ORIGINAL

In the
Supreme Court of Ohio

GUISEPPE GULLOTTA, Respondent-Appellant, and INDUSTRIAL COMMISSION OF OHIO, Respondent-Appellant, v. AKRON PAINT & VARNISH, INC., Relator-Appellee.	:	Case No. 10-0636 Appeal from the Court of Appeals for Franklin County, Ohio Tenth Appellate District Case No. 09APD-492

SECOND NOTICE OF APPEAL OF RESPONDENT-APPELLANT INDUSTRIAL COMMISSION OF OHIO

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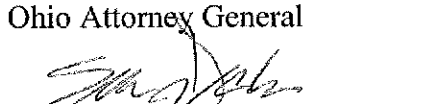
FILED
MAY 14 2010
CLERK OF COURT
SUPREME COURT OF OHIO

SECOND NOTICE OF APPEAL

The Industrial Commission of Ohio gives notice of its appeal to the Supreme Court of Ohio from the Judgment Entry entered in Tenth District Court of Appeals, for Franklin County, Ohio, Case No. 09APD-492, rendered on March 30, 2010. This case originated in the court of appeals.

Respectfully submitted,

RICHARD CORDRAY
Ohio Attorney General



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Second Notice of Appeal was served by U.S. mail this 14th day of May, 2010 upon the following counsel:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

State of Ohio ex rel. Akron Paint & Varnish, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-492
Guiseppe Gullotta and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 30, 2010, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we issue a writ of mandamus ordering the commission to vacate its staff hearing officer's order of July 16, 2008, and to enter an order that denies the request for temporary total disability compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008. Costs assessed against respondents.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

William A. Klatt

Judge William A. Klatt

Judge Peggy Bryant

Judge Patrick M. McGrath

A-4

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO
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CLERK OF COURTS

State of Ohio ex rel. Akron Paint & Varnish, Inc.,	:	
Relator,	:	
	:	No. 09AP-492
v.	:	(REGULAR CALENDAR)
Guiseppe Gullotta and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 30, 2010

Richard L. Williger Co., L.P.A., and *Richard L. Williger*, for relator.

Philip J. Fulton Law Office, William A. Thorman, III, and *Michael P. Dusseau*, for respondent Guiseppe Gullotta.

Richard Cordray, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Akron Paint & Varnish, Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded respondent, Guiseppe Gullotta ("claimant"), temporary total disability ("TTD") compensation beginning November 5, 2007, and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 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 hereto. The magistrate found that the commission abused its discretion when it awarded claimant TTD compensation because it failed to properly exercise continuing jurisdiction. The magistrate determined that the commission's earlier order denying the claimant TTD compensation was final, and therefore, the order bound the commission in subsequent administrative proceedings unless the commission properly invoked its R.C. 2143.52 continuing jurisdiction. Because the commission did not properly invoke its continuing jurisdiction, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶3} The commission filed an objection to the magistrate's decision arguing that it properly exercised continuing jurisdiction because there were "new and changed circumstances" that warranted the payment of TTD. Therefore, the commission argues that it was not bound by its earlier order that denied claimant TTD compensation. We disagree.

{¶4} The claimant's refusal to perform light duty work within his physical restrictions offered by relator was the basis for the commission's prior order denying TTD. Although the commission found that the worsening of claimant's condition constituted "new and changed circumstances," there was no evidence that the claimant would have been prevented from performing the light duty work previously offered by relator. Without such evidence, the commission did not properly invoke continuing jurisdiction over its prior final order. Simply stated, the new and changed circumstances

noted by the commission did not undermine the basis for the commission's prior order. Therefore, there was no evidence upon which the commission could exercise continuing jurisdiction. Accordingly, the commission is bound by its prior order that denied claimant TTD compensation because the claimant refused light duty work within his physical restrictions offered by relator. We overrule the commission's objection.

{¶5} The claimant also filed objections to the magistrate's decision. The claimant first argues that there was evidence that his worsened condition would have prevented him from performing the offered light duty work. Specifically, the claimant points to an increase in treatment and restrictions as evidence supporting the commission's exercise of continuing jurisdiction. However, as relator points out, an increase in treatment and restrictions are not sufficient to demonstrate that the claimant could not have performed the offered light duty work without some reference to the requirements of that work.

{¶6} The claimant also argues that Dr. Unger's June 4, 2008 report is some evidence that the claimant's worsened condition would have prevented him from performing the offered light duty work. Again, we disagree. The portion of Dr. Unger's report cited by claimant does not discuss the physical requirements of the light duty work offered by relator. Nor does Dr. Unger clearly state that the claimant would not have been able to perform the light duty work offered by relator. Therefore, we overrule claimant's first objection.

{¶7} In his second objection, the claimant argues that the magistrate erred by applying the doctrine of voluntary abandonment in his analysis. However, the claimant misunderstands the basis for the magistrate's decision.

{¶8} The magistrate discussed the doctrine of voluntary abandonment in his decision, but only to explain why the commission properly refused to apply the doctrine to claimant's claim. Contrary to the claimant's contention, the magistrate did not find that the claimant had to re-enter the work force to re-establish entitlement to TTD. Nor did the magistrate apply any other principle associated with the doctrine of voluntary abandonment. Rather, the magistrate found that there was no evidence to establish new and changed circumstances that would justify the commission's exercise of continuing jurisdiction given the commission's prior order denying claimant TTD based upon his refusal to perform light duty work within his physical restrictions. Therefore, we overrule claimant's second objection.

{¶9} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of facts and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus ordering the commission to vacate its staff hearing officer's order of July 16, 2008, and to enter an order that denies the request for TTD compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008.

Objections overruled;
writ of mandamus granted.

BRYANT and McGRATH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Akron Paint & Varnish, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-492
Guiseppe Gullotta and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 25, 2009

Richard L. Williger Co., L.P.A., and *Richard L. Williger*, for relator.

Philip J. Fulton Law Office, William A. Thorman, III, and *Michael P. Dusseau*, for respondent Guiseppe Gullotta.

Richard Cordray, Attorney General, and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} In this original action, relator, Akron Paint & Varnish, Inc. ("relator" or "APV"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Guiseppe Gullotta

("claimant") temporary total disability ("TTD") compensation beginning November 5, 2007, and to enter an order denying said compensation.

Findings of Fact:

{¶11} 1. On January 2, 2007, claimant injured his lower back while employed with relator, a state-fund employer. Initially, the industrial claim (No. 07-300245) was allowed for "sprain lumbar region."

{¶12} 2. Following a brief period of TTD compensation, claimant returned to work at APV at a light-duty position on February 23, 2007.

{¶13} 3. On April 11, 2007, attending physician Stephen A. Lohr, M.D., wrote: "He is not amenable to increasing his work restrictions. He said his work causes him a lot of pain. We will continue him on his current work restrictions and we will have him see a spine specialist."

{¶14} 4. On April 16, 2007, claimant met with APV Vice President Michael Summers, who thereafter memorialized the meeting in a letter to claimant dated April 18, 2007:

> * * * You had expressed some concern for the new position we have established for you to meet the requirements of APV Production and to stay within the restrictions of your medical release[.] It was explained to you on Monday[,] April 16th[,] 2007[,] that you were being moved from your position in the Shipping and Receiving Department and moved to the Production Department to perform tasks within your physical limitations[.] * * *
>
> * * *
>
> You expressed further concern that any one of these tasks for a long period of time would aggravate your condition and APV answered this concern with flexibility in completing the tasks[.] It was further explained that although these tasks needed to be completed each day, there was no particular

> order that they needed to be completed and that you had the freedom to move between these tasks to remain in accordance with your medical release[.] It was also offered that you could be sent out for an independent evaluation and functional assessment to determine if the task that we proposed met the criteria of the release[.] You had refused the independent evaluation and expressed that you just wanted to be left in shipping[.] When it was made clear that this was no longer an option you stated that you were tired of this situation and gave a verbal resignation, "I quit" and left the premises[.] APV accepted your resignation and accompanied you to gather your belongings and escorted you off the premises as is our policy in voluntary quit situations[.]

{¶15} 5. On August 1, 2007, claimant submitted two C-84s completed by Daniel Mazanec, M.D. The C-84s requested TTD compensation for the period from April 24 through November 4, 2007.

{¶16} 6. Following a September 18, 2007 hearing, a district hearing officer ("DHO") issued an order denying the request for TTD compensation.

{¶17} 7. Claimant administratively appealed the DHO's order of September 18, 2007.

{¶18} 8. Following a November 29, 2007 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order but, nevertheless, denies the request for TTD compensation for the period April 24 through November 4, 2007. The SHO's order of November 29, 2007 explains:

> The Claimant was employed in the shipping department at the employer's place of business on the date of injury. Following his injury on 01/02/2007, the Claimant was paid temporary total disability compensation through 02/22/2007. Thereafter, the Claimant returned to work at light duty based on restrictions provided by his physician of record, Dr. Lohr. The 02/22/2007 Medco-14 report of Dr. Lohr released the Claimant to return to work at light duty as a courier for

paperwork between departments, with the further restriction of no lifting, stooping, or repetitive motions.

On 03/14/2007[,] Dr. Lohr issued a new Medco-14 report which increased the Claimant's physical capabilities. This report allowed the Claimant to carry up to ten pounds frequently, eleven to twenty pounds occasionally, and allowed for occasional bending, twisting/turning, reaching below the knee, pushing/pulling, and squatting/kneeling. The Claimant was not restricted on his ability to stand, walk, or sit. Based upon these new restrictions from Dr. Lohr, the employer began to increase the job duties assigned to the Claimant. The Claimant testified that these job duties involved labeling containers of paint or varnish and operating an automatic wrapping machine.

The Claimant testified that these increased job duties caused increased low back pain, and he felt that the new job duties were not within the restrictions outlined by Dr. Lohr.

The Claimant saw Dr. Lohr on 04/11/2007. Dr. Lohr's office note from that date does indicate that the Claimant complained of increasing back pain which the Claimant attributed to his work duties. However, after an examination of the Claimant, Dr. Lohr returned the Claimant to work with the same restrictions that had been in place since 03/14/2007. Dr. Lohr did not indicate that the Claimant could not perform the job duties to which he had been assigned by the employer.

The Claimant apparently complained to the employer regarding his job duties while on light duty. As a result, Mr. Summers met with the Claimant on 04/16/2007. The results of this meeting are outlined in a letter from Mr. Summers to the Claimant dated 04/18/2007. At the meeting on 04/16/2007 the employer offered different light duty work to the Claimant, including placing empty pails into an automatic labeling machine, labeling small package items such as four ounce cans, quarts, and dot markers, and running an automatic sweeper machine similar to a fork truck. The employer attempted to address the Claimant's concerns regarding these particular tasks by informing him that the tasks did not need to be completed in a particular order and that he had freedom to move between those tasks at his discretion. When the Claimant expressed his desire to return to the shipping department, he was informed that this was

not possible due to the restrictions placed by Dr. Lohr. As a result, the Claimant verbally informed Mr. Summers that he was quitting and left the premises.

It is clear that the Claimant was unable to return to work at his former position of employment at the time of his resignation on 04/16/2007. Therefore, the Claimant's resignation cannot be considered a voluntary abandonment of employment that would bar the receipt of temporary total compensation thereafter. State ex rel. OmniSource Corp. v. Indus. Comm. (2007), 113 Ohio St. 3d 303. In addition, the Claimant's refusal of a light duty job offer does not equate to a voluntary abandonment of employment. State ex rel. Ellis Super Valu, Inc. v. Indus. Comm. (2007), 115 Ohio St. 3d 224.

However, the employer did provide the Claimant with a light duty job within the restrictions placed by Dr. Lohr prior to the Claimant's decision to resign his employment. The Claimant did work successfully in that position despite his complaints of increasing low back pain. Further, the employer sought to accommodate the Claimant's complaints by assigning him new job duties of a lighter nature. Instead of accepting or even attempting to perform these new job duties, the Claimant chose to resign his employment on 04/16/2007. Although the Claimant asserts that he was physically unable to do the job duties assigned by the employer and that these duties were outside the restrictions imposed by Dr. Lohr, the Claimant has presented no medical evidence from Dr. Lohr in support of this assertion. To the contrary, the 04/11/2007 office note and Medco-14 report of Dr. Lohr clearly indicate that the Claimant was advised to continue working in his light duty position with the same restrictions imposed previously. There is no indication that Dr. Lohr was of the opinion that the Claimant was medically incapable of performing the light duty position created by the employer or that Dr. Lohr advised the Claimant that he could not medically continue to perform his light duty job.

The Hearing Officer concludes that the period of disability beginning 04/24/2007 is not causally related to the industrial injury in this claim, but rather is due to the Claimant's refusal to return to his light duty job, his refusal of the modified light duty work offered on 04/16/2007, and his unilateral decision to resign from employment on 04/16/2007.

> Therefore, it is the order of the Staff Hearing Officer that temporary total compensation is denied from 04/24/2007 through 11/04/2007.
>
> This order is based on the 02/16/2007, 03/14/2007, and 04/11/2007 office notes of Dr. Lohr; the 02/22/2007, 03/14/2007, and 04/11/2007 Medco-14 reports of Dr. Lohr; the 04/18/2007 letter from Mr. Summers; and the testimony of Mr. Summers regarding the Claimant's job duties while on light duty and his resignation from employment.

{¶19} 9. On January 5, 2008, another SHO mailed an order refusing claimant's administrative appeal from the SHO's order November 29, 2007.

{¶20} 10. Earlier, on October 4, 2007, treating chiropractor Brent A. Ungar, D.C., wrote:

> * * * I believe that Mr. Glufeppa [sic] Gullotta is still suffering from a chronic lumbar sprain/strain. However, I believe that this condition has not resolved and the pain was persistent due to the fact that he had an aggravation of a preexisting underlying condition of hypertrophy to the L4 and L5 facet which was aggravated from this injury. This facet hypertrophy was a preexisting condition and showed up on the MRI that was dated 1/4/07. I believe that his underlying chronic pain that he is still suffering post ten months from the injury is a direct causal relation to the injury and it greatly aggravated his preexisting facet hypertrophy as it was directly a result of the injury he sustained on 1/2/07. * * *

{¶21} 11. On November 20, 2007, claimant moved for the allowance of an additional condition in the claim.

{¶22} 12. Following a March 24, 2008 hearing, a DHO additionally allowed the claim for "substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints." The DHO's order states reliance upon Dr. Ungar's October 4, 2007 report and the January 4, 2007 MRI.

{¶23} 13. Apparently, the DHO's order of March 24, 2008 was not administratively appealed.

{¶24} 14. On April 14, 2008, Dr. Ungar completed a C-84 certifying TTD from September 10, 2007 to an estimated return-to-work date of May 16, 2008. The C-84 was filed on April 23, 2008.

{¶25} 15. Following a May 27, 2008 hearing, a DHO issued an order denying TTD compensation from November 5, 2007 through May 16, 2008.

{¶26} 16. Claimant administratively appealed the DHO's order of May 27, 2008.

{¶27} 17. Following a July 16, 2008 hearing, an SHO issued an order that vacates the DHO's order of May 27, 2008 and awards TTD compensation from November 5, 2007 through May 16, 2008 and to continue upon submission of medical proof. The SHO's order of July 16, 2008 explains:

> * * * [T]he C-84 filed 04/23/2008 is granted to the extent of this order.
>
> By way of history[,] the Staff Hearing Officer notes the Injured Worker was temporarily and totally disabled following the injury in this claim through 02/22/2007. The Injured Worker returned to work for the named employer in a light-duty capcity from 02/23/2007 through 04/23/2007. By Staff Hearing Officer order dated 11/29/2007[,] temporary total compensation was denied for the closed period 04/24/2007 through 11/04/2007 as the Injured Worker was found to have quit a light-duty job with the named employer which was within the restrictions provided by his physicians. Pursuant to the holding in State ex rel. OmniSource Corp. v. Industrial Commission (2007), 113 Ohio St. 3d 303, the Staff Hearing Officer expressly found the Injured Worker's resignation from employment on 04/23/2007 [sic] did not amount to a voluntary abandonment of employment as the Injured Worker was unable to return to his former position of employment on the date he resigned.

> Subsequent to this determination, this claim was additionally recognized for substantial aggravation of hypertrophy of the L4 and L5 facet joints on 03/24/2008. The Staff Hearing Officer finds this is evidence of a worsening of the Injured Worker's condition and is evidence of new and changed circumstances which warrant the payment of temporary total compensation. Therefore, temporary total compensation is ordered paid from 11/05/2007 through 05/16/2008 and to continue upon the submission of medical proof.
>
> This decision is based on the treatment records, narrative reports dated 10/04/2007 and 06/04/2008, and C-84 report dated 04/14/2008 from B.A. Ungar, D.C., and on the treatment records from Dr. Neuendorf which reflect the Injured Worker is presently receiving facet blocks for the newly recognized conditions. The Staff Hearing Officer notes the Medco-14 dated 09/10/2007 from B.A. Ungar, D.C., listed the Injured Worker's work-related capabilities which were more restrictive than those issued by Dr. Lohr and Dr. Mazanec which were the focus of the prior temporary total disability determination. Further, the newly imposed restrictions from Chiropractor Ungar on the 04/14/2008 C-84 report include the newly recognized condition of substantial aggravation of hypertrophy of the L4 and L5 facet joints. Lastly, the Staff Hearing Officer notes that the file presently contains no medical evidence which indicates the Injured Worker is capable of returning to work at his former position of employment in the shipping department of the named employer. The 05/01/2008 independent medical review of K.L. Schoenman, D.C., upon which the employer relies, indicates that temporary total compensation should not be paid as the Injured Worker is capable of resuming light-duty work. This is not the standard for the assessment of the propriety of the payment of temporary total compensation.

{¶28} 18. On August 7, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 16, 2008.

{¶29} 19. On May 19, 2009, relator, Akron Paint & Varnish, Inc., filed this mandamus action.

Conclusions of Law:

{¶30} The SHO's order of November 29, 2007 is a final commission order that, in denying TTD compensation, determined that claimant had, without justification, abandoned his light-duty job at APV and refused APV's offer of other light-duty work.

{¶31} The SHO's order of July 16, 2008 is a final commission order that awards claimant TTD compensation beginning November 5, 2007 notwithstanding the prior commission determination that claimant abandoned his light-duty job and refused an offer of other light-duty work without justification.

{¶32} The SHO's order of July 16, 2008 determined that medical evidence of a worsening of claimant's condition due to the additional claim allowance produced new and changed circumstances that permit an award of TTD compensation notwithstanding the prior commission determination that claimant abandoned his light-duty job and refused an offer of other light-duty work without justification.

{¶33} Accordingly, the main issue here is whether the commission abused its discretion by awarding TTD compensation following its prior final determination that, on April 16, 2007, claimant, without legal justification, abandoned his light-duty job and refused APV's offer of other light-duty work.

{¶34} Finding that the commission did abuse its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶35} R.C. 4123.56(A) provides for compensation in the event of temporary total disability:

> * * * [P]ayment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is

> capable of returning to the employee's former position of employment, *when work within the physical capabilities of the employee is made available by the employer or another employer*, or when the employee has reached the maximum medical improvement. * * * The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

(Emphasis added.)

{¶36} Supplementing the statute, Ohio Adm.Code 4121-3-32(A) provides:

> (3) "Suitable employment" means work which is within the employee's physical capabilities.
>
> * * *
>
> (6) "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. * * *
>
> Ohio Adm.Code 4121-3-32(B) provides:
>
> (2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:
>
> * * *
>
> (d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

{¶37} In his order of November 29, 2007, the SHO held that, because claimant was medically unable to return to his former position of employment at the time of his April 16, 2007 "resignation," such "resignation" cannot be found to be a voluntary abandonment of employment as that judicial doctrine has evolved by case law. The SHO's citation to *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, supports the SHO's holding.

{¶38} Rather, in his order of November 29, 2007, the SHO, in effect, determined that TTD compensation was statutorily barred under R.C. 4123.56(A)'s provision that TTD compensation shall not be paid "when work within the physical capabilities of the employee is made available by the employer." Clearly, under the statute, as supplemented by the administrative rule, TTD compensation is barred when the claimant refuses, without justification, to return to the light-duty job he has previously accepted.

{¶39} The SHO appropriately cited *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, wherein the court had occasion to distinguish the judicial doctrine of voluntary abandonment of employment with the R.C. 4123.56(A) statutory bar to compensation when work within the physical capabilities of the employee is made available by the employer.

{¶40} The *Ellis Super Valu* court explained the distinction:

> * * * 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. As critical as compensating injured workers and their dependents is, it is not the only goal addressed by the workers' compensations system. Assisting a claimant's return to gainful employment is also important, benefiting not only the employer and employee, but society at large.
>
> * * *
>
> * * * As a further incentive to return to the work force, R.C. 4123.56(A) was amended to provide that a claimant who was offered a job within his or her physical capacities could not receive temporary total disability compensation if he or she refused that job. 141 Ohio Laws, Part I, 766.
>
> Given these distinct inquiries, a finding that a claimant has unjustifiably refused an offer of suitable alternate employment does not translate into a finding that the claimant voluntarily abandoned the former position of employment. In fact, they are mutually exclusive. An offer of alternate employment would occur only when a claimant is medically unable to return to the former position of employment. In such a case, a finding of voluntary abandonment could not be sustained, since a claimant cannot voluntarily abandon a position that he or she is medically incapable of performing. *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41.

Id. at ¶8-12.

{¶41} In the November 29, 2007 SHO's order, the application of the statutory bar is explained as follows:

> The Hearing Officer concludes that the period of disability beginning 04/24/2007 is not causally related to the industrial injury in this claim, but rather is due to the Claimant's refusal to return to his light duty job, his refusal of the modified light

> duty work offered on 04/16/2007, and his unilateral decision to resign from employment on 04/16/2007.

{¶42} The commission's determination that claimant's request for TTD compensation is statutorily barred by the events of April 16, 2007 is contained in a final commission order that remains unchallenged in mandamus. Thus, that determination has a binding effect on subsequent administrative proceedings unless the commission were to appropriately exercise its R.C. 4123.52 continuing jurisdiction over the prior finding.

{¶43} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990.

{¶44} Here, in the July 16, 2008 order, the SHO attempts to informally exercise continuing jurisdiction over the November 29, 2007 order and its finding that claimant unjustifiably abandoned his light-duty job and unjustifiably refused an offer of light-duty work. *State ex rel. Internatl. Truck and Engine Corp. v. Indus. Comm.*, 119 Ohio St.3d 402, 404, 2008-Ohio-4494, ¶16 (the case law renders an informal invocation of continuing jurisdiction impossible). The basis for this informal exercise of continuing jurisdiction is the prerequisite called "new and changed circumstances."

{¶45} While it is conceivable that the commission could appropriately exercise continuing jurisdiction over a prior determination that a claimant unjustifiably abandoned a light-duty job based upon the prerequisite of new and changed circumstances, it did not do so here. Claimant did not submit evidence of new and changed circumstances

that can justify elimination of the binding effect of the November 29, 2007 SHO's order and its statutory bar of compensation.

{¶46} In support of his claim to new and changed circumstances, claimant pointed to the additional claim allowance and to medical evidence showing that the medical condition had worsened subsequent to his April 16, 2007 resignation.

{¶47} However, even if there is medical evidence upon which the commission relied showing that claimant's medical condition has worsened since his April 16, 2007 resignation, such evidence of a worsening medical condition cannot alter the previously determined fact that claimant has no job to return to as a direct result of his unjustified abandonment of his light-duty job or his unjustified refusal to accept other light-duty work offered by his employer. Thus, claimant has lost no wages during the period of claimed disability for which he can be compensated.

{¶48} Based upon the above analysis, the magistrate concludes that the commission abused its discretion in determining that new and changed circumstances exist to permit an award of TTD compensation beginning November 5, 2007.

{¶49} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of July 16, 2008, and to enter an order that denies the request for TTD compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008.

/S/ Kenneth W. Macke

KENNETH W. MACKE
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).

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