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## INTRODUCTION

In this Workers' Compensation case, Appellant, Patricia Rouan (hereinafter "Appellant"), challenged the Industrial Commission's (hereinafter "Commission") denial of temporary total disability compensation (hereinafter "TTD") benefits. Appellant was injured at work and filed a Workers' Compensation claim. On or about February 1, 2005, Appellant was granted a disability retirement through Ohio Public Employees Retirement System (hereinafter "OPERS").

The Commission did not abuse its discretion when it denied Appellant's request for TTD based upon claimant's voluntary retirement through OPERS.

## STATEMENT OF THE FACTS

On May 24, 2004, Appellant was injured in the course and scope of her employment while working for Appellee, Mahoning County. (See Appendix attached to Appellant's Brief, referred to as Agreed Stipulation of Evidence, at pg. 44, herein after S. \_\_\_\_).<sup>1</sup> Appellant filed a claim for Workers' Compensation benefits. Her claim was originally allowed for a fracture femoral condyle-closed, left; proximal tibial plateau fracture, left. (S. 44). Appellant filed a motion requesting that her claim be additionally allowed for major depression, recurrent, severe. (S. 44). This request was denied by both the District Hearing Officer (hereinafter "DHO") and the Staff Hearing Officer (hereinafter "SHO") and the Commission refused to hear the appeal. (S. 44-45; S. 41-42).

On June 9, 2005, OPERS informed Appellant that her application for disability retirement benefits was granted and that it was effective February 1, 2005. (S. 43). The only medical documentation ever presented to the Industrial Commission or the employer, in connection with the granting of the OPERS disability application, was a form completed by claimant's doctor, Dr. Cosmo Kaza. (S. 50-51). On that

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<sup>1</sup> Appellee is referring to documents attached to Appellant's Brief as the Appendix, although not specifically labeled as such by Appellant.

document, the only diagnosis listed is major depressive disorder. Nowhere in the Workers' Compensation claim file, or in the possession of the employer, does any additional medical documentation exist detailing any other reason for the granting of the OPERS disability application.

Interestingly, in its Statement of Facts, Appellant fails to reference the OPERS application and the fact that the only diagnosis listed is the major depressive disorder, which is specifically denied in this case.

Prior to May 25, 2006, Appellant's claim was additionally allowed for arthrofibrosis, left knee. (S. 39-40). As a result, Appellant requested TTD based upon the newly allowed condition. However, both the DHO and the SHO determined that the Appellant had reached maximum medical improvement (hereinafter "MMI") in 2005 based upon the opinion of her treating physician, Dr. Raymond Boniface's, statement that she had reached MMI. (S. 39-40; S. 37-38).

Appellant then filed a request for Permanent Total Disability (hereinafter "PTD") in her Workers' Compensation claim. On April 10, 2008, the SHO denied the request for PTD. (S. 33-34).

Appellant then filed a motion requesting that her claim be additionally allowed for aggravation of pre-existing arthritis, left knee, and post-traumatic arthritis, left knee, based upon the report and office notes of Dr. Boniface. (S. 30-31). In Dr. Boniface's July 17, 2008 correspondence, he references his evaluation from May 16, 2005. (S. 30-32). The Bureau of Workers' Compensation granted the request for the additional allowances in an order dated August 19, 2008. (S. 26-27).

Then on July 8, 2009, Appellant requested payment of TTD from June 5, 2006 to the present and continuing based on the newly allowed conditions (S. 24-25). The DHO and the SHO denied Appellant's request for TTD. (S. 15-18; S. 10-13). The SHO denied the request for TTD based upon the fact that the injured worker applied for, and received, a disability pension through OPERS, effective February 1, 2005. This disability pension was predicated exclusively upon the condition of "major depression," a condition which was specifically denied in this claim. The SHO rejected Appellant's argument "that the employer was

barred by the doctrine of res judicata from asserting the abandonment defense for this new period of temporary total compensation.” (S. 11).

The basis for this appeal is the SHO’s finding on voluntary abandonment and the rejection of the res judicata argument, which was affirmed by the Tenth District Court of Appeals.

## LAW AND ARGUMENT

### A. STANDARD OF REVIEW

For a writ of mandamus to issue, Appellant must demonstrate that she has a clear legal right to the relief sought, and that the Commission had a clear legal duty to provide such relief. *State ex rel. Pessley v. Indus. Comm.* (1967), 11 Ohio St. 2d 141, 228 N.E. 2d 631. In order to establish a basis for mandamus relief, it must be shown that the Commission abused its discretion by issuing an order that is not supported by evidence in the administrative record. *State ex re. Elliott v. Indus. Comm.* (1986), 26 Ohio St. 3d 76, 78-79, 497 N.E. 2d 70. In *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St. 3d 167, 170, 509 N.E. 2d 946, the Ohio Supreme Court stated:

It is basic law, without need of citation, that the Industrial Commission has considerable discretion in the performance of its duties; that its actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; and that so long as there is some evidence in the file to support its findings and orders, this court will not overturn such.

Thus, it has been held that a writ of mandamus will not be granted if an order of the Commission is supported by “some evidence.”

The determination of disputed facts is within the final jurisdiction of the Commission. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St. 3d 396, 433 N.E. 2d 159. Therefore, the Ohio Supreme Court has often declined to reevaluate and reweigh the evidence before the Commission, holding that the Commission is the “exclusive evaluator of disability.” See e.g., *State ex rel. Moss v. Indus. Comm.* (1996),

75 Ohio St. 3d 414, 416, 66 N.E. 2d 364, 366. It is undisputed that “questions of credibility and the weight to be given evidence are clearly within the Commission’s discretionary powers of fact-finding.” *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St. 2d 165, 167, 429 N.E. 2d 433, 436. “It is immaterial whether other evidence, even if greater in quality and/or quantity supports a decision contrary to the Commission’s.” *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St. 3d 373, 376, 658 N.E. 2d 1055, 1057. The Commission is only required to state what evidence it relied upon and a brief explanation as to why the claimant is or is not entitled to the requested benefits. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St. 203, 204, 567 N.E. 2d 245, 247.

**B. THE INDUSTRIAL COMMISSION DID NOT ERR WHEN IT FOUND THAT APPELLANT’S DISABILITY RETIREMENT WAS A BAR TO FUTURE TEMPORARY TOTAL DISABILITY.**

The SHO determined that Appellant was ineligible to receive TTD based upon the fact that she received a disability pension through OPERS, effective February 1, 2005. (S. 10-13). The SHO reasoned that because the OPERS disability retirement was based upon the condition of “major depression”, and the fact that major depression was not an allowed condition in this claim, that Appellant was barred from receiving TTD.

As cited by the SHO, *State ex rel. Staton v. Indus. Comm. Of Ohio.* (2001), 91 Ohio St. 3d 407, is controlling with regard to this issue. In *Staton*, the Supreme Court stated as follows:

For years, voluntary departure from employment was the end of the story, and harsh results sometimes followed. Claimants who left the former position of employment for a better job forfeited temporary total compensation eligibility forever after. In response, *State ex rel. Baker v. Industrial Commission* (2000), 89 Ohio St. 3d 376, declared that voluntary departure to another job no longer barred temporary total disability. It retained, however, the prohibition against the entire labor market. Thus, the claimant who vacates the work force for non-injury reasons not related to the allowed condition and who later alleges an inability to return to the former position of employment cannot get temporary total disability. This of course makes sense. One cannot credibly allege the loss of wages for which temporary total disability

is meant to compensate when the practical possibility of employment no longer exists.

In this case, claimant retired from the work force in 1993. All relevant retirement documentation from his attending physician listed claimant's non-allowed heart condition and depression as the reason for departure. Appellants cite this as "some evidence" that claimant's work-force retirement was due to causes other than industrial injury, barring temporary total disability. (ID. at page 409-410: emphasis added).

As was the case in *Staton*, the only medical documentation provided in the administrative proceedings listed a diagnosis(es) that were not allowed in the Workers' Compensation claim. In this case, Appellant's OPERS disability form, completed by Dr. Kaza, detailed the condition rendering her disabled was major depression. (S. 50). This form was the only piece of medical information submitted to the Workers' Compensation claim file with regard to Appellant's OPERS disability. If, as the Appellant is arguing, the allowed conditions related to this claim were resulting in her inability to work, those conditions would have been included in her OPERS disability application. However, Appellant had the opportunity to present such documentation at the administrative level, and failed to do so because it is unlikely such evidence exists.

At no time did Appellant submit documentation to support her argument that her disability retirement was predicated upon the conditions which are allowed in this claim. Major depression is a non-allowed condition in her Workers' Compensation claim. Therefore, based upon *Staton*, the Commission correctly ruled and the Court of Appeals correctly agreed, that because Appellant's disability retirement was predicated upon a condition that is not allowed in her Workers' Compensation claim, this acts as a voluntary abandonment from her employment and, therefore, bars the payment of TTD. Clearly, the Commission had some evidence when it denied the request for TTD benefits.

Appellant is arguing that *Staton* does not apply to this case because she has been off work since the

date of the injury and that she did not voluntarily abandon her former position of employment. Appellant is alleging that she was incapable of returning to her former position of employment. However, the Supreme Court has held that if you voluntarily abandon your position of employment, based upon conditions that are not allowed in your Workers' Compensation claim, you are ineligible to receive payment of TTD benefits. See *Staton*.

Appellant asserts that this Court should rely on *State ex rel. Pretty Products v. Indus. Comm.* (1996), 77 Ohio St. 3d 5. Appellant is correct in asserting that the Supreme Court found that total temporary compensation eligibility hinges on timing and character of the Appellant's departure. However, in *Pretty Products*, the issue of eligibility TTD compensation has nothing to do with the injured worker leaving the workforce due to retirement, as it does in *Staton*. *Pretty Products* addresses someone who may have voluntarily abandoned her position of employment by not turning in a work slip at the appropriate time. The Court in *Pretty Products* does state that the "receipt of temporary total disability compensation rests on a claimant's inability to return to his or her former job as a direct result of an industrial injury." *Staton* citing *State ex rel. Remariz v. Indus. Comm.* (1982), 69 Ohio St. 2d 630.

As stated in both *Staton* and *Pretty Products*, the basic premise of these types of cases is if someone is unable to return to their former position of employment as a direct result of the industrial injury, then they can receive temporary total benefits under the claim. Because Appellant received OPERS disability benefits based upon the diagnosis of major depression - which is a denied condition in this claim - she is unable to return to her former position of employment. If the OPERS disability award had been based upon major depression and any of the allowed conditions in this claim, then Appellant might have been eligible to receive TTD benefits. However, that is not the case.

Appellant also cites *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St. 3d 45, as controlling with regard to the premise that an injured worker can only abandon a former position of employment if she

has the physical capacity for employment at the time of the abandonment or removal. Again, this case did not deal with the retirement issue as the *Staton* case does. In *Brown*, the Court was addressing an injured worker's benefits while incarcerated and their ability to receive such benefits. The law that was applicable to *Brown* in 1993 is not the law as it stands today. In fact, the Ohio Revised Code now addresses the issue of receipt of temporary disability benefits while incarcerated. Ohio Revised Code §4123.3.54 (J) specifically states that compensation of benefits are not payable to a claimant during a period of confinement in any state or federal correctional institute. This statute did not apply in *Brown* because *Brown's* date of injury preceded the amendment of the statute to include such language.

Appellant references that *Brown* does apply to retirement. However, it does not and should not be relied upon in this case.

Appellant further references *State ex rel. Chrysler v. Indus. Comm.* (1991), 62 Ohio St. d 193 for the premise that an injured worker's entitlement to TTD depends on whether or not the retirement occurred on or after she became disabled. In *Chrysler*, the Court determined that the Commission did not address the claimant's retirement in making their PTD determination and remanded the case back to the Commission to address such.

The *Chrysler* Court does, however, reference both *Remariz* and *State ex rel. Rockwell International v. Indus. Comm.* (1988), 40 Ohio St. 3d 44 for the premise that "a claimant who retires for reasons unrelated to his or her injury cannot receive temporary total disability compensation since it is the claimant's own action, not the industrial injury, that prevents the return to the former position of employment." *Chrysler* at 195-196. Again, the Court is addressing the law with regard to voluntarily abandoning a position of employment. When Appellant applied for and was granted OPERS disability benefits based upon the major depression, it in and of itself became the reason Appellant was unable to return to her former position of employment. Because she was receiving OPERS disability benefits, she was unable to return to her former

position of employment. Because these OPERS disability benefits were predicated only on a non-allowed condition in Appellant's Workers' Compensation claim, she became ineligible to receive TTD benefits.

Based upon *Staton* and the other referenced cases, it is Appellee, Mahoning County's position that the Industrial Commission did not abuse its discretion in making the determination that because Appellant departed the workforce for a reason not associated with the allowed conditions in the claim that she was barred from future TTD benefits subsequent to her retirement date of February 1, 2005. The evidence is clear and complies with the law regarding retirement and TTD benefits. The Appellant abandoned the entire workforce when she retired in 2005 for reasons unrelated to the industrial injury. Therefore, she cannot allege the loss of wages.

**C. THE INDUSTRIAL COMMISSION OF OHIO CORRECTLY RULED THAT EMPLOYER'S ARGUMENT WITH REGARD TO VOLUNTARY ABANDONMENT WAS NOT BARRED BY THE DOCTRINE OF RES JUDICATA.**

Appellant argued that Appellee, Mahoning County, was barred from asserting the argument of voluntary abandonment for the new period of temporary total compensation because of the doctrine of res judicata. The SHO rejected Appellant's argument with regard to res judicata. In making this determination, the SHO specifically relied upon the Supreme Court's ruling in *State ex rel. B.O.C. Group, General Motors Corporation v. Industrial Commission of Ohio* (1991), 58 Ohio St. 3d 199. In *B.O.C. Group*, soon after the injury in 1981, the claimant was laid off. The injured worker then received TTD for a six-month period in 1984, and one month in July of 1985. Subsequent to this receipt of TTD, the injured worker applied for a new period of TTD from July 30, 1985 to April 10, 1987 and to continue. The employer argued that the injured worker's lay off precluded her from the receipt of TTD in her claim. At that time, the injured worker argued that the employer had not previously raised that defense which paid for previous periods and, therefore, the doctrine of res judicata precluded the employer from raising the defense for the new period of TTD.

This Honorable Court addressed the issue as follows:

B.O.C. urges a similar result here, asserting that the issue of claimant's earlier compensation for temporary total disability was an issue distinct from her current request. It is a point well taken. As stated in 3 Larson, workers' compensation law (1989) 15-426, 272 (99) to 15-426, 272 (100) section 79.72(f): 'It is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times...A moments reflection would reveal that otherwise there would be no such thing as reopening for change in condition. The same would be true of any situation in which the facts are altered by a change in the time frame...

Claimant also argues that the layoff issued has been mooted by her subsequent reinstatement by B.O.C. during this appeal. We again disagree. While her grievance and eventual reinstatement may ultimately bear on the question of whether claimant had abandoned her employment, it does not negate the layoff as a factor preventing work, unrelated to the accident, during the claimed period of disability.

In this case, the SHO correctly held, based on *B.O.C. Group*, that "the injured worker's request for temporary total compensation is for a period separate and distinct from the prior periods of compensation previously adjudicated by the Industrial Commission." (S. 12). The SHO determined that based upon *B.O.C. Group*, employer's counsel is able to assert the defense of voluntary abandonment from the workforce with regard to payment of TTD.

It is clear that based on *B.O.C. Group*, this Court would not agree with Appellant. This Court held that arguing voluntary abandonment on a new period of temporary total is not res judicata and employer's counsel should not be barred from such argument. *B.O.C. Group* at 199.

Appellant asserts that *B.O.C. Group* is factually distinguished from the instant case because in *B.O.C. Group*, the employer did not raise the affirmative defense with respect to the previous period of disability. However, it is apparent from review of all prior orders with regard to TTD benefits and PTD benefits, that if the argument with regard to preclusion of payment of benefits based upon voluntary abandonment was addressed at prior hearings, the hearing officers chose not to address that argument in

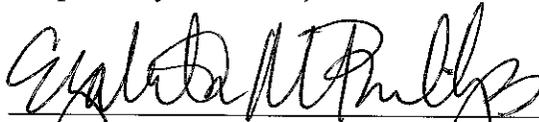
any of the orders. See S. 33-35; S. 37-38; S. 39-40). In fact, the issue of voluntary abandonment is not addressed in any of these prior orders. Appellee does not agree with this proposition and relies on *B.O.C. Group* as the controlling law. In order for the doctrine of res judicata to apply, an argument has to actually be made, addressed, and ruled upon. That did not happen in the instant case. Based upon the orders, the Commission never addressed any voluntary abandonment with regard to Appellant's Workers' Compensation claims. More importantly, this request is for a new period of TTD, and *B.O.C. Group* holds that a voluntary abandonment argument can be raised for a new period of TTD, without having res judicata apply.

Appellee, Mahoning County, asserts that the Commission did not abuse its discretion in following *B.O.C. Group* in determining that res judicata did not bar Appellee's argument of voluntary abandonment.

#### **CONCLUSION**

For all of the foregoing reasons, Appellee, Mahoning County, submits that the Commission did not abuse its discretion and the Court of Appeals did not err when it determined that Appellant's disability retirement on February 1, 2005 was a bar to payment of future TTD benefits. In addition, the Commission did not abuse its discretion and the Court of Appeals did not err when it ruled that the employer's argument with regard to the voluntary abandonment was not barred by the doctrine of res judicata.

Respectfully submitted,

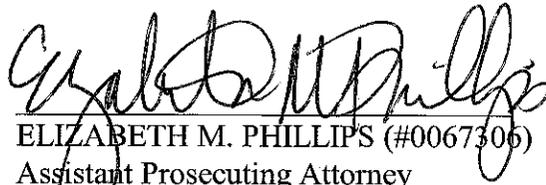


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**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief was sent by regular U.S. Mail this 15<sup>th</sup> day of December, 2011, to Shawn Muldowney, Attorney for Appellant Patricia Rouan, Schiavoni, Schiavoni, Bush & Muldowney, 87 Westchester Drive, Youngstown, OH 44515, and Kevin J. Reis, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, OH 43215.

  
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