



denying her temporary total disability compensation on eligibility grounds, and to enter an order awarding her temporary total disability compensation beginning July 8, 2007.

### **I. Facts and Procedural History**

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. The magistrate identified two issues presented in relator's complaint: (1) whether the commission abused its discretion in concluding relator is ineligible for temporary total disability compensation, and (2) whether res judicata bars the commission's eligibility determination. In resolving the two issues, the magistrate determined (1) the commission did not abuse its discretion in concluding relator is not eligible for temporary total disability compensation, and (2) res judicata does not bar the commission's eligibility determination. As a result, the magistrate determined the requested writ should be denied.

### **II. Objection**

{¶3} Relator filed a single objection to the magistrate's conclusions of law:

Magistrate erred by denying Relator's complaint for Writ of Mandamus and by finding that the Industrial Commission did not abuse its discretion in determining that the Relator was ineligible for temporary total compensation due to her taking a disability retirement while she was receiving temporary total compensation under this claim.

{¶4} As the magistrate's decision indicates, relator, a participant in the Ohio Public Employee's Retirement System ("PERS"), opted for a disability retirement based on her condition, major depression. After receiving a disability retirement from PERS in 2005, relator, following additionally allowed conditions, sought a period of temporary total

disability compensation through her workers' compensation claim. The staff hearing officer ultimately denied the request, concluding relator was ineligible because she voluntarily abandoned the workforce through her disability retirement.

{¶5} In her single objection, relator reargues those matters adequately addressed in the magistrate's decision. The magistrate properly concluded the Supreme Court of Ohio's decision in *State ex rel. Staton v. Indus. Comm.*, 91 Ohio St.3d 407, 2001-Ohio-88, controls disposition of relator's request for a writ of mandamus.

{¶6} In *Staton*, the employee sustained an industrial injury in April 1993. He took a medical leave of absence in May 1993 that eventually extended into permanent retirement, all based on conditions not allowed in the claim. After being denied permanent total disability compensation for the allowed conditions in his workers' compensation claim, he moved for temporary total disability compensation. In rejecting the request, the court stated that a "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]." *Id.* at 410. As the court noted, "[o]ne 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." *Id.*

{¶7} Despite the similarities of *Staton*, relator relies on *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, contending that because she was medically unable to return to her former position of employment on the effective date of her disability retirement, she is entitled to temporary total disability benefits. The magistrate, citing *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, points out the interplay between voluntarily abandoned employment

under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153 and *Pretty Prods.* The magistrate observed that "this action does present a question of the relationship between a *Staton*-type workforce abandonment and the *Pretty Prods.* doctrine that can preclude a voluntary job abandonment during a period of [temporary total disability]." Defining the relationship, the magistrate concluded *Staton* deals with eligibility, while *Pretty Prods.* presents "a doctrine applicable to job abandonment cases." (Mag. Dec., ¶51.) The magistrate ultimately determined that because relator abandoned the entire workforce with her disability retirement and for reasons unrelated to her industrial injury, she cannot receive the loss of wages at the heart of a temporary total disability compensation, as the possibility of employment no longer exists. Rather, her abandonment of the workforce severed any causal relationship between her industrial injury and her claimed disability, meaning the staff hearing officer appropriately denied the requested compensation.

{¶8} In an attempt to avoid such a result, relator suggests her disability retirement was not related solely to major depression, but included physical disabilities arising from her industrial injury. In support, relator points to the application for disability benefits under PERS that the employer completed. In response to an inquiry whether the applicant was permanently incapacitated from performing her duties, the employer indicated "yes" and stated relator "has been experiencing many physical and emotional challenges for several years." (Stipulated Evidence, 48.) Relator's argument fails for two reasons.

{¶9} Initially, relator failed to object to the magistrate's conclusions of fact, arguably forfeiting any alleged inaccuracy in the findings. More significantly, however, the

doctor whose report supported relator's application for PERS disability benefits stated the diagnosis to be major depressive disorder. Relator's doctor, not her employer, defines the conditions subject of relator's request for PERS disability benefits. Because relator's disability retirement is premised on a condition not allowed in the industrial injury, the *Staton* case controls. The magistrate appropriately determined the requested writ should be denied. Relator's objection is overruled.

### III. Disposition

{¶10} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objection overruled;  
writ denied.*

SADLER and TYACK, JJ., concur.

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# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Patricia Rouan,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-36
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Mahoning County,	:	
	:	
Respondents.	:	
	:	

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## MAGISTRATE'S DECISION

Rendered on December 29, 2010

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*Schiavoni, Schiavoni, Bush & Muldowney, and Shawn Muldowney, for relator.*

*Richard Cordray, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.*

*Elizabeth M. Phillips, Assistant Prosecuting Attorney, for respondent Mahoning County.*

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### IN MANDAMUS

{¶11} In this original action, relator, Patricia Rouan, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying her temporary total disability ("TTD") compensation on eligibility grounds, and to enter an order awarding her TTD compensation beginning July 8, 2007.

Findings of Fact:

{¶12} 1. On May 24, 2004, relator sustained an industrial injury while employed as a social services inspector for respondent Mahoning County ("Mahoning County"). As an employee of Mahoning County, relator was a member of the Ohio Public Employees Retirement System ("OPERS").

{¶13} 2. Initially, the industrial claim (No. 04-829452) was allowed for "fracture femoral condyle-closed, left; proximal tibial plateau fracture, left."

{¶14} 3. Apparently, relator received TTD compensation which was terminated effective May 15, 2005 by an order of the Ohio Bureau of Workers' Compensation ("bureau"). The bureau order of June 1, 2005 determined that the allowed conditions were at maximum medical improvement ("MMI"). The bureau order was not administratively appealed.

{¶15} 4. OPERS publishes a form captioned "Report of Attending Physician for Disability Applicant." Under the caption of the form, it is stated:

A member is considered eligible for a disability benefit if the disabling condition prevents the performance of duties for their last employment and the disabling condition is expected to last at least 12 months.

{¶16} On December 23, 2004, relator completed sections one and two of the form. By her signature on the form, relator authorized Dr. Kaza Cosmo to report to OPERS on relator's medical conditions. At section three of the form, Dr. Cosmo listed his diagnosis as "Major Depressive Disorder."

{¶17} The form also asks the physician: "Is member expected to \* \* \* return to work with their public employer?" In response, Dr. Cosmo marked the "no" box. Further, Dr. Cosmo certified that the medical condition is "permanently disabling."

{¶18} 5. On January 25, 2005, on an OPERS form, relator's employer certified its belief that "the applicant is permanently incapacitated for the performance of his/her duties."

{¶19} 6. On May 18, 2005, OPERS approved relator's disability application. On June 9, 2005, OPERS notified relator that the effective date of her disability retirement benefits is February 1, 2005.

{¶20} 7. Earlier, on February 4, 2005, relator moved for the allowance of a psychiatric condition in the claim.

{¶21} 8. Ultimately, following a July 18, 2005 hearing, a staff hearing officer ("SHO") disallowed the claim for "major depression, recurrent, severe." The SHO explained:

\* \* \* [T]he C-86, filed 2/4/05, is denied based on the 3/3/05 report of Dr. Byrnes, and his opinions contained therein, and is based further on the claimant's extensive, severe past medical history of psychological problems, including a six and a half month hospitalization in 2002-2003, and multiple prescriptive medications taken through to the date of injury. Therefore, this claim is disallowed for the condition of "MAJOR DEPRESSION, RECURRENT, SEVERE" as being causally unrelated by either direct causation or aggravation.

(Emphasis sic.)

{¶22} 9. Thereafter, the claim was additionally allowed for "arthrofibrosis of the left knee."

{¶23} 10. On March 2, 2006, relator moved for TTD compensation beginning January 5, 2006, based solely upon the newly allowed condition "arthrofibrosis of the left knee."

{¶24} 11. Ultimately, following a June 28, 2006 hearing, an SHO denied relator's March 2, 2006 motion on grounds that the newly allowed condition was also at MMI.

{¶25} 12. On October 16, 2007, relator filed an application for permanent and total disability ("PTD") compensation.

{¶26} 13. Following an April 10, 2008 hearing, an SHO issued an order denying the PTD application. In denying the application, the SHO determined that the industrial injury did not prohibit all sustained remunerative employment. Following consideration of the nonmedical disability factors, the SHO concluded that relator was medically and vocationally qualified for some sustained remunerative employment.

{¶27} 14. In August 2008, the industrial claim was additionally allowed for "aggravation of pre-existing arthritis left knee; post traumatic arthritis left knee."

{¶28} 15. On a C-84 dated July 8, 2009, attending physician Vincent J. Malkovits, D.O., certified a period of TTD from June 5, 2006 to an estimated return-to-work date of September 1, 2009. The C-84 form asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work."

In response, Dr. Malkovits wrote:

821.21	Fracture condyle, femoral
823.80	Fracture of lower leg
719.56	Arthrofibrosis

{¶29} The C-84 form also asks the physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for other allowed conditions being treated." In response, Dr. Malkovits wrote:

715.36	Osteoarthritis of knee
716.16	Traumatic arthropathy knee

{¶30} On the C-84 form, Dr. Malkovits wrote "Patient has not reached maximum medical improvement." (Emphasis omitted.)

{¶31} 16. On July 8, 2009, relator moved for TTD compensation, citing only the C-84 from Dr. Malkovits.

{¶32} 17. Following a September 10, 2009 hearing, a district hearing officer ("DHO") issued an order denying the July 8, 2009 C-84 request for TTD compensation.

{¶33} 18. Relator administratively appealed the DHO's order of September 10, 2009.

{¶34} 19. Following an October 19, 2009 hearing, an SHO issued an order that vacates the DHO's order of September 10, 2009. Nevertheless, the SHO's order of October 19, 2009 denies the July 8, 2009 motion and C-84 request for TTD compensation. The SHO's order explains:

The Staff Hearing Officer finds that the Injured Worker's C-86 Motion requests payment of temporary total disability compensation for the period beginning 06/05/2006 and continuing. The Staff Hearing Officer finds that there is no jurisdiction to consider the Injured Worker's request for temporary total disability compensation for the closed period from 06/05/2006 through 07/07/2007 inclusive, as the request for such compensation pre-dates the filing of the Injured Worker's motion of 07/08/2009 by a period in excess of two years. Pursuant to the provisions of Ohio Revised Code Section 4123.52, the Staff Hearing Officer finds that he

does not have jurisdiction to proceed in this regard given the two year statute of limitations described in that code section.

The Staff Hearing Officer denies the Injured Worker's request for temporary total disability compensation for the period from 07/08/2007 through 10/19/2009 inclusive. The Staff Hearing Officer finds that the Injured Worker applied for, and received, a disability pension through the Public Employees Retirement System, effective 02/01/2005. This disability pension was predicated exclusively upon the condition of "MAJOR DEPRESSION", a condition which is not recognized in this claim. The Injured Worker has not returned to work in any capacity since obtaining her disability pension in February 2005. Counsel for the Employer now argues that this Injured Worker's departure from the work force was for a reason not associated with the allowed conditions in this claim. As such, the Employer argues that this Injured Worker is barred from temporary total disability compensation for the period subsequent to 02/01/2005. The Staff Hearing Officer finds the Employer's argument to be with merit.

The Staff Hearing Officer concludes that this Injured Worker's departure from employment was for a reason not associated with the allowed condition in this claim and as such the Injured Worker is no longer entitled to temporary total disability compensation in this claim. In issuing this decision, the Staff Hearing Officer relies upon the holding set forth in State ex rel. Staton v. Industrial Commission (2001), 91 Ohio St.3d 407. Therein, the Ohio 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 disability 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 temporary total disability to claimants who voluntarily abandon 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.)

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.

In issuing this order, the Staff Hearing Officer rejects the Injured Worker's argument at hearing that the Employer is barred by the doctrine of Res Judicata from asserting the abandonment defense for this new period of temporary total disability compensation requested by the Injured Worker.

The Staff Hearing Officer rejects that contention.

The Staff Hearing Officer relies upon the holding set forth 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, the Injured Worker suffered an injury on 08/03/1981. The Injured Worker was subsequently laid off from her position of employment with the Employer of Record on October 1981. Subsequent to her layoff, the Injured Worker requested and received payment of temporary total disability for the period from 03/05/1984 through 09/30/1984, and for the period from 07/11/1985 through 07/28/1985. The Injured Worker subsequently requested payment for a new period of temporary total disability commencing 07/30/1985 through 04/10/1987, and continuing. The Employer asserted the defense that the Injured Worker's layoff precluded her receipt of temporary total disability compensation in this claim. In response, the Injured Worker's counsel argued that as the Employer of Record did not raise that affirmative defense with respect to the previous periods of compensation requested and paid, Res Judicata precludes the Employer from asserting that defense with respect to the new period of compensation requested by the Injured Worker.

In addressing this issue, the Ohio Supreme Court stated 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... [sic]

Claimant also argues that the layoff issued [sic] 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.

Here, in the present claim, the Injured Worker's request for temporary total disability compensation is for a period separate and distinct from the prior periods of compensation previously adjudicated by the Industrial Commission. Therefore, under the holding of B.O.C. Group, the Employer's counsel retains every right to assert the affirmative defense of voluntary abandonment of the work force as a defense against payment of temporary total disability compensation for the period beginning 07/08/2007. Accordingly, for these reasons, the Injured Worker's assertion that Res Judicata bars the Employer's presentation of the abandonment of employment issue is found to be without merit.

(Emphases sic.)

{¶35} 20. On November 12, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 19, 2009.

{¶36} 21. Relator moved for reconsideration. On January 6, 2010, the three-member commission, in a two-to-one vote, mailed an order denying reconsideration.

{¶37} 22. On January 15, 2010, relator, Patricia Rouan, filed this mandamus action.

#### Conclusions of Law:

{¶38} Two issues are presented: (1) whether the commission abused its discretion in determining that relator is ineligible for TTD compensation, and (2) whether the commission's eligibility determination is barred by res judicata.

{¶39} The magistrate finds: (1) the commission did not abuse its discretion in determining that relator is ineligible for TTD compensation, and (2) the commission's eligibility determination is not barred by res judicata.

{¶40} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶41} Turning to the first issue, relying upon *State ex rel. Staton v. Indus. Comm.* (2001), 91 Ohio St.3d 407, the commission, through its SHO, determined that relator is ineligible for TTD compensation because she abandoned the workforce for reasons unrelated to her industrial injury. In so determining, the commission relied upon relator's application for an OPERS disability retirement benefit and the OPERS approval of the application effective February 1, 2005. The commission also found that relator had not reentered the workforce subsequent to the OPERS approval of her application.

{¶42} In *Staton*, the claimant, Larry O. Staton, sustained an industrial injury in April 1993 that was eventually allowed for cervical and bilateral shoulder strain.

{¶43} Although Staton complained to the plant doctor of neck and shoulder soreness, no treatment was rendered and Staton returned to work.

{¶44} In early May 1993, Staton took a medical leave of absence that ultimately extended into a permanent retirement. Supporting documents from the attending physician all listed coronary artery disease and depression as the sole reasons for the retirement. Neither condition was allowed in the claim.

{¶45} Later, Staton moved for permanent total disability ("PTD") compensation, but the commission's neurologist opined that the allowed conditions were not at MMI.

Following an interlocutory commission order holding the PTD application in abeyance due to the temporary nature of the allowed conditions, Staton moved for TTD compensation.

{¶46} Ultimately, the commission denied Staton's request for TTD compensation.

Upholding the commission's decision, the *Staton* court explains:

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 TTD eligibility forever after. In response, *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 732 N.E.2d 355, declared that voluntary departure *to another job* no longer barred TTD. It retained, however, the prohibition against TTD to claimant's [sic] who voluntarily abandoned 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 TTD. This, of course, makes sense. One cannot credibly allege the loss of wages for which TTD is meant to compensate when the practical possibility of employment no longer exists.

In this case, claimant retired from the work force in 1993. [Footnote 1] All relevant retirement documentation from his attending physician listed claimant's nonallowed heart condition and depression as the reasons for departure. Appellants cite this as "some evidence" that claimant's work-force retirement was due to causes other than industrial injury, barring TTD.

[Footnote] 1. There has been no allegation from claimant that his retirement was less than total. Work-force departure is further evinced by claimant's PTD application—which was ultimately unsuccessful—which hinges on permanent departure from the labor market.

Id. at 410. (Emphases sic.)

{¶47} Here, citing *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, a case not addressed by the commission in its order, relator claims

that she cannot be found ineligible for TTD compensation because, as of the effective date of her OPERS disability retirement, i.e., February 1, 2005, she remained medically unable to return to her former position of employment at Mahoning County due to her industrial injury. In fact, relator did receive TTD compensation until May 5, 2005, when it was terminated by a bureau order on MMI grounds. There appears to be no dispute here that, in fact, relator was medically unable to return to her former position of employment at Mahoning County at the effective date of her OPERS disability retirement benefit.

{¶48} While not cited by relator, the magistrate notes that the *Pretty Prods.* doctrine was further explained in *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499.

{¶49} In *Reitter Stucco*, the claimant, Tony A. Mayle, was discharged from his employment for comments he made about the company's president following his industrial injury. Prior to his discharge, the employer had been paying Mayle wages in lieu of TTD compensation. The employer argued that Mayle had voluntarily abandoned his employment under the rationale of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153, but the commission held that because Mayle was TTD when he was fired, *Pretty Prods.*, rather than *Louisiana-Pacific*, was controlling.

{¶50} In *Reitter Stucco*, at ¶7-11, the court analyzed and explained the relationship between *Louisiana-Pacific* and *Pretty Prods.*:

Two cases are pertinent here—*Louisiana-Pacific*, 72 Ohio St.3d 401, 650 N.E.2d 469, and *Pretty Prods.*, 77 Ohio St.3d 5, 670 N.E. 2d 466. *Louisiana-Pacific* involves the classic voluntary/involuntary-departure debate, but in the context of a discharge, rather than the usual context of an employee's quitting. In *Louisiana-Pacific*, the claimant argued that his employer, and not he, initiated his separation from

employment when it fired him. The employee argued that his separation was not a voluntary decision and must be considered an involuntary departure that did not disrupt his eligibility for temporary total compensation.

We disagreed. Quoting *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202, we stated that although the employer may have formalized the separation, it was the claimant who had initiated it when he chose to engage in the misconduct that caused the firing. This statement stems from the principle that " 'one may be presumed to tacitly accept the consequences of his voluntary acts.' " *Louisiana-Pacific*, 72 Ohio St.3d at 403, 650 N.E.2d 469, quoting *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533.

The presumption of tacit acceptance, however, is fair only if the consequence is one of which the claimant was, or should have been, aware. See *State ex rel. Liposchak v. Indus. Comm.* (1995), 73 Ohio St.3d 194, 652 N.E.2d 753. Thus, we established the three-part test in *Louisiana-Pacific* that defined a termination as "voluntary" when it is "generated by the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee." *Id.* at 403, 650 N.E.2d 469.

*Pretty Prods.* was decided shortly after *Louisiana-Pacific*. In *Pretty Prods.*, we held that the character of the employee's departure—i.e., voluntary versus involuntary—is not the only relevant element and that the timing of the termination may be equally germane. In *Pretty Prods.*, we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled. *Id.*, 77 Ohio St. 3d at 7, 670 N.E. 2d 466; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, ¶ 10. Thus, even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the discharge occurred.

The present litigants treat the two cases as mutually exclusive, with the company urging that *Louisiana-Pacific* is dispositive and Mayle and the commission citing *Pretty Prods.* Yet *Louisiana-Pacific* and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. If the *Louisiana-Pacific* three-part test is satisfied, however, suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination. We thus take this opportunity to reiterate that *Louisiana-Pacific* and *Pretty Prods.* are not mutually exclusive and that they may both factor into the eligibility analysis.

{¶51} Of course, here, *Louisiana-Pacific* is not involved because this case does not involve a discharge. However, this action does present a question of the relationship between a *Staton*-type workforce abandonment and the *Pretty Prods.* doctrine that can preclude a voluntary job abandonment during a period of TTD.

{¶52} Key to resolution of the issue is the observation that *Pretty Prods.* presents a doctrine applicable to job abandonment cases while *Staton* deals with eligibility when the claimant has abandoned the entire workforce even when workforce abandonment is due to circumstances beyond the claimant's control.

{¶53} Here, it is not actually disputed by relator that she abandoned the entire workforce at the time that she applied for the OPERS disability retirement.

{¶54} Because relator abandoned the entire workforce in early 2005 for reasons unrelated to her industrial injury, she cannot credibly allege the loss of wages for which TTD is meant to compensate when the practical possibility of employment no longer exists. That is, workforce abandonment severs any causal relationship between her industrial injury and her claimed disability.

{¶55} Once causal relationship has been severed, it is not revived at some later time simply because relator remains medically unable to return to the former position of employment.

{¶56} In short, relator's reliance upon *Pretty Prods.* is misplaced. The commission correctly relied upon *Staton* in determining relator to be ineligible for the requested TTD compensation.

{¶57} As earlier noted, the second issue is whether the commission's eligibility determination is barred by *res judicata*. The magistrate finds that it is not.

{¶58} The issue here was correctly addressed by the commission in its SHO's order of October 19, 2009. The SHO correctly relied upon *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199. In the *B.O.C. Group* case, the court states:

*Res judicata* operates "to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St. 3d 9, 10, 16 OBR 361, 362, 475 N.E. 2d 782, 783. It applies "not only to defenses which were considered and determined but also to those defenses which could properly have been considered and determined." *State, ex rel. Moore, v. Indus. Comm.* (1943), 141 Ohio St. 241, 25 O.O. 362, 47 N.E. 2d 767, paragraph two of the syllabus; *Rogers v. Whitehall* (1986), 25 Ohio St. 3d 67, 25 OBR 89, 494 N.E. 2d 1387.

The principle applies to administrative proceedings. *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St. 3d 260, 31 OBR 463, 510 N.E. 2d 373. However, because of the commission's continuing jurisdiction under R.C. 4123.52, "the defense of *res judicata* has only a limited application to compensation cases." *Cramer v. Indus. Comm.* (1944), 144 Ohio St. 135, 138, 29 O.O. 176, 177, 57 N.E. 2d 233, 234.

*Res judicata* requires "an identity of parties and issues in the proceedings." *Beatrice Foods Co. v. Lindley* (1982), 70 Ohio St. 2d 29, 35, 24 O.O. 3d 68, 71, 434 N.E. 2d 727, 731. \* \* \*

\* \* \*

\* \* \* 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 moment's 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 \* \* \*."

Id. at 200-01.

{¶59} Here, relator argues:

\* \* \* In the instant case, the issue of abandonment was specifically raised and argued at a previous Staff Hearing Officer hearing on April 10, 2008. Although the Staff Hearing Officer denied the Relator's permanent total disability application, the Staff Hearing Officer did not find as the employer had requested that the Relator had voluntarily abandoned her employment and, therefore, was not entitled to permanent total disability. Accordingly, the Relator believes that the employer is barred from raising the same argument as subsequent to the Industrial Commission hearing.

(Relator's brief, at 6.)

{¶60} To begin, the record fails to support relator's assertion that Mahoning County presented its eligibility defense before the SHO who heard the PTD application. (The record here contains no transcript of the October 16, 2007 hearing.) However, it is clear that the SHO's order denying the PTD application does not address, or in any way adjudicate, an eligibility defense.

{¶61} Thus, we do not know from the record whether Mahoning County submitted its eligibility defense at the PTD hearing and the SHO decided not to address it, or that Mahoning County simply failed to submit its eligibility defense at the PTD hearing. Nor does Mahoning County concede in this action that it never previously raised the defense.

{¶62} In either event, *B.O.C. Group* tells us that Mahoning County was not barred by res judicata from raising its eligibility defense at the administrative hearings on relator's July 8, 2009 motion for TTD compensation.

{¶63} Thus, the commission's eligibility determination is not barred by res judicata.

{¶64} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

          /s/ Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

#### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).