



**TABLE OF CONTENTS**

INTRODUCTION .....1  
LAW AND ARGUMENT .....2  
CONCLUSION.....7  
CERTIFICATE OF SERVICE .....8

## TABLE OF AUTHORITIES

### Cases

<i>State ex rel. Akron Paint &amp; Varnish, Inc. v. Gullotta, et al.</i> Franklin App. No. 09AP-492, 2010-Ohio-1321 .....	1, 2, 3
<i>State ex rel. Am. Std., Inc. v. Boehler</i> 99 Ohio St.3d 39, 2003-Ohio-2457.....	4
<i>State ex rel. Bing v. Indus. Comm.</i> (1991), 61 Ohio St.3d 424.....	3
<i>State ex rel. Burley v. Coil Packing, Inc.</i> (1987), 31 Ohio St.3d 18.....	4
<i>State ex rel. Ramirez v. Indus. Comm.</i> (1982), 69 Ohio St.2d 630.....	6
<i>State ex rel. Spohn v. Indus. Comm.</i> 115 Ohio St.3d 329, 2007-Ohio-5027.....	4
<i>State ex rel. Teece v. Indus. Comm.</i> (1967), 67 Ohio St.2d 161.....	5

### Other Authorities

R.C. 4123.52 .....	5
R.C. 4123.56(A).....	passim
Ohio Adm.Code 4121-3-32(A)(6) .....	6

## INTRODUCTION

This case deals with two orders of the Appellant Industrial Commission of Ohio (“Industrial Commission”) regarding temporary total compensation (“TTD”) requested by Appellant Guiseppe Gullotta (“Gullotta”). Appellee Akron Paint & Varnish, Inc. (“Akron Paint”) contends that the first, in which the Industrial Commission denied TTD, prevents Gullotta’s subsequent request for TTD.

Specifically, Gullotta quit a light-duty job Akron Paint had offered him after his injury, and the Industrial Commission, in a November 29, 2007 order, denied his request for TTD for the period April 24, 2007, through November 4, 2007, citing his “unilateral decision to resign from employment on 04/16/2007.” (Supp. 5.) Subsequently, additional medical conditions were recognized in the claim and Gullotta once again applied for TTD. This time, the Industrial Commission, in a July 16, 2008, order, allowed TTD beginning November 5, 2007. (Supp. 15.)

Akron Paint contends that the Industrial Commission abused its discretion because its order (1) is “in violation of Ohio Revised Code Section 4123.56(A), and case law, which concerns suitable alternate employment;” (2) “violates principles of law concerning Voluntary Abandonment of Employment;” and (3) “violates principles of res judicata and collateral estoppel, and possibly Law of the Case.” Complaint and Petition in Mandamus, ¶¶ 14, 15 and 16, respectively. The substance of Akron Paint’s arguments is that the Industrial Commission’s November 29, 2007, order is dispositive of Gullotta’s current request for TTD, despite the additional medical conditions allowed in his claim. (Supp. 7.)

The court of appeals rejected Akron Paint’s voluntary abandonment arguments. *State ex rel. Akron Paint & Varnish, Inc. v. Gullotta, et al.*, Franklin App. No. 09AP-492, 2010-Ohio-1321, (“Decision”), at ¶¶ 8 and 37. However, the court below issued a writ of mandamus

because “there was no evidence to establish new and changed circumstances that would justify the commission’s exercise of *continuing jurisdiction*.” (Emphasis added.) Id. at ¶ 8.

The court below was correct with regard to the voluntary abandonment issue, but otherwise should be reversed. First, as Gullotta had filed a separate TTD application, for a different time period and after getting additional medical conditions allowed, the Industrial Commission was within its discretion to award TTD without reopening its earlier order. Second, even if an exercise of continuing jurisdiction were necessary, the allowance of additional conditions can constitute “new and changed circumstances” that allows the Industrial Commission to exercise continuing jurisdiction over a prior order. Third, the entitlement to TTD is measured by the effects of the allowed medical conditions on the injured worker’s ability to return to his *former* position of employment, not to any subsequent job.

Though it did not separately appeal the court of appeals’ decision, Akron Paint primarily argues that Gullotta voluntarily abandoned his light-duty employment, and that this serves to disqualify him from receipt of *any* award of TTD, regardless of later facts and circumstances. It further urges the Court to accept its analysis of the evidentiary record, and find that, even with the consideration of the additional medical conditions allowed in March of 2008, Gullotta could have performed the light-duty work Akron Paint had offered him in February of 2007. Akron Paint’s arguments must fail.

## LAW AND ARGUMENT

The court erred in issuing a writ of mandamus because a claimant, even after voluntarily abandoning a light-duty job, may re-apply and be awarded TTD if newly allowed medical conditions prevent a return to his or her former employment. Specifically, the court erred because the Industrial Commission need not exercise continuing jurisdiction at all for a new

period of TTD justified by the allowance of new medical conditions. The Industrial Commission's jurisdiction was invoked when Gullotta filed an application for additional medical conditions and, once allowed, considered the question of compensation entitlement. And even if the Industrial Commission could be said to have exercised continuing jurisdiction, newly allowed medical conditions are "new and changed circumstances" sufficient to justify continuing jurisdiction.

Moreover, Akron Paint is misguided in its arguments for at least two reasons. First, it did not appeal the lower court's ruling on voluntary abandonment, so cannot argue that that holding be reversed here. And second, Akron Paint mischaracterizes the standard for TTD.

There were new and changed circumstances subsequent to the September 2007 order. The denial of TTD in September of 2007 does not preclude an entirely new request later, without the necessity for invoking continuing jurisdiction. Gullotta quit a light-duty job for Akron Paint in 2007, and this prevented the Industrial Commission from awarding him TTD under his August 1, 2007, request. The Industrial Commission's denial of TTD at that time was limited to "the period from April 24 through November 4, 2007." Decision, at ¶ 15. Moreover, at the time of the adjudication of that application, the claim had been recognized only for the lumbar sprain. Under those circumstances, the SHO denied TTD solely for the closed period April 24, 2007, through November 4, 2007. (Supp. 5.)

The denial of one period of TTD does not preclude an award of TTD at another time if the circumstances warrant it. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, syllabus. "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." R.C. 4123.56(A). Here, Gullotta would have been

awarded TTD following his industrial injury but for Akron Paint's job offer. Gullotta, however, is not forever precluded from applying for TTD if the circumstances later justify it.

Gullotta applied for TTD again, but for a different period of time and supported by new medical conditions on the claim. The order relevant here was for an application for TTD on and after November 5, 2007. (Supp. 15.) And, Gullotta's claim has now been recognized for a substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints. (Supp. 7.) The C-84 physician's report from Brent A. Unger, D.C., Gullotta's treating physician, specifically covers the period from September 10, 2007, to May 16, 2008, and includes a diagnostic code for all of recognized medical conditions being treated and "which prevent return to work." (Supp. 10.) The doctor's letter of June 4, 2008, was also cited by the SHO as supporting medical evidence for the TTD award. (Supp. 11.) Hence, there unquestionably is "some evidence" on which the award can be justified. This Court routinely holds that, "so long as there is 'some evidence in the record to support the commission's stated basis for its decision,'" an abuse of discretion will not be found. *State ex rel. Spohn v. Indus. Comm.*, 115 Ohio St.3d 329, 2007-Ohio-5027, ¶ 33; *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, syllabus. Under this standard of review, "the presence of contrary evidence is immaterial, so long as the 'some evidence' standard has been met." *State ex rel. Am. Std., Inc. v. Boehler*, 99 Ohio St.3d 39, 2003-Ohio-2457, ¶ 29.

Gullotta is entitled to TTD for this new period unless one of the delineated exceptions set forth in R.C. 4123.56(A) operates to bar the award. At the time he applied for *this* award, he had not returned to work, nor had his treating physician made a written statement that he could return to his former position of employment. R.C. 4123.56(A). There had not been a determination of maximum medical improvement. *Id.* And, there was no evidence presented that "work within

the physical capabilities ... was made available by the employer or another employer.” Id. No job offer which takes into consideration all of the allowed conditions had been made.

The Industrial Commission’s SHO, the fact-finder here, considered the record and heard argument and, after recognizing all of the medical conditions allowed in the claim, awarded TTD:

[B]ased on the treatment records, narrative reports dated 10/04/2007 and 06/04/2007, 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. ....

(Supp. 16-17.) Weighing and evaluating medical reports is within the sound judgment and discretion of the Industrial Commission. *State ex rel. Teece v. Indus. Comm.* (1967), 67 Ohio St.2d 161. Here, there is ample evidence establishing Gullotta’s entitlement to TTD starting November 5, 2007. The Industrial Commission does not have to exercise continuing jurisdiction to revisit its November 29, 2007 order, which denied TTD through November 4, 2007, to grant this new period of TTD when there are new and changed circumstances. Thus, contrary to the appellate court’s rationale, an exercise of continuing jurisdiction is not implemented.

Moreover, even if the Industrial Commission did have to exercise continuing jurisdiction, the new medical conditions here easily satisfy the standard for doing so. “The jurisdiction of the industrial commission ... over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, *as, in its opinion is justified.*” (Emphasis added.) R.C. 4123.52. Therefore, even if the Industrial Commission did have to exercise continuing jurisdiction here, the addition of medical conditions in the claim could justify a modification to a prior order and serve to satisfy the prerequisites for such exercise.

Akron Paint’s arguments are improperly presented because it waived any argument about voluntary abandonment, by not appealing or cross-appealing the court of appeals’ order.

Moreover, even if it could make the argument, Akron Paint misinterprets the effect of Gullotta's voluntary abandonment on this case.

Under the workers' compensation statute, TTD is payable if the injured worker is unable to return to his or her *former position of employment*. R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, syllabus. Thus, if Gullotta cannot return to his *original* job, he is eligible for TTD. Some exceptions are spelled out in the statute, but they do not apply here. Specifically:

[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 maximum medical improvement.

(Emphasis added.) R.C. 4123.56(A). Thus, the only limitation that looks to the injured worker's *capability* to work focuses on his or her returning to the *former position of employment*.

Akron Paint, however, wants the Court to deny TTD because it avers that Gullotta can return to the light-duty work they originally offered him in 2007. Specifically, on page 5 of its brief, Akron Paint questions the SHO's failure to make a finding of fact regarding the legitimacy of the offer of light-duty work. Later on that page, Akron Paint states that TTD "is not payable 'when work within the physical capabilities of the employee is made available by the employer or another employer.'" On page 8, Akron Paint references the decision of the court below, and again makes reference to light-duty work that was "offered." Ohio Adm.Code 4121-3-32(A)(6) defines a "job offer" which could serve as a basis to deny TTD as "a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence." But Akron Paint's job offer was made before the new allowed conditions, and it presents no evidence that it has made a job offer to Gullotta that encompasses all of his now-allowed medical

conditions. In response to Gullotta's April 2008 request for TTD, Akron Paint failed to show that any bona fide job offer had been made.

Akron Paint relies on an expert opinion by K.L. Schoenman, D.C., concerning Gullotta's ability to return to the *light-duty* job that he had been doing. As the SHO stated in her July 18, 2008, order:

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.*

(Emphasis added.) (Supp. 16.) Akron Paint's theory does not follow the statute, and cannot be used to deny Gullotta TTD.

Further, the SHO noted: "[T]he 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." (Supp. 16.) The record before the Industrial Commission justifies a finding that Gullotta was entitled to TTD. As the SHO noted, "this is evidence of a new and worsening of the Injured Worker's condition and is evidence of new and changed circumstances which warrant the payment of temporary total compensation." (Supp. 15.) In the opinion of the SHO, the injured worker's presently-existing medical conditions would prohibit him from returning to his former position of employment. TTD compensation was legitimately awarded.

## CONCLUSION

The Industrial Commission did not have to invoke continuing jurisdiction to "modify" an earlier order, because the order at issue here does not undo or otherwise change that earlier order. Rather, based upon the evidence and a consideration of the "new and changed circumstances,"

the Industrial Commission properly awarded TTD to Gullotta for a period of time *after* November 5, 2007.

For the reasons set forth above, as well as those expressed in the Industrial Commission's merit brief, the decision and judgment of the court below should be reversed and the requested writ of mandamus denied.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



---

GERALD H. WATERMAN (0020243)  
Assistant Attorney General  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215-3130  
Tel: (614) 466-6696  
Fax: (614) 752-2538  
gerald.waterman@ohioattorneygeneral.gov

Attorney for Appellant,  
Industrial Commission of Ohio

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, Industrial Commission of Ohio was served upon Richard L. Williger, counsel for Appellee, Akron Paint & Varnish, Inc., Richard L. Williger Co., LPA, 2070 East Avenue, Akron, Ohio 44314, and Ross R. Fulton, counsel for Appellant, Guiseppe Gullotta, Philip J. Fulton Law Office, 89 East Nationwide Boulevard, Suite 300, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 4<sup>th</sup> day of February, 2011.



---

GERALD H. WATERMAN (0020243)  
Assistant Attorney General