her own volition, and the payment of temporary total disability compensation from 06/07/2010 through 03/31/2011, inclusive, is adequately supported as causally related to the allowed conditions in the claim.

Therefore, it is the order of the Deputy that the Employer's request to retroactively terminate temporary total disability compensation effective 06/07/2010, or in the alternative, 10/04/2010, is DENIED.

The Deputy's findings were approved and confirmed by two of the three commissioners.

{¶ 45} 29. Relator's further request for reconsideration was denied by order of the commission mailed August 17, 2011.

{¶ 46} 30. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 47} Relator contends that the commission abused its discretion in granting TTD compensation to claimant when it was clear that, at the time of the surgery, claimant was not employed and had no lost wages. Relator contends that claimant's decision to leave her job at TelePerformance due to her low back condition constitutes a voluntary abandonment and bars the payment of TTD compensation.

{¶ 48} For the reasons that follow, the magistrate disagrees and recommends that the court deny relator's request for a writ of mandamus.

{¶ 49} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 50} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement. *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 51} R.C. 4123.56 has been defined as compensation for wages lost when a claimant's injury prevents a return to the former position of employment. *Id.* Where an employee's own actions, for reasons unrelated to the injury, preclude him or her from returning to their former position of employment, he or she is not entitled to TTD benefits since it is the employee's own actions, rather than the injury, that precludes return to the former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist.1985). When demonstrating whether an injury qualifies for TTD compensation, a two-part test is used. The first part of the test focuses on the disabling aspects of the injury. The second part of the test

determines if there are any factors, other than the injury, which would prevent claimant from returning to his or her former position of employment. However, only a voluntary abandonment precludes the payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988). As such, voluntary abandonment of a former position of employment can, in some instances, bar eligibility from TTD compensation.

{¶ 52} The voluntary nature of any claimant's departure from the workforce or abandonment is a factual question which centers around the claimant's intent at the time of the departure. In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989), the Supreme Court of Ohio stated that consideration must be given to all relevant circumstances existing at the time of the alleged abandonment. Further, the court stated that the determination of such intent is a factual question which must be determined by the commission.

{¶ 53} If it is determined that a claimant's departure from a job was voluntary, TTD compensation can be awarded only if the claimant has re-entered the workforce and, due to the allowed conditions from the industrial injury, becomes temporarily and totally disabled while working at the new job. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. However, a claimant's complete abandonment of the entire workforce precludes the payment of TTD compensation altogether. *Jones; State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000).

{¶ 54} As an initial matter, although claimant was terminated from her employment with relator due to excessive absenteeism, before filing objections to the deputy's order, relator has never challenged claimant's contention that the majority of those absences after the date of her injury were due to the allowed conditions in her claim. Relator had never argued that claimant's termination constituted a voluntary abandonment of that job. The stipulated record indicates that claimant's excessive absenteeism was due to the allowed conditions in her claim; therefore, the commission did not abuse its discretion by finding that her departure from her employment with relator was involuntary.

{¶ 55} Although claimant had restrictions due to the allowed restrictions in her claim, claimant was able to secure employment with TelePerformance. That employment was within her physical restrictions. However, the job with TelePerformance exacerbated a pre-existing back condition and claimant left that job. As such, at that time, claimant was unable to return to her former position of employment with relator and was unable to continue working with TelePerformance. Claimant testified that she looked for but was unable to secure other employment after she left TelePerformance.

{¶ 56} In arguing that claimant is not entitled to TTD compensation, relator focuses on the fact that claimant was able to secure work with TelePerformance and that this work could be performed within the restrictions due to her allowed conditions. When claimant quit her job with TelePerformance, the allowed conditions were not the cause; instead, unallowed back conditions were the cause of claimant's separation from employment. Based on this fact, relator contends that claimant's unemployment was not due to the allowed conditions and should be considered involuntary.

{¶ 57} Relator argues that the proper "inquiry is whether the claimant voluntarily abandoned the job held immediately preceding the period of TTD at issue—regardless of whether this job was with the employer of record."

{¶ 58} Relator cites several cases in support of its argument; however, the magistrate finds that those cases do not apply here for two reasons: (1) each of these cases involved claimants whose departure from their former position of employment was voluntary, and (2) none of these claimants returned to or sought work after their departure.

{¶ 59} First, relator cites *State ex rel. Williams v. Coca-Cola Ent., Inc.*, 10th Dist. No. 04AP-1270, 2005-Ohio-5085. In that case, Charlie Williams sustained a left knee injury while employed as a tractor-trailer driver for Coca-Cola. Williams underwent surgery and he returned to work. Thereafter, Williams became disabled due to an unrelated condition and took a length of service retirement from Coca-Cola. Williams did not return to the workforce thereafter.

{¶ 60} Williams later underwent total left knee arthroplasty and requested a period of TTD compensation. The commission denied that request.

{¶ 61} Williams' mandamus action in this court was denied. This court found that the commission did not abuse its discretion by finding that Williams' departure from his employment with Coca-Cola was voluntary and that, pursuant to *McCoy*, Williams could only receive TTD compensation again if, after returning to work, he became disabled due to the allowed conditions in the claim. The Supreme Court of Ohio affirmed this court's decision.

{¶ 62} *Williams* does not apply here because Williams left his job with his original employer, Coca-Cola, for reasons unrelated to the allowed conditions in his claim. Therefore, Williams' departure from the workforce was voluntary. Conversely, in the present case, claimant's departure from her job with relator was not voluntary. Because Williams was able to return to his former position of employment without restrictions and never sought other employment, that case does not apply here.

{¶ 63} Relator also cites this court's decision in *State ex rel. Carkido v. Indus. Comm.*, 10th Dist. No. 10AP-27, 2011-Ohio-4051. In that case, Margaret Carkido sustained a work-related injury, and her claim was allowed for left knee conditions. After surgery, Carkido returned to work with restrictions; however, those restrictions were eventually lifted.

{¶ 64} While working without restrictions, Carkido was involved in a motor vehicle accident and was unable to return to work. Although Carkido later had surgery which was necessitated by the allowed conditions, the commission found that she was not entitled to TTD compensation. The commission's order was upheld following Carkido's mandamus action.

{¶ 65} Carkido's factual situation is similar to Williams' factual situation. Both Williams and Carkido were able to return to their former positions of employment without restrictions. Thereafter, both Williams and Carkido became unemployed for reasons unrelated to the allowed conditions in their claims. Williams retired, and Carkido was involved in a motor vehicle accident. But for Williams' retirement and Carkido's motor vehicle accident, both were able to return to their former positions of employment and their loss of wages was not due to the allowed conditions.

{¶ 66} Relator also cites this court's decision in *State ex rel. Hildebrand v. Indus. Comm.*, 10th Dist. No. 10AP-625, 2011-Ohio-3787. In this case, Brian Hildebrand sustained a work-related injury and his claim was allowed for a low back condition. Hildebrand's employer was able to accommodate his restrictions and Hildebrand returned to work. While working for his employer with restrictions, Hildebrand had an argument with his boss and quit. Hildebrand did not return to work.

{¶ 67} Later, Hildebrand's treating physician certified that he was temporarily and totally disabled from his employment due to the allowed conditions in the claim. However, after finding that Hildebrand's departure from his job was voluntary, the commission found that Hildebrand did not return to other employment and, pursuant to *McCoy* and the cases which followed, Hildebrand's lack of wages was not due to the allowed conditions in his claim.

{¶ 68} Again, the fact that Hildebrand quit his job with the employer for whom he was working at the time he was injured for reasons unrelated to his allowed conditions, his departure was voluntary and, because he did not re-enter the workforce, he was not entitled to TTD compensation. Here, claimant left her job with relator due to the allowed conditions and re-entered the workforce. As such, claimant's departure from her job with relator was not voluntary. Claimant was able to find a job which she could perform within the restrictions which were due to the allowed conditions; however, she was forced to leave that job due to other medical conditions.

At the time she left the job with TelePerformance, claimant remained unable to return to her former position of employment with relator without restrictions. As such, the allowed conditions in her claim still prevented her from returning to work with relator. Thereafter, claimant sought other employment.

{¶ 69} As this court and the Supreme Court of Ohio have repeatedly stated, these cases are very fact specific and, these factual determinations are best left to the commission. Where there is some evidence in the record to support the commission's determination, mandamus is not appropriate.

{¶ 70} Here, the commission found that claimant left her job with relator due to the allowed conditions and that her departure was not voluntary. Thereafter, claimant secured other employment; however, she was forced to leave that job due to non-allowed medical conditions. Finding that her departure from her job with relator was not voluntary and further finding that her return to work with TelePerformance was some evidence that claimant intended to continue working, and further finding that claimant's allowed conditions continued to render her unable to return to her former position of employment at the time she underwent surgery for the allowed conditions in her claim, the commission found that she remained eligible for TTD compensation. The commission cited the evidence upon which it relied, provided an explanation for that decision, and the magistrate finds that the commission's order is based on some evidence and relator has not demonstrated an abuse of discretion on the part of the commission.

{¶ 71} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding claimant TTD compensation, and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks  
STEPHANIE BISCA BROOKS  
MAGISTRATE



**NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).