

grounds that he had previously refused a good faith offer of suitable employment from respondent, Digital Dish, Inc., and to enter an order granting said compensation.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. The magistrate found that the commission did not abuse its discretion when it denied relator TTD compensation on grounds that relator refused an offer of suitable employment within relator's restrictions. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator has filed an objection to the magistrate's decision arguing that the magistrate applied "the incorrect legal standard." Essentially, relator argues that the commission and the magistrate confused the concept of voluntary abandonment with the concept of the refusal of an offer of suitable employment within the claimant's restrictions. Although the magistrate's discussion of this issue is not the model of clarity, relator misunderstands the basis for the commission's order and the essence of the magistrate's decision.

{¶4} The magistrate's decision is premised on the fact that relator never asked the commission to reopen the matter to determine whether relator's refusal of suitable employment within relator's restrictions was justified. In other words, relator never asked the commission to exercise continuing jurisdiction based on new and changed circumstances. Pursuant to R.C. 4123.56, relator is not entitled to TTD compensation if work within his physical capabilities is made available to him. The staff hearing officer's October 10, 2007 order denying relator TTD compensation due to his refusal to accept

an offer of light duty work is a final order. That order remains controlling unless relator establishes a basis for the commission to exercise continuing jurisdiction. Because relator never requested the commission to exercise continuing jurisdiction, the magistrate found that the commission did not abuse its discretion when it denied relator TTD compensation based upon the October 10, 2007 order. We agree. Therefore, we overrule relator's objection.

{¶5} Although relator takes issue with various references by the commission and the magistrate to relator's failure to re-enter the work force, that point has no significance here. Contrary to relator's suggestion, neither the commission nor the magistrate applied the theory of voluntary abandonment in this case. Relator was denied TTD compensation based upon the October 10, 2007 order. That order was premised on relator's refusal to accept a good faith offer of suitable employment. That order remains controlling unless relator establishes a basis for the commission to exercise continuing jurisdiction. Relator made no attempt to do so here.

{¶6} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, with the clarifications set forth herein, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objection overruled;
writ of mandamus denied.*

BRYANT and McGRATH, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Jeffery Ready,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-90
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Digital Dish, Inc.,	:	
	:	
Respondents.	:	
	:	

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

Rendered on June 16, 2009

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg and Jennifer L. Lawther, for relator.

Richard Cordray, Attorney General, and Douglas R. Unver, for respondent Industrial Commission of Ohio.

Constance A. Snyder, for respondent Digital Dish, Inc.

IN MANDAMUS

{¶6} Relator, Jeffery Ready, 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 him an award of temporary total disability ("TTD") compensation on grounds that he had previously refused a good-faith

offer of suitable employment from respondent Digital Dish, Inc. ("Digital"), and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶7} 1. Relator sustained a work-related injury on April 21, 2007, and his claim was originally allowed for "sprain lumbar region."

{¶8} 2. Relator began receiving TTD compensation.

{¶9} 3. On July 26, 2007, relator's treating physician, Amardeep S. Chauhan, D.O., released relator to return to work with light-duty restrictions.

{¶10} 4. On July 30, 2007, Digital offered relator a light-duty job which was within his physical capabilities.

{¶11} 5. When relator did not respond to the job offer, Digital filed a motion to terminate his TTD compensation.

{¶12} 6. In an order mailed August 6, 2007, the administrator of the Ohio Bureau of Workers' Compensation ("BWC") terminated relator's TTD compensation effective August 1, 2007 on grounds that he had refused Digital's offer of light-duty work within the restrictions set out by his treating physician.

{¶13} 7. Relator appealed and the matter was heard before a district hearing officer ("DHO") on September 13, 2007. The DHO vacated the prior BWC's order relying on the August 15, 2007 report of Susan E. Stephens, M.D. Because Dr. Stephens had opined that relator was temporarily and totally disabled, the DHO concluded that he did not refuse a light-duty job offer by Digital. In that August 15, 2007 report, Dr. Stephens noted that relator had a lumbar disc herniation and needed

physical therapy three times a week for six weeks followed by a functional capacity evaluation.

{¶14} 8. Digital appealed and the matter was heard before a staff hearing officer ("SHO") on October 10, 2007. The SHO vacated the prior DHO's order and found that relator's TTD compensation should be terminated based upon his refusal to accept the light-duty job offer made by Digital. Further, the SHO noted that Dr. Stephens was treating relator for a nonallowed herniated disc and it was that condition, and not the allowed condition of sprain lumbar region, that was rendering relator disabled.

{¶15} 9. In an order mailed November 2, 2007, relator's further appeal was refused.

{¶16} 10. In the interim, relator underwent an MRI on August 3, 2007. The MRI revealed: Central protrusion of the degenerated L5-S1 disc without central or neural foraminal compromise" and "[r]ight lateral protrusion of the L4-5 disc with at most mild right neural foraminal stenosis."

{¶17} 11. There are numerous office notes from Dr. Stephens contained in the record. It is apparent that, as early as August 2007, Dr. Stephens was indicating that relator's back condition was significantly more severe than simply a lumbar strain. Dr. Stephens noted that relator continued to have low back pain with radiculopathy and continued to note that efforts were being undertaken in order to have relator's workers' compensation claim additionally allowed for the herniated disc conditions.

{¶18} 12. In an order mailed December 5, 2007, the BWC determined that relator's claim should be additionally allowed for herniated discs at L4-L5 and L5-S1. The BWC's order was affirmed by both the DHO and SHO.

{¶19} 13. Thereafter, relator requested additional TTD compensation. Dr. Stephens signed four separate C-84 forms certifying that relator was temporarily and totally disabled beginning April 21, 2007. One form is undated and does not list the diagnosis preventing relator from returning to work. Another is dated August 15, 2007, and lists lumbar strain as the condition causing relator to be disabled. A third C-84 is dated January 8, 2008, and it again lists only the lumbar sprain as the condition causing relator to be disabled. What appears to be that same form is contained in the record a second time and this time the herniated disc conditions have been written in along with the lumbar sprain as the conditions causing relator to be disabled.

{¶20} 14. Relator's request for TTD compensation was denied by the BWC in an order mailed January 17, 2008. The BWC listed the following explanation:

* * * Per Staff Hearing Order dated 10-10-07, temporary total disability compensation is terminated due to refusal by the claim to accept the viable light duty job offer made by the employer. The administrator requests temporary total be denied based on the fact that the injured worker did not return to work when light duty job was offered by employer.

{¶21} 15. The matter was then heard before a DHO on February 12, 2008. The DHO denied the requested period of TTD compensation for two reasons. First, the DHO pointed out that, on October 10, 2007, an SHO had determined that relator had refused a light-duty job offer from the employer which constituted an abandonment of employment. Inasmuch as relator had not become employed with another employer since that date, the DHO concluded that he was not entitled to TTD compensation now. The DHO also denied compensation based on a lack of sufficient medical evidence as follows:

The District Hearing Officer finds that temporary total compensation, even if there were no abandonment of employment, is not warranted by the medical evidence on file. There are two C-84 forms on file, dated 1/8/2008, signed by Dr. Stephens which show an alleged disability period between 4/27/2007 and 4/6/2008. One of the above-noted C-84 forms includes the diagnosis of lumbar sprain (847.2) and on the other C-84 form, filed 1/14/2008, the diagnostic code of 722.10 (lumbar displacement without myelopathy) has been added to the otherwise same C-84 form. There are no objective or subjective clinical findings on either C-84 form to support the lengthy alleged disability period.

{¶22} 16. Relator's appeal was heard before an SHO on March 24, 2008. The SHO modified the prior DHO's order and denied TTD compensation as follows:

The Staff Hearing Officer finds that the injured worker's [sic] ineligible to receive temporary total compensation for this period. The order of the Staff Hearing Officer from the hearing dated 10/10/2007 found that the injured worker had refused to accept modified work that was consistent with his physical restrictions. This renders the injured worker ineligible to receive temporary total compensation if he has not returned to the work force since this refusal to accept modified work. There is no evidence that the injured worker has returned to the work force since he refused the offer of modified duty. The injured worker, therefore, is ineligible to receive temporary total compensation. All proof on file was reviewed and considered.

{¶23} 17. Relator's further appeal was refused by order of the commission mailed April 11, 2008.

{¶24} 18. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶25} 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.

{¶26} For the reasons that follow, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

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

{¶28} In the present case, relator's original receipt of TTD compensation was terminated on grounds that Digital made work within relator's physical capabilities available to him and he refused to take the job.

{¶29} After he refused Digital's offer of employment, the record is clear that relator did not seek or obtain any other employment. After additional conditions in his claim were allowed, relator filed a motion requesting the payment of TTD compensation from April 21, 2007, the date of injury, based upon these newly allowed conditions. Relator argues that the commission applied an incorrect standard when it denied him this new period of TTD compensation.

{¶30} Relator is correct when he states that a refusal to accept a good-faith job offer made by an employer is not synonymous with a voluntary abandonment of employment. In *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶6-9, the Supreme Court of Ohio stated:

We clarify at the outset that this is not a case of voluntary abandonment. Rather, the facts of this case raise the possibility of a different defense: refusal of suitable alternate employment. R.C. 4123.56(A) prohibits the payment of temporary total disability compensation "when work within the physical capabilities of the employee is made available by [an] employer." Both defenses affect a claimant's eligibility for temporary total disability compensation, but they derive from different compensatory theories and involve distinct analyses.

* * * For many years, there were three main defenses to the payment of temporary total disability compensation: (1) the claimant is medically able to return to the former position, (2) the claimant's condition is no longer temporary, and (3) the claimant's inability to return to the former position of employment is not due to injury. See *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 632, 23 O.O.3d 518, 433 N.E.2d 586; [*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42].

The defense of voluntary abandonment derives from the last of the three. In a case of voluntary abandonment, the claimant's inability to return to the former position of employment is never in dispute. What is instead always at issue is the reason for that inability. Common to every

voluntary-abandonment controversy is the existence of two independent reasons for the claimant's inability to return to the former position of employment. One is medical and one is not, with the two most common nonmedical reasons being an employment termination or a voluntary refusal to return. The issue in every voluntary-abandonment case is which cause was primary and which was secondary.

That is not the case with the defense of refusal of suitable alternate employment. This defense does not ask why the claimant has not returned to his former position of employment, because the answer is inherent in the mere fact of a job offer. There is no need to propose alternate employment if the claimant's inability to return to the former position is attributable to anything other than the injury. Instead, the relevant inquiry in this situation is why the claimant has rejected an offer to ameliorate the amount of wages lost. This, in turn, can involve considerations of, for example, employment suitability, the legitimacy of the job offer, or whether the position was offered in good faith. The causal-relation question in this situation is different because it derives from a different compensatory intent, which is to facilitate the claimant's return to the work force. * * *

{¶31} In this mandamus action, relator argues that the commission incorrectly applied the voluntary abandonment doctrine to the facts of his case. Relator is correct that, in the February 12, 2008 DHO's order, the DHO does state that relator had voluntarily abandoned his employment when he refused the job offer made by Digital and did not, thereafter, obtain any employment. However, that is the only time the commission used that language.

{¶32} When the matter was heard before the SHO on March 24, 2008, the SHO modified the prior DHO's order and denied the requested compensation on grounds that relator refused the offer of employment made by Digital and had not returned to the workforce since he refused the job. While it might appear that the SHO applied the voluntary abandonment rule, such is not the case.

{¶33} When the commission terminated relator's TTD compensation on grounds that he refused an offer of suitable employment made by Digital, that order continued to have authority in the future. Relator cannot escape the fact that his treating physician released him to return to light-duty work, Digital offered him a job within his restrictions, and he refused that job. That order terminating his TTD compensation remained in effect when he again sought TTD compensation.

{¶34} In the present case, relator never asked the commission to reopen the issue of whether he had actually been physically able to do the job Digital offered him at the time it was offered. As is clear from the record, at the same time the BWC was terminating his TTD compensation (August 6, 2007), relator had an MRI performed which indicated that his condition was significantly more severe than a mere lumbar sprain. That August 3, 2007 MRI showed that relator had herniated discs. In essence, the herniated discs condition existed at the time relator refused Digital's offer of employment.

{¶35} Pursuant to R.C. 4123.52, relator could have asked the commission to reopen the matter and presented evidence that, due to the newly allowed conditions, he would not have been able to perform the job Digital had offered. Instead, relator never answered the question of why he refused Digital's offer of employment at a time when the medical evidence indicated that he could perform that job. Similar to a voluntary abandonment issue, relator left open the question of why he refused the job and did not seek other employment thereafter. Presumably, relator is attempting to demonstrate that the allowance of the new conditions constitutes new and changed circumstances

warranting the reinstatement of his TTD compensation; however, the fact remains that relator refused to accept the job offer.

{¶36} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion when it denied his request for TTD compensation, 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).