[Cite as *State ex rel. Escajadillo v. Koch Foods of Cincinnati, L.L.C.*, 2015-Ohio-1226.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Emilia Escajadillo,	:	
Relator,	:	
v.	:	No. 14AP-267
Koch Foods of Cincinnati, LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 31, 2015

Evans Law Office and *Marquette D. Evans,* for relator.

Dinsmore & Shohl, LLP, and *Joan M. Verchot*, for respondent Koch Foods of Cincinnati, LLC.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} Relator, Emilia Escajadillo ("Escajadillo"), 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 request for temporary total disability ("TTD") compensation, and ordering the commission to find that she is entitled to that compensation.

{¶ 2} The court referred this matter to a 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 this court deny Escajadillo's request for a writ of mandamus.

I. Facts and Procedural History

{¶ 3} As more fully set forth in the magistrate's decision, Escajadillo sustained a work-related injury on April 3, 2010, and her workers' compensation claim was initially allowed for sciatica. Beginning April 17, 2010, Escajadillo received TTD compensation. Escajadillo received TTD compensation until it was determined that her allowed condition of sciatica had reached maximum medical improvement ("MMI"). Escajadillo's TTD compensation was terminated on April 4, 2011. Before Escajadillo's TTD compensation was terminated, she filed a motion to amend her claim to include the condition of L4-5 disc protrusion. On January 19, 2012, the Butler County Court of Common Pleas entered an agreed judgment entry determining that the condition of L4-5 disc protrusion was causally related to Escajadillo's April 3, 2010 injury and, thus, became an allowed condition in her claim.

{¶ 4} In view of the newly allowed condition, Escajadillo requested a new period of TTD compensation from April 5, 2011 through April 25, 2012. A District Hearing Officer ("DHO") granted Escajadillo's request for a new period of TTD compensation. But a Staff Hearing Officer ("SHO") subsequently denied the request for a new period of TTD compensation. The SHO concluded that the medical evidence was not sufficient to demonstrate that the additional condition of L4-5 disc protrusion constituted a new and changed circumstance warranting the reinstatement of TTD compensation for the period of April 5, 2011, through April 25, 2012. The commission refused Escajadillo's appeal.

{¶ 5} On September 11, 2012, Escajadillo requested her workers' compensation claim include the conditions of "depressive disorder, nos and pain disorder associated with both psychological factors and general medical condition." Following a hearing before a DHO on December 6, 2012, Escajadillo's workers' compensation claim was additionally allowed for the condition of major depression, moderate severity. This condition remained allowed despite appeals by Escajadillo's employer. Thereafter, Escajadillo requested TTD compensation beginning August 22, 2012, based on the condition of major depression, moderate severity. Following a hearing before a DHO on September 5, 2013, Escajadillo's request for TTD compensation beginning August 22,

2012 was denied. Escajadillo appealed the decision, and the appeal was heard before an SHO on October 12, 2013. The SHO affirmed the DHO order. Further appeal was refused by order of the commission. Escajadillo thereafter filed this mandamus action.

{¶ 6} On September 23, 2014, the magistrate issued a decision recommending this court deny Escajadillo's request for a writ of mandamus. Pursuant to Civ.R. 53, Escajadillo filed objections to the magistrate's decision.

II. Objections to Magistrate's Decision

{¶ 7} Escajadillo sets forth the following objections to the magistrate's decision:

> 1. The Magistrate erred in failing to enter a writ directing the Industrial Commission to award Relator temporary total disability compensation for the period from April 5, 2011 through April 25, 2012.
>
> 2. The Magistrate erred in failing to enter a writ directing the Industrial Commission to award Relator temporary total disability compensation for the period from August 22, 2012 through September 5, 2013.

III. Discussion

A. First Objection – April 5, 2011 through April 25, 2012

{¶ 8} Escajadillo's first objection relates to the commission's denial of TTD compensation from April 5, 2011 through April 25, 2012. Escajadillo argues the magistrate erroneously concluded there was some evidence to support the order of the commission denying the request for TTD compensation for this period of time.

{¶ 9} The commission based its decision to deny Escajadillo's request for TTD compensation from April 5, 2011 through April 25, 2012 on the medical reports of Drs. Jay L. Blatnik and Steven R. Rodgers and the office notes of Dr. Dan Buchanan. Escajadillo argued that Dr. Blatnik's March 14, 2012 report did not constitute some evidence upon which the commission could properly rely in denying her request because Dr. Blatnik relied almost exclusively on the report of Dr. Robert L. Boyer. Dr. Boyer's January 31, 2011 report, which indicated that the allowed condition of sciatica had reached MMI, was completed before the allowance of the claim for the condition of L4-5 disc protrusion. Dr. Blatnik's report incorrectly states that Dr. Boyer's report indicated that MMI had been obtained for the "allowed conditions." In view of this misstatement, Escajadillo also argues that Dr. Blatnik's report could not constitute some evidence upon

which the commission could properly rely, arguing that Dr. Blatnik misunderstood Dr. Boyer's MMI conclusion.

{¶ 10} As the magistrate noted, Dr. Blatnik's report was not based exclusively on Dr. Boyer's report but was based on all the medical evidence, including MRIs, numerous medical reports, and the chronology of Escajadillo's symptoms and the medical findings. Moreover, Dr. Blatnik expressly accepted the allowance of the condition of L4-5 disc protrusion in his report, and his report reflected his independent opinion that the medical evidence in the file demonstrated Escajadillo had reached MMI. Therefore, we find the magistrate correctly determined there was some evidence to support the commission's decision that Escajadillo was not entitled to TTD compensation for the period of April 5, 2011 through April 25, 2012. For these reasons, we overrule Escajadillo's first objection.

B. Second Objection – August 22, 2012 through September 5, 2013

{¶ 11} Escajadillo's second objection relates to the commission's denial of her request for TTD compensation from August 22, 2012 through September 5, 2013. Escajadillo generally asserts that the magistrate erroneously failed to conclude that she is entitled to a writ of mandamus ordering the commission to award her TTD compensation for this period based on her allowed psychological condition.

{¶ 12} The commission denied Escajadillo's request for TTD compensation beginning August 22, 2012 for two independent reasons. First, the commission determined Escajadillo was not part of the workforce at the time of the alleged disability, thereby precluding TTD compensation. The commission relied on Escajadillo's testimony that she had not worked in any capacity since four days after her injury on April 3, 2010, that she had not looked for any work since the date of the injury, that she was 69 years of age at the time of the SHO decision, and that she had elected to receive Social Security retirement benefits commencing April 2011. Second, the commission determined Escajadillo failed to meet her burden of demonstrating she was medically entitled to payment of TTD compensation as of August 22, 2012. The commission found that the report of Escajadillo's treating psychologist, Dr. Roberto Madrigal, indicated Escajadillo was disabled on the basis of a non-allowed condition. Consequently, the commission concluded Escajadillo was not entitled to TTD compensation beginning August 22, 2012.

{¶ 13} In recommending the court deny the writ as to the TTD compensation request relating to Escajadillo's allowed psychological condition, the magistrate determined that the two reasons provided by the commission for denying the requested TTD compensation are supported by the record. First, the magistrate found that there is some evidence in the record that Escajadillo had abandoned the workforce, which precluded the requested TTD compensation. Second, the magistrate determined that the commission did not abuse its discretion when it found Escajadillo's evidence to be insufficient to support her request for TTD compensation beginning August 22, 2012.

{¶ 14} Escajadillo argues there is no evidence in the record demonstrating she retired or otherwise exited the workforce. Escajadillo asserts that all the medical evidence in the record demonstrates her inability to return to her former position of employment during the relevant time period. Escajadillo argues that the cases relied upon by the magistrate relating to workforce abandonment are inapposite because the underlying facts in those cases were significantly different than the facts found here. Lastly, Escajadillo argues the fact that she applied for Social Security retirement benefits is irrelevant to determining whether her absence from the workforce was her personal choice or was caused by her industrial injury.

{¶ 15} R.C. 4123.56 provides for TTD compensation when an industrial injury prevents a claimant from performing the duties of his or her position of employment. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376, 380 (2000). The purpose of this provision is to compensate the injured worker for lost earnings during a period of disability while an injury heals. *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 137 Ohio St.3d 129, 2013-Ohio-4538, ¶ 14. An injured worker's eligibility for TTD compensation depends not only on whether the claimant is unable to perform the duties of the position of employment, but also on whether the claimant continues to be a part of the active workforce. *Baker* at 380. Because TTD compensation is intended to compensate an injured worker for the loss of earnings while the industrial injury heals, a claimant who is no longer part of the workforce can have no lost earnings. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, ¶ 9; *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 43-44 (1987). "When a claimant has voluntarily removed himself from the work force, he no longer incurs a loss of earnings because he is

no longer in a position to return to work. This logic would apply whether the claimant's abandonment of his position is temporary or permanent." *Id.* at 44.

{¶ 16} The magistrate referenced multiple Supreme Court of Ohio cases, each involving a claimant who sought TTD compensation after allegedly retiring from the workforce, namely *Pierron, State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089, and *State ex rel. Corman v. Allied Holdings, Inc.*, 132 Ohio St.3d 202, 2012-Ohio-2579. Escajadillo argues that the cases of *Pierron*, *Lackey*, and *Corman* are each distinguishable from this case. Escajadillo is correct that those cases are factually distinguishable from this case because Escajadillo did not formally or officially retire from employment with her employer. But the magistrate's reference to those cases was appropriate considering the principles set forth in those cases guide the analysis relating to evidence of Escajadillo abandoning the workforce. There is no one-size-fits-all formula for circumstances involving the issue of voluntary abandonment of employment prior to an alleged period of TTD; however, the central issue in such circumstances is whether there is a loss of earnings as a result of the industrial injury. *See, generally*, *Pierron*, *Lackey*, and *Corman*. Thus, contrary to Escajadillo's contentions, we find no error in the magistrate discussing *Pierron, Lackey,* and *Corman*.

{¶ 17} Escajadillo also argues her receipt of Social Security retirement benefits at full retirement age did not demonstrate her intent to exit the workforce. As to the issue of a claimant's receipt of Social Security retirement benefits in the context of determining if a claimant has abandoned the workforce, the Supreme Court has found that evidence that a claimant applied for and received Social Security retirement benefits prior to full retirement age, along with other evidence of workforce abandonment, supports a finding that the claimant intended to abandon the workforce. *State ex rel. Floyd v. Formica Corp.*, 140 Ohio St.3d 260, 2014-Ohio-3614, ¶ 24; *see State ex rel. Kelsey Hayes Co. v. Grashel*, 138 Ohio St.3d 297, 2013-Ohio-4959, ¶ 19 (finding that claimant's decision to opt for early Social Security retirement benefits, along with other evidence of workforce abandonment, demonstrated that the claimant had abandoned the job market).

{¶ 18} Unlike the circumstances in *Floyd* and *Kelsey Hayes*, it is undisputed that Escajadillo did not begin receiving Social Security retirement benefits until after she reached full retirement age under the Social Security system. Working and receiving

Social Security retirement benefits are not mutually exclusive. Thus, Escajadillo's receipt of those benefits should not be relied on in determining whether she voluntarily abandoned the workforce. But even with Escajadillo's election to receive Social Security retirement benefits not considered, the evidence cited by the magistrate supported the commission's determination that Escajadillo voluntarily removed herself from the workforce.

{¶ 19} Escajadillo was injured on April 3, 2010. She received TTD compensation from April 17, 2010 through April 4, 2011, when her originally allowed condition was determined to have reached MMI based on the January 31, 2011 report of Dr. Boyer. In Dr. Boyer's January 31, 2011 report finding the allowed condition to have reached MMI, Dr. Boyer also opined that, even though Escajadillo could not return to her former position of employment, she was capable of performing remunerative employment. Even so, Escajadillo testified before the commission that she had not worked since four days after the date of the injury, and that she had not looked for any work since the date of the injury. Thus, in the 16 months between the termination of Escajadillo's TTD compensation due to the allowed condition reaching MMI, and August 22, 2012, the date she requested TTD compensation to begin, Escajadillo did not work in any capacity or seek any employment, despite evidence that she was capable of working in some capacity. This evidence supported the commission's finding that Escajadillo was not in the workforce as of August 22, 2012. Therefore, the magistrate correctly determined that the commission did not abuse its discretion in not awarding Escajadillo TTD compensation beginning August 22, 2012. Accordingly, we overrule Escajadillo's second objection.

{¶ 20} Because we agree with the magistrate's determination that some evidence supports the commission's determination that Escajadillo was not in the workforce as of August 22, 2012, and overrule Escajadillo's second objection on this basis, we decline to address the additional issue raised by Escajadillo's second objection—whether the commission abused its discretion in finding that Escajadillo failed to meet her burden of demonstrating that she was medically entitled to TTD compensation beginning August 22, 2012.

IV. Conclusion

{¶ 21} Following our independent review of the record pursuant to Civ.R. 53, we find that the magistrate correctly determined that Escajadillo is not entitled to the requested writ of mandamus as there is some evidence in the record to support the commission's denial of Escajadillo's TTD compensation requests for the periods beginning April 5, 2011 and August 22, 2012. Moreover, having found some evidence supporting the finding that Escajadillo abandoned the workforce, we need not address the alternative reason provided by the commission for the denial of TTD compensation beginning August 22, 2012. Accordingly, we adopt the magistrate's decision as our own, including the magistrate's findings of fact and conclusions of law, as amplified and clarified herein, except to the extent the decision's conclusions of law relate to the issue we decline to address. We therefore overrule Escajadillo's objections to the magistrate's decision and deny Escajadillo's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

DORRIAN and BROGAN, JJ., concur.

BROGAN, J., retired, formerly of the Second Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Emilia Escajadillo,	:	
Relator,	:	
v.	:	No. 14AP-267
Koch Foods of Cincinnati, LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on September 23, 2014

Evans Law Office, and *Marquette D. Evans*, for relator.

Dinsmore & Shohl, LLP, and *Joan M. Verchot*, for respondent Koch Foods of Cincinnati, LLC.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 22} Relator, Emilia Escajadillo, 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 request for temporary total disability ("TTD") compensation, and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶ 23} 1. Relator sustained a work-related injury on April 3, 2010 and her workers' compensation claim was initially allowed for sciatica. TTD compensation was also awarded beginning April 17, 2010.

{¶ 24} 2. On January 31, 2011, relator was examined by Robert L. Boyer, M.D., who opined that her allowed condition of sciatica had reached maximum medical improvement ("MMI").

{¶ 25} 3. At the time that Dr. Boyer examined relator, she had a pending motion to amend her claim to include the condition of L4-5 disc protrusion.

{¶ 26} 4. The Ohio Bureau of Workers' Compensation ("BWC") filed a motion to terminate relator's TTD compensation on grounds that her allowed condition of sciatica had reached MMI.

{¶ 27} 5. Following a hearing before a district hearing officer ("DHO") on April 4, 2011, relator's allowed condition of sciatica was found to have reached MMI and her TTD compensation was terminated. This decision was upheld following relator's appeal to a staff hearing officer ("SHO") and her further appeal was refused.

{¶ 28} 6. Relator sought to have her claim additionally allowed for L4-5 disc protrusion.

{¶ 29} 7. Arthur Hughes, M.D., performed an independent medical review. In his December 13, 2011 report, Dr. Hughes discussed the results of MRIs performed in April and July 2010. The April 2010 MRI showed a left paracentral/foraminal disc protrusion at L4-5 displacing the left L5 nerve root. The July 2010 MRI showed only bulging slightly more pronounced at L4-5. Although he noted her condition had already improved, he opined that she did have the condition of L4-5 disc protrusion.

{¶ 30} 8. In an agreed judgment entry filed January 19, 2012, the Butler County Court of Common Pleas determined that the condition of L4-5 disc protrusion was causally related to relator's April 3, 2010 injury and, as such, it became an allowed condition in her claim.

{¶ 31} 9. Based on the newly allowed condition, relator filed a C-84 seeking a new period of TTD compensation. In support, relator submitted the March 23, 2012

report of her treating physician Dan Buchanan, D.C., who opined that she was temporarily and totally disabled from April 5, 2011 through March 25, 2012.

{¶ 32} 10. A physician's review was completed by Jay L. Blatnik, D.C., dated March 14, 2012. Dr. Blatnik opined, to a reasonable degree of medical certainty, the newly allowed condition did not support the request for an additional period of disability, stating:

> The claimant was found to have reached MMI over a year ago and subsequent independent evaluations, office notes and progress reports do not reflect any significant worsening of subjective complaints or objective clinical findings. The attending physician indicates on the C84 forms that pain and restricted range of motion are the reason for ongoing disability, but those findings do not reflect any new or changed circumstances that would confirm that maximum improvement has not been obtained. The underlying degenerative component could easily be responsible for the pain and restricted motion.

{¶ 33} 11. Steven R. Rodgers, M.D., also reviewed the medical evidence in the file. In his report dated July 11, 2012, Dr. Rodgers opined that the medical evidence did not support the requested period of TTD compensation, stating:

> The work-related injury question is now more than two years old and it is medically unlikely that the current symptoms are related to the events from 04-03-10. In fact, the second MRI, done 3 1/2 months after the date of injury, showed no evidence of a herniation at the L4-L5 level, suggesting its resolution. Instead, it is more likely that the current symptoms are due to the multilevel degenerative changes noted on the MRIs. This is supported by the notation on 01-27-12 that the claimant's symptoms had worsened over the last 6 months, suggesting a simple progression of the lumbar degenerative conditions. Additionally, there is insufficient evidence to establish that the claimant would have been unable to work in any capacity throughout the entire period in question. In all likelihood she could have been allowed to work with appropriate restrictions, including limited lifting and bending.
>
> The conditions associated with this claim in all likelihood resolved and the current symptoms are most likely due to the simple progression of the lumbar degenerative changes noted on the MRIs from 2010.

{¶ 34} 12. Relator's request for TTD compensation was originally granted following a hearing before a DHO; however, following a July 12, 2012 hearing before an SHO, relator's request for TTD compensation was denied. The SHO concluded that relator's medical evidence was not sufficient to demonstrate the newly allowed condition of L4-5 disc protrusion constituted a new and changed circumstance warranting the reinstatement of a period of TTD compensation. The SHO specifically relied on the medical reports of Drs. Blatnik and Rodgers, as well as office notes from Dr. Buchanan.

{¶ 35} 13. Relator's appeal was refused by order of the commission mailed August 9, 2012.

{¶ 36} 14. Relator's treating psychologist Roberto Madrigal, Ph.D., diagnosed her with depression disorder and pain disorder.

{¶ 37} 15. Relator was examined by Terry R. Schwartz, Psy.D. In his October 29, 2012 report, Dr. Schwartz opined that, while relator did not have a depressive disorder or a pain related disorder, she met the criteria for major depression as a direct and proximate result of her industrial injury.

{¶ 38} 16. Following a hearing before a DHO conducted on December 6, 2012, relator's workers' compensation claim was additionally allowed for the condition of major depression, moderate severity.

{¶ 39} 17. Despite her employer's appeals, her claim remained additionally allowed for major depression, moderate severity.

{¶ 40} 18. Thereafter, relator filed a motion seeking an award of TTD compensation beginning August 22, 2012. Relator's motion was supported by a C-84 from Dr. Madrigal, who opined that the conditions of depressive disorder and pain disorder rendered her temporarily and totally disabled.

{¶ 41} 19. A physician review was performed by Patricia Martin, M.D. In her August 7, 2013 report, Dr. Martin specifically noted that Dr. Madrigal listed depressive disorder and pain disorder while Dr. Schwartz diagnosed a major depressive disorder. She went on to explain that as Dr. Martin noted, the commission thereafter allowed her claim for major depression, moderate severity. As Dr. Martin stated further:

> Of note is the confusing allowance of Major Depressive Disorder as allowed by the DHO on 12/6/12 and reconfirmed

> on 1/22/13 despite the C-86 motion on 9/11/12 requesting Depressive Disorder, NOS and Pain Disorder with both psychological factors and a general medical condition. The ODG specifically notes that the diagnosis of Major Depressive Disorder excludes Depression NOS. This technical confusion needs to be clarified. However, in the meanwhile, it should not be the [Injured Worker] to "pay the price" for this confusion.
>
> From the available information, it appears as if Ms. Escajadillo has been chronically depressed for the past year, although according to Dr. Madrigal, she is now improving. I was also unable to find any documentation that she has been referred for a psychiatric evaluation as advised by Dr. Schwartz. Medication in a person with a severe enough depression to keep them from working, is generally a very useful adjunct and often propalactic against further deterioration, especially when suicidal thoughts have been present.
>
> Based on my review of the medical records, there is sufficient evidence to determine that changed circumstances have occurred that warrant Ms. Escajadillo TTD as from 8/22/12 until 8/23/13. This evidence is the allowance on 1/29/13 of an additionally allowed psychological condition(s), whatever the appropriately allowed diagnosis is i.e. Major Depressive Disorder or Depressive Disorder, NOS.

{¶ 42} 20. Following a hearing before a DHO on September 5, 2013, relator's motion was denied. Specifically, the DHO noted that relator returned to work for four days after the date of injury, but has not worked since that time, nor has she looked for work. The DHO noted that relator began receiving Social Security Benefits beginning April 2011. Because relator was not employed at the time of the alleged period of disability and had not been employed in any capacity for a significant amount of time prior to the requested period of disability, the DHO denied the request citing *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089, *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, and *State ex rel. Corman v. Allied Holdings, Inc.*, 132 Ohio St.3d 202, 2012-Ohio-2579.

{¶ 43} 21. Relator's appeal was heard before an SHO on October 12, 2013. The SHO affirmed the prior DHO order with additional reasoning. First, the SHO noted that relator had not worked since April 7, 2010, stating:

> In the present case, the Hearing Officer finds that the Injured Worker was not in the workforce as of 08/22/2012, the date that the Injured Worker requests payment of temporary total disability compensation. The Hearing Officer finds that the Injured Worker's orthopedic condition was found to have reached maximum medical improvement as of 04/11/2011. The Injured Worker testified that she has not worked in any capacity since 04/07/2010 (four days after the date of injury). She further testified that she has not looked for any work since the date of injury. The Hearing Officer notes that the Injured Worker is 69 years of age and has elected to receive Social Security Retirement benefits commencing April, 2011. Based upon these factors, the Hearing Officer finds that the Injured Worker was not in the workforce as of 08/22/2012 and therefore has not suffered any loss of earnings. As such, the Injured Worker is not entitled to payment of temporary total disability compensation commencing 08/22/2012.

{¶ 44} The SHO also found that relator failed to meet her burden of proving that she was medically entitled to the payment of TTD compensation, stating:

> The Hearing Officer notes that the MEDCO-14s completed by Dr. Madrigal dated 07/01/2013 and 08/26/2013 indicate that the Injured Worker was temporarily and totally disabled due to the condition of pain disorder with psychological factors and a medical condition, which is a condition which is not currently recognized in the claim.
>
> The Hearing Officer finds that temporary total disability compensation must be based solely on the allowed conditions in the claim and non-allowed conditions must not contribute to the Injured Worker's disability. Industrial Commission Policy Statements and Guidelines Memo S14. In the present case, the Hearing Officer finds that the non-allowed condition of pain disorder with psychological factors and a medical condition is a basis for the Injured Worker's inability to return to and perform the duties of her former position of employment. Therefore, the Hearing Officer finds that there is insufficient medical evidence to support the payment of temporary total compensation commencing 08/22/2012.

{¶ 45} 22. Relator's further appeal was refused by order of the commission mailed November 14, 2013.

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

Conclusions of Law:

{¶ 47} 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).

{¶ 48} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 49} 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.*, 69 Ohio St.2d 630 (1982).

{¶ 50} Relator first challenges the commission's order which denied her request for TTD compensation for the period beginning April 5, 2011. This requested period of TTD compensation was based on relator's newly allowed condition of L4-5 disc

protrusion. Relator contends that Dr. Buchanan's report clearly establishes that the newly allowed condition rendered her temporarily and totally disabled. Relator asserts that Dr. Blatnick's report, upon which the commission relied, was based heavily on the report of Dr. Boyer who rendered his opinion before the new condition was allowed. Relator also challenges Dr. Rodger's report because he opined that there was insufficient evidence to establish that relator would not have been able to work in any capacity throughout the entire period in question and because Dr. Rodgers discussed an MRI taken in July 2010 and indicated that the disc protrusion had resolved. Relator contends that Dr. Rodgers did not accept that her claim was actually allowed for the newly allowed condition.

{¶ 51} In the present case, relator's originally allowed physical condition of sciatica was found to have reached MMI and, as a result, her TTD compensation was terminated. Thereafter, her claim was amended to include the condition of L4-5 disc protrusion and relator sought the reinstatement of TTD compensation. It is undisputed that, once a determination of MMI has been made, TTD compensation may be paid again if an injured worker establishes that there are new and changed circumstances warranting the reinstatement of TTD compensation. *State ex rel. Bing v. Indus. Comm.*, 61 Ohio St.3d 424 (1991). Further, the granting of an additional claim allowance following a finding of MMI may constitute a new and changed circumstance warranting the reinstatement of TTD compensation; however, the granting of an additional claim allowance after a finding of MMI does not automatically resume the payment of TTD compensation. *See State ex rel. Basye v. Indus. Comm.*, 64 Ohio St.3d 68 (1992) and *State ex rel. Vance v. Marikis*, 86 Ohio St.3d 305 (1999).

{¶ 52} In finding that relator did not demonstrate new and changed circumstances, the commission relied upon the reports of Drs. Blatnik, Rodgers, and the progress notes of relator's treating physician Dr. Buchanan.

{¶ 53} Relator contends that Dr. Blatnik's March 14, 2012 report does not constitute some evidence upon which the commission could properly rely. Relator contends that Dr. Blatnik relied almost exclusively on the report of Dr. Boyer whose report was written prior to the allowance of the new condition. However, a review of Dr. Blatnik's report reveals that relator's assessment is incorrect as Dr. Blatnick relied on

significantly more than Dr. Boyer's report. Specifically, Dr. Blatnik stated as follows in his report:

> Initial subjective complaints (FROI-1), were in the left arm and leg, while objective findings were indicative of disc involvement. Initial ER x-rays of the chest and lumbar spine and CT scan of the head were unremarkable except for multi-level lumbar degenerative disc and joint changes. A lumbar MRI that was performed revealed a compressive disc displacement at L4-5. A neuro consult with Dr. Arand on 4-7-10 reports degenerative disc disease without any evidence of impingement, and attributes the back, buttock and leg pain to musculo-ligamentous involvement. The claimant was provided with medication and followed with a course of physical therapy. The claimant sought chiropractic intervention on 6-8-10 for low back pain with tingling and numbness into the left lower extremity, and an office note from Dr. Lutz (6-14-10) provides a diagnosis of sciatica. Another lumbar MRI (7-19-10) revealed degenerative changes from L2 to S1 with a non-compressive disc displacement at L4-5 and lumbarization of S1. An IME by Dr. Murdock on 9-9-10 notes low back pain extending to both legs with absent left patellar and Achilles reflexes, and recommends epidural steroid injections. Subsequent office notes thru 12-16-10 reflect improvement in subjective complaints and objective clinical findings. An exam by Dr. Boyer on 1-31-11 indicates that maximum medical improvement has been attained for the allowed conditions in the claim and suggests that no further treatment is required. Progress reports from 2-15-11 and 6-3-11 record improved low back pain but no change in leg symptoms, and an exam by Dr. Bright (7-29-11) states that ongoing treatment is unrelated to the original injury. A C92 exam by Dr. Hughes on 12-7-11 notes no strength loss in the lower extremities, symmetrical reflexes and some decreased sensation in the left foot, and an additional C92 exam by Dr. Dange (1-25-12) notes difficult ambulation but no neural or strength abnormality. Most recent office notes thru 2-21-12 also reflect no neurological deficit. The recent C84 forms cite decreased range of motion and pain as justification for disability.

{¶ 54} Dr. Blatnick concluded:

> The claimant was found to have reached MMI over a year ago and subsequent independent evaluations, office notes and progress reports do not reflect any significant worsening

> of subjective complaints or objective clinical findings. The attending physician indicates on the C84 forms that pain and restricted range of motion are the reason for ongoing disability, but those findings do not reflect any new or changed circumstances that would confirm that maximum improvement has not been obtained. The underlying degenerative component could easily be responsible for the pain and restricted motion.

{¶ 55} A review of the above demonstrates that Dr. Blatnik's report was based on significantly more than just the report of Dr. Boyer. His opinion was based on all the medical evidence, including both MRIs, numerous medical reports, and the chronology of relator's symptoms and medical findings. Relator contends that Dr. Blatnik's statement indicating that her condition and symptoms remained relatively unchanged clearly demonstrates that her disability is due to the newly allowed disc condition and not sciatica.

{¶ 56} The situation presented here is not unique. Often injured workers attempt to have their claims amended to include additional conditions relative to the same body part for which their claim was originally allowed. At times, based on the originally allowed conditions, the commission finds that the injured worker has reached MMI. When, thereafter, the injured worker's claim is allowed for an additional condition related to that same body part, physicians are asked to opine whether or not that newly allowed condition is currently rendering the injured worker unable to return to their former position of employment. Often, as here, doctors opine that not only has the originally allowed condition reached MMI, but the newly allowed condition also has reached MMI. In other words, these doctors opine that the newly allowed condition was present while the injured worker was receiving TTD compensation for the originally allowed condition, but that newly allowed condition has now reached MMI. This does not mean that the examining physicians are not considering the newly allowed condition. Relator's entire argument with regard to Dr. Blatnik's report revolves around this scenario and the magistrate finds that this does not constitute valid grounds to remove Dr. Blatnik's report from consideration.

{¶ 57} Relator also contends that the commission abused its discretion by denying her TTD compensation beginning August 22, 2012. The commission denied

this period of compensation for two reasons: (1) relator was not working at the time of the alleged disability and, as such, suffered no loss of wages, and (2) Dr. Madrigal's documentation indicated that relator was disabled based on non-allowed psychological conditions.

{¶ 58} There is no dispute that relator has not worked since April 7, 2010, four days after the date of injury. Further, relator's allowed physical conditions were found to have reached MMI as of April 4, 2011. At that time, relator applied for Social Security Retirement Benefits instead of looking for a job.

{¶ 59} An injured worker's eligibility for temporary total disability compensation depends not only on whether the claimant is unable to perform the duties of the position of employment, but also on whether the claimant continues to be a part of the active workforce. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000). Because temporary total disability compensation is intended to compensate an injured worker for the loss of earnings while the industrial injury heals, a claimant who is no longer part of the workforce can have no lost earnings. *Pierron, State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987).

{¶ 60} A claimant who voluntarily retires for reasons unrelated to the industrial injury may no longer be eligible for temporary total disability compensation to which he otherwise might be entitled if, by retiring, he has voluntarily removed himself permanently from the workforce. *Baker* at 383. Moreover, if the departure is related to the industrial injury, "it is not necessary for the claimant to first obtain other employment, but it is necessary that the claimant has not foreclosed that possibility by abandoning the entire workforce" in order to remain eligible for temporary total disability compensation. *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089, ¶ 11; *Baker* at 383–384.

{¶ 61} Thus, the critical issue for postretirement eligibility for temporary-total-disability compensation is whether the injured worker permanently abandoned the entire job market after retirement. This is a factual question for the commission that depends primarily on what the claimant intended. *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 383 (1989). The commission may infer a claimant's intent " ' "from words spoken, acts done, and other objective facts." ' " *Id.*,

quoting *State v. Freeman,* 64 Ohio St.2d 291, 297 (1980). The commission must consider all relevant circumstances existing at the time of the alleged abandonment, including evidence of the claimant's intention to abandon the work place as well as acts by which the intention is put into effect. *Id.*

{¶ 62} A claimant's failure to search for other employment following retirement may be evidence that he or she has permanently abandoned the entire workforce. In *Pierron,* the claimant was working in a light-duty position when his employer gave him the option to retire or be laid off. Pierron retired and, other than a brief part-time job, never worked again. Six years after he retired, Pierron filed for temporary-total-disability compensation. The commission concluded that he was no longer eligible because he had voluntarily abandoned his employment. This court upheld the commission's decision. The court reasoned that Pierron's failure to search for employment in the years that followed his retirement was evidence that he had intended to leave the entire workforce; thus, he could not allege that any lack of income was due to his industrial injury. *Id.*, ¶ 10-11.

{¶ 63} In *Lackey,* this court agreed with the commission that the claimant's failure to look for work in the 17 months after he retired from his former position was evidence that he had retired from the entire labor market. *Id.*, ¶ 12. The court reasoned that when Lackey filed for retirement, there was no evidence that he was medically unable to work, *Id.*, ¶ 13; thus, he would have been eligible for postretirement temporary total disability compensation only if he were gainfully employed elsewhere and unable to perform the duties of that job because of his industrial injury, *Id.*, ¶ 15.

{¶ 64} Likewise, in *Corman,* the claimant voluntarily retired from employment while he was receiving temporary total disability compensation for a 2002 industrial injury. When his condition reached maximum medical improvement (and compensation was terminated by law), he did not obtain other work. In 2009, Corman applied to have temporary total disability compensation reinstated, but the commission denied his request on the basis that he had voluntarily retired and never again looked for work. This court agreed, reasoning that like Pierron, Corman chose not to work; consequently, he could not allege a loss of wages as the result of his industrial injury. *Id.*, ¶ 7.

{¶ 65} In the present case, the magistrate finds that there is some evidence in the record to support the commission's determination that relator's failure to return to any work or look for any work constitutes some evidence upon which the commission could rely.

{¶ 66} Relator also contends that the commission abused its discretion when it found that her treating physician was basing the period of disability on a non-allowed condition. In doing so, relator directs this court's attention to the August 7, 2013 physician's review prepared by Patricia Martin, M.D., who opined that regardless of how her psychological condition was identified, it existed and rendered her temporarily and totally disabled.

{¶ 67} Relator's originally allowed condition of sciatica was found to have reached MMI as of April 4, 2011. In his January 31, 2011 report, Dr. Boyer opined that relator could return to work with restrictions. Thereafter, relator's claim was additionally allowed for more serious physical conditions and relator sought TTD beginning April 5, 2011, the day after her originally allowed condition was found to have reached MMI. This request was denied. A psychological condition was allowed December 6, 2012 and relator sought TTD compensation beginning August 22, 2012.

{¶ 68} Arguably, relator was capable of performing work within the restrictions set out by Dr. Boyer. However, relator did not seek any employment for 16 months (April 4, 2011 through August 22, 2012). Instead, relator applied for and was granted Social Security Retirement Benefits.

{¶ 69} In support of her argument, relator cites *State ex rel. L.P. Cavett Co. v. Indus. Comm.*, 118 Ohio St.3d 157, 2008-Ohio-1430. In that case, the claimant's treating physician Kent A. Eichenauer, Psy.D., opined that he suffered from post-traumatic stress disorder and major depression. Another doctor examined the claimant and determined that, in her opinion, the claimant did not have post-traumatic stress disorder, but did suffer depression which she characterized as a depressive disorder. Thereafter, the commission allowed the claimant's claim for depressive disorder.

{¶ 70} Dr. Eichenauer certified that the claimant was temporarily and totally disabled based solely on the depressive disorder. The employer argued that Dr. Eichenauer could not attribute the disability to depressive disorder when he had in fact

originally opined that the claimant suffered from post-traumatic stress disorder and major depression.

{¶ 71} The Supreme Court of Ohio disagreed, stating:

> The C–84 attributes disability to "depressive disorder," which is the allowed psychological condition in the claim. Cavett contends that because Dr. Eichenauer originally described Sanders's condition as posttraumatic stress disorder and major depression, the doctor is bound by those diagnoses and cannot now attribute Sanders's disability to depressive disorder.
>
> Cavett's argument lacks merit for two reasons. First, a medical professional is not precluded from reevaluating his or her opinion in light of new evidence. Second, Cavett's proposal would require Dr. Eichenauer to attribute every request for compensation or treatment to posttraumatic stress disorder or major depression, which would immediately invalidate every request because those conditions are not allowed in the claim.

Id. ¶ 15-16.

{¶ 72} Unlike the *L.P. Cavett* case, Dr. Madrigal did not list the allowed condition as the condition rendered claimant temporarily and totally disabled. Instead, he continued to list the conditions he originally opined claimant was experiencing. Unlike Dr. Eichenauer, Dr. Madrigal never listed the actual allowed conditions.

{¶ 73} As such, the magistrate finds the commission did not abused its discretion when it found relator's evidence was insufficient. Even if this court disagrees, the commission's findings that relator had abandoned the workforce constitutes an independent ground upon which the commission relied.

{¶ 74} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion when it denied her request for temporary total disability compensation and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).