ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, ex rel. PATRICIA ROUAN,	:	Case No. 11-0775
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 10AP-0036
v.	:	
INDUSTRIAL COMMISSION OF OHIO, et al.,	:	
Appellees.	:	

BRIEF OF APPELLEE, INDUSTRIAL COMMISSION OF OHIO

SHAWN R. MULDOWNEY* (0058525)
Counsel of Record
SCHIAVONI, SCHIAVONI, BUSH & MULDOWNEY
87 Westchester Drive
Youngstown, Ohio 44515
330-799-5940
330-799-5998-fax
Schiavoni@live.com
Counsel for Appellant
Patricia Rouan

MICHAEL DEWINE
Ohio Attorney General

KEVIN J. REIS* (0008669)
Assistant Attorney General
Counsel of Record
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215
614-466-6696
614-728-9535-fax
Kevin.reis@ohioattorneygeneral.gov

Counsel for Appellee
Industrial Commission of Ohio

ELIZABETH M. PHILLIPS* (0067306)
Counsel of Record
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503
330-740-2330
330-740-2008-fax
lphillips@mahoningcountyoh.gov

Counsel for Appellee
Mahoning County

FILED
DEC 16 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE FACTS AND OF THE CASE 2

ARGUMENT 4

Appellee Industrial Commission's Proposition of Law No. 1 7

The burden is on the injured worker to prove that his/her retirement in causally related to the industrial injury.

Appellee Industrial Commission's Proposition of Law No. 2 11

The commission does not abuse its discretion in denying TTD where there is some evidence that the retirement is "voluntary" based on the medical evidence at the time of the retirement.

Appellee Industrial Commission's Proposition of Law No. 3 12

The defense of "res judicata does not apply if the issue is the injured worker's physical condition or disabilty at two entirely different times." State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm. *(1991), 58 Ohio St.3d 199.*

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

State ex rel. Ashcraft v. Indus. Comm.
(1987), 34 Ohio St.3d 42 ..... 6, 10

State ex rel. B.O.C. Group, General Motors Corporation v. Indus. Comm.
(1991), 58 Ohio St.3d 199 12

State ex rel. Baker Material Handling Corp. v. Indus. Comm.
(1994), 69 OhioSt.3d 202 10

State ex rel. Brown v. Indus. Comm.
(1993), 68 Ohio St.3d 45 9

State ex rel. Burley v. Coil Packing, Inc.
(1987), 31 Ohio St.3d 18 6

State ex rel. Bryant v. Indus. Comm.
(1996), 74 Ohio St.3d 458 5

State ex rel. Chrysler v. Indus. Comm.
(1991), 62 Ohio St.3d 193 10

State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.
(1989), 45 Ohio St.3d 381 ..... 7, 8

State ex rel. Elliott v. Indus. Comm.
(1986), 26 Ohio St.3d 76 4

State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.
(1985), 29 Ohio App.3d 145 ..... 5, 6, 10

State ex rel. Lackey v. Indus. Comm.
129 Ohio St.3d 119, 2011-Ohio-3089 7

State ex rel. Lewis v. Diamond Foundry Co.
(1987), 29 Ohio St.3d 56 5

State ex rel. Noll v. Indus. Comm.
(1991), 57 Ohio St.3d 203 12

State ex rel. Pass v. C.S.T. Extraction Co.
74 Ohio St.3d 373, 1996-Ohio-126 5

State ex rel. Pleban v. Indus. Comm.
(1997), 78 Ohio St.3d 406 7

State ex rel. Pressley v. Indus. Comm.
(1967), 11 Ohio St.2d 141 4

State ex rel. Pretty Products v. Indus. Comm.
(1996), 77 Ohio St.3d 5 9

State ex rel. Ramirez v. Indus. Comm.
(1982), 69 Ohio St.2d 630 ..... 5, 6

State ex rel. Rockwell Internatl. v. Indus. Comm.
(1988), 40 Ohio St.3d 44 6

State ex rel. Rouan v. Indus. Comm.
Franklin App. No. 10AP-36, 2011-Ohio-1897 2

State ex rel. Staton v. Indus. Comm.
(2001), 91 Ohio St.3d 407 4

State ex rel. Teece v. Indus. Comm.
(1981), 68 Ohio St.2d 165 5

State v. Freeman
(1980), 64 Ohio St.2d 291 7

Other Authorities

R.C. 4123.52 4

INTRODUCTION

This is a workers' compensation case regarding voluntary retirement. If an injured worker voluntarily retires from his/her employment, the injured worker is no longer eligible should he/she later request temporary total disability compensation ("TTD") benefits for an injury sustained while employed at the former employer. Briefly stated, TTD benefits (which represent lost wages) are paid to an injured worker for that period of time during which the injured worker is not able to perform (i.e., is disabled from) his/her job duties on account of the industrial injury. So, if an injured worker *retires* from the employer for reasons not related to the industrial injury and never re-enters the work force, he/she is no longer eligible for TTD benefits.

Appellant, Patricia Rouan ("Rouan") maintains that she did not voluntarily retire from her employer. Rouan asserts that her retirement was not voluntary because she took disability retirement when she was still receiving TTD under her workers' compensation claim. However, the Industrial Commission of Ohio ("commission") found that Rouan, when she accepted a disability retirement, she did so for medical reasons *not related to* her industrial injury. Specifically, Rouan retired because of a psychological condition that was not related to her industrial injury. Because the disability retirement was for reasons not related to the industrial injury, her retirement is a voluntary abandonment of the work force which renders her ineligible for TTD.

Rouan has the burden to prove that her departure from her employer was related to her industrial injury. The commission reasoned that Rouan did not present sufficient medical evidence that the industrial injury caused Rouan to retire. In short, Rouan's retirement was voluntary, and accordingly, she was not eligible for TTD benefits.

The commission did not abuse its discretion when it determined that Rouan's retirement constituted a voluntarily abandonment of her former position of employment. The Court of

Appeals found that there was "some evidence" to support the commission's decision denying TTD and denied the request for the writ of mandamus. Therefore, this Court should affirm the Court of Appeals decision which denies the requested writ of mandamus.

STATEMENT OF THE FACTS AND OF THE CASE

Rouan was injured during the course of her employment with Mahoning County on May 24, 2004. (*State ex rel. Rouan v. Indus. Comm.*, Franklin App. No. 10AP-36, 2011-Ohio-1897, ¶ 24 ("Decision, ¶ ___ ") Rouan's workers' compensation claim has been allowed for "closed fracture left femoral condyle; fracture left proximal tibial plateau; arthrofibrosis left knee; aggravation of pre-existing arthritis left knee; post traumatic arthritis left knee," and *disallowed* for "major depression-recurrent, severe." (Decision, ¶¶ 13, 21 and 27) Effective May 15, 2005, Rouan's TTD was terminated after a finding of maximum medical improvement ("MMI"). (Decision, ¶ 14) Rouan did not appeal the finding of MMI that terminated TTD. Id.

Rouan applied for disability retirement benefits in January of 2005, based on a diagnosis of "Major Depressive Disorder with Psychotic." (Decision, ¶¶ 15-18) On May of 2005, Ohio Public Employees Retirement System ("OPERS") granted her application for disability retirement effective February 1, 2005. (Decision, ¶ 19) Rouan has not returned to any position of employment since that date. (Decision, ¶ 34)

In February 2005, Rouan requested that her workers' compensation claim be additionally allowed for "Major depression, recurrent, severe." (Decision, ¶ 20) In July 2005, a staff hearing officer ("SHO") for the commission denied the psychological condition because it was not causally related to the industrial injury of 2004. (Decision, ¶ 21)

In June 2006, more than a year after her having retired on disability, Rouan requested TTD for the period January 2006 to June 2006 based on the additional condition of "arthrofibrosis of

the left knee." (Decision, ¶ 22-23) The DHO and SHO both denied TTD because the newly allowed condition was also at MMI, and there was no evidence of "new and changed circumstances" since the previous determination of MMI back in May 2005 that would warrant the reinstatement of TTD benefits. (Decision, ¶ 24)

In October 2007, Rouan applied for permanent and total disability ("PTD"). (Decision, ¶ 25) In April 2008, PTD was denied because Rouan was found to be capable of sedentary work, and based on her age, education and work history was still capable of sustained remunerative employment. (Decision, ¶ 26)

In August 2008, Rouan's claim was additionally allowed for "aggravation of pre-existing arthritis left knee; post traumatic arthritis left knee." (Decision, ¶ 27) In July 2009, Rouan submitted to the commission a C-86 motion requesting that TTD compensation for the periods of "June 5, 2006, through the present and onward." (Decision, ¶¶ 28-31) A DHO for the commission denied Rouan's request for TTD benefits. (Decision, ¶ 32) Rouan appealed from the DHO order denying TTD. (Decision, ¶ 33)

The SHO for the commission vacated the DHO order. (Decision, ¶ 34) However, the SHO denied TTD for a different reason. The SHO found that Rouan voluntarily abandoned the workforce, effective February 2005, when she applied for and accepted a *disability retirement* "for reasons *not associated with the allowed conditions in this claim*," that being "Major Depressive Disorder with Psychotic." (Italics added) (Decision, ¶ 34)

The relevant portion of the SHO order states:

> Here, the evidence from the PERS disability application records submitted to the claim file, established that the Injured Worker's abandonment of her employment with the Employer of record was in fact due to the condition of "MAJOR DEPRESSION", the condition upon which the Injured Worker's PERS disability was awarded. This claim is not allowed for a major depressive condition. The Injured Worker has not returned to any position of employment subsequent to

> acquiring her PERS disability on 02/01/2005. Thus, the Staff Hearing Officer concludes that the Injured Worker completely abandoned the work force for reasons not associated with the allowed conditions in this claim. As in *Staton*, the Staff Hearing Officer concludes that the Injured Worker is not eligible for temporary total disability compensation in this claim given her above abandonment from employment through her procurement of a disability pension for conditions not associated with this claim. Accordingly, temporary total disability compensation is denied for the period from 07/08/2007 through 10/19/2009 inclusive.

(Decision, ¶ 34)

Therefore, the SHO denied TTD for the period from July 2007, through October 2009, inclusive. Id. As to the period prior to July 2007, the SHO held that the commission lacked jurisdiction to consider the closed period of Rouan's request beginning June 5, 2006, through July 7, 2007, inclusive, because R.C. 4123.52 bars TTD for those periods of time more than two years prior to the request for said benefits. Id.

Rouan's appeal of the SHO's order was refused, and her request for reconsideration was denied by the commission. (Decision, ¶¶ 35-36) Rouan filed the underlying action in mandamus in the Court of Appeals. The magistrate of the Court of Appeals recommended that the requested writ be denied. (Decision, ¶¶ 40-64) Rouan filed an objection. (Decision, ¶ 3) The Court of Appeals overruled Rouan's objections, adopted the magistrate's decision and denied the requested writ. (Decision, ¶ 10) Rouan appealed to this Court.

ARGUMENT

Rouan must show that she has a clear legal right to the relief sought and that the commission has a clear legal duty to provide that relief to obtain a writ of mandamus overruling a determination of the commission. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right exists only where the relator, here Rouan, shows that the commission abused its discretion by entering an order that is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. In this case, Rouan must show

that the commission acted contrary to law or grossly abused its discretion by issuing a determination unsupported by evidence in the administrative record. Id. at 78-79. Absent this showing, Rouan is not entitled to an extraordinary writ of mandamus.

Where the record contains "some evidence" to support the commission's findings, the commission has committed no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact-finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

The function of the court in a mandamus action involving an order of the commission is not to re-evaluate the evidence and substitute the court's judgment for that of the commission. A mandamus action does not afford a de novo review process. *State ex rel. Bryant v. Indus. Comm.* (1996), 74 Ohio St.3d 458, 460, ("As we reaffirmed in *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 658 N.E.2d 1055, we will not review the commission's findings de novo.") Rather, the judicial review is limited to an analysis of the legal propriety of the commission's determination.

In *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, this Court defined "temporary total disability" as a "disability which prevents a worker from returning to his former position of employment." Id. at syllabus. In *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 147, the Tenth District Court of Appeals held that:

> A worker is prevented by an industrial injury from returning to his former position of employment where, but for the industrial injury, he would return to such former position of employment. However, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment. Such action

> would include such situations as the acceptance of another position, as well as voluntary retirement.

Id. at 147. Thus, where an employee voluntarily resigns from a position of employment, and gives no indication that his resignation is due to an industrial injury, the employee's own volitional action has prevented a return to the former position of employment, relinquishing an entitlement to TTD compensation. *Ramirez*, supra. The voluntary nature of abandonment is a factual question within the commission's final jurisdiction. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

Jones & Laughlin was approved by this Court in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, with the Court stating:

> The crux of this decision [*Jones & Laughlin*] was the court's recognition of the two-part test to determine whether an injury qualified for temporary total disability compensation. The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position. In *Ashcraft*, supra, an incarcerated inmate was found to have voluntarily abandoned his employment through his incarceration. The Court found that, "while the prisoner's incarceration would not normally be considered a 'voluntary' act, *one may be presumed to tacitly accept the consequences of his voluntary acts.*" (Emphasis added.)

Id. at 44.

In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the Supreme Court distinguished between voluntary and involuntary abandonment and clarified that only a voluntary abandonment barred TTD compensation. In *Rockwell*, the physician imposed restrictions on the work duties on account of the industrial injury such that the retirement was arguably not a voluntary retirement. Here, the retirement was prompted by a psychological condition that was *not related* to the industrial injury.

The question of whether a claimant voluntarily abandoned a former position of employment is "primarily one of intent that may be inferred from words spoken, acts done, and other objective facts." *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381. "The presence of such intent, being a factual question, is a determination for the commission." Id. at 383, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 297.

Appellee Industrial Commission's Proposition of Law No. 1

> *The burden is on the injured worker to prove that his/her retirement in causally related to the industrial injury.*

The law requires that to establish entitlement to TTD after retirement, the injured worker has the burden of proving that his/her industrial injury *caused* him/her to retire. *State ex rel. Pleban v. Indus. Comm.* (1997), 78 Ohio St.3d 406. Here, the injured worker took disability retirement, based on medical conditions other than her industrial injuries, in February 2005 when she coincidentally was receiving TTD. The injured worker then made a request for TTD in 2009, for the period June 2006 forward, despite having taken a disability retirement in 2005 for unrelated reasons. Rouan wrongly argues that she continues to be eligible for TTD because, although she took disability retirement predicated on medical conditions unrelated to her industrial injuries, she did so at a time when she was receiving TTD on account of her industrial injuries.

Where the reason for leaving the work force is a retirement, the injured worker has the burden of proving that the retirement was caused by the medical conditions allowed in the workers' compensation claim. *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089. There must be contemporaneous medical evidence demonstrating that the industrial injury caused the injured worker to retire and cut short their work life if the injured worker is to retain his/her eligibility for TTD benefits. Id.

Here, the commission was not persuaded that the retirement was causally related because the stated reason for the retirement was clearly not related to the industrial injury. (Decision, ¶¶ 15-19) The commission relied on Rouan's application for disability retirement, which stated that she retired because of a psychological condition not allowed in her workers' compensation claim.

Thus, the commission was presented with a factual dispute as to the injured worker's intent. "The presence of such intent, being a factual question, is a determination for the commission." *Diversitech*, supra. Here, the commission determined that Rouan, based on the signed disability retirement form and the medical evidence in the file, had voluntarily abandoned the workforce for reasons not related to her industrial injury when she took the disability retirement. (Decision, ¶¶ 53-55)

Thus, there is "some evidence" that Rouan's departure from the work force was not related to her industrial injury. Furthermore, Rouan did not present sufficient medical evidence to rebut the stated reason for the disability retirement: a psychological condition that is not causally related to her industrial injury.

Rouan argues that her *status*, i.e., being on TTD for her workers' compensation claim from January 2005 until May 2005 (Decision, ¶¶ 14-19), effectively insulates her from the voluntary abandonment doctrine. (Rouan's brief, pp. 3-4) During that period (January 2005 to May 2005) she was receiving TTD while awaiting a decision on her request for disability retirement. However, there is no factual or legal support for Rouan's novel argument that being on TTD at her retirement actually precludes a finding of a voluntary abandonment of the work place for other, non-work-related reasons. The legal test has always been whether the industrial injury *caused* the abandonment.

Here, Rouan does not dispute that, by her disability retirement, she effectively abandoned the work force. (Decision, ¶ 53) An injured worker who elects to take a disability retirement has indicated her intent to leave and not re-enter the work force. Taking disability retirement benefits means the injured worker may no longer be employed because of the circumstances that formed the basis for the disability retirement award. TTD benefits are only paid to compensate for lost wages until the injured worker can return to his/her former position of employment. Here, Rouan chose to receive disability benefits because of a psychiatric condition instead of returning to her former position of employment. Therefore, as a matter of law, Rouan was no longer eligible for TTD benefits, unless the industrial injury caused her to retire.

Rouan's reliance on *State ex rel. Pretty Products v. Indus. Comm.* (1996), 77 Ohio St.3d 5, and the other cases discussed below, is misplaced. In *Pretty Products* the violation of a work rule (i.e., the act of abandonment) was the injured worker's *absence from his work without leave*. However, a worker's absence may in some instances be *caused by* the industrial injury. In *Pretty Products* the absence allegedly occurred because the injured worker was *disabled* (unable to perform his job) *on account of the industrial injury*. Here, however, Rouan was not terminated by the employer for a work rule violation. Rather, here, although at the time receiving TTD benefits, Rouan decided to terminate her employment *for reasons not related to the industrial injury*, when she elected to take disability retirement.

In *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, the injured worker had already been awarded permanent and total disability ("PTD") benefits when he was incarcerated. In *Brown*, this Court explained that PTD, although a wage loss type of compensation, is a permanent award for the life of the injured worker. However, TTD, while also a type of wage loss compensation, is only a temporary payment until the injured worker recovers and can return

to his former position or some other job in the work force. So, this Court held that the incarceration was not a valid basis to suspend *PTD* payments. Id. Here, however, Rouan's request for PTD had already been denied in 2007 (Decision, ¶¶ 25-26), prior to the time in 2009 when she requested TTD benefits back to 2006 and forward. (Decision, ¶¶ 28-31) Her retirement made her ineligible for TTD.

In *State ex rel. Chrysler v. Indus. Comm.* (1991), 62 Ohio St.3d 193, this Court issued a limited writ because the commission did not address the employer's defense that the retirement in 1982 barred the 1984 and 1986 applications for PTD. In short, there would have to be determination as to whether the retirement was voluntary. Here, the issue of voluntary retirement was timely raised by the employer and addressed in the commission's order.

In *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 OhioSt.3d 202, the Court distinguished between PTD and TTD. In *Baker*, this Court held that the injured worker who applied for PTD in 1987 and retired in 1990 was not precluded from receiving an award for PTD benefits in 1991. In *Baker*, however, the Court issued a limited writ remanding the matter to the commission to determine whether the retirement was voluntary.

The above cases stand for the proposition that the injured worker can abandon the former position of employment *if* the act of the alleged abandonment (e.g., work rule violation or retirement) is *causally related* to the industrial injury. However, these cases do not support the notion that an injured worker can never abandon the work force, even for unrelated reasons, if receiving TTD benefits at the time of retirement. The test remains – did the industrial injury *cause* the retirement.

A *voluntary* disability retirement (i.e. a retirement *not related to the industrial injury*) severs the requisite causal connection. See *Jones & Laughlin* and *Ashcraft*, supra. Although her

workers' compensation claim would later (in 2006) be additionally allowed for medical conditions related to her industrial injury, Rouan had already (in 2005) abandoned the entire work force. She remained entitled to medical treatment, but not TTD wage loss benefits.

In summary, there is a presumption that retirement is a voluntary abandonment of the job and the workforce. Consequently, there must be persuasive, contemporaneous medical evidence that Rouan's separation and departure from her employer was due to her industrial injury, if she is to prove the requisite causal connection for TTD benefits. (Decision, ¶¶ 53-56)

Appellee Industrial Commission's Proposition of Law No. 2

> *The commission does not abuse its discretion in denying TTD where there is some evidence that the retirement is "voluntary" based on the medical evidence at the time of the retirement.*

The evidence in the record supports the commission's determination that Rouan's retirement from Mahoning County was voluntary and not related to her work injury. The disability retirement was based on a psychological condition "Major Depressive Disorder." (Decision, ¶ 16) However, "Major Depressive Disorder" is not an allowed condition in Rouan's workers' compensation claim. The commission found medical evidence (Decision, ¶ 21) that Rouan's departure was specifically related to a non-allowed or non-work medical condition. In July 2005, the commission *denied* Rouan's request for "major depression-recurrent, severe." Id. The SHO found that Rouan had "extensive, severe past medical history of psychological problems, including a six and half month hospitalization in 2002 - 2003, and multiple prescriptive medications taken through to the date of injury." Id. Therefore, Rouan could not establish the requisite causal relationship between her retirement and the industrial injury.

When an injured worker voluntarily retires from his/her employment, the retirement breaks the causal connection between the industrial injury and the alleged inability to return to the work place. Put another way, when the injured worker retires, the *retirement*, not the industrial injury,

is the reason why the injured worker cannot return to her former position of employment. Here, Rouan never re-entered the work force after her retirement, in large part, because she was receiving disability retirement benefits.

The commission clearly stated the evidence it relied on, provided a brief explanation for its decision, and thereby complied with the *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. The commission found no persuasive medical evidence that Rouan's disability retirement was causally related to the industrial injury. Finally, the commission's finding of voluntary retirement was not an abuse of discretion.

Appellee Industrial Commission's Proposition of Law No. 3

> *The defense of "res judicata does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times.* State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm. *(1991), 58 Ohio St.3d 199.*

The employer's defense of voluntary abandonment is not waived or barred by the doctrine of res judicata as to *subsequent* workers' compensation proceedings where the claimant's requested relief raises a different issue. Here, the defense of voluntary abandonment was not necessary to nor was it decided in any of the administrative proceedings prior to Rouan's request for TTD in 2009.

First, the doctrines of res judicata, waiver or collateral estoppel do not apply because the issues of PTD and TTD are not the same. In *State ex rel. B.O.C. Group, General Motors Corporation v. Indus. Comm.* (1991), 58 Ohio St.3d 199, the employer was not barred from raising the affirmative defense of voluntary abandonment with respect to a *new period* of compensation. Here, there is a new period of TTD being requested.

Second, an employer's defense of a voluntary abandonment by the injured worker was not necessary because the SHO's decision that *denied* the worker's request for PTD was a *decision in favor of the employer*. Third, when Rouan subsequently applied for a *different type of benefit*

(TTD), the defense of voluntary abandonment remained viable as it had not been previously decided. Furthermore, it was not known that Rouan would apply for TTD when she was denied PTD and was already receiving disability retirement benefits. When she applied for TTD in 2006, she had, in 2005, already abandoned the work force, and thus not entitled to TTD.

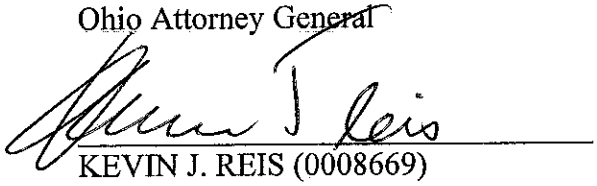
The issue/defense of voluntary abandonment need not be raised, or addressed prior to the period of TTD in question. Furthermore, the defense of voluntary abandonment was not raised or decided when Rouan applied for PTD. Accordingly, the defense of voluntary abandonment was not waived or barred as to Rouan's *subsequent* application for TTD benefits.

CONCLUSION

Rouan failed to prove that her retirement was related to her industrial injury. The Tenth District Court of Appeals determined that the commission did not abuse its discretion because the commission's order is supported by evidence in the record. Accordingly, this Court should affirm the Court of Appeals decision and judgment denying the requested writ of mandamus.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



KEVIN J. REIS (0008669)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
614-466-3361 Phone
614-728-9535 Fax
Kevin.reis@ohioattorneygeneral.gov

Attorney for Appellee,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellee, Industrial Commission of Ohio, was served by U.S. mail, postage prepaid, on this 16th day of December, 2011, upon the following counsel:

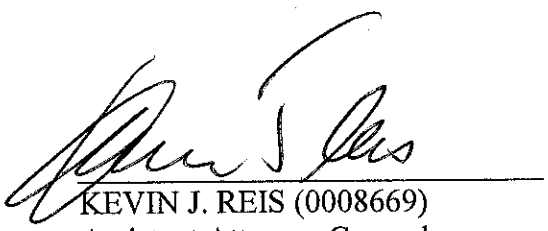
SHAWN R. MULDOWNEY
SCHIAVONI, SCHIAVONI, BUSH & MULDOWNEY
87 Westchester Drive
Youngstown, Ohio 44515

Counsel for Appellant
Patricia Rouan

and

ELIZABETH M. PHILLIPS
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

Counsel for Appellee
Mahoning County



KEVIN J. REIS (0008669)
Assistant Attorney General