IN THE SUPREME COURT OF OHIO

THE STATE ex rel. AUTOZONE STORES, INC.,	:	Case No. 2023-0493
Appellant/Relator,	:	On Appeal from the Franklin County Court of Appeals,
v.	:	Tenth Appellate District
INDUSTRIAL COMMISSION OF OHIO et al.,	:	Court of Appeals Case No. 21AP-294
Appellees/Respondents.	:	

BRIEF OF APPELLEE/RESPONDENT, INDUSTRIAL COMMISSION OF OHIO

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INTRODUCTION

This case is a direct appeal from an original action in mandamus in the Tenth District Court of Appeals ("Tenth District"). Appellant/Relator, AutoZone Stores, Inc. ("AutoZone") requests this Court vacate the Tenth District's order, grant a writ of mandamus, and deny Respondent/Appellee, Jason Schomaker ("Schomaker") temporary total disability ("TTD") compensation from November 16, 2020, through March 25, 2021, and to continue upon submission of supporting medical records. The issue in this case is whether Schomaker is entitled to TTD compensation pursuant to R.C. 4123.56(F) for this time period.

STATEMENT OF FACTS AND CASE

The workers' compensation claim at issue in this case involves a work injury that Schomaker sustained on June 15, 2020. (Stipulation of Evidence at 1-2, 23-24, "S.__"). This claim is allowed for the conditions of "sprain of muscle, fascia and tendon at shoulder and upper arm level," "right biceps tendinitis" and "right shoulder bursitis." (S. 23-24).

Following the work injury, Schomaker returned back to work at AutoZone with work restrictions. (S. 3-6, 115-140). Subsequently, Schomaker was terminated from his employment with AutoZone as of September 16, 2021, following an investigation where AutoZone determined that Schomaker should be terminated from his employment based on a "serious violation" and "unprofessional behavior." (S. 66-81, 115-140).

Schomaker continued to have work restrictions after his termination from employment. (S. 25-26, 94-95). Schomaker's physician, Dr. Scott Albright, issued a MEDCO-14 Physician's Report of Work Ability ("MEDCO-14") form on October 15, 2020, continuing to give Schomaker work restrictions after Schomaker was terminated from his employment. (S. 25-26). Additionally,

Schomaker's surgeon, Dr. Anthony Checroun, issued a MEDCO-14 form dated November 3, 2020, also giving Schomaker work restrictions after his termination. (S. 94-95).

Using these two MEDCO-14 forms, Schomaker requested TTD compensation following his termination from employment. (S. 27, 29, 104). AutoZone objected to Schomaker's request for TTD compensation and the issue was scheduled for administrative hearings before Appellee/Respondent, Industrial Commission of Ohio ("commission"). (S. 28).

After Schomaker was terminated from his employment with AutoZone, he underwent a previously-approved surgery on his right shoulder in his claim, which was performed by Dr. Checroun on November 16, 2020. (S. 30-32, 150). Following this surgery, Schomaker requested payment of TTD compensation. (S. 38, 148, 172). Dr. Checroun issued MEDCO-14 forms after the surgery dated December 1, 2020, and January 12, 2021, taking Schomaker off work completely. (S. 35-36, 146-147). On February 23, 2021, Dr. Checroun issued a MEDCO-14 form, giving Schomaker work restrictions from February 23, 2021, to an estimated April 19, 2021. (S. 165-166).

A hearing before the commission Staff Hearing Officer ("SHO") on the issue of TTD compensation was held on March 25, 2021. (S. 176-178). The SHO found that Schomaker was unable to return to and perform the duties of his former position of employment due to the allowed conditions in the claim from the date of the surgery, November 16, 2020, through March 25, 2021, and to continue upon the submission of medical evidence. (S. 176-178). The SHO granted TTD compensation to Schomaker for this time period on this basis. (S. 176-178).

In making this determination, the SHO referenced the fact that Schomaker had undergone the authorized surgery in his claim on November 16, 2020, and that Schomaker was recuperating and recovering after this surgery. (S. 176-178). The SHO based his decision on the MEDCO-14

forms from Dr. Checroun dated November 3, 2020, January 12, 2021, February 23, 2021, and December 1, 2021. (S. 176-178). The SHO also based his decision on Schomaker's testimony at the hearing, the November 16, 2021 operative report, the C9 Request for Medical Service Reimbursement or Recommendation for Additional Conditions for Industrial Injury or Occupational Disease approving the surgery, and the post-operative physical therapy records filed on August 18, 2021, February 3, 2021, and January 14, 2021. (S. 176-178).

The SHO also rejected AutoZone's argument that TTD compensation should be denied because Schomaker had been terminated from his employment with AutoZone on September 16, 2020. (S. 176-178). In rejecting this argument, the SHO cited to the amended Ohio Revised Code Section 4123.56(F) and determined that Schomaker was not able to work or return to his former position of employment from November 16, 2021, through March 25, 2021, as a direct result of an impairment arising from the allowed condition in the claim. (S. 176-178). The SHO cited to the fact that Schomaker was under work restrictions due to the allowed conditions in the claim at the time of his September 16, 2020 termination from employment with AutoZone, which prevented him from returning to and performing the full duties of his former position of employment. (S. 176-178). The SHO also cited to the MEDCO-14 forms of Dr. Checroun dated December 1, 2020, and January 12, 2021, which he noted were the first two MEDCO-14 forms issued after the surgery and completely removed Schomaker from the workforce due to the allowed conditions in the claim. (S. 176-178).

AutoZone filed an appeal to the SHO's order, which was refused by the commission's order dated April 27, 2021. (S. 187-188). AutoZone then filed an action in mandamus.

On August 10, 2022, a magistrate for the Tenth District recommended denial of a writ of mandamus based on R.C. 4123.56(F). In making this recommendation, the magistrate noted that

R.C. 4123.56(F) contains two distinct sections for determining whether an employee is entitled to TTD compensation. (Tenth District Magistrate's Decision at 6). Citing to R.C. 4123.56(F), the magistrate stated:

> Pursuant to the first section, an employee is entitled to receive compensation if the employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease. As this first section applies here, claimant was entitled to receive compensation because he underwent an authorized surgery to treat allowed conditions on November 6, 2020. Claimant was unable to work as of the date of his surgery, as supported by the MEDCO-14 reports from Dr. Checroun dated December 1, 2020, and January 12, 2021. Thus, as of the date of his surgery, claimant was "unable to work * * * as the direct result of an impairment arising from an injury." R.C. 4123.56(F). The current situation fit squarely within the plain language of this section.
>
> Pursuant to the second section of R.C. 4123.56(F), if an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive wage-loss compensation. As this second section applies here, claimant underwent surgery due to the allowed conditions, and commencing on the date of the November 16, 2020, surgery, claimant was not able to work per Dr. Checroun's MEDCO-14 reports. Thus, immediately post-surgery, claimant was not working as a direct result of reasons related to the allowed injuries. At that point, his failure to work was not "a direct result of reasons unrelated to the allowed injury." R.C. 4123.56(F). Contrary to the employer's argument, as of November 16, 2020, claimant was unable to work regardless of the reason or cause of his termination on September 16, 2020. His reason for not working up until the date of surgery was irrelevant for purposes of determining his eligibility for wage-loss compensation after surgery due to the allowed conditions.

(Tenth District Magistrate's Decision at 6-7).

On March 2, 2023, the Tenth District overruled AutoZone's objections to the Magistrate's Decision. The Tenth District adopted the Magistrate's Decision as its own and denied the writ of mandamus.

LAW AND ARGUMENT

This Court has set forth three requirements that 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, 451 N.E.2d 225 (1983). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order that is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76, 78-79, 497 N.E.2d 70 (1986). An abuse of discretion has been defined as "not merely error of judgment, but a perversity of will, passion, prejudice, partiality, or moral delinquency * * * [to] be found only where there exists no evidence upon which the commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster*, 22 Ohio St.3d 191, 193, 489 N.E.2d 288 (1986). This Court has stated that, "so long as there is some evidence in the file to support its findings and orders, this court will not overturn such." *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167, 170, 509 N.E.2d 946 (1987). Therefore, 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, 505 N.E.2d 962 (1987).

In interpreting a statute, a court's duty is to give effect to the words used in the statute. The court is not to delete or insert words. *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, citing *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly. * * * An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 316, 55 N.E.2d 413 (1944).

R.C. 4123.56(F) is plain and unambiguous and not subject to the rules of statutory interpretation. The SHO and the Tenth District appropriately interpreted the plain meaning of R.C.

4123.56(F). There was some evidence to support the SHO's application of the facts in this case to R.C. 4123.56(F) and the Tenth District appropriately denied the writ of mandamus.

Proposition of Law No. I:

Amended R.C. 4123.56(F) specifically supersedes the doctrine of voluntary abandonment and prohibits a similar analysis

R.C. 4123.56(F) specifically superseded all prior case law applying the doctrine of voluntary abandonment of employment. Therefore, the legislature clearly intended to abrogate all prior case law applying this doctrine in order to bring clarity to this area of the law. R.C. 4123.56(F). The legislature would not have done this to merely set forth "basically" the same "test" for TTD compensation as set forth in the prior abrogated case law as AutoZone argues. (AutoZone Brief at 5-7). The criteria set forth in R.C. 4123.56(F) is *different from* the "test" under the voluntary abandonment doctrine that was established pursuant to prior case law. The legislature did not merely replace the term "voluntary abandonment" with the term "not working" with the intention that it be given the same meaning and consideration. In fact, the legislature specifically indicated that R.C. 4123.56(F) superseded all prior case law that applied the voluntary abandonment doctrine. R.C. 4123.56(F).

Contrary to AutoZone's argument, in amending 4123.56(F) and abrogating the doctrine of voluntary abandonment, the legislature set forth two plain sentences specifically stating when an employee is eligible for TTD compensation. The first two sentences of R.C. 4123.56(F) provide:

> If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified. If an employee is not working or has suffered a wage loss as a direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section.

The legislature also specifically indicated that all case law applying the doctrine of voluntary abandonment was superseded by this amendment. R.C. 4123.56(F).

R.C. 4123.56(F) does not dictate that an employee can never be ineligible for TTD compensation based on a termination from employment as argued by AutoZone. (AutoZone Brief at 6). Rather, if an employee is not working at the time of his or her request for TTD compensation, an analysis must be done as to whether the employee is unable to work or suffering a wage loss for the requested period of TTD compensation as a direct result of an impairment arising from the allowed conditions in the claim. Therefore, a causal relationship between the allowed injury and TTD compensation is still considered and required under R.C. 4123.56(F). Pursuant to the second sentence of 4123.56(F), the reason that the employee is not working must be directly related to the allowed injury in the claim. If the employee is not working for reasons directly related to the allowed injury in the claim, then he or she is eligible for TTD compensation. R.C. 4123.56(F).

In this case, the SHO and the Tenth District properly analyzed *why* Schomaker was not working at the time that he requested TTD compensation. The fact is that at that time of his request for TTD compensation, Schomaker had undergone an approved surgery for an allowed condition in the claim and he had been taken off work completely by his surgeon due to the approved surgery. (S. 35-36, 146-147, 165-166). Therefore, at the time of the request of TTD compensation, Schomaker was unable to work due to an allowed condition in the claim. This fits squarely within the plain criteria set forth in the statute. Therefore, Schomaker was entitled to TTD compensation pursuant to the plain meaning of R.C. 4123.56(F).

Proposition of Law No. II:

Termination from employment does not automatically preclude TTD compensation

The fact that an employee has been terminated from employment *prior* to the requested period of TTD compensation does not automatically preclude TTD compensation pursuant to 4123.56(F). As outlined above, if an employee is not working at the time of the request for TTD compensation, an analysis must be done pursuant to the second sentence of R.C. 4123.56(F) to determine if the employee is unable to work or suffering a wage loss for the requested period of TTD compensation as a direct result of an impairment arising from the allowed conditions in the claim. If the reason the employee is not working at the time of the request for TTD compensation is directly related to the allowed injury in the claim, then the employee is eligible for TTD compensation. R.C. 4123.56(F). The fact that Schomaker was terminated from employment with AutoZone on September 17, 2020, *prior* to the requested period of TTD, is not relevant in this case because as of the requested period of TTD beginning on November 16, 2020, Schomaker could *not work due to* the approved surgery and the *allowed injury* in the claim. (S. 35-36, 146-147, 165-166). It was the approved surgery in the claim that directly rendered Schomaker unable to work at that time. As of the November 16, 2020 surgery, there was a direct causal relationship between the inability to work and the allowed injury in the claim. Therefore, Schomaker was eligible for TTD compensation pursuant to the plain criteria set forth in R.C. 4123.56(F).

Contrary to AutoZone's arguments, the approved surgery in the claim *was* the *direct* reason that Schomaker was not working as of November 16, 2020. As found by the Tenth District, the term "direct" was not defined in the statute. Therefore, it should be given its plain and ordinary meaning. (Tenth District Decision at ¶ 21, citing *Gabbard v. Madison Local School Dist. Bd. of Edn.*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, ¶ 13; *State ex rel. Nat'l. Lime &*

Stone Co. v. Marion Cty. Bd. of Commrs., 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404,¶ 14; *Thomas v. Logue*, 10th Dist. Franklin No. 21AP-385, 2022-Ohio-1603, ¶ 15, quoting *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782). Relevant definitions of the term, "direct" include: "proceeding from one point to another in time or space without deviation or interruption; proceeding by the shortest way; stemming immediately from a source; having no compromising or impairing element; natural, straightforward." (Tenth District Decision at ¶ 21, citing *Merriam-Webster Dictionary* Online, https://www.merriam-webster.com/dictionary/direct - last accessed March 2, 2023).

Schomaker's inability to work as of November 16, 2020, directly flowed from the approved surgery and it was the direct and immediate result of the surgery. The Tenth District correctly held that the statute does not require an employee to prove that the *only* reason he or she is not able to work is due to the allowed injury. (Tenth District Decision at ¶ 22). The court found that such a reading of the statute would result in adding a word to the statute, which courts are not permitted to do. (Tenth District Decision at ¶ 22). AutoZone takes issue with this ruling by the Tenth District. (AutoZone Brief at 8). AutoZone argues that a claimant that is "not even employed" is precluded from receiving TTD compensation regardless of whether the word "only" appears in the statute. In making this argument, AutoZone is once again attempting to assert the doctrine of voluntary abandonment, which was specifically superseded by the statute. (AutoZone Brief at 8). This argument was correctly rejected by the Tenth District. (Tenth District Decision at ¶ 17-25).

Further, the Tenth District's reliance on *State ex rel. BF Goodrich Co. v. Indus. Comm.*, 148 Ohio St.3d 212, 2016-Ohio-7988, 69 N.E.3d 728 is not misplaced. (Tenth District Decision at ¶ 23-25). The fact that the claimant was working light duty in *Goodrich*, while Schomaker was not working at the time that he requested TTD compensation in this case, does not distinguish the

Goodrich case from this case as argued by AutoZone. (AutoZone Brief at 8). This is because the issue in *Goodrich* was not TTD compensation. Rather, the issue in *Goodrich* was working wage loss compensation. *Goodrich* at ¶ 1. Unlike TTD compensation where a claimant cannot receive such compensation while also working, a claimant can still be working while also receiving working wage loss compensation. R.C. 4123.56. A claimant can receive working wage loss compensation if they suffer a loss of wages as a direct result of the allowed conditions in the claim. *Id.* In *Goodrich*, the claimant returned back to work in a different light duty position from her former position of employment before the work injury. *Goodrich* at ¶ 1. The claimant in *Goodrich* could not work overtime in the light duty position because the collective bargaining agreement with the employer precluded over time work in this position. The Goodrich claimant requested working wage loss compensation because she could no longer work overtime in the light duty position. *Id.* at ¶ 3-6.

The important comparison of this case with *Goodrich* was that the Court in *Goodrich* analyzed whether the claimant's working wage loss was the *direct* result of physical restrictions that were causally related to the allowed conditions in the claim. *Id*. at ¶ 14. As noted by the Tenth District in this case, the *Goodrich* Court considered the causal connection between the claimant's reduced wages and the allowed conditions in the claim. *Id.* (Tenth District Decision at ¶ 23-25). The employer in *Goodrich* argued that the claimant's lost wages were due to the collective bargaining agreement and not due to the work restrictions in the claim. *Goodrich* at ¶ 13. The *Goodrich* Court disagreed. The Court determined the commission did not abuse its discretion in concluding that the claimant's lost wages were the direct result of her inability to return to her former position of employment due to the physical restrictions in her claim. *Id*. at ¶ 14, 19. The Tenth District appropriately found the Court's ruling in *Goodrich* to be supportive of its

determination in this case. (Tenth District Decision at ¶ 23-25). The Tenth District appropriately found that Schomaker was unable to work as of November 16, 2020, as a direct result of the allowed surgery and injury in the claim given that he was completely unable to work due to this surgery. (S. 35-36, 146-147, 165-166); (Tenth District Decision at ¶ 25).

Proposition of Law No. III:

Schomaker was otherwise qualified for TTD compensation pursuant to R.C. 4123.56(F)

The first sentence of R.C. 4123.56(F) provides: "If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury * * * the employee is entitled to receive compensation * * * provided the employee is *otherwise qualified*." (Emphasis added.)

"Otherwise qualified" as set forth in the first sentence of R.C. 4123.56(F) refers to the other TTD compensation eligibility requirements set forth in R.C. 4123.56(A). R.C. 4123.56(A) provides that TTD compensation will not be paid for any time when an employee has returned to work, when an employee's physician has made a written statement that the employee is capable of returning to his or her former position of employment, when work within the employee's physical capabilities are made available by the employer or another employer or when the employee has reached maximum medical improvement. The first sentence of R.C. 4123.56(F) does not state and does not mean that an employee must be employed or working in order to be "otherwise qualified" as argued by AutoZone. (AutoZone Brief at 10).

In taking this position, AutoZone is once again arguing that an employee is not eligible or "otherwise qualified" for TTD compensation unless the employee is employed at the time that he or she requests TTD compensation. This is not what R.C. 4123.56(F) provides. Rather, AutoZone

is again attempting to restore the doctrine of voluntary abandonment, which has now been superseded by the statute.

Proposition of Law No. IV:

R.C. 4123.56(F) does not require an employee to be employed or working in order to be eligible for TTD compensation

R.C. 4123.56(F) does not require that an employee be employed or working in order to be eligible for TTD compensation. R.C 4123.56(F) makes no mention of being "employed" and it specifically provides that if an employee is *not working*, he or she is still eligible for TTD compensation *unless* it is due to reasons unrelated to the allowed injury in the claim. The statute does not provide a requirement of "employment" at the time of the requested TTD compensation as argued by AutoZone. (AutoZone Brief at 13). This is also clear from the fact that the statute also superseded all prior case law related to the doctrine of voluntary abandonment. The requirement of "employment" or that an employee be working is no longer applicable.

The second sentence of R.C. 4123.56(F) also does not provide two separate circumstances in which an employee is not eligible for TTD compensation as argued by AutoZone. (AutoZone Brief at 12). The status provides, "[If" an employee is not working or suffered a wage loss as a direct result of reasons unrelated to the allowed injury * * * the employee is not eligible to receive compensation under this section." This does not mean that an employee is not eligible for TTD compensation if he or she is not working at the time of the request for TTD compensation. Rather, this sentence plainly means that if an employee is *not working or* suffers a *wage loss* at the time of the requested TTD compensation *then* an analysis must be done as to why he or she is not working and whether or not it is due to the allowed injury in the claim. The "or" in the sentence separates "not working" and "wage loss." It does *not* separate the circumstance of "not working" from the remainder of the sentence and impose a requirement that an employee be working at the time of

the requested TTD compensation. Rather, it provides that if an employee is not working *or* suffers a wages loss, then an analysis must be done as to whether it is as a direct result of the allowed conditions and injury in the claim. R.C. 4123.56(F).

The argument that an employee must be "employed" in order to be eligible for TTD compensation is an argument based on the prior case law dealing with voluntary abandonment. This no longer applies. R.C. 4123.56(F). R.C. 4123.56(F) does not provide any requirement of being "employed" or having "employment." If the legislature intended a requirement of having "employment" at the time of the request for TTD compensation, it would have stated that, but it did not. The argument that an employee must be suffering a "wage loss," that they must have "wages to replace" or that they be a part of the "active workforce" at the time of the request for TTD compensation are concepts for voluntary abandonment arguments. It is clear that in superseding the case law on voluntary abandonment and specifically providing for new criteria in order to determine eligibility for TTD compensation, contrary to AutoZone's argument, the legislature did intend to "wipe clean" the precedent on this issue in order to bring clarity to the issue. R.C. 4123.56(F) (AutoZone Brief at 16).

Further, using the term "employee" is interchangeable with a claimant or injured worker. In order to have a workers' compensation claim, a claimant would have had to have been employed and be an "employee" of the employer at the time that the injury occurred. The use of the term "employee" has no significance beyond that. If the legislature had intended to preclude TTD compensation from those who were no longer employed by the employer of record at the time of the injury, the statute would have reflected that intention when R.C. 4123.56(F) was recently amended.

In this case, Schomaker was not working on November 16, 2020, the date of the approved surgery for the allowed condition, and the date he requested TTD compensation. As of that date, Schomaker could no longer work in any capacity due to the approved surgery and the allowed injury in the claim. (S. 35-36, 146-147, 165-166). Therefore, he was eligible for TTD compensation as of that date pursuant to the plain meaning of R.C. 4123.56(F).

CONCLUSION

AutoZone is not entitled to a writ of mandamus because Schomaker was entitled to TTD compensation pursuant to R.C. 4123.56(F). Schomaker was unable to work as of the date of the November 16, 2020 approved surgery in the claim as a direct result of the surgery and the allowed injury. Further, Schomaker was not working as of November 16, 2020, as a direct result of the surgery and the allowed injury in the claim. Therefore, Schomaker was entitled to TTD compensation pursuant to the plain meaning of R.C. 4123.56(F). Therefore, the commission respectfully requests that this Court uphold the Tenth District's decision and deny AutoZone's request for a writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee/Respondent, Industrial Commission of Ohio, was served on this 21st day of July, 2023, to:

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