

[Cite as *State ex rel. Carkido v. Indus. Comm.*, 2011-Ohio-4051.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Margaret M. Carkido, :
Relator, :
v. : No. 10AP-27
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Carlisle Companies, Inc., :
Respondents. :

D E C I S I O N

Rendered on August 16, 2011

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

Michael DeWine, Attorney General, and Kevin J. Reis, for respondent Industrial Commission of Ohio.

Wickens, Herzer, Panza, Cook & Batista Co., Christine M. Faranda, Paul R. Phillips, Thomas J. Stefanik, Jr., and Patrick G. O'Hara, for respondent Carlisle Companies, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Margaret M. Carkido, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio

("commission"), to vacate its order denying her application for temporary total disability ("TTD") compensation and to order the commission to issue a new order finding that she is entitled to such compensation.

{¶2} Pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision which is appended to this decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶3} In her first objection, relator contends that the magistrate erred when she agreed with the commission that relator left the work force voluntarily after she suffered a motor vehicle accident ("MVA") in May 1999. A worker who leaves the work force voluntarily is barred from receiving TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. For the purposes of workers' compensation law, a voluntary departure from the work force is any departure that is for reasons other than allowed conditions. *Id.* The commission must make its decision based on the standard of "some evidence." *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 20.

{¶4} Here, the medical evidence supports the conclusion of the magistrate and commission that relator left the work force due to the non-allowed conditions caused by her MVA and not because of her 1998 industrial injury. Relator's physician, Dr. James Brodell, wrote that restrictions due to the industrial injury were lifted on January 28, 1999, approximately three months before relator's MVA. The only evidence in opposition to the commission's decision was the testimony of relator herself that she left due to her allowed left knee injury. As the magistrate reasoned, the commission did not err in basing its

decision to deny TTD on the medical evidence that indicated relator had recovered from her 1998 industrial injury when she left the work force after May 1999, which clearly met the requisite standard of "some evidence."

{¶5} In addition, relator argues that, because the knee surgery in 2009 was approved by the commission as being necessitated by her original industrial injury, she is entitled to TTD compensation for the period after the surgery. However, as the magistrate pointed out in addressing this same contention, although relator is correct that the surgery was necessitated by her allowed condition, she was still required to show that she suffered a wage loss based upon her inability to return to employment. In this respect, relator failed, because, as explained above and *infra*, relator was not working at the time of the surgery, and she failed to show that it was her allowed conditions that forced her to abandon the work force prior to the surgery. For these reasons, relator's first objection is overruled.

{¶6} In her second objection, relator contends that the magistrate misapplied *State ex rel. Staton v Indus. Comm.* (2001), 91 Ohio St.3d 407. In *Staton*, the claimant sustained an injury while working, returned to work for a few weeks, one month later took a medical leave based upon conditions unrelated to the industrial injury, and then eventually retired. Claimant's subsequent application for TTD was denied because all of the documentation regarding claimant's retirement listed non-allowed conditions as the reason for the claimant's departure from the work force; thus, the commission found the claimant had voluntarily retired and left the work force. In the present case, relator argues she did not permanently retire from the work force but was, instead, temporarily disabled while she recovered from the MVA. However, the permanency of the claimant's

retirement was not the pertinent factor for denying TTD. Rather, the import of *Staton*, for purposes of this case, is that a claimant who voluntarily leaves the work force due to non-allowed conditions cannot later collect TTD compensation. Here, there is no medical evidence that demonstrates relator departed from the work force due to allowed conditions in either 1999 or 2003, the later of which occurred after she had briefly re-entered the work place in 2002; therefore, the commission's decision that relator's departure from the work force was voluntary was proper. Again, the only evidence relator presents that her departure from the work force was due to the allowed left knee condition is her own testimony. No other evidence was presented, and there was no evidence of any treatment for the allowed condition between 1999 and 2006. Therefore, this objection is without merit.

{¶7} In her third objection, relator mainly contends that the magistrate misapplied *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, when she found that relator was not entitled to compensation after re-entering the work force in 2002 and then once again leaving it in 2003. Under *McCoy*, a claimant who voluntarily retires may still be eligible for TTD compensation if she re-enters the work force and, as a result of the original industrial injury, becomes temporarily and totally disabled while working in her new position. However, again, as the magistrate found, there was no medical evidence supporting relator's claim that the allowed condition forced her out of the work force in 2003. The only evidence presented by relator was her own testimony, which both the commission and the magistrate found was outweighed by medical evidence. The commission had "some evidence" supporting its decision;

therefore, the magistrate properly applied *McCoy* in finding that the commission did not abuse its discretion in denying relator TTD compensation.

{¶8} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT, P.J., and DORRIAN, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Margaret M. Carkido, :
Relator, :
v. : No. 10AP-27
Industrial Commission of Ohio : (REGULAR CALENDAR)
and Carlisle Companies, Inc., :
Respondents. :
:

MAGISTRATE'S DECISION

Rendered on March 15, 2011

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

Michael DeWine, Attorney General, and Rachel L. Lawless, for respondent Industrial Commission of Ohio.

Wickens, Herzer, Panza, Cook & Batista Co., Christine M. Faranda, Paul R. Phillips, Thomas J. Stefanik, Jr. and Patrick G. O'Hara, for respondent Carlisle Companies, Inc.

IN MANDAMUS

{¶} Relator, Margaret M. Carkido, has filed this original action requesting this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its order which denied her request for temporary total disability ("TTD") compensation and ordering the commission to find that she is entitled to that compensation.

Findings of Fact:

{¶10} 1. Relator sustained a work-related injury on October 14, 1998, and her claim was originally allowed for: "strain/sprain left knee; torn lateral meniscus, left knee."

{¶11} 2. On November 5, 1998, James David Brodell, M.D., performed arthroscopic surgery on relator's knee, and his post-operative diagnosis was: "Small tear posterior horn lateral meniscus, advanced tricompartmental osteoarthritis left knee."

{¶12} 3. Relator was able to successfully return to work. In his January 26, 1999 office note, Dr. Brodell stated:

We received a call from Carlisle Industries asking if the patient could work overtime. I told them that her restrictions would be lifted on January 28, 1999, and that if she felt that she could work overtime that would be fine with us.

In his February 22, 1999 office note, Dr. Brodell stated:

The patient is doing fairly well with her LEFT knee. It is not perfect. There is a little aching and stiffness and a mild feeling of instability. That is to be expected with the amount of arthritis that she has in the joint.

On physical examination there is no effusion and good motion. She is up and around, walking and doing reasonably well.

Recommendation: She is holding down her job successfully. (1) I think that she is as good as she is going to get as a result of this recent injury, and I do not visualize that there is going to be any need for future diagnostic studies or treatment as it relates to the accident. Having said that, I think she will be back down the road with arthritic knee

trouble. She may eventually need to have a total knee replacement.

(Emphasis sic.)

{¶13} 4. It is undisputed that relator was involved in a serious motor vehicle accident ("MVA") in May 1999.

{¶14} 5. According to relator's affidavit, she was unable to return to work after the 1999 MVA and began receiving Social Security Disability Benefits ("social security"). She continued to receive social security until 2002 when she became employed as a housecleaner. While she worked for the majority of 2002, she did not work thereafter and again began receiving social security in 2003.

{¶15} 6. J. L. Stychno, D.C., authored a report dated September 18, 2001, for purposes of determining relator's permanent partial impairment. Dr. Stychno stated in relevant part, as follows:

* * * MS. CARKIDO WAS INJURED ON 10/14/98 DURING THE COURSE OF HER EMPLOYMENT[.] * * * CLAIMANT SUBSEQUENTLY CAME UNDER THE CARE OF DR. BRODELL WHO PERFORMED AN ARTHROSCOPIC SURGERY FOLLOWED BY A COURSE OF PHYSICAL THERAPY. CLAIMANT WAS UNABLE TO WORK FOLLOWING HER INCIDENT AND IS CURRENTLY ON SOCIAL SECURITY DISABILITY AND NOT WORKING AT THE PRESENT TIME RELATED TO A MOTOR VEHICLE ACCIDENT OF 5/99 IN WHICH SHE INJURED HER RIGHT LOWER EXTREMITY. * * * HER LAST TREATMENT WAS APPROXIMATELY ONE YEAR AGO RELATED TO THE ABOVE NOTED ALLOWED CONDITIONS. * * *

* * *

* * * PALPATION [OF THE LEFT KNEE] REVEALED PAIN AND TENDERNESS IN BOTH THE MEDIAL AND LATERAL COMPARTMENTS. RANGE OF MOTION FOR THE LEFT KNEE WAS NOTED AS FOLLOWS: FLEXION 80°,

EXTENSION 5° LAG. * * * CREPITATION WAS NOTED UPON ACTIVE RANGE OF MOTION. * * * BILATERAL AND SYMMETRICAL SENSORY EXAMINATION WAS WITHIN NORMAL LIMITS. VASCULAR EXAMINATION WAS WITHIN NORMAL LIMITS. TEST FOR LIGAMENTOUS STABILITY WERE WITHIN NORMAL LIMITS. APPELY'S COMPRESSION TEST WAS NOTED AS NEGATIVE. MCMURRAY'S TEST WAS NOTED AS NEGATIVE. MOTOR EXAMINATION REVEALED WEAKNESS OF THE KNEE EXTENSORS GRADED AT 4/5.

BASED ON TODAY'S HISTORY, PHYSICAL EXAMINATION, ALLOWED CONDITIONS AND THE AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, FOURTH EDITION, MS. CARKIDO HAS SUSTAINED A 17% WHOLE PERSON IMPAIRMENT * * * DIRECTLY AND CAUSALLY RELATED TO THE ABOVE NOTE[D] INJURY.

{¶16} 7. The record is devoid of any medical evidence of treatment for relator's allowed conditions to her left knee from March 1999 until 2006.

{¶17} 8. Relator saw Michael J. Miladore, M.D., on February 28, 2006. In his office note of that date, Dr. Miladore noted the following:

* * * Patient subsequently underwent additional care from Dr. Larry DiDomenico for left foot reconstruction procedures.

* * * [S]he is ambulating with a CAM walker, her gait is antalgic, left knee has increased valgus alignment, range of motion is – 10 degrees of extension to 100 degrees of flexion. * * * Knee has generalized heat and swelling and synovial thickening. Left ankle shows all wounds are healed and these appear to be hind foot incisions. Ankle is stiff with its range of motion.

* * * [X-rays] of her left knee demonstrates severe osteoarthritis of her left knee with valgus deformity, large osteophytes, subchondral sclerosis. These are non-weight bearing films.

IMPRESSION: Advanced DJD left knee with valgus deformity.

* * * Patient will need a left total knee replacement surgery in order to help balance the knee out to improve its alignment, lessen her pain and possibly improve her range of motion.

* * *

{¶18} 9. In an order dated June 28, 2006, relator's claim was additionally allowed for the following condition: "aggravation of pre-existing osteoarthritis of the left knee." This order was based on the April 13, 2006 report of Dr. Mansour, which is not contained in the stipulation of evidence.

{¶19} 10. Relator filed a motion seeking approval of arthroscopic surgery for her left knee.

{¶20} 11. Relator's motion was heard by a district hearing officer ("DHO") on December 16, 2008, and was granted based on "the office note of Dr. Miladore, dated 8/12/08." (This office note is not contained in the stipulation of evidence.)

{¶21} 12. The employer appealed and the matter was heard before a staff hearing officer ("SHO") on February 19, 2009. The SHO affirmed the prior DHO order and granted relator's request for the surgery based on the "9/16/2008 C-9 report, 2/28/2006 office visit note and 8/12/2008 office visit note, all from Dr. Miladore."

{¶22} 13. Following the surgery, relator filed a motion seeking the payment of TTD compensation following the surgery on May 27, 2009. Relator sought TTD compensation beginning May 14, 2009 to an estimated return-to-work date of August 17, 2009.

{¶23} 14. Relator's motion was heard before a DHO on July 14, 2009 and was denied for the following reasons:

The District Hearing Officer denies the request that Ms. Carkido be ordered to be paid temporary total disability

benefits for the period commencing 05/14/2009 and continuing through 07/14/2009, the date of today's hearing.

In so ruling the District Hearing Officer relies on the medical evidence on file which establishes that Ms. Carkido suffered serious injuries when involved in a motor vehicle accident in 1999. These injuries were so serious that she quit the workforce and went on Social Security disability benefits. Consequently, while she underwent surgery for an allowed condition in this claim, any disability arising from such treatment did not disable her from work as she was not working at the time of the surgery.

{¶24} 15. Relator appealed and submitted an affidavit stating, in pertinent part, as

follows:

On October 14, 1998, I was injured in the course and scope of my employment. * * * I was able to eventually return to work but continued to have on-going left knee pain. In 1999 I was involved in a motor vehicle accident which involved injuries to the right side of my body. At or about that time in 1999, I did apply for social security disability, which was granted based upon both my 1999 motor vehicle accident as well as my October 14, 1998, industrial accident. I made a complete recovery from my motor vehicle accident in 2001. I continued to receive social security disability until I found employment in 2002. I worked for the majority of the 2002 year. When I found employment and worked over this period of time, I was completely and fully recovered from my 1999 motor vehicle accident. However, I never fully recovered from my October 14, 1998, industrial accident. In fact, my left knee condition continued to worsen until I was no longer able to perform my job duties as a house cleaner and had to stop employment due solely to my left knee condition. After working one year as a house cleaner, I reapplied for social security disability and was granted social security disability based upon my inability to work from my left knee condition.

{¶25} Relator also submitted what appears to be a printout from the Social Security Administration showing relator's FICA wages for certain requested years. As is relevant here, that document shows the following:

YEAR	EARNINGS
1999	11239.25
2000	2776.00
2001	.00
2002	19068.00

{¶26} Relator did not present any evidence that she worked after 2002, nor did she present any of the documentation she submitted on behalf of her request for social security.

{¶27} 16. A hearing was held before an SHO on September 4, 2009. Relator appeared at this hearing and provided the following relevant testimony: When asked whether or not her left knee condition had ever fully recovered, relator responded that it did not. Relator stated that the 1999 MVA involved her right leg and did not affect her left knee in any way. Relator stated that she returned to work in 2002 but that, at the end of 2002, she was forced to stop working solely because of her left knee condition. Relator indicated that she waited four years to seek treatment because she was afraid of the surgery. (Tr. 5-9.)

{¶28} Counsel for respondent Carlisle Compaines, Inc. ("employer") did not ask any questions on cross-examination; however, counsel made the following relevant points: The medical evidence reveals that as of February 22, 1999, relator's left knee was doing well; there is no medical evidence submitted to support relator's affidavit that her left knee condition was one of the reasons she had applied for social security in 1999 and the sole reason she applied for social security in 2003; counsel referenced the March 7, 2000 report of Dr. Zellers indicating that relator had not seen a physician for her claim

allowance for more than a year and that, as a result of her 1999 MVA, relator "uses crutches on a constant basis and continues to require a right foot orthotic." (Tr. 13.) Counsel also referenced the September 18, 2001 report of Dr. Stychno indicating that relator was not currently working due to the MVA of 1999 and the March 2, 2002 report of Dr. Downey indicating that relator underwent surgery for her left knee condition in 1998 and, approximately six weeks after surgery, she returned to work. Thereafter, Dr. Downey indicated that the last time relator saw her physician of record was eight weeks after the operation. Counsel also referenced the January 31, 2006 report of Dr. Ziran. According to Dr. Ziran, " 'She had multiple procedures in 1999. She had a car accident and had multiple fractures which were treated. * * * She recently had a progressive flat foot deformity and has had an Achilles lengthening osteotomy * * * of the mid foot and pinning. She is being considered for a total ankle replacement.' " (Tr. 14-15.) Counsel indicated that this evidence was contrary to relator's testimony that she had fully recovered from the 1999 MVA in 2002.

{¶29} On re-direct, relator testified that, after the 1999 MVA, she approached her employer asking if there was any type of light-duty work that she could do while in a wheelchair because the social security payments just were not enough to pay the bills.

{¶30} 17. On September 4, 2009, the SHO modified the prior DHO order and denied relator's request for TTD compensation. Specifically, the SHO stated:

The Staff Hearing Officer finds that the Injured Worker has failed to satisfy her requisite burden of proof in demonstrating her eligibility for temporary total disability compensation for the above period. The Staff Hearing Officer finds that there is evidence in file to establish that following her motor vehicle injury, the Injured Worker began receiving Social Security Disability Benefits based solely on

her injuries sustained from the motor vehicle accident of 1999. This finding is based upon the 09/18/2001 report of Dr. J. L. Stychno, D.C. Therein, Dr. Stychno provides as follows:

"I've had the opportunity to examine the claimant, Mrs. Carkido, on 08/06/2001 for purposes of determining permanent partial impairment. Ms. Carkido was injured on 10/14/1998 during the course of her employment at a rubber plant. Apparently, the claimant slipped and fell. The claim was subsequently allowed for the above noted allowed conditions. Claimant subsequently came under the care of Dr. Brodell who performed an arthroscopic surgery followed by a course of physical therapy. Claimant was unable to work following her incident and is currently on Social Security Disability and not working at the present time related to a motor vehicle accident of 05/1999 in which she injured her right lower extremity." (Emphasis Added.)

The conclusion that the motor vehicle accident was the exclusive event which removed the Injured Worker from the workforce is heightened following a review of Dr. James Brodell's office records of early 1999. In an entry dated 01/26/1999, Dr. Brodell evaluated the Injured Worker with respect to her allowed conditions in this claim and stated that "her restrictions would be lifted 01/28/1999, and that if she felt she could work overtime that would be fine with us." In a following entry of 02/22/1999, Dr. Brodell states:

"the patient is doing fairly well with her left knee . . . It is not perfect. There is a little aching and stiffness and a mild feeling of instability. That is to be expected with the amount of arthritis that she has in the joint. She is holding down her job successfully. I do not visualize that there is going to be any need for future diagnostic studies or treatment as it relates to the accident." (Emphasis added.)

These records were generated only three to four months before the motor vehicle injury of 05/1999. These records demonstrate that the Injured Worker's allowed conditions in this claim did not preclude her return to employment. These records infer that the Injured Worker had returned to work in some capacity with this employer of record in early 1999. In fact, the record is devoid of this Injured Worker receiving any treatment for the allowed conditions in this claim from 03/1999 to 2006, nearly a seven year period of time. Given these findings, the Staff Hearing Officer concludes that the

Injured Worker's receipt of Social Security Disability benefits, beginning in 1999, was related to her motor vehicle injuries-- as alleged by the employer--rather than the allowed conditions in this claim.

Regarding the evidence relator did submit, the SHO stated:

Although the Injured Worker specifically states in her Affidavit of 07/31/2009 that her Social Security Disability Benefit award in 1999 was predicated upon both her allowed conditions in this claim and her motor vehicle injury, the Injured Worker has failed to present any documentation from the Social Security Administration to corroborate her assertions. Similarly, there is no documentation from the Social Security Administration to support the Injured Worker's assertions that her allowed conditions in this claim independently resulted in her becoming disabled in 2003, a disability for which she once again received Social Security Disability Benefits beginning in 2003. Such records could have been obtained by the Injured Worker from the Social Security Administration in support of her contention at hearing that she was removed from the employment arena in 1999 and 2003 as a result of the allowed conditions in this claim. The Injured Worker's failure to provide such documentation undermines her ability to rebut the employer's argument that it was the motor vehicle accident that removed the Injured Worker from the job market in 1999 -- not the allowed conditions in this claim. The Staff Hearing Officer finds that the Injured Worker's self-serving statements in her Affidavit are without evidentiary weight given the lack of corroborating documentation from the Social Security Administration.

(Emphasis sic.)

Thereafter, the SHO concluded that relator's departure from the workforce was voluntary because she had failed to demonstrate that it was related to the allowed conditions in the claim, as follows:

Given the totality of the above findings the Staff Hearing Officer concludes that the Injured Worker vacated her job with this employer of record in 1999 for reasons not associated with the allowed conditions in this claim. As such,

this departure from the workforce is deemed to have been voluntary. The Staff Hearing Officer concludes that the Injured Worker vacated her employment in 1999 due to the serious motor vehicle injuries she suffered in 05/1999. The Staff Hearing Office[r] also concludes that under this fact pattern the Injured Worker abandoned the entire job market in 1999 for reasons not associated with the allowed conditions in this claim. As such, this Injured Worker is precluded from receiving temporary total disability benefits for her above requested period of time from 05/14/2009 through 09/04/2009. In reaching this decision, the Staff Hearing [O]fficer relies upon the holding set forth in State ex rel. Staton v. Indus. Comm. (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 compensation eligibility forever after. In response, State ex rel. Baker V. Indus. Comm. (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 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 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 p. 409-410: emphasis added.)

The Staff Hearing Officer finds the holding in S.E.R. Staton to be controlling in the facts at hand.

Lastly, the SHO addressed the fact that relator had returned to work in 2002 and why that was not sufficient to warrant a payment of TTD compensation, as follows:

Finally, the Staff Hearing Officer finds it necessary to address the complicating factor of the Injured Worker's return to the work force in 2002. The Injured Worker testified in her Affidavit of 07/31/2009 that she returned to the work force as a house cleaner in 2002. This work is corroborated by her Social Security Report of Earnings record in file. The Injured Worker also stated in her Affidavit that she left this employment in 2003 due to her allowed knee conditions in this claim. Her Affidavit alleges that she once again was awarded Social Security Disability Benefits in 2003 as a result of the allowed conditions in this claim. However, there is no contemporaneous medical evidence in 2003 to support her contention. Nor is there any medical evidence in file to establish that in 2003 the allowed conditions in this claim independently resulted in the Injured Worker being temporarily and totally disabled due to a flare up from the performance of her house cleaning activities. These findings preclude application of the decision set forth in State ex rel. McCoy v. Dedicated Transport, Inc. (2002) 97 Ohio St. 3d 25. Therein, the Ohio Supreme Court held that a claimant who voluntarily retired will be eligible to receive temporary total disability compensation if he or she re-enters the work force and, due to the original injury, becomes temporarily and totally disabled while working at that new job. Simply stated, the Injured Worker has failed to present evidence that she was forced to abandon the work force in 2003 once again as a result of the allowed conditions in this claim.

What is known is that some three years later in 2006, this claim was additionally allowed for the condition of "aggravation of pre-existing osteoarthritis of the left knee" by District Hearing Officer decision of 06/28/2006. Subsequently, on 02/19/2009, a Staff Hearing Officer authorized treatment for this newly allowed condition in the form of "left knee arthroscopy." This surgery was performed on 05/14/2009 – the beginning date of the requested period of temporary total disability compensation now in issue. This finding is based upon the Injured Worker's Affidavit of 07/31/2009 in file. Notably, the Injured Worker was not working at the time of her new period of disability in 2009. In fact, her own Affidavit suggests that she had been out of the

work force for nearly a six year period of time, during which she was receiving Social Security Disability Benefits. It is well settled law that only Injured Workers who are gainfully employed at the time of re-injury are again eligible for temporary total disability compensation. (See State ex rel. McCoy v. Dedicated Transport, Inc. (2002) 97 Ohio St. 3d 25.) There is no evidence to establish that this Injured Worker suffered a re-injury when she re-entered the work force in 2002. There is no evidence in file to establish that she suffered a re-injury while working at the time of her surgery in May 2009. In short, there is insufficient evidence to establish by a preponderance that this Injured Worker's voluntary abandonment from the work force in 1999 has somehow been superseded by the events that transpired subsequent to her receipt of Social Security Disability Benefits in 1999.

{¶31} 18. Relator's appeal was refused by order of the commission mailed October 1, 2009.

{¶32} 19. Relator's request for reconsideration was denied by order of the commission mailed December 4, 2009.

{¶33} 20. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶34} Relator argues that the commission abused its discretion by finding that the 1999 MVA removed her from the job market, thus barring TTD compensation for the following three reasons: (1) the medical evidence establishes that she made a full recovery after the 1999 MVA; (2) *State ex rel. Staton v. Indus. Comm.*, 91 Ohio St.3d 407, 2001-Ohio-88, does not apply because, in *Staton*, all the medical evidence regarding the claimant's retirement listed non-allowed conditions (depression and a heart condition) as the reasons for the claimant's retirement; and (3) even if *Staton* does apply, relator's re-entry into the workforce in 2002 triggers the application of *State ex rel. McCoy v.*

Dedicated Transport, Inc, 97 Ohio St.3d 25, 2002-Ohio-5305, and warrants the payment of TTD compensation.

{¶35} The magistrate finds that the commission did not abuse its discretion in finding: (1) relator failed to meet her burden of proving that her departure from the workforce was related to the allowed conditions in the claim; (2) that the evidence in the record supported the finding that her removal from the workforce was due to the injuries she sustained in the 1999 MVA as opposed to the allowed conditions in the 1998 claim, thereby rendering her departure from the workforce essentially voluntary; and (3) that relator's return to the workforce in 2002 was not sufficient to warrant a new period of TTD compensation after her 2006 surgery.

{¶36} Relator bore the burden of proving that she was entitled to TTD compensation. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31. TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630. In the present case, relator was required to demonstrate that the allowed conditions in her claim were the cause of this most recent period of disability. In support of her contention, relator argues that she is seeking TTD compensation following arthroscopic surgery on her left knee, which was performed because of the allowed conditions in her claim. Because the surgery was related to her allowed conditions, relator contends that she is entitled to TTD compensation.

{¶37} Relator is correct in arguing that the surgery was necessitated because of the allowed conditions in her claim. However, relator still had the burden of proving that

she suffered a loss of wages as a result of the surgery. In that regard, relator submitted an affidavit and provided testimony in an effort to establish that her departure from the workforce in 1999 and her subsequent receipt of social security was due in part to the allowed conditions in this claim and was not predicated upon the injury she sustained in the 1999 MVA. Relator does not dispute that she left the workforce in 1999, returned for one year in 2002, and then left the workforce altogether in 2003. Further, relator does not dispute that she began receiving social security in 1999, stopped receiving social security in 2002 and resumed receipt of social security in 2003. Relator's entire argument focuses on her assertion that she was not working because of the allowed conditions in this claim.

{¶38} Relator argues that the medical evidence clearly establishes that she made a full recovery after the 1999 MVA. In support of this argument, relator asserts that following the MVA, she contacted her employer asking if she could return to work in some capacity. The only evidence supporting this assertion is contained in the transcript from the hearing before the SHO on September 4, 2009, where the following exchange took place between relator and her counsel:

Q. But after the motor vehicle accident had occurred, and after you had recovered from that, but before you started this housekeeping job, you told me that you actually did go back to Carlisle and asked them if there was any type of light-duty work that they had; is that correct?

A. I did. I was still in a wheelchair, and I asked them if they had piecework. You know, something that I could sit down and –

Q. So you were willing to do whatever they had?

A. Whatever they had.

Q. And told them as soon as you fully recovered, you were able to go back, but it just never got to the point from a

medical standpoint that you were able to go back and do that type of work?

A. Exactly. I felt that anything was better than being on Social Security. * * *

(Tr. 42-43.)

{¶39} Relator asserts that the above exchange between herself and counsel clearly establishes that she recovered in full after the 1999 MVA and, therefore, the only injuries which could have possibly removed her from the workforce were the allowed conditions in this 1998 claim.

{¶40} On the other hand, as noted in the findings of fact, counsel for the employer pointed to several reports, some of which are not in the stipulation of evidence. The employer pointed to the March 7, 2000 report of Dr. Zellers, wherein it was noted that relator uses crutches on a constant basis and continues to require a right foot orthotic. The employer also pointed to the March 2, 2002 report of Dr. Downey, stating that the last time relator saw her physician of record for the allowed conditions in this claim was eight weeks following the surgery. The employer also pointed to the January 31, 2006 report from Dr. Ziran indicating that relator had multiple procedures performed in 1999 due to multiple fractures she sustained in the MVA. He also noted that relator recently had a progressive flat foot deformity and an Achilles lengthening osteotomy of the mid foot and pinning and that she was being considered for a total ankle replacement. The employer had presented this evidence of treatment for the injuries relator sustained in the 1999 MVA to counter relator's assertion that she had completely recovered from the MVA and as evidence that relator did not have any treatment for the allowed conditions in this claim from 1999 until 2006.

{¶41} The SHO determined that relator had failed to meet her burden of proving that her absence from the workforce was due to the allowed conditions in her claim. The SHO concluded that relator's receipt of social security in 1999 was based solely on the injury she sustained in the 1999 MVA. The SHO relied on the September 18, 2001 report of Dr. Stychno, wherein he states relator is "currently on Social Security Disability and not working at the present time related to a motor vehicle accident of 5/99 in which she injured her right lower extremity. * * * Her last treatment was approximately one year ago related to the above-noted allowed conditions." The SHO also relied on medical evidence in the record from relator's treating physician, Dr. Brodell. Specifically, in his January 26, 1999 office note, Dr. Brodell had indicated that relator's "restrictions would be lifted on January 28, 1999, and that if she felt she could work overtime, that would be fine with us." As the SHO noted, Dr. Brodell's office note was generated several months before the MVA, and demonstrates that relator was able to return to work without any restrictions. Further, the SHO noted that relator had failed to present any medical evidence that she received any treatment for the allowed conditions of this claim between March 1999 and 2006. The SHO weighed that evidence against relator's affidavit and credibility and placed greater weight on the medical evidence. 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.

{¶42} Because relator failed to present any contemporaneous medical evidence that the allowed conditions in this claim forced her from the workforce, the SHO found that relator had failed to meet her burden of proving that the allowed conditions had kept her from returning to the workforce. As such, it is apparent that the SHO did not find relator's

testimony, in the absence of any medical evidence to substantiate that testimony, to be credible. This does not constitute an abuse of discretion, and the magistrate finds that relator has not demonstrated that the commission abused its discretion by failing to find that the medical evidence clearly established that relator had made a full recovery after the 1999 MVA.

{¶43} Relator also contends that the commission abused its discretion by applying the rationale from *Staton* to the facts of her case. In *Staton*, the claimant, Larry O. Staton, sustained a work-related injury in April 1993 when he received an electrical shock at work. Staton finished work for the day; however, the following day he reported the incident to the employer and complained of neck and shoulder pain. The plant physician examined Staton, but no treatment was recommended and Staton returned to work. Apparently Staton made no further complaints, and there was no other evidence that he received any treatment. His claim was eventually allowed for cervical and bilateral shoulder strain.

{¶44} In May 1993, Staton took a medical leave of absence that ultimately extended into a permanent retirement. The documents supporting his leave of absence listed coronary artery disease and depression as the sole reasons for Staton's retirement.

{¶45} Staton applied for TTD compensation, and the commission denied the request for two reasons: a lack of medical evidence and voluntary retirement. Ultimately, the Supreme Court of Ohio upheld the commission's decision. Citing *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court reiterated that the character of claimant's retirement is relevant because, if it is injury-related, it is involuntary and cannot bar an award of TTD compensation. Thereafter, the court stated:

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 claimants 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.

Id. at 410 (emphases sic.).

{¶46} Relator argues that *Staton* is clearly distinguishable from this case because, in *Staton*, all of the retirement documentation listed non-allowed conditions as the reason for *Staton's* departure from the workforce. Relator argues that she did not retire from the job market; instead, she was temporarily disabled while she recovered from the 1999 MVA. Because she returned to work for one year in 2002, relator argues that *Staton* is inapplicable because her departure from the workforce was temporary as opposed to permanent. For the reasons that follow, this magistrate disagrees.

{¶47} Relator did indeed return to the workforce in 2002. However, relator left the workforce at the end of 2002 and did not work in 2003, 2004, 2005, or 2006. As such, the question is whether or not relator abandoned the workforce in 2003 and whether that departure was necessitated by the allowed conditions in this claim or the injuries she sustained in the 1999 MVA. As the commission found, relator failed to present any evidence of medical treatment for the allowed conditions in this claim from 1999 until

2006. It is not an abuse of discretion for the commission to find a lack of contemporaneous medical evidence of treatment or disability to be relevant. *State ex rel. Bercaw v. Sunnybreeze Health Care Corp.*, 119 Ohio St.3d 284, 2008-Ohio-3922; *State ex rel. Gibson v. Indus. Comm.*, 123 Ohio St.3d 92, 2009-Ohio-4148.

{¶48} When considering whether or not one's removal from the workforce was voluntary or involuntary, it appears that relator is arguing that leaving the workforce for medical reasons is never voluntary. However, for purposes of workers' compensation law, an involuntary departure only means that it was occasioned by the allowed conditions in the claim. A voluntary departure simply indicates that the allowed conditions in the claim were not the cause of the departure. The commission did not abuse its discretion when it applied *Staton* to relator's case.

{¶49} Lastly, relator argues that, in the event this court finds that the commission did not abuse its discretion by finding her departure from the workforce in 1999 was voluntary, because she returned to the workforce in 2003, the commission abused its discretion by not applying the rationale from *McCoy* and finding that her return to employment rendered her again eligible for TTD compensation.

{¶50} In *McCoy*, the Supreme Court of Ohio held that a claimant who voluntarily retires from the workforce will be eligible to receive TTD compensation if that claimant re-enters the workforce and, due to the original injury, becomes temporarily and totally disabled while working at that new job. Relator's difficulty here is the same as the difficulty she had establishing that her departure in 1999 was due to the allowed conditions: there is no contemporaneous medical evidence in the record demonstrating that relator's allowed left knee condition forced her from the workforce in either 1999 or at

the end of 2002. As the commission noted, relator could have presented documentation from her social security disability application identifying her injury to her left knee as the reason she could not work; however, she did not. The only evidence to support relator's assertion that the allowed conditions in this claim forced her from the workforce in either 1999 or at the end of 2002 are her self-serving statements. It was not an abuse of discretion for the commission to find that relator did not meet her burden of proof.

{¶51} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion in denying her request for TTD compensation, and this court should deny her request for a writ of mandamus.

/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).