2021 LEGAL UPDATE

Getaway CLE
Workers' Compensation Seminar
August 4, 2021
Columbus, Ohio

Prepared By:
Jon H. Goodman
Jon Goodman Law, LLC
6797 North High St., Suite 314
Worthington, Ohio 43085
(614) 985-3552 (phone)
(614) 985-4133 (fax)
jon@jongoodmanlawoffice.com

***State ex rel. Digiacinto v. Indus. Comm.*, 159 Ohio St.3d 346, 2020-Ohio-707** - claimant was injured and last worked in 2001. In 2003, he was awarded social security disability (SSDIB) based on a finding that he could only perform sedentary work.

Claimant sought PTD in 2007 and was denied. The Industrial Commission found that claimant was capable of medium work. Claimant filed for PTD again in 2013 and was again denied. The Industrial Commission denied the second PTD application on the basis that he was capable of sedentary work and that the non-medical disability factors did not preclude him from qualifying for sedentary work.

In 2014, the claim was additionally allowed for psychological conditions and temporary total was awarded. There is no evidence that the employer or BWC raised the issue of voluntary abandonment at that time. Claimant filed a third PTD application which was also denied, based on voluntary abandonment. The Industrial Commission noted that despite being found capable of medium work in 2007 and sedentary work in 2014, claimant had not returned to work, nor had he sought vocational rehabilitation, and thus that he abandoned the workforce for reasons other than the allowed conditions. The Industrial Commission's order denying the third PTD application did not mention the 2003 SSDIB decision.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the SSDIB decision was relevant to the voluntary abandonment issue and that it could not be presumed that the Industrial Commission considered it.

The Industrial Commission appealed to the Supreme Court as of right. The Court reversed, finding that the Industrial Commission has no duty to list the evidence it relied on in support of its decision. On the contrary, as long as the Industrial Commission cites the evidence

upon which it relies and does not attempt to list all the evidence that it considers, there is a presumption that the Industrial Commission considered all of the evidence before it. See *State ex. Rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250 (1996); *State ex rel. Buttolph v. Gen. Motors Corp. Terex Div.*, 79 Ohio St.3d 73 (1997). However, the Industrial Commission abuses its discretion if it endeavors to list all the evidence it reviews and omits evidence that could impact the outcome of the dispute. See *State ex rel. Shields v. Indus. Comm.*, 74 Ohio St.3d 264; *State ex rel. Fultz. v. Indus. Comm.*, 69 Ohio St.3d 327 (1994); *State ex rel. Staton v. Indus. Comm.*, 91 Ohio St.3d 407 (2001). The Industrial Commission also abuses its discretion by finding that a party fails to submit evince supporting its position when there is such evidence. See *State ex rel. Abex Corp. v. Indus. Comm.*, 74 Ohio St.3d 125 (1995).

The Court found that the Industrial Commission's decision did not list all of the evidence it considered and therefore had no obligation to list the SSDIB decision. Because the Industrial Commission listed only the evidence on which it relied, it was presumed that it considered all of the evidence before it. Moreover, the Court found that even if the Industrial Commission had listed the evidence it considered and omitted the SSDIB decision, it would not have changed the outcome because the SSDIB decision was based, in part, on non-allowed conditions and also because it found claimant capable of sedentary work.

Note – for reasons that are unclear, claimant failed to pursue the argument that the BWC/employer waived voluntary abandonment because they failed to raise the defense when temporary total was awarded for the allowed psychological conditions in 2014-2015. As discussed in the review of the next case, that argument likely would have precluded voluntary abandonment from being used to defeat the third PTD application because the voluntary abandonment defense is waived if it is not asserted when a party has a chance to raise it. Effectively and unfortunately, clamant waived the waiver argument.

***State ex rel. Navistar, Inc. Indus. Comm.*, 160 Ohio St.3d 7, 2020-Ohio-712** – claimant sustained two significant injuries working for employer before retiring in 2003. He eventually then worked part-time for another company from 2004 – 2010. While he was working part time, he had surgery for an allowed condition and was awarded temporary total. The part-time employer closed in 2010 and claimant did not return to work in any capacity thereafter.

In 2015, claimant filed for PTD which was granted by the Industrial Commission based on reports from Drs. Rutherford and Grunstein. Dr. Grunstein opined that claimant could perform some activities for a few hours each day but not enough for sustained work of any kind. The Industrial Commission found that the allowed physical conditions precluded sustained remunerative employment and therefore did not discuss the non-medical disability factors. No mention was made of a voluntary abandonment argument in the Industrial Commission's order. On reconsideration, the employer asserted a voluntary abandonment defense for the first time. The employer claimed that there were facts in the record that supported this defense even though it was not argued at the PTD hearing. The Industrial Commission refused reconsideration and the employer sought a writ of mandamus in the Tenth District Court of Appeals.

The appellate court held that the employer waived the voluntary abandonment defense by not arguing it at the PTD hearing and that there was some evidence to support the Industrial Commission's award of PTD. The employer appealed to the Supreme Court as of right.

While the case was pending before the Court, claimant passed away. The Court ordered the employer to show cause why the mandamus action should not be abated by claimant's death. The employer responded and the Court proceeded to address the abatement issue and the merits in its opinion.

The Court held that even though a claimant's death typically abates a workers' compensation claim pursuant to Ohio Adm.Code 4123-5-21, there is an exception when an employer appeals from a decision that ordered compensation paid. See *Youghiogheny & Ohio Coal Co. v. Mayfield*, 11 Ohio St.3d 70 (1984). The Court reasoned that if the employer prevailed, it would either be reimbursed what it had paid from the surplus fund pursuant to R.C. 4123.512(H) and/or save on the amount it paid for the safety and hygiene fund assessment. See R.C. 4123.35(J); Ohio Adm.Code 4123-17-32(B). Thus, there remained a justiciable issue.

On the merits, the Court found that the employer waived the voluntary abandonment defense by failing to raise it at the PTD hearing. The fact that there were issues mentioned at the hearing that could allow the Industrial Commission to infer that voluntary abandonment occurred was not enough. The Court cited Ohio Adm.Code 4121-3-34(D), which states:

> If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself or herself from the work force, the injured worker shall be found not to be permanently and totally disabled. *If evidence of voluntary abandonment is brought into issue*, the adjudicator shall consider evidence that is submitted of the injured workers' medical condition at or near the time of removal/retirement.

The Court noted that the Industrial Commission abuses its discretion by failing to address voluntary abandonment if it is raised and argued, or by addressing it for the first time in an order when it is not argued at the hearing. See *State ex rel. Stevens v. Indus. Comm.*, 142 Ohio St.3d 313, 2015-Ohio-1352 (employer raised and argued the issue but the Industrial Commission failed to address it); *State ex rel. Jenkins v Indus. Comm.*, 2017-Ohio-7896 (10th Dist.) (issue not argued at hearing but Industrial Commission denied compensation based on voluntary abandonment anyway thereby violating claimant's right to due process). Moreover, if the issue is not raised and argued when a party has the opportunity to do so, the defense is waived. See *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78 (1997). In *Quarto Mining*, the employer "sat idly by" during the PTD hearing and failed to raise a voluntary abandonment defense, even though there was evidence on file that may have supported the argument. The employer sought a writ of mandamus after PTD was granted and argued that the Industrial Commission should have to address voluntary abandonment even if it is not raised and argued by a party if there is evidence on file that could support the defense. The Court rejected that argument and reiterated that voluntary abandonment is an affirmative defense that must be raised and proved. It is not the Industrial Commission's job to address a defense that the employer and/or BWC fail(s) to assert.

In this case, the employer conceded in its reconsideration motion that it did not argue voluntary abandonment at the hearing, but asserted that it should have been addressed by the Industrial Commission because there was evidence on file that could have supported the defense. The Court rejected this argument based on *Quarto Mining* and further noted that it doesn't matter if the defense is raised for the first time in mandamus or in a reconsideration motion that is denied – if voluntary abandonment is not "brought into issue" (i.e., raised and argued) at the hearing, it is waived.

The Court also rejected the employer's attack on the evidence cited by the Industrial Commission in support of its award of PTD. The employer argued that because Dr. Grunstein allegedly found claimant capable of four hours of work per day (the report did not actually say that), the report did not support PTD. The employer asserted that the ability to work four hours a day is an automatic basis for denial of PTD pursuant to *State ex rel. Bonnlander v. Hamon*, 150 Ohio St.3d 567, 2017-Ohio-4003. However, in *Bonnlander* the Industrial Commission denied PTD based on a report that said claimant could work four hours per day, whereas in this case, Dr. Grunstein's report was relied on to award PTD. Moreover, *Bonnlander* explicitly held that there is no hourly standard for determining one's capacity to perform sustained remunerative employment. "Sustained" means "an ongoing pattern of activity" that can be intermittent, occasional, or part-time and the Industrial Commission must decide PTD applications on a case-by-case basis.

The employer also argued that Dr. Rutherford's report was equivocal and therefore not "some evidence" supporting the award of PTD. The Court did not reach that argument because Dr. Grunstein's report was found to be some evidence and as long as some evidence supports the Industrial Commission's decision, the fact that other reports it relies on are flawed is irrelevant. See *State ex rel. Ehlinger v. Indus. Comm.*, 76 Ohio St.3d 400 (1996).

Note – this is an important case that reinforces several principles:

a) if the Industrial Commission relies on medical evidence to support PTD based on the allowed conditions, there is no need for it to discuss the non-medical *Stephenson* factors. See *State ex rel. Galion Mfg. Div., Dresser Industries v. Haygood*, 60 Ohio St.3d 38 (1991);

b) there are no bright-line rules when it comes to PTD and the number of hours that can be worked in a given day. These are case-by-case determinations and the Industrial Commission cannot simply rely on a physician's "bottom line" identification of an exertional category (medium/light/sedentary) but must base its decision on the specific restrictions imposed by the physician in the body of the report. See *State ex. rel. Howard v. Millennium Inorganic Chemicals,* 10th Dist. No. 03AP–637, 2004-Ohio-6603, quoting *State ex. rel. Owens–Corning Fiberglass v. Indus. Comm.,* 10th Dist. No. 03AP–684, 2004-Ohio-3841. Therefore, if the physician imposes specific restrictions, "the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor;"

c) the BWC and employers waive affirmative defenses if they fail to raise and argue them when the can. This principle is crucial and should be carefully considered any time that

voluntary abandonment could become an issue. Review the history of the claim and determine if there was a situation in which the defense could have been raised but was not. If such an omission occurred, voluntary abandonment can be defeated. For examples of this argument, see the Industrial Commission's orders in claim numbers 97-550552 (October 4, 2018) and 12-826974 (October 11, 2018). These orders are available at https://www.ic.ohio.gov/orders/browse.jsp;

d) be aggressive in fighting voluntary abandonment. Remember it is the employer/BWC that bears the burden of proof - ambiguities or half-baked defenses should be resolved in the claimant's favor. See *State ex rel. Abbott Foods, Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 03AP-1042, 2004-Ohio-4787. See also, *State ex rel. Honey Baked Ham v. Indus. Comm.*, 10th Dist. Franklin No. 03AP-503, 2004-Ohio-2496. Moreover, the claimant's testimony is "some evidence" on the issue of voluntary abandonment and the Industrial Commission has an affirmative duty to determine whether a rule violation actually occurred and not just accept the employer's version of events. See *State ex rel. Brown v. Indus. Comm.*, 10th Dist. Franklin No. 10AP-1021, 2010-Ohio-6174, affirmed by *State ex rel. Brown v. Indus. Comm.*, 132 Ohio St.3d 520, 2012-Ohio-3895. See also, *State ex rel. Welsh Ents., Inc. v. Indus. Comm,*, 10th Dist. Franklin N0. 19 AP-127, 2020-Ohio-2801 (Industrial Commission does not have to accept a criminal no contest plea with respect to the facts of whether a claimant was fired for assaulting the employer. The Industrial Commission is within its discretion to find the claimant's testimony more credible than the employer's testimony. A plea in a criminal case does not get res judicata effect in a related civil case – it is admissible, however).

***State ex rel. Neitzelt v. Indus. Comm.*, 160 Ohio St.3d 175, 2020-Ohio-1453** – claim was allowed for L4-5 herniated disc. The allowance was not appealed to court pursuant to R.C. 4123.512. Claimant subsequently underwent surgery but the operative report did not confirm the presence of a disc herniation. Ten months later, the employer obtained a report from a defense doctor who concluded that there was no disc herniation at L4-5. Ten days later, the employer filed a motion requesting that the Industrial Commission invoke its continuing jurisdiction and disallow L4-5 disc herniation. The Industrial Commission granted the employer's motion, finding that the allowance of L4-5 disc herniation was a clear mistake of fact and the operative findings constituted new and changed circumstances which could not have been known at the time the conditions was allowed. Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the employer did not seek continuing jurisdiction in a timely fashion because it failed to appeal the allowance of L4-5 disc herniation to common pleas court pursuant to R.C. 4123.512. The employer and the Industrial Commission appealed to the Supreme Court as of right.

The Court reversed and affirmed the Industrial Commission's denial of L4-5 disc herniation. The Court held that the existence of an appeal under R.C. 4123.512 does not deprive the Industrial Commission of its statutory authority under R.C. 4123.52(A) if an element or elements necessary to invoke continuing jurisdiction are present (clear mistake of law; clear mistake of fact; new and changed circumstances that could not have been discovered through due diligence at the time the initial decision was made; fraud; and/or error of an inferior tribunal). In

this case, surgery was performed after the condition in question was allowed and after the 60-day appeal period had run from the allowance of L4-5 disc herniation. The employer filed its continuing jurisdiction motion within ten days of receiving its defense report. The Court held that under these facts continuing jurisdiction was sought within a reasonable period of time. See *State ex rel. Gatlin v. Yellow Freight Sys., Inc.*, 18 Ohio St.3d 245 (1985); *State ex rel. Gordon v. Indus. Comm.*, 63 Ohio St.3d 469 (1992) (continuing jurisdiction must be sought within a reasonable amount of time after the discovery of the facts justifying its exercise). Further, the operative and defense reports were some evidence of a clear mistake of fact since they indicated that the herniated disc did not exist. Finally, there were new and changed circumstances since the surgery was performed after the herniated disc was allowed and the operative results could not have been known at that time, even with the exercise of due diligence.

Note – Industrial Commission decisions invoking its continuing jurisdiction or refuse it invoke it are extent of disability issues and are not appealable under R.C. 4123.512. See *State ex rel. Belle Tire Distribs., Inc. v. Indus. Comm.*, 154 Ohio St.3d 488, 2018-Ohio-2122.

Also, *Neitzelt* is distinguishable from situations in which the Industrial Commission attempts to rule on an issue that has already been appealed to common pleas court or challenged in mandamus. For example, if a claim is disallowed and the claimant appeals to court pursuant to R.C. 4123.512, the Industrial Commission would be without jurisdiction to reconsider the allowance issue while the court appeal is pending. The same would be true with a final extent of disability order that has been challenged in mandamus. Once the court action is filed, the Industrial Commission is divested of jurisdiction over the issue pending in court. See, e.g., *State ex rel. Rodriguez v. Indus. Comm.*, 67 Ohio St.3d 21 (1993). The facts in *Neitzelt* were different because no court appeal was ever filed. If no court action is filed, the fact that such an action could have been filed is irrelevant to a subsequent motion for continuing jurisdiction, provided that one or more of the five continuing jurisdiction criterion/a is/are met.

***State ex rel. Bonnlander v. Hamon*, 161 Ohio St.3d 373, 2020-Ohio-4269** – this case has a long procedural history with a prior Supreme Court decision upholding the denial of a prior PTD application. See *ex rel. Bonnlander v. Hamon*, 150 Ohio St.3d 567, 2017-Ohio-4003. In that case, the issue was whether a report that found claimant capable of working four hours per day was "some evidence" supporting the Industrial Commission's denial of PTD. The Court held that there is no specific hourly standard for determining one's capacity to perform sustained remunerative employment and that "sustained" means "an ongoing pattern of activity" that can be intermittent, occasional, or part-time. The Court found that the Industrial Commission must decide PTD applications on a case-by-case basis.

While the first mandamus case was being litigated in 2015, claimant sought vocational rehabilitation. He had not worked since 2009 in any capacity. His psychologist would not cooperate with the vocational rehab process and the program was ultimately closed due to medical instability based on limited information, including the claimant's statements and reports indicating that he could perform at least some work activities on a part-time basis.

In 2017, claimant filed a new PTD application. The Industrial Commission's physical and psychological reports supported PTD and a tentative order was issued granting PTD. BWC objected and the matter went to hearing. The Industrial Commission denied PTD based on voluntary abandonment. The Industrial Commission noted that claimant had not worked since 2009 and had not looked for work since 2014. The Industrial Commission cited claimant's testimony at hearing that he did not seek work, at least in part, because he was receiving federal disability benefits that did not permit him to work. The Industrial Commission also pointed out that the Supreme Court had upheld the prior order denying PTD based on a report that found claimant capable of working four hours per day. Finally, the Industrial Commission found that the vocational effort was not "meaningful" and based on incomplete information.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ, finding that the Industrial Commission's decision was supported by some evidence. Claimant appealed to the Supreme Court as of right.

The Court affirmed, finding that the Industrial Commission relied on some evidence in support of its order denying PTD. The Court acknowledged that claimant had sought voc rehab, but found that the Industrial Commission was entitled to weigh the credibility of the effort. Moreover, the Court found that the previous PTD denial was based on a finding that claimant could work four hours per day without consideration of vocational rehab. The Court found the Industrial Commission was within its discretion to cite claimant's testimony that he did not work due to receipt of federal benefits as a factor against the approval of PTD and overall that claimant's inaction as evidence that he voluntarily decided not to work, citing *State ex rel. McKee v. Union Metal Corp.*, 150 Ohio St.3d 223, 2017-Ohio-5541, ¶ 10. Finally, the Court held that because claimant voluntarily abandoned the workforce before the Industrial Commission's doctors found he was incapable of sustained remunerative employment, that the denial of PTD was valid.

Note: effective September 15, 2020, portions of HB 81 become effective which statutorily abrogate voluntary abandonment as a matter of law. With respect to temporary total, newly enacted R.C. 4123.56(F) states as follows:

> 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.

With respect to PTD, the newly amended version of R.C. 4123.58(D) will state:

> (D) Permanent total disability shall not be compensated when the

> reason the employee is unable to engage in sustained remunerative employment is due to any of the following reasons, whether individually or in combination:
>
> (1) Impairments of the employee that are not the result of an allowed injury or occupational disease;
> (2) Solely the employee's age or aging;
> (3) The employee retired or otherwise is not working for reasons unrelated to the allowed injury or occupational disease;
> (4) The employee has not engaged in educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain.

Section (D(3) currently states: "[t]he employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease."

These changes in the law apply to any claim pending on or arising after September 15, 2020. See HB 81, uncodified section 3.

An interesting question is posed by the facts presented in *Bonnlander*: if claimant were to file a new application for PTD on or after September 15, 2020, and the Industrial Commission's doctors again find that the allowed physical and psychological conditions preclude sustained remunerative employment, would claimant be entitled to PTD? The answer would appear to be yes since after September 15, 2020 voluntary abandonment no longer exists as a matter of law. On the other hand, the employer could still assert that claimant "retired or otherwise is not working for reasons unrelated to the allowed injury." That sounds a lot like voluntary abandonment without using those actual words. The inquiry is thus one of causal connection – who can make the better case for the claimant's lack of work: the claimant based on the allowed conditions; or, the employer based on unrelated reasons? The Industrial Commission must decide and it must do so without citation to or reliance on voluntary abandonment caselaw which has been superseded by legislative fiat.

***State ex rel. U.S. Tubular Prods., Inc,. v. Indus. Comm*., ___ Ohio St.3d__, 2021-Ohio-1174 -** claimant sustained an injury when a water pipe testing procedure went awry. The employer tests water pipes to determine whether they leak. In order to test the integrity of the pipe, water is forced through the tube. The tests are conducted by two employees, one at each end of the pipe. One employee puts a cap, or swage, on one end of the pipe and then starts an engine to which a hose is connected. Water flows into the pipe through the hose. The employee at the other end also affixes a swage, but with a slide valve which allows air to exit the pipe as water fills it from the opposite end. Once water flows out the slide valve, the valve is closed thereby pressurizing the pipe. Both employees then retreat behind "safety zones" until the test is completed.

During a particular test, it was apparent that the pipe was leaking. Both employees left their respective safety zones. Unfortunately, one of the swages blew off because the pipe was still pressurized. The pipe moved forward due to the change in pressure and struck one of the employees, resulting in serious injuries.

The VSSR section in question was Ohio Adm. Code 4123:1-5-05(D)(1), which provides, "[m]eans shall be provided at each machine, within easy reach of the operator, for disengaging it from its power supply." Further, Ohio Adm. Code 4123:1-5(B)(92) defines "operator" as "any employee assigned or authorized to work at the specific equipment." There was protracted litigation as to whether the injured worker was an "operator" of the hydro-test machine. Ultimately, the Industrial Commission ruled in the employer's favor, finding that he was an "operator" and that means of disengaging the equipment from its power supply were not within his easy reach.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and the employer appealed to the Supreme Court as of right. The Court affirmed. Like most VSSR cases, this case is very fact-specific. Ultimately, the Court found that the Industrial Commission's decision was supported by "some evidence" and upheld the VSSR award.

VSSR notes:

Uncodified section 3 of HB 81 states that the amendment to R.C. 4121.471 applies to all claims arising on or after the date HB 81 becomes law, which is September 15, 2020.

Exhaustion of administrative remedies prior to filling mandamus-a party must request rehearing under Ohio Adm. Code 4121-3-20(E).

Employers have the following VSSR affirmative defenses available: 1) first time failure – *see State ex rel. M.T.D. Prods. v. Stebbins*, 43 Ohio St.2d 43 (1975); *State ex rel. Pressware Internatnl. v. Indus. Comm.*, 85 Ohio St.3d 284 (1999); 2) unilateral negligence (applies only if the employer first complies with the VSSR section and the employee subsequently does something to defeat the protection provided) – see *State ex rel. Frank Brown v. Indus. Comm.*, 37 Ohio St.3d 162 (1988); *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190 (2000); and 3) impossibility – *State ex rel. Jackson Tube Serv. v. Indus. Comm.*, 154 Ohio St.3d 180, 2018-Ohio-3892. Added to these defenses is the principle that doubts about the interpretation of VSSR codes mist be resolved in the employer's favor since VSSRs are penalties. See *State ex. rel Burton v. Indus. Comm.*, 46 Ohio St.3d 170 (1989).