

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Gary T. Howell,	:	
	:	
Relator,	:	No. 11AP-370
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio et al.,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on May 8, 2012

Urban Co., L.P.A., and Anthony P. Christine, for relator.

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

Elizabeth A. Crosby, for respondent Thomas Steel Strip Corporation.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Gary T. Howell has filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to grant him temporary total disability ("TTD") compensation.

{¶ 2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision, appended hereto, which contains detailed findings of fact and conclusions of law. The magistrate's decision includes a recommendation that we deny the request for a writ.

{¶ 3} Counsel for Gary T. Howell has filed objections to the magistrate's decision. Counsel for the commission has not filed a response. The case is now before the court for a full, independent review.

{¶ 4} Howell was injured in 1989 while working for Thomas Steel Strip Corporation ("Thomas Steel"). He left that employment for reasons unrelated to his injuries and worked at Bartech Technical Services for over three years. Later, he worked during the summer months for Big Andy's BBQ in 2006, 2007 and 2008.

{¶ 5} The following February, arthroscopic surgery was authorized. The surgery was performed September 11, 2009. Following the surgery, Howell was unable to work for several months, which led to his applying for TTD compensation.

{¶ 6} Howell's application was turned down because he had left his employment with Thomas Steel for reasons not related to his injuries and because he was not working for anyone when the arthroscopy was performed.

{¶ 7} The record before us includes a letter from an assistant manager at the Tippecanoe Country Club who indicated that he offered Howell a position as a chef, but "[d]ue to physical difficulties and limitations of his shoulder, and impending corrective surgery, Gary was unable to accept the position, at that time." The commission could interpret this letter as indicating that Howell was offered a job less than six months before

the surgery, but did not take it. Stated somewhat differently, Howell chose not to be employed the summer before his surgery. Had he taken the job and been unable to do the job once he started it, TTD compensation would have been appropriate. Not taking the job because of fear the employment would be difficult for you is not the same.

{¶ 8} The commission was within its discretion to deny TTD compensation. We adopt the findings of fact and conclusions of law contained in the magistrate's decision. We overrule the objections to the magistrate's decision and deny the request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BRYANT and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Gary T. Howell,	:	
	:	
Relator,	:	No. 11AP-370
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio et al.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on December 20, 2011

Urban Co., L.P.A., and Anthony P. Christine, for relator.

Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

Elizabeth A. Crosby, for respondent Thomas Steel Strip Corporation.

IN MANDAMUS

{¶ 9} Relator, Gary T. Howell, 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 his request for temporary total disability

("TTD") compensation and ordering the commission to find that he is entitled to that compensation.

Finding of Fact:

{¶ 10} 1. Relator sustained a work-related injury on September 1, 1989, and his workers' compensation claim has been allowed for the following conditions: sprain right shoulder; bursitis; tendonitis; right shoulder impingement; anterior subluxation right upper limb; thoracic outlet syndrome, right; rotator cuff tear, right shoulder; distal supraspinatus intrasubstance tear of the distal mid tendon, right shoulder; posterior cuff interval; labrum slap tear, right shoulder.

{¶ 11} 2. Relator left his job with respondent-employer, Thomas Steel Strip Corporation to pursue other employment opportunities. Relator's departure from his employment was unrelated to the allowed conditions in his claim.

{¶ 12} 3. Relator did obtain other employment. Specifically, relator "worked for Bartech Technical Services from August 2001 through January 28, 2005, and he worked over the summer months for the years 2006, 2007, and 2008 for Big Andy's BBQ."

{¶ 13} 4. Following a hearing on February 13, 2009, the district hearing officer ("DHO") granted relator's request for arthroscopic surgery and post-operative visits:

It is the order of the District Hearing Officer that authorization of arthroscopic repair of rotator cuff and biceps tenodesis [sic] at University Hospital by Dr. Goodfellow and post operative physical therapy at 2-3 times per week for 6-8 weeks, pursuant to the C-9 physician's request for medical services of Donald Goodfellow, M.D., dated 11/6/2008, is specifically granted.

The District Hearing Officer relied on the letter of Dr. Goodfellow, dated 10/9/2008.

It is the decision of the District Hearing Officer that the requested treatment is reasonably related and medically necessary and appropriate and cost effective for the treatment of the allowed conditions in this claim.

{¶ 14} 5. No appeal was taken from this order.

{¶ 15} 6. Relator underwent surgery on September 11, 2009.

{¶ 16} 7. Relator's treating physician, Donald B. Goodfellow, M.D., completed a C-84 certifying that relator was disabled from the date of surgery, September 11, 2009 through an estimated return-to-work date of June 13, 2010. Relator filed his request for TTD compensation in April 2010.

{¶ 17} 8. Relator's request for TTD compensation was heard before a DHO on June 4, 2010. After finding that relator had last worked sometime in 2008, the DHO concluded that relator was not entitled to TTD compensation because he had voluntarily terminated his employment with the employer of record for reasons unrelated to the injuries and, although he did re-enter the work force for a period of time, because he was not employed at the time he underwent surgery, he had no lost wages and was not entitled to TTD compensation.

{¶ 18} 9. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on December 16, 2010. The SHO affirmed the prior DHO order and denied relator's request for TTD compensation stating:

The Staff Hearing Officer finds that the Injured Worker is requesting temporary total compensation beginning 9/11/2009 based upon the fact that he had right shoulder surgery. However, the Staff Hearing Officer finds that temporary total compensation is not payable in this claim. The Staff Hearing Officer finds that the Injured Worker left the Employer of record for reasons unrelated to this claim. Also, the Staff Hearing Officer finds that the Injured Worker

was not working at the time of the requested period of disability.

This order is being placed pursuant to the application of these facts to the holding in State ex rel. McCoy v. Dedicated Transport Inc. (2002), 97 Ohio St.3d 25. In the McCoy case, the Court held that:

Voluntary departure [from the former position of employment] does not sever this causal connection [between the claimant's industrial injury and the claimant's wage loss] when the claimant re-enters the work force and, due to his or her original industrial injury, again becomes temporarily and totally disabled while working at the new job. In this situation, the claimant's actual loss of earning results from the industrial injury because the claimant would have been working but for the injury. Thus, an award of compensation in this situation would be consistent with the underlying purpose of TTD compensation, which is to provide the injured worker with a substitute for earnings that are lost while the injury heals.

In this claim, the Injured Worker left his employment with the Employer of record in January 2000 for reasons unrelated to the claim, but he was not employed at the time he underwent the approved surgery on 9/11/2009. The Staff Hearing Officer notes that the Injured Worker did re-enter the work force because he worked for Bartech Technical Services from August 2001 through January 28, 2005, and he worked over the summer months for the years 2006, 2007, and 2008 for Big Andy's BBQ.

{¶ 19} 10. Relator's further appeal was refused by order of the commission mailed January 12, 2011.

{¶ 20} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 21} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying his request for TTD compensation and this court should deny his request for a writ of mandamus.

{¶ 22} 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.

{¶ 23} 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 MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶ 24} Two facts are undisputed in this mandamus action: (1) relator left his employment with his employer of record for reasons unrelated to the allowed conditions

in his workers' compensation claim, and (2) relator was not employed at the time he underwent arthroscopic surgery and requested TTD compensation.

{¶ 25} Relator contends that these facts do not preclude the payment of TTD compensation because, although he was unemployed at the time of the surgery, his employment in the years after his departure from the employer of record demonstrates an intent to work and entitles him to an award of TTD compensation. Conversely, the commission argues that these two facts are dispositive and that, because relator was not employed at the time of the surgery, there are no lost wages to replace and relator is not entitled to an award of TTD compensation.

{¶ 26} The Supreme Court of Ohio has already addressed this issue. In *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, the court held as follows in the syllabus:

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} The court extended that rationale in *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶39, when the court held:

Accordingly, we hold that a claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶ 28} The court went on to state that the holding was "limited to claimants who are gainfully employed at the time of their subsequent disabilities." *Id.* at ¶40. As such, the court distinguished its prior cases where claimants had voluntarily abandoned their prior position of employment and had no job at the time of the subsequent period of disability. As the court stated, "claimants in those situations will continue to be ineligible for TTD compensation." *Id.*

{¶ 29} In the present case, although relator had been employed after he left his former position of employment, it is equally clear that he was not employed at the time the period of disability began. The court's holdings in *Baker* and *McCoy* apply here.

{¶ 30} Relator cites *State ex rel. Pierron v. Indus. Comm.*, 172 Ohio App.3d 167, 2007-Ohio-3292, in an attempt to distinguish his situation. In that case, Richard Pierron sustained a work-related injury in 1973. He returned to a light-duty position with his employer in 1974 and worked in that position until 1997 when he was informed that his position was being phased out and that he would be laid off. Pierron took a regular retirement and began receiving his pension.

{¶ 31} After his retirement, Pierron worked approximately five hours per week delivering flowers in 1997 and 1998.

{¶ 32} In 2003, Pierron moved for the allowance of additional conditions and sought TTD compensation. Although the additional conditions were allowed, his request for TTD compensation was denied. The commission found that Pierron's retirement was voluntary and precluded the payment of TTD compensation.

{¶ 33} Pierron filed a mandamus action and this court noted that the commission's determination that Pierron's retirement was voluntary did not end the question of his

entitlement to TTD compensation. As this court stated, only complete abandonment of the entire work force precludes subsequent TTD compensation altogether. Where a claimant demonstrates that, subsequent to his voluntary retirement, he re-entered the work force and suffered a temporary disability while on the new job, that claimant again becomes eligible for TTD compensation.

{¶ 34} Relator argues that Pierron's "lack of activity in the months and years that followed his separation from his employer clearly indicated his intent to leave the work force." As such, relator argues that TTD compensation was properly denied. However, relator's statement is inaccurate. Specifically, Pierron did work after he left his employment with the employer of record. However, he was not employed at the time of the disability. As this court stated, "even if [claimant] had not intended to abandon the work force entirely, his claim for TTD compensation would fail" because "only claimants who are 'gainfully employed' at the time of re-injury are again eligible for TTD compensation." *Pierron* at ¶27. As such, *Pierron* does not support relator's argument, but actually supports the commission's decision.

{¶ 35} Relator also cites this court's decision in *State ex rel. Estes Express Lines v. Indus. Comm.*, 10th Dist. No. 08AP-569, 2009-Ohio-2148. Relator asserts that this court has held that as long as the claimant's intent was to be working at the time of the disability, TTD compensation was payable. Relator has misinterpreted this court's holding in *Estes*.

{¶ 36} In *Estes*, Jason Chasteen sustained a work-related injury in 2005. Shortly thereafter, Chasteen was terminated and his first request for TTD compensation was

denied based upon his voluntary abandonment of his employment, i.e., he was fired for violating an employment policy.

{¶ 37} Chasteen subsequently re-entered the work force that year as a golf ranger, but was laid off from this position on November 3, 2006. That same day, Bradley Skidmore, M.D., performed surgery on him. Chasteen sought TTD compensation following the surgery and the commission found that he was entitled to that compensation. The commission found that, because Chasteen re-entered the work force, he became eligible to receive TTD compensation. Further, because Chasteen's lay-off did not constitute a voluntary abandonment of employment, the commission found that he was entitled to the requested period of TTD compensation.

{¶ 38} The employer had argued that Chasteen's lay-off made him unemployed, but that this court concluded that TTD compensation was nevertheless warranted. In upholding the commission's determination that Chasteen was eligible for TTD compensation, this court concluded that, under *State ex rel. B.O.C. Group, Gen. Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, Chasteen's lay-off made his departure from the work force involuntary and, as such, Chasteen had not voluntarily abandoned his employment.

{¶ 39} Here, there is no evidence that relator was laid off or that his departure was involuntary and *Estes* does not apply. Instead, relator voluntarily left his employment for reasons unrelated to his allowed conditions and, while he did work thereafter, he had not been working for at least eight months and has never asserted that he was looking for work during this period.

{¶ 40} In the final analysis, relator was not employed at the time the period of disability began and, pursuant to *Baker* and *McCoy*, he was not eligible to receive TTD compensation.

{¶ 41} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and relator's request for a writ of mandamus should be denied.

/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).