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I. INTRODUCTION

The Relator-Appellee APV's Response Brief indicates that it agrees with much of the Industrial Commission's determination. The parties agree that the Commission had previously and correctly terminated Mr. Gullotta TTD benefits on November 29, 2007 for the period from April 24 through November 4, 2007, because he refused a good-faith job offer. (Appellants' Joint Supplement, hereinafter "Supp." at p. 4-6); *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6 (refusal of good faith job offer is a defense to TTD benefits). The parties also agree that voluntary abandonment is inapplicable here, as Mr. Gullotta could not return to his former position of employment. (Supp. at p. 15-16).

Relator-Appellee's disagreement with the Industrial Commission's determination essentially boils down to two contentions: that the Commission did not have continuing jurisdiction to consider Mr. Gullotta's temporary total disability ("TTD") because, according to Relator-Appellee's assertion, Mr. Gullotta's condition did not exhibit new and changed circumstances, and even if the Commission did have such jurisdiction, Mr. Gullotta was not entitled to TTD compensation because he refused the employer's good-faith job offer. Both positions, however, are incorrect.

Following the determination that Mr. Gullotta's TTD application was denied due to the refusal of a light-duty offer, Mr. Gullotta's claim was subsequently allowed for the additional condition of "Substantial Aggravation of Pre-Existing Hypertrophy at the L4 and L5 Facet Joints." (Supp. at p. 15). Dr. Ungar found Mr. Gullotta had increased work restrictions, namely that Mr. Gullotta could no longer perform light-duty work. (Supp. at p. 9-12). Because of this, Mr. Gullotta applied for TTD compensation for a new and *different* time period, November 5, 2007 through May 16, 2008. (Supp. at p. 15). The Industrial Commission granted Mr.

Gullotta's request because he had not reached maximum medical improvement and could not return to his former position of employment. (Supp. at p. 15). *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1979), 58 Ohio St.2d 127. In so finding, the Commission held that it possessed continuing jurisdiction because 'new and changed circumstances' existed, namely that Mr. Gullotta had an additional condition and increased work restrictions. See *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, 426, 575 N.E.2d 177 (a change in a claimant's allowed conditions warrants continuing jurisdiction). The Commission is entrusted with determining whether it had continuing jurisdiction. *Id.*

The Commission also rejected that the defense of refusal of a light-duty job offer applied. See *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6 (discussing this defense). For this defense to apply, its pre-requisites must be met, most specifically that the job-offer takes *all* restrictions into account. O.A.C. § 4121-3-32(B)(1)(b). Here, the employer made a job-offer when Mr. Gullotta claim was only allowed for "sprain lumbar region." But then Mr. Gullotta's claim was allowed additionally for new conditions and his work restrictions became more severe. The employer did not make a *new* job offer that took these restrictions into account. Indeed, the employer did not make any job offer. As such, the employer did not meet the pre-requisites to make this defense applicable, making TTD compensation for Mr. Gullotta appropriate. (Supp. at p. 15-16).

The Commission's determination was correct as a matter of law and entitled to deference here in mandamus. As noted, the Relator-Appellee has two primary objections to the Commission's determination, but neither withstands scrutiny.

II. THE COMMISSION CORRECTLY FOUND JURISDICTION

The Relator-Appellee is incorrect in asserting that the Commission lacked jurisdiction. First, the Commission did not need to find continuing jurisdiction because it was not modifying a previous order. A Commission order terminating TTD does not bar future TTD awards. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St. 3d 424. This includes where an injured worker previously had TTD terminated, but has a change in their condition that again renders the claimant TTD. *Bing*, 61 Ohio St.3d at 426.

As the Commission demonstrates, continuing jurisdiction is not applicable here because the Commission is not modifying a previous order. (Respondee-Appellant Indus. Comm. brief at 4). The SHO's order simply denied TTD compensation from April 24 through November 4, 2007. (Supp. at p. 4). Subsequently, Mr. Gullotta's claim was allowed for the additional condition of "substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints." (Supp. at p. 7). Mr. Gullotta then filed for TTD for a new and different period. (Supp. at 15-16). The July 16, 2008 order granting TTD, grants it for a *different* period (November 5, 2007 through May 16, 2008) for a *different* condition. (Id.) As the original TTD denial was of limited time applicability, and the Commission can grant subsequent TTD periods after a denial for worsening conditions, *Bing*, 61 Ohio St. 3d 424, the Commission had jurisdiction to consider and grant Mr. Gullotta's TTD benefits *without* finding continuing jurisdiction.

Second, even if a separate finding of continuing jurisdiction was necessary, the Commission correctly found such jurisdiction based upon "new and changed circumstances." *State ex rel. Board of Ed. V. Johnston* (1979), 58 Ohio St. 2d 132, 388 N.E.2d 1383. If a claimant's physical condition that existed at the time of the order changes, the Commission has continuing jurisdiction to consider and act upon that changed condition. *State ex rel. Rohr v.*

Indus. Comm., 126 Ohio St.3d 259, 933 N.E.2d 254, 2010-Ohio-3756, ¶ 15; *State ex rel. Weinberger v. Indus. Comm.* (1941), 139 Ohio St. 92, 38 N.E.2d 399. Here, Mr. Gullotta had both an additional allowance *and* increased work restrictions. This qualifies as new and changed circumstances. *Rohr*, 2010-Ohio-3756, ¶ 16 (the Commission has exclusive responsibility for determining new and changed circumstances apply).

Relator-Appellee's citation to *Moore v. Intern'l Truck & Engine, et al.*, 116 Ohio St.3d 272, 878 N.E.2d 19, 2007-Ohio-6055 does not alter this basic tenet. *Moore* instead supports Mr. Gullotta's position. In *Moore*, this Court held *per curium* that a worsening of an allowed condition justifies the re-instatement of previously terminated TTD compensation. *Id.* at ¶37. That is *precisely* the case here as Mr. Gullotta's condition was recognized as worsening. Indeed, Mr. Gullotta's case is a *more obvious* situation to invoke new and changed circumstances than *Moore*. In *Moore*, the only change was the claimant's worsening condition. By contrast, Mr. Gullotta *also* had an additional allowance and increased restrictions. The Commission's invocation of new and changed circumstances was even more appropriate here, justifying the Commission's determination.

III. THE DEFENSE OF A GOOD FAITH JOB OFFER IS NOT APPLICABLE AND THE COMMISSION CORRECTLY FOUND MR. GULLOTTA ENTITLED TO COMPENSATION

The Commission also properly granted Mr. Gullotta TTD for the period in question. TTD is awarded for a claimant who is not MMI and is disabled from returning to their former position of employment. *State ex rel. Nelson McCoy Pottery Co. v. Wilson* (1990), 56 Ohio St.3d 28, 564 N.E.2d 91. Here, the Commission correctly determined Mr. Gullotta met this standard. As the Commission noted, no evidence exists "which indicates [Mr. Gullotta] is

capable of returning to his former position of employment in the shipping department of the named employer.” (Supp. at p. 15).

Despite the Relator-Appellee’s contention, whether Mr. Gullotta could return to light duty work is irrelevant for determining TTD. (Supp. at p. 15). The only application is as a defense of a light-duty job offer under R.C. 4123.56(a). *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6. That is, a claimant who is otherwise eligible for TTD can be denied TTD on the basis of refusing a good faith job offer. *Id.* The Commission is responsible for determining whether this defense is applicable. *Id.* at ¶13. Before this defense can apply, however, such an offer must take into account *all* allowed conditions. O.A.C. § 4121-3-32(B)(1)(b). As noted, this defense is separate from voluntary abandonment, which examines why the claimant left their former position of employment. *Super Valu*, 2007-Ohio-4920, at ¶ 6. Importantly, if a claimant fails to meet R.C. 4123.56(a), they are still able to bring a future application for TTD benefits. *Bing*, 61 Ohio St.3d 424. This is in contrast to a voluntary abandonment finding, which all parties agree does not apply here because Mr. Gullotta was medically removed from his former position of employment. (Supp. at 15). See *State ex rel. Pretty Prods. v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (voluntary abandonment only applies when claimant voluntarily leaves former position of employment for non-medical reasons).

Here, Mr. Gullotta brought a subsequent claim for TTD benefits based on his additional condition and increased medical restrictions. (Supp. at p. 15-16). Importantly, the defense of refusal of a good faith job offer no longer applied because the employer did not make a new job offer following Mr. Gullotta’s additional allowance that fit his increased work restrictions. The only light-duty job offer the employer had made was for when Mr. Gullotta’s claim was only

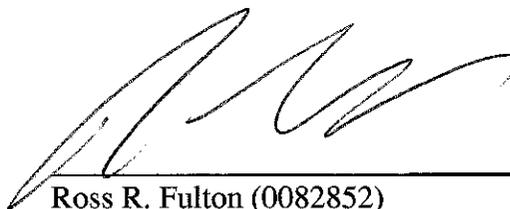
allowed for “sprain lumbar region.” (Supp. at p. 5). Mr. Gullota did not accept that offer, resulting in the termination of Mr. Gullotta’s TTD. (Id.)

Subsequent to this decision, however, Mr. Gullotta’s claim was additionally allowed for “substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints.” (Supp. at p. 7). Mr. Gullotta had increased workplace restrictions placed upon him by his physicians. (Supp. at p. 11). The Relator-Appellee thus needed to make a *new* job offer that took account of *all* of Mr. Gullotta’s restrictions. O.A.C. § 4121-3-32(B)(1)(b). The previous offer obviously did not as when it was made Mr. Gullotta only had one allowed condition. APV made no such new offer. As such, the SHO correctly found this doctrine inapplicable, finding it irrelevant whether Mr. Gullotta could resume the previous light-duty position because it no longer fit all his restrictions. (Supp. at p. 15-16). This is the Commission’s exclusive decision to make. *Super Valu*, 2007-Ohio-4920, ¶13. As such, no defense existed to Mr. Gullotta’s otherwise qualified TTD application. The SHO correctly awarded TTD compensation, a decision that is entitled to abuse of discretion review here and should be upheld.

CONCLUSION

For the foregoing reasons, the Tenth District failed to follow its role in mandamus. It is clear that the Commission had some evidence for its decision, rendering mandamus inappropriate. The Tenth District’s decision should be reversed and Relator-Appellant’s mandamus request should be denied.

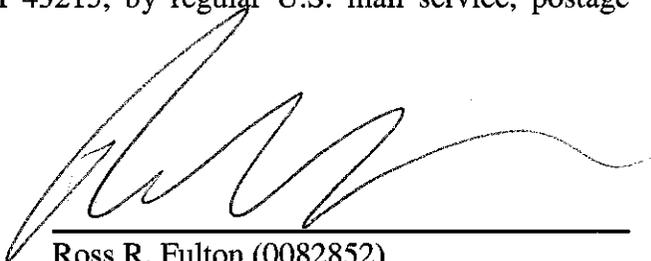
Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the Reply Brief of Appellant-Respondent Giuseppe Gullotta was served to Richard L. Williger, Attorney at Law, 2070 East Avenue, Akron, OH 44314, and Gerald H. Waterman, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay Street, 22nd Floor, Columbus, OH 43215, by regular U.S. mail service, postage prepaid, on this 7th day of February, 2011.



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