

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel.)	
Akron Paint & Varnish, Inc.)	Case No. 2010-0636
)	
Appellee,)	
)	
v.)	On appeal from the Court of
)	Appeals for Franklin County, Ohio,
Guiseppe Gullotta, et al.,)	Tenth Appellate District, Case No.
)	09AP-492
Appellants.)	

BRIEF OF APPELLEE, AKRON PAINT & VARNISH, INC.

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RECEIVED
 DEC 29 2010
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FILED
 DEC 29 2010
 CLERK OF COURT
 SUPREME COURT OF OHIO

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FACTS AND STATEMENT OF THE CASE

This matter arose by injury which occurred on January 2, 2007. The Injured Worker, Guiseppe Gullotta (hereinafter “Injured Worker,” “claimant,” or “Gullotta,”) was lifting a box and sustained a lower back injury. His claim was originally allowed for “Sprain Lumbar.” On April 25, 2008, it was additionally allowed for “Substantial Aggravation of Pre-Existing Hypertrophy Facet Joints L4-L5.” (*Stip., at p. 21*)¹ The Injured Worker had originally missed 51 days from work which were paid by Salary Continuation by the Employer, Akron Paint & Varnish, Inc. (Relator, hereinafter “Employer,” “APV,” or “Appellee.”)

The Employer offered the Injured Worker light duty in April, 2007. This followed receipt of Bureau of Workers’ Compensation (“BWC”) form, called a “Medco 14,” from his Physician of Record (POR), and another physician. The Medco 14 demonstrated the Injured Worker’s physical capacities and limitations as of the date it was completed. In addition, POR office notes of April 11, 2007, revealed physical improvement, and a statement by his POR that “I don’t think there is anything else I can do for him. He is not amenable to increasing his work restrictions.” (*Stip., at Exhibit B, page 6*)

The Injured Worker began working at this light duty job at APV; however, he ended up quitting this job at APV April 18, 2007. (*Stip., at Exhibit D, p. 10*) At the time he quit, he had not been released to work without restrictions, and had not been found to have reached Maximum Medical Improvement (“MMI”). He reported his quitting not only to his

¹ References to the Stipulated Record filed with the Court of Appeals are set forth herein as “Stip., at _____.”

employer, but also to his doctor. (*Stip., at Exhibit C, page 7*) In point of fact, he noted to his doctor that the reason for his quitting was that he felt as though he was being humiliated.

The Injured Worker filed a C84 Request for Temporary Total Compensation (“TT”) on August 1, 2007, claiming TT from 4/24/2007 through 11/4/2007. This matter was heard by a District Hearing Officer (“DHO”) on 9/18/2007, and TT was denied. (*Stip., at Exhibit E, page 11*) This was appealed, and a Staff Hearing Officer (“SHO”) affirmed the denial of TT, having heard the matter 11/29/2007. (*Stip., at Exhibit F, p. 14*) In both Orders, it was specifically found that the Injured Worker quit his employment. It was also specifically found that the Injured Worker was capable of performing the light duty job offered.

The claim, as noted, was additionally allowed in April, 2008. The Claimant filed a new C84 on 4/23/2008, again seeking TT. As noted by a BWC Reviewing physician, Dr. Kirk Schoenman, there seemed to be no reason why the light duty job would not have been appropriate, but for the fact the Claimant had quit his job. (*Stip., at Exhibit A, p. 4*) The DHO denied TT, having heard the matter 5/27/2008. The DHO recognized the prior Orders relating to TT, and found the reasoning applicable. While he stated that “the issue is clearly not Res Judicata,” he found that while there had been additional allowances, there was “no indication that the Injured Worker’s restrictions or his ability to perform light duty work were at all altered.” (*Stip., at Exhibit G, p. 17*) Thus, since the Injured Worker had refused light duty and did not prove he could not return to such light duty, he was not entitled to TT.

The Claimant appealed this decision, and an SHO, having heard the matter July 16, 2008, reversed, and granted TT, pursuant to her reading of *State ex rel OmniSource Corp v I.C. (2007), 113 Ohio St3d 303*. (*Stip., at Exhibit H, p. 19*) She found that, following the

original denial of TT the prior year, the additional allowance constituted a “change of circumstances,” warranting an award of TT. She, however, made no finding that the Injured Worker had returned to any employment at all in the time between the first denial of TT, and her decision granting TT. She also made no finding that the Injured Workers’ physical restrictions had changed as a result of such additional allowance. In addition, she made no finding that the job offered to the Injured Worker at the time said offer was made and refused, *see, State ex rel. Pretty Prods. v Indus. Comm. (1996) 77 Ohio St.3d 5*, that the position was not offered in good faith, and/or that the job offer was not legitimate.

LAW AND ARGUMENT

Standard of Review

For a Writ of Mandamus to issue, a party to a Workers’ Compensation claim must demonstrate a clear legal right to the relief sought and that the Commission had a clear legal duty to provide such relief. *State ex rel. Pressley v Industrial Commission (1967) 11 Ohio St.2d 141*. In order to establish a basis for Mandamus relief, it must be shown that the Commission acted contrary to law, or abused its discretion by issuing an order that is not supported by evidence in the administrative record.. *State ex rel Elliott v Industrial Commission (1986) 26 Ohio St.3d 76*. Such an abuse of discretion must be “not merely error of judgment but perversity of will, passion, prejudice, partiality, or moral delinquency.” *State ex rel. Commercial Lovelace Motor Freight v. Lancaster (1986) 22 Ohio St.3d 191, 193*.

The determination of disputed facts is within the jurisdiction of the Commission, subject to correction in Mandamus upon a showing of abuse of discretion. In addition, a Writ of

Mandamus will not be granted if an order of the Commission is supported by “some evidence.”

State ex rel. Pass v. C.S.T. Extraction Co., 74 Ohio St.3d 373, 376, 1996-Ohio-126.

A. OmniSource and its progeny are based upon the Louisiana-Pacific line of cases, which discuss the termination of an employee as if s/he quit, which is to be distinguished from an actual voluntary quit by an employee, so that an Employee who resigns from suitable light duty work is not entitled to Temporary Total Compensation pursuant to Ohio Revised Code Section 4123.56(A).

The doctrine of Voluntary Abandonment has undergone significant development over the last few years. However, this case does not revolve around facts that ultimately lead to a termination and a claim that said termination constituted a “voluntary abandonment” because of, for example, violation of a written work rule; rather, this matter involves an individual who quit his employment when suitable work had been offered at that time and, in fact, was working at a suitable light duty job. Thus, the question is not whether there was a written job description assessing a violation for a particular prohibited conduct, *a la State ex rel. Louisiana Pacific Corp v Indus. Comm.* (1995) 72 Ohio St.3d 401, and the cases decided thereafter based upon that *construct*; rather, the Injured Worker was allowed to perform certain job duties, and yet *quit* his employment because he felt he was being humiliated. Cases involving the “true” voluntary abandonment of employment stand on a different footing, and whether or not a Claimant is capable of returning to his/her former position of employment is not germane. Rather, in a true voluntary quit situation, the Claimant has clearly separated him/herself from the workplace, not in a way that involves a termination, and has removed himself from the workforce. In this case, *State ex re OmniSource Corp v Industrial Commission* (2007) 113 Ohio St.3d 303, and the

Louisiana Pacific line of cases are simply inapposite. Rather, the relevant inquiry is statutory, and, in this case, the Claimant is ineligible for Temporary Total compensation as he voluntarily removed himself from the job market. This matter more appropriately, then, should be regarded as one wherein a Claimant refuses suitable employment pursuant to Ohio Revised Code 4123.56(A). This section provides, *inter alia*, that Temporary Total Compensation is not payable “when work within the physical capabilities of the employee is made available by the employer or another employer.” As this Court has noted, in a case such as this, which involves a refusal of suitable alternate employment, the question is not whether the Claimant is able to return to his former position of employment, as the answer clearly is in the negative. “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.” *State ex rel Ellis Super Valu, Inc., v Industrial Commission*, 115 Ohio St.3d 224, 2007-Ohio-4920. Thus, the SHO’s determination that a change in circumstances warranted payment of TT under the *OmniSource* case is inapplicable. In point of fact, the SHO made no findings of fact relative to the legitimacy of the offer made, and the reason as to why the Injured Worker rejected this attempt to “ameliorate the amount of wages lost.” *Id.*, at 226.

The Magistrate made specific note of this aspect, and went into great detail, noting the letter prepared by Michael Summers, APV Vice President, which summarized the meeting he had with the claimant. The Magistrate specifically noted the portions of the letter that demonstrated that the claimant quit his otherwise suitable job because he did not like the job he was assigned, and wanted to be placed back in shipping. As again noted by the Magistrate, and as memorialized

the letter, “When it was made clear that [being placed in shipping] was not an option you stated that you were tired of this situation and gave a verbal resignation, “I quit” and left the premises[.]” (*Decision of the Magistrate at 6 and 7, para. 14, and Stip., at Exhibit D., page 10*)

B. An additional allowance, without more, is not sufficient to break the chain of causation as to the Injured Worker’s continued unemployment.

At the time the new C84 (request for Temporary Total Compensation) was filed, the Claimant was not working, had not returned to any gainful employment, and an additional allowance had been added to the claim. The SHO, in granting TT, stated that the fact of the additional allowance was “evidence of new and changed circumstances which warrant the payment of temporary total compensation.” (*Stip., at Exhibit H, page 19*) The problem with this analysis, of course, is that an additional allowance, without more, does not necessarily equate to additional physical restrictions, and, even if it did, the original voluntary quit was never “cured.” In essence, the original reason for the denial of TT still stood, and the factors surrounding his refusal to accept light duty (and, in fact, his having quit) had not changed. As previously noted, the Injured Worker noted to his doctor that the reason for his quitting was that he felt as though he was being humiliated. As this Court has noted, Temporary Total Compensation is designed to compensate a claimant for wages lost due to an *injury*, and *not* for a plain decision to remove himself from the employment arena. As this Court stated in *State ex rel Ashcraft v Indus. Comm.* (1987) 34 Ohio St.3d 42, “[w]hen 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.” *Id.*, at 44.

Here, the Injured Worker was assigned light-duty work consistent with his physical capabilities. He did not like the work, however, and wanted to return to his former position of employment, which was not possible at the time. (*Stip., at Exhibit D, p.10, and Exhibit E, page 11*) The reason he remained unemployed was not due to his disability, but to his dissatisfaction with the job duties assigned to him.

The claim was additionally allowed March 24, 2008, for the condition of “substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints.” (*Stip at Exhibit I, p. 21*) However, the mere fact of an additional allowance, without more, cannot magically transform a refusal to perform work into a period of Temporary Total Compensation. *See, State ex rel. Moore v International Truck & Engine, 116 Ohio St.3d 272, 2007-Ohio-6055.* In point of fact, despite argument to the contrary, the chiropractor upon whose C84 Temporary Total was later paid, Brent Ungar, D.C., stated that the assumption that the Injured Worker was temporarily and totally disabled merely due to the newly allowed condition “is not the case.” (*Stip., at Exhibit K, Page 26*) Instead, it was Dr. Ungar’s opinion that the “additional conditions” existed from the original date of injury. *Id.* Thus, it should be clear, as it was to the BWC Reviewing Physician, Dr. Kirk Schoenman, that the Injured Worker was capable of performing light duty work, but refused same as his physical restrictions had not changed in the meantime. In addition to the foregoing, it is noted that a new C84 was filed, following rulings by the DHO, SHO, and refusal Order of the full Commission, regarding a period of TT prior to the one being awarded. In those decisions, the Hearing Officers not only considered that the Claimant had voluntarily quit work he could perform, but also that a valid light-duty job offer had been made within the Injured Worker’s restrictions. The only thing that was different between the first C84 and the second was an

additional allowance - the physical restrictions had not changed. This is well-documented in the attached Stipulated Record, especially at Exhibits A, F, G, K, and L.

The Court of Appeals and the Magistrate concluded, in considering Appellants' contentions, that an additional allowance, by itself, "is not sufficient to demonstrate that the claimant could not have performed the offered light duty work without some reference the the requirements of that work." *Decision of the Court of Appeals, at 3, para. 5* The Court also acknowledged that Dr. Ungar's report does not discuss the physical requirements of the light duty work, and it does not state that the claimant could not perform that work.

C. There is no evidence that the Injured Worker returned to gainful employment following his voluntary departure from work. Therefore, he was not entitled to Temporary Total Compensation.

In the event this Court should somehow conclude that the claimant might be entitled to compensation based upon "new and changed circumstances," it should then be noted that, as the Injured Worker voluntary quit his employment, and as there is no evidence that he became employed elsewhere, this Court has suggested that a subsequent period of temporary total compensation cannot be had; in other words, the Injured Worker must have employment to be removed from, in order to be considered Temporarily and Totally disabled. *State ex rel McCoy v Dedicated Transport, Inc., 97 Ohio St.3d 25, 2002-Ohio-5305; see, also, State ex rel. Eckerly v. Indus. Comms (2005) 105 Ohio St.3d 428* ("...the industrial injury *must remove the claimant from his or her job*. This requirement obviously cannot be satisfied if claimant had no job *at the time of the alleged disability.*" *Id., at 429; italics in original.*) As the Injured Worker had removed

himself from the workforce due to his job dissatisfaction, he must re-enter the workforce, and his removal thereafter must be related to his industrial injury, for Temporary Total to be properly awarded. *Id.*

CONCLUSION

The original SHO's decision that initially spawned the Mandamus filing is flawed in many respects. In the first instance, if this matter is one under the *Louisiana-Pacific* line of cases, then it is clear that the Injured Worker voluntarily abandoned his employment by actually *quitting*. This is distinct from the type of case where a termination can be deemed a voluntary quitting. Although *OmniSource* says that a claimant cannot abandon a position if s/he is temporarily and totally disabled at the time, Appellant believes that, in a case such as the one at bar, a claimant can remove him/herself from the employment arena. Here, the Injured Worker did just that. If this case is analyzed under the *Ellis v. Super Valu* construct, it is clear, again, that the SHO did not consider the evidence and factors enumerated by this Court prior to granting TT. It is also clear that *OmniSource* would not apply in the *Ellis* type of case, and the SHO decision was flawed in that respect.

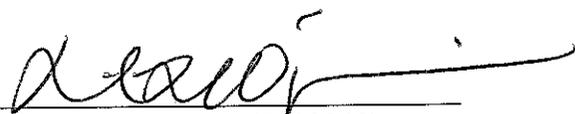
Even assuming that TT should somehow be considered in the facts of this matter, the Injured Worker would be disqualified from receipt of these benefits as a result of his failure to re-enter the workforce following the IC's denial of TT for refusing a job offer and the time he subsequently sought TT.

The Court of Appeals and the Magistrate considered the issues urged by the Appellants herein and concluded that Mandamus was appropriate. Simply stated, the claimant quit work he was performing because he did not like the work. A year later, an additional condition was

allowed, which did not change the physical restrictions under which the claimant had previously operated. No "change in circumstances" has been introduced that would change the finding the Commission made that the claimant created his own unemployment; further, conditions had not changed so as to magically transform the claimant's willful unemployment into a situation that would make compensation available.

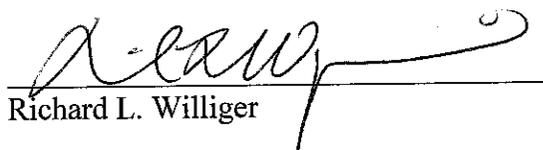
For all of the foregoing reasons, Appellee respectfully requests this Court affirm the Decision of the Court of Appeals, grant Appellee's request for a Writ of Mandamus ordering the Industrial Commission to vacate the Staff Hearing Order of July 16, 2008, and enter an Order that denies the request for Temporary Total Compensation presented by Dr. Ungar's C84 which was completed April 14, 2008. and filed April 23, 2008.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Relator was sent by Regular U.S. Mail to Ross Fulton, esq., 89 E. Nationwide Blvd., Suite 300, Columbus Ohio 43215-2554, and to Gerald Waterman, esq., Assistant Attorney General, State of Ohio, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, this 28th day of December, 2010.


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