

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

THE STATE ex rel.	:	CASE NO. 21AP000054
HUNTINGTON BANCSHARES	:	
INCORPORATED,	:	MAGISTRATE SCHOLL
	:	
Relator,	:	
	:	
v.	:	
	:	
JENARIUS TAKU, et al.,	:	
	:	
Respondents.	:	

BRIEF OF RESPONDENT, INDUSTRIAL COMMISSION OF OHIO

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I. INTRODUCTION

In this original action in mandamus, Relator, Huntington Bancshares Incorporated (“Huntington”), challenges an order issued by the Industrial Commission of Ohio (“commission”), where it determined that Respondent, Jenarius Taku (“Taku”), was entitled to receive temporary total disability (“TTD”) compensation in his workers’ compensation claim.

Following the language in the newly enacted workers’ compensation statute, R.C. 4123.56(F), effective September 15, 2020, the commission found that Taku was temporarily and totally disabled and unable to work after undergoing an approved left knee surgery in his workers’ compensation claim on June 19, 2020, and, therefore, was entitled to receive TTD compensation from June 19, 2020, through November 8, 2020, and to continue upon submission of supporting medical evidence. The commission relied upon evidence in the record to reach this conclusion. Thus, the commission did not abuse its discretion and the requested writ should be denied.

II. STATEMENT OF THE FACTS AND CASE

On September 5, 2019, while working as an “IT Network Engineer,” Taku sustained injuries in the course of, and arising out of, his employment with Huntington. (Stipulation of Evidence at 9, 66, “S. ___”). The First Report of Injury, which Taku filed in his workers’ compensation claim, indicates that he fell down stairs while heading down to the cafeteria. (S. 9). Taku’s claim was initially allowed for a left knee sprain. (S. 3-5).

On that same day, September 5, 2019, Taku saw Robert Whitehead, M.D. for an ortho consult. (S. 1-5). At this initial consult, Dr. Whitehead placed Taku on work restrictions for a couple of weeks, indicating he could not kneel or squat, took him off work the next day, and ordered an MRI. (S. 1-5). Taku returned to work on September 9, 2019, as instructed by Dr. Whitehead. (S. 1-5). A few weeks later, on September 30, 2019, an MRI was performed on Taku’s left knee. (S. 6-7). The MRI showed a “[n]ear full-thickness tear of the midportion of the ACL with only a few ill-defined disorganized fibers remaining intact.” (S. 6). Consequently, following the MRI, Taku’s claim was amended to include a left knee ACL

tear. (S. 8, 12-15). Huntington also accepted the claim for this additionally allowed condition. (S. 14-15). Dr. Whitehead then referred Taku to Keith LaDu, D.O. for further treatment. (S. 10-11).

Taku continued to work with restrictions until October 15, 2019, when he was laid off due to an Employer initiated reduction in work force. (S. 179-180). Following his lay off, Taku began searching for a new job, and uploaded an affidavit to the claim file attesting to this. (S. 126-174). In his affidavit, Taku listed all of the jobs he applied to and interviewed for, and provided the results of each job search, including supporting documentation for each. (S. 126-174). Although Taku received a job offer by one of the companies he had several interviews with, unfortunately, his job search was unsuccessful. (S. 108-111, 126-174, 179-181). As a result, on March 29, 2020, Taku applied to receive unemployment compensation. (S. 107, 112-114). Taku began receiving unemployment compensation on June 13, 2020, for the period beginning on April 4, 2020. (S. 107, 115).

Shortly after he was laid off from Huntington, on October 21, 2019, Dr. LaDu examined Taku for the first time. (S. 10-11). After reviewing the MRI, Dr. LaDu recommended surgical intervention. (S. 10-11). A request for left knee surgery and physical therapy was submitted, and, a few months later, on January 17, 2020, the surgery was approved in Taku's claim. (S. 16). Taku's surgery was originally scheduled for March 31, 2020, but due to pre-operative clearance issues and COVID-19 issues, the surgery did not take place until June 19, 2020. (S. 26-33, 180).

On June 19, 2020, Dr. LaDu performed a left knee arthroscopy with a partial lateral meniscectomy and an ACL reconstruction with hamstring autograft. (S. 30). Taku was then taken off work from June 19, 2020, the date of surgery, until September 21, 2020, which was later extended to November 9, 2020, because Taku needed additional time to heal from his surgery. (S. 34-35, 101-102). Dr. LaDu listed "off work healing from surgery on 6/19/2020" as the reason Taku could not return to his former position of employment during this time period. (S. 34-35, 101-102).

A few months after his surgery, on September 2, 2020, the Ohio Department of Job and Family Services ("ODJFS") issued a

determination that Taku was overpaid unemployment benefits beginning on June 14, 2020, the week of his surgery. (S. 112). In its order, the agency found “that beginning 06/14/2020, the claimant was **not able to work** and, therefore, failed to meet the requirement of Ohio Revised Code Section 4141.29(A)(4)(a)(i). An individual is ineligible from Sunday of the week in which the issue started through Saturday of the week in which the issue ended.” (Emphasis added.) (S. 112). Since Taku was not able to work due to his surgery on June 19, 2020, Taku was ordered to repay \$7,920.00 of unemployment benefits that he received the week of his surgery and the weeks following his surgery during his recovery. (S. 112-113).

After several months of physical therapy, Taku was still experiencing a great deal of pain; therefore, Dr. LaDu recommended and inserted a knee injection into Taku’s left knee to help alleviate some of his pain. (S. 103). Dr. LaDu then indicated that he would need to “keep [Taku] off work over the next six weeks.” (S. 103).

Approximately four weeks later, with little-to-no improvement following the knee injection, Dr. LaDu ordered an updated MRI, which

was approved on November 4, 2020. (S. 117-118). The MRI was conducted on November 24, 2020, and showed a 0.3 cm radial tear of the posteromedial meniscal root, mild chronic thickening of the proximal femoral portion of the MCL, mild ¼ noncomplex suprapatellar effusion, and a tibial osteophyte posterior to the tibial tunnel entrance that compressed upon the graft inserted during the prior ACL repair. (S. 121-125). Based on these results, Dr. LaDu recommended a second surgery. (S. 124-125). Specifically, Dr. LaDu recommended “a left knee arthroscopy with partial medial meniscectomy and chondroplasty and attempt at debriding the tibial osteophyte posterior the tibial tunnel entrance.” (S. 124-125). Dr. LaDu indicated that Taku wanted to proceed with the surgery as soon as possible. (S. 124). The request for surgery was submitted, but it was denied on December 14, 2020, as it was unrelated to the allowed conditions. (S. 176). Following this denial, on December 17, 2020, Taku requested to have the condition of “medical [sic] meniscus tear, left knee” added to his claim, and renewed his request to have a second surgery on his left knee, which was still pending at the

time the commission heard Taku's request to receive TTD compensation. (S. 182).

As expected, Taku never re-filed for unemployment benefits. (S. 107). Instead, because he was unable to work due to the approved surgery in his claim, he applied for TTD compensation. (S. 66). Following Taku's request to receive TTD compensation, Huntington objected and asked that the claim be referred to the commission for a hearing on the issue. (S. 75-76). Taku then made a request to have the hearing expedited on October 7, 2020, due to personal reasons. (S. 104-105). Shortly thereafter, on October 13, 2020, a commission district hearing officer ("DHO") heard the issue, and denied Taku's request to receive TTD compensation from the date of the surgery, June 19, 2020, to October 13, 2020, the date of the hearing. (S. 104-105, 115-116). In reaching this decision, the DHO referenced the new statute, and concluded that Taku was not working because Huntington laid him off on October 15, 2019; therefore, according to the DHO, because Taku was not working for a reason unrelated to Taku's industrial injury, Taku was not entitled to receive TTD compensation for the requested period. (S. 115-116). Taku

appealed the DHO order, and the matter was referred to a commission staff hearing officer (“SHO”). (S. 120, 179-181).

On December 10, 2020, the SHO vacated the order of the DHO, and granted TTD compensation from June 19, 2020, through November 8, 2020, and to continue upon submission of supporting medical evidence. (S. 179-181). The SHO explained that since “there is no medical evidence contradicting the certification of [TTD] from all employment beginning 06/19/2020 from Keith LaDu, D.O., * * * [t]he sole contested issue relative to this request for [TTD] is whether [Taku] is eligible to receive [TTD] compensation beginning 06/19/2020 when consideration is given to the provision of R.C. 4123.56(F).” (S. 179). In line with the DHO, the SHO referenced the new statute, but, in analyzing it, found that Taku “has been temporarily and totally disabled from performing all employment, including the former position of employment, since the date he underwent approved left knee surgery on 06/19/2020.” (S. 179). The SHO further explained that “as of 06/19/20 when [Taku] underwent left knee surgery and was disabled from all work by Dr. LaDu, [Taku] ‘was unable to work as a direct result’ of the allowed conditions.” (S. 180). Furthermore, in

pointing to Taku's affidavit and supporting job search documentation submitted the day before the SHO hearing, the SHO found that Taku "was actively searching for employment prior to his surgery and had not abandoned the work force following his Employer initiated lay off," and, as a result, was entitled to receive TTD compensation based on the statute. (S. 179-181).

Huntington appealed the SHO's decision and, on January 7, 2021, the commission issued an order refusing to hear Huntington's appeal. (S. 212-213). Following this decision, Huntington filed this action in mandamus requesting that the commission order granting TTD compensation be vacated.

III. LAW AND ARGUMENT

A. Standard of Review

"A writ of mandamus is an extraordinary remedy." *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.*, 87 Ohio St.3d 325, 334, 720 N.E.2d 901 (1999). For entitlement to a writ of mandamus, a relator must demonstrate: (1) a clear legal right to the relief sought; (2) a corresponding clear legal duty on the part of the respondent; and (3) the lack of an

adequate remedy in the ordinary course of the law. *State ex rel. Moore v. Malone*, 96 Ohio St.3d 417, 420, 775 N.E.2d 812 (2002); *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967). “A clear legal right to a writ of mandamus exists only where the relator shows that the [commission] abused its discretion * * *.” *State ex rel. Taylor v. Indus. Comm.*, 150 Ohio App.3d 309, 2002-Ohio-6451, 780 N.E.2d 1049, ¶ 21 (10th Dist.).

The determination of disputed facts is within the final jurisdiction of the commission. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.3d 396, 433 N.E.2d 159 (1982). The court is not to evaluate and judge the credibility of evidence that was before the commission, such that it undertakes the role of “super commission.” *State ex rel. Burley v. Coil Packaging, Inc.*, 31 Ohio St.3d 18, 20, 508 N.E.2d 936, 938 (1987).

B. The commission did not abuse its discretion when it granted temporary total disability compensation pursuant to R.C. 4123.56(F) after finding Taku was unable to work and not working due to an approved left knee surgery in his workers’ compensation claim.

As indicated in the workers’ compensation statute, and made clear by the Ohio Supreme Court, TTD is defined as “a disability that prevents a

worker from returning to his former position of employment.” *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630, 631, 433 N.E.2d 586 (1982). At the outset, TTD compensation was payable to an injured worker if he was unable to return to his former position of employment. *Id.* Over the years, however, the courts decided a long line of cases that created the doctrine of voluntary abandonment, which prevented awards of TTD compensation to injured workers in certain circumstances. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145, 504 N.E.2d 451 (10th Dist.1985) (finding that a voluntary retirement may preclude a TTD award if the injured worker voluntarily removed himself permanently from the work force); *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 517 N.E.2d 533 (1987) (holding an injured worker is not entitled to TTD compensation if his own actions, rather than his work injury, prevents him from returning to his former position of employment); *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 383, 544 N.E.2d 677 (1989) (indicating that an injured worker’s intent is important when considering voluntary abandonment, but consideration must also be given to all of the relevant circumstances

existing at the time of the alleged abandonment, which “may be inferred from words spoken, acts done, and other objective facts.”); *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 7, 670 N.E.2d 466 (1996) (holding that “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.”); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51, ¶ 35 (explaining that the injured worker must show “a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings” in order to receive TTD compensation). These cases, along with many other voluntary abandonment cases, are what the commission relied on in issuing awards for TTD compensation and denying awards based on voluntary abandonment. That was, however, until the Ohio Supreme Court’s decision in *State ex rel. Klein v. Precision Excavating & Grading Co.*, 155 OhioSt.3d 78, 2018-Ohio-3890, 119 N.E.3d 386, which was issued on September 27, 2018. As this Court is aware, the decision in *Klein* overruled a number of voluntary abandonment cases, some entirely and some only partially, and set forth

a different legal principle upon which the commission was to base its decisions—if an injured worker “voluntarily removes himself from his former position of employment for reasons unrelated to a workplace injury, he is no longer eligible for TTD compensation, even if the claimant remains disabled at the time of his separation from employment.” *Klein* at ¶ 29. *Klein* was to be applied to all administrative decisions from September 27, 2018, forward.

Two years after the Supreme Court’s decision in *Klein*, though, in order to clarify the unsettled caselaw regarding TTD compensation and voluntary abandonment, the Ohio legislature passed H.B. No. 81, which modified R.C. 4123.56 by adding the following new language:

(F) If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified. If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

R.C. 4123.56(F), effective Sept. 15, 2020. The statute is broken down into three different sentences. *Id.* The first sentence states that an employee is eligible for TTD benefits if he is unable to work as a direct result of an impairment arising from an injury, as long as he is otherwise qualified. *Id.* The second sentence explains that an employee is ineligible for TTD benefits if he is not working for reasons unrelated to the allowed injury. *Id.* Finally, the third sentence makes clear that all prior caselaw on the doctrine of voluntary abandonment are superseded by this section of the statute. *Id.* Still, a closer examination of each sentence as it applies to the facts of this case is warranted.

1. The commission did not abuse its discretion when it found that Taku was unable to work as a direct result of an impairment arising from his work injury and is eligible to receive TTD compensation.

The beginning of the statute states, “[i]f an employee is **unable to work** or suffers a wage loss **as the direct result of an impairment arising from an injury** or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified.” (Emphasis added.) R.C. 4123.56(F). Here, the

beginning part of this sentence—whether an employee is unable to work as a direct result of an impairment arising from an injury—begins the analysis.

In this case, following an MRI, Taku’s claim was allowed and accepted by Huntington for the additional condition of a left knee ACL tear. (S. 8, 12-15). Based on a recommendation from his treating physician, Dr. LaDu, Taku subsequently underwent left knee surgery on June 19, 2020, to repair his ACL. (S. 30-33). This surgery was also approved in Taku’s claim. (S. 16). After the surgery, Dr. LaDu took Taku off work from June 19, 2020, the date of surgery, until November 9, 2020. (S. 34-35, 101-102). Dr. LaDu listed “off work healing from surgery on 6/19/2020” as the reason Taku could not return to his former position of employment during this time period. (S. 34-35, 101-102). Therefore, Taku was physically unable to work from June 19, 2020, until at least November 9, 2020, based on the record, due to his claim approved knee surgery. (S. 34-35, 101-102).

To further support this, on September 2, 2020, ODJFS issued an overpayment beginning the week of Taku’s surgery because Taku was

“not able to work” and “failed to meet the qualifications under R.C. 4141.29(A)(4)(a)(i).” (S. 112). Pursuant to R.C. 4141.29(A)(4)(a)(i), an individual is eligible to receive unemployment benefits if the individual “is **able** to work and **available for suitable work * * * .**” (Emphasis added.) In this case, due to his surgery, Taku was not able to work or available for suitable work beginning the week of his surgery, which was Sunday, June 14, 2020, and that is why ODJFS declared an overpayment starting on that date. Accordingly, Taku meets the criteria for the first sentence of R.C. 4123.56(F)—he was not able to work due to an impairment arising from his work injury. This is also why he was not entitled to unemployment benefits, but is qualified to receive TTD compensation for the requested time period since he was recovering from his claim approved surgery. Consequently, the commission properly found that Taku was unable to work as a direct result of an impairment arising from his work injury and is eligible to receive TTD compensation.

2. The commission did not abuse its discretion when it found that Taku was entitled to receive TTD compensation because he was not working as a direct result of an impairment arising from his work injury.

The second sentence of the statute states, “[i]f an **employee is not working** or has suffered a wage loss **as the direct result of reasons unrelated to the allowed injury or occupational disease**, the employee is not eligible to receive compensation under this section.” (Emphasis added.) R.C. 4123.56(F). After already finding that an injured worker is unable to work as a direct result of an impairment arising from his work injury, the commission, as the fact-finder, can then determine if the injured worker is not working for some other reason-that would disqualify him from receiving TTD compensation. In looking at the second sentence, the question is not simply if the injured worker is working, and if not, then he is disqualified. Instead, the question becomes whether he is not working **for reasons unrelated to the allowed injury**. Then, and only then, is the injured worker not eligible to receive TTD compensation. Here, after reviewing all of the facts, the credibility of the evidence presented, and the second sentence of the statute, the commission found

that Taku remains eligible and “otherwise qualified” to receive TTD compensation. (S. 179-181).

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,” and the determination of disputed facts is well within the final jurisdiction of the commission. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 169, 429 N.E.2d 433, 436 (1981); *Allerton*, 69 Ohio St.3d at 396, 433 N.E.2d 159. In examining the second sentence of the statute, and showing that it did not disqualify Taku from receiving TTD compensation, the SHO went into an analysis of Taku’s job search following his Employer initiated reduction in work force and lay off on October 15, 2019. (S. 179-181). Since Taku was not working at the time of his surgery, this was necessary to determine if he was “not working” either “as the direct result of reasons unrelated to the allowed injury or occupational disease” or because of Taku’s allowed work injury.

In support of the fact that Taku was actively searching for a job prior to his approved knee surgery, and would have obtained one “but for” his surgery, he submitted an affidavit on December 9, 2020, the day before

the SHO hearing. (S. 126-174). In that affidavit, Taku listed all of the jobs he applied to and interviewed for, and provided the results of each job search, including supporting documentation for each. (S. 126-174). Specifically, for a position as a Network Engineer for TravelClick, he indicated that “[he] told them [he] was expecting a surgery, and they never called [him] after that.” (S. 126-174). Also, for a position as the Lead Network Engineer for OCLC, he stated he “interviewed three times, and was rejected as soon as [he] told them [he] would be having surgery in March.” (S. 126-174). Again, for a position with CBC, he was offered the job, but “[t]hey revoked the job offer because of [his] scheduled surgery.” (S. 126-174). Before awarding TTD compensation to Taku, the SHO read the record, including Taku’s affidavit and supporting documentation, conducted an administrative hearing, and in consulting the statute found that “[Taku] would have been working prior to the surgery **but for** the allowed conditions and the necessity for surgery associated with the allowed conditions.” (Emphasis added.) (S. 180). As the exclusive evaluator of the evidence and judge of credibility, this finding is well within the discretion of the commission.

Using inapplicable voluntary abandonment caselaw and the second sentence of the statute, Huntington believes that Taku being laid off and unable to secure another position of employment prior to his approved knee surgery is sufficient to disqualify Taku from receiving TTD compensation. (Huntington Brief at 16-22). That is simply incorrect. Huntington seems to take a completely unsupported position to say that an injured worker can only receive TTD compensation if he is working at the time of his request for TTD compensation, even if the reason he is not employed or not working is of no fault of his own. (Huntington Brief at 20). In essentially making an unenforceable voluntary abandonment argument, Huntington completely ignores the end of the second sentence, which states “as the direct result of reasons unrelated to the allowed injury or occupational disease * * *.” Reading the sentence as a whole, the statute does not make it a requirement that an injured worker is employed and working at the time of his TTD request in order to receive TTD compensation. In fact, the new statute specifically anticipates that an injured worker may not be working, and as long as it is not for reasons unrelated to the work injury, the injured worker is “otherwise qualified”

and eligible to receive TTD compensation. As such, based on the current law, an injured worker is eligible to receive TTD compensation if he is “unable to work” (the first sentence) and “not working” (the second sentence) “as the direct result of an impairment arising from an injury or occupational disease,” as is the case here. As such, Taku satisfies both sentences of the TTD statute—first, the eligibility, and second, the potential, but unsuccessful, disqualification.

Therefore, in following the third sentence of the statute and not applying old voluntary abandonment caselaw, the commission properly exercised its discretion as the factfinder to conclude that, given the circumstances and a good faith job search, Taku was unable to work due to his impairment and “but for” his approved surgery in the claim would in fact be working somewhere. Therefore, TTD compensation was warranted, and the decision of the commission should not be disturbed.

3. The commission did not abuse its discretion when it did not rely on inapplicable voluntary abandonment caselaw to reach its conclusion.

Finally, the language in the statute specifically provides that “[i]t is the intent of the general assembly to supersede any previous judicial

decision that applied the doctrine of voluntary abandonment to a claim brought under this section.” R.C. 4123.56(F). Therefore, **all** of the cases Huntington cites to in support of its arguments relating to TTD compensation—*State ex rel. Andrasi v. Indus. Comm.*, 10th Dist. Franklin No. 15AP-531, 2016-Ohio-4971; *Ashcraft*, 34 Ohio St.3d 42, 517 N.E.2d 533; *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587, 828 N.E.2d 97; *State ex rel. Goff v. Indus. Comm.*, 10th Dist. Franklin No. 15AP-1016, 2016-Ohio-7270; *State ex rel. James v. Wal-Mart Stores, Inc.*, 149 Ohio St.3d 700, 2017-Ohio-1426, 77 N.E.3d 952; *McCoy*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51; *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, 896 N.E.2d 140; and *State ex rel. Vonderheide v. Multi-Color Corp.*, 156 Ohio St.3d 403, 2019-Ohio-1270, 128 N.E.3d 188, as well as any other cases involving the doctrine of voluntary abandonment—were all superseded by the statute. (Huntington Brief at 16-22). Consequently, these cases cannot be used or relied upon by the commission, or this Court, in analyzing a claim brought under the newly enacted section of the statute.

IV. CONCLUSION

The commission had some evidence to support its determination that Taku was entitled to receive TTD compensation since he was unable to work and not working due to an approved knee surgery in the claim. For all of the foregoing reasons, and as the evaluator of the evidence, the commission submits that it did not abuse its discretion in reaching its conclusion. Accordingly, the requested writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Respondent, Industrial Commission of Ohio was served on this 28th day of June, 2021, to:

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