ORIGINAL

IN THE SUPREME COURT OF OHIO

Delores M. Roxbury Appellant, v. The Industrial Commission of Ohio and Catholic Healthcare Partners, Inc. Appellees.	: : : : : : : : :	Case No. 2012-0815 On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

ORIGINAL ACTION IN MANDAMUS
REPLY BRIEF OF APPELLANT DELORES M. ROXBURY

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LAW AND ARGUMENT

The Employer, Catholic Healthcare Partners, Inc. and the Industrial Commission of Ohio (hereinafter "Respondents") first assert that the Industrial Commission of Ohio did not abuse its discretion when it determined that Appellant voluntarily abandoned the workforce and therefore is not entitled to temporary total disability benefits. In support of this argument, Respondents state that the Appellant's assertion of the inability to work due to the allowed conditions in the workers' compensation is unsupported by the Industrial Commission of Ohio's decisions dated July 10, 2006, which found the Appellant to be at maximum medical improvement for the allowed physical conditions, and dated June 13, 2009, which denied permanent total disability. Appellant did not abandon the work force, she has not returned to work since the date of injury due to the allowed conditions that resulted from her work injury.

Temporary total benefits are designed to compensate an injured worker for a temporary loss of earnings. A causal connection must exist between the workplace injury and the inability to return to the former position of employment. *State ex. rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St. 3d 42. Temporary total benefits may be terminated if the claimant's inability to return to his or her former position of employment is due to something other than the workplace injury. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St. 2d 630, 632. If the inability to return to work is related to the injury, then temporary total disability compensation is appropriate. If the inability to return to work is due to a voluntary exit from the workforce or a termination, compensation is barred. *State ex. rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App. 3d 145 (10th Dist. 1985).

Further, claimant cannot remove himself or herself from the work force if he or she is disabled at the time of removal from the work force. *State ex rel. OmniSource Corp. v. Indus.*

Comm., 113 Ohio St. 3d 303 (2007). A claimant who is already disabled at the time of separation from the work force is not disqualified from temporary total disability compensation. *State ex rel. Pretty Prods., Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466; *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 623 N.E.2d 55. "A claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal." *Id.* at 48.

Respondents assert that Appellant's argument that *State ex rel. Pierron v. Indus. Comm.*, (2008), 120 Ohio St.3d 40, is distinguishable from the case at bar is erroneous. Respondents claim that in *Pierron* and in the case at bar, both claimants had a choice to either seek other employment or no longer work and neither chose employment. Therefore, Respondents argue that temporary total disability was properly denied in both cases.

Contrary to Respondents' assertion, *Pierron* is distinguishable. The claimant in *Pierron* retired from his employment when his light duty position was eliminated. He did not seek any viable work after his retirement. This Court rejected the claimant's request for temporary total benefits on the grounds that Pierron abandoned the workforce, as his departure from the workforce was unrelated to his work injury. *Id.* at 41. On the contrary, Appellant's departure from the workforce was totally related to the injuries suffered on September 21, 2004.

Appellant has not returned to work since her date of injury. The Magistrate noted in the Decision, page 25, that the Appellant's physical conditions did cause her to leave the work foce in September 2004. Roxbury received temporary total disability until July 10, 2006 when a district hearing officer found the physical conditions in her claim to have reached at maximum medical improvement. Appellant was disabled when her separation from the workforce occurred.

Therefore, consistent with *Pretty Products*, Appellant cannot be found to have abandoned the workforce.

Respondents finally assert that Appellants failed to object to the Magistrate's decision regarding Dr. Lichstein's retroactive certification of disability. Accordingly, Respondents rely on Civil Rule 53(D)(3)(b)(iv) to contend that Appellant waived any error on the issue. However, Appellant requests that this Court apply the plain error doctrine. In applying the doctrine of plain error in a civil case, a court can apply plain error where exceptional circumstances require its application to "prevent a manifest miscarriage of justice, and if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson,* 79 Ohio St.3d 116 (Ohio 1997). Such a case exists here and the plain error doctrine should be applied. The plain error is that court of appeals found Dr. Lichstein's retroactive certification of disability was insufficient to be considered some evidence of disability.

Further, Civ. R. 53(D)(4)(c) provides:

> If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

As such, Appellant submits that although an objection was not filed to a Magistrate's decision regarding the issue of Dr. Lichstein's retroactive opinion of disability, an error of law or defect of evidence exists on the face of the decision and therefore, no objection is necessary. The error of law exists with the Magistrate's decision that Dr. Lichstein's retroactive certification of disability was insufficient to be considered some evidence of disability.

CONCLUSION

For the reasons set forth above, the Appellant, Delores Roxbury, respectfully requests that this Court reverse the court of appeals' decision and find that the court of appeals erred when concluding that the Industrial Commission did not abuse its discretion. Temporary total disability compensation cannot be denied based upon voluntary abandonment when Claimant's failure to reenter the workforce was based upon her disability associated with her work-related injury. Further, the Appellant requests that this court find that the temporary total disability compensation can be granted when an examining physician reviews all relevant medical evidence generated prior to the date of disability.

Respectfully submitted,
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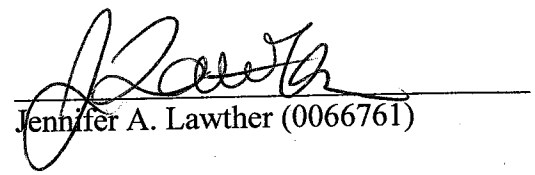
Certificate of Service

I certify that a copy of this Appellant's Reply Brief was sent by ordinary U.S. mail this 2 day of April, 2013 to counsel of record for appellees, Attorney Jerry Cline and Attorney Thomas Wyatt, Andrews & Wyatt, LLC, 561 Boston Mills Road, Suite 700, Hudson, OH 44236 and Assistant Attorney Sandra E. Pinkerton and Attorney General Robert Dewine, 150 E. Gay Street, 22nd Floor, Columbus, OH 43215.



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