

[Cite as *State ex rel. Croswell Bus Line Inc. v. Hudlin*, 2010-Ohio-789.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.	:	
Croswell Bus Line Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-499
	:	
Elaine Hudlin and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on March 4, 2010

Frost Brown Todd LLC, James C. Frooman, and Julie M. Bruns, for relator.

Honerlaw & Honerlaw Co., LPA, and Michael J. Honerlaw,
for respondent Elaine Hudlin.

Richard Cordray, Attorney General, and Charissa D. Payer,
for respondent Industrial Commission of Ohio.

IN MANDAMUS

FRENCH, J.

{¶1} Relator, Croswell Bus Line Inc., filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial

Commission of Ohio, to vacate its order that granted temporary total disability compensation to respondent, Elaine Hudlin, and to enter an order denying that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections to the magistrate's decision have been filed.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, this court adopts 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, the requested writ is denied.

Writ of mandamus denied.

TYACK, P.J., and BROWN, J., concur.

A P P E N D I X

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Croswell Bus Line Inc.,	:	
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Relator,	:	
	:	
v.	:	No. 09AP-499
	:	
Elaine Hudlin and Industrial	:	(REGULAR CALENDAR)
Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on November 23, 2009

Frost Brown Todd LLC, James C. Frooman and Julie M. Bruns, for relator.

Honerlaw & Honerlaw Co., LPA, and Michael J. Honerlaw, for respondent Elaine Hudlin.

Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} Relator, Croswell Bus Line Inc., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of

Ohio ("commission") to vacate its order which granted temporary total disability ("TTD") compensation to respondent Elaine Hudlin ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation because she voluntarily abandoned her employment with relator.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury on December 5, 2007 when she slipped and fell while trying to unlock a gate in a parking lot. Claimant's claim was assigned claim No. 07-882564 and was allowed for "sprain lumbar region."

{¶6} 2. Claimant slipped a second time in the parking lot on February 22, 2008. This claim was assigned claim No. 08-810439.

{¶7} 3. Ultimately, the commission would determine that claimant did not meet her burden of proving that she sustained a new injury on February 22, 2008. Instead, both a district hearing officer ("DHO") and staff hearing officer ("SHO") determined that the February 22, 2008 incident resulted in an exacerbation of the allowed condition in claim No. 07-882564.

{¶8} 4. Prior to the commission's orders finding that claimant had not sustained a new injury, her treating physician, John B. Jacquemin, M.D., completed Medco-14 forms (March 13, April 10 and May 21, 2008) indicating that relator could return to work with restrictions. Those restrictions included: "Avoid driving." Since she was a bus driver, relator could not return to her former position of employment. These forms all contained the 2007 claim number.

{¶9} 5. Dr. Jacquemin's office notes referenced back pain/lumbar pain and indicated lumbar sprain.

{¶10} 6. Claimant filed C-84 forms requesting the payment of TTD compensation beginning March 13, 2008. Claimant filed her C-84 forms under claim No. 08-810439.

{¶11} 7. In the interim, relator terminated claimant's employment after discovering that, in October 2007 when claimant completed her application for employment, she did not disclose her employment with Wesley Community Services, a company from which claimant had recently been terminated. Relator discovered this information when it received notice that claimant had been denied unemployment compensation as follows:

The claimant was discharged by WESLEY COMMUNITY SERVICES (INC.) on 10/19/2007. The employer discharged the claimant for violating a company rule. Evidence supports that violating the rule did materially and substantially affect the employer's interest. * * * Therefore, no benefits will be paid until the claimant obtains employment subject to an unemployment compensation law, works six weeks, earns wages of \$1200, and is otherwise eligible.

(Emphasis sic.)

{¶12} 8. Relator terminated claimant citing the following portion of the employment application: "TO BE READ AND SIGNED BY APPLICANT[.] This certifies * * * that all entries on it and information in it are true and complete to the best of my knowledge. * * * In the even[t] of employment, I understand that false or misleading information given in my application or interview(s) may result in discharge." (Emphasis

sic.) Because relator terminated claimant's employment, relator maintained that claimant was not entitled to TTD compensation.

{¶13} 9. Claimant's application for TTD compensation was heard before a DHO on November 25, 2008. The DHO denied claimant's request for TTD compensation after finding that she had voluntarily terminated her employment when she submitted the false job application.

{¶14} 10. Claimant appealed and the matter was heard before an SHO on January 26, 2009. The SHO modified the prior DHO's order and granted claimant's request for TTD compensation as follows:

The Staff Hearing Officer finds that as a result of the allowed conditions in this claim the Injured Worker was not able to return to and perform the duties of her former position of employment from 03/13/2008 to 07/15/2008. Therefore, temporary total disability compensation is to be paid to the Injured Worker for said period less any sickness and accident benefits or salary continuation that the Injured Worker may have received for the same period of time.

Payment of temporary total disability compensation is to continue upon submission of medical evidence documenting the Injured Worker's continued inability to return to work due to the conditions that are recognized in this claim.

The Staff Hearing Officer finds that the Injured Worker was terminated from employment on 03/24/2008 for violation of an Employer Work Rule. The Staff Hearing Officer finds that the termination from employment does not [bar the] payment of temporary total disability compensation. The Staff Hearing Officer finds that at the time of the termination, the Injured Worker was already temporarily and totally disabled.

This portion of the order is based upon the C-84 from Dr. Jacquemin, the testimony of the Injured Worker at the hearing and [*State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499].

{¶15} 11. Relator appealed and that appeal was refused by order of the commission mailed March 3, 2009.

{¶16} 12. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶17} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶18} Relator makes two interrelated arguments. First, relator contends that there was no competent, credible evidence submitted in claimant's 2007 claim establishing that she was temporarily and totally disabled on March 13, 2008. Second, because there is no medical evidence establishing that claimant was temporarily and totally disabled in the 2007 claim at the time she was terminated, her termination

precludes the payment of TTD compensation. For the reasons that follow, this magistrate disagrees.

{¶19} Relator's first argument centers around the fact that claimant filed for a separate claim following her February 22, 2008 work-related injury. Ultimately, the commission concluded that claimant had not sustained a new injury and, as such, a 2008 claim was not recognized. However, the commission did find that claimant sustained a work-related injury on February 22, 2008 and that injury had exacerbated the sprain lumbar region condition which had previously been allowed under the 2007 claim number.

{¶20} Relator challenges claimant's medical evidence because it was filed under the 2008 claim number and not the 2007 claim number. The magistrate finds that this is not a reason to exclude the medical evidence.

{¶21} In the present case, the commission found that claimant exacerbated her 2007 allowed condition on February 22, 2008. Although a new claim number had been given to this 2008 injury, the exacerbation of the 2007 claim was acknowledged and the 2008 claim was not allowed. As such, claimant's medical evidence filed under the 2008 claim number is equally admissible and supports claimant's motion for TTD compensation beginning March 13, 2008. It is the exacerbation of the 2007 injury, recognized by the commission, which rendered claimant temporarily and totally disabled. The fact that these documents were originally filed under a 2008 claim number is irrelevant as it is the condition which was allowed and not a new claim number. As such, relator's first argument is rejected.

{¶22} Relator also asserts that claimant's medical evidence is equivocal. Specifically, relator points out that Dr. Jacquemin originally completed Medco-14 forms indicating that claimant could return to work with restrictions beginning March 13, 2008. It was not until May 2008 that Dr. Jacquemin completed a C-84 certifying that claimant was temporarily and totally disabled beginning March 13, 2008.

{¶23} Contrary to relator's arguments, the magistrate finds the evidence is not equivocal. One of claimant's restrictions was to avoid driving. Because she was a bus driver, it is obvious that she could not return to her former position of employment.

{¶24} Relator next argues that, because there is no competent medical evidence upon which the commission could rely to grant compensation in the 2007 claim, the commission abused its discretion when it relied on *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499. The magistrate disagrees.

{¶25} As the *Reitter Stucco* court stated, two cases are pertinent to the facts presented here: *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5. The *Reitter Stucco* court discussed those cases and stated:

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.

Id. at ¶10-11.

{¶26} In the present case, relator was certainly entitled to terminate claimant's employment when relator learned that claimant had failed to provide information on her original application indicating that she had been terminated from her previous job. However, just because relator was entitled to terminate claimant, her entitlement to TTD compensation remained open because, at the time relator terminated claimant, she was unable to perform her job duties as a driver. Because there is some evidence in the record to support the commission's finding that claimant was unable to perform her former position of employment at the time relator terminated her, the commission properly awarded TTD compensation.

{¶27} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding claimant TTD compensation and relator's request for a writ of mandamus should be denied.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).