

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can a claimant who takes a disability retirement for an unrelated condition still receive temporary total disability benefits?

When an employee abandons the workforce because of a work-related injury, it is fairly clear that the employee cannot also receive temporary total disability ("TTD") compensation. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2003-Ohio-5245. A difficult question presents itself when an employee is on temporary total for one condition while at the same time seeking disability retirement for another unrelated condition.

State ex rel. Rouan v. Indus. Comm., 133 Ohio St.3d 249, 2012-Ohio-4639, involved a claimant who injured her leg at work in 2004 and received TTD. Several months later, she sought disability retirement with the Ohio Public Employees Retirement System, citing "major depressive disorder" as the sole basis. (The claimant had unsuccessfully sought to have that condition allowed in her workers' compensation claim.) She received TTD while the disability application was pending, but when her leg conditions reached "MMI," her temporary total was terminated. Approximately two (2) years later, after the disability retirement was granted, the claimant again sought TTD for two newly allowed conditions. This request was denied because the claimant had retired, and therefore voluntarily removed herself from the workforce. The claimant, citing *State ex rel. Brown v. Indus. Comm.*, 60 Ohio St.3d 45, 623 N.E.2d 55 (1993), argued that a claimant who is temporarily and totally disabled cannot voluntarily retire, but this argument was rejected. The claimant sought a writ of *mandamus*, which was denied, prompting an appeal as of right to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that the claimant had permanently abandoned the workforce when she sought retirement. The Court stressed that TTD is intended to replace "lost earnings," and there can be no "lost earnings" when the claimant is not part of the workforce. The Court distinguished *Brown* (which involved a claimant who became incarcerated while receiving permanent total disability), stating that it was not the claimant's leg injury that permanently disabled her. Second, even though the claimant in *Brown* voluntarily left the workforce when he was incarcerated, his status as a member of the workforce did not change. In the present case, the claimant's status did change, because after she had reached MMI she did not return to work due to her "major depressive disorder."

This decision re-affirms that the issue of voluntary abandonment requires a two-step analysis, looking both at the reason for the disability and whether the claimant removed themselves from the workforce. The claimant in *Rouan* attempted to exploit an apparent contradiction in *Brown* – that a claimant on TTD cannot "voluntarily" retire – and the Court recognized and rejected this argument.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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