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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When a claimant voluntarily retires, can she later seek temporary total disability compensation arising from conditions which were allowed after her retirement? Can it be said that she voluntarily abandoned her position, which should preclude TTD?

Ohio courts have generally held that employees who voluntarily retire and remove themselves from the workplace are no longer entitled to temporary total disability compensation ("TTD") because they can by definition no longer have lost "earnings." *State ex rel. Floyd v. Formica Corp.*, 140 Ohio St.3d 260, 2014-Ohio-3614. This concept of "voluntary abandonment" is subject to limitations, including whether the claimant has "permanently abandoned the entire job market" after retirement. This is a factual question for the Industrial Commission, and such decisions will normally not be overturned if there is some evidence to support them. *Id.* Recently, the Tenth District Court of Appeals considered a mandamus action brought by an employer who contended that a claimant who received TTD after voluntarily retiring from her position had in fact abandoned her employment, and whether the Industrial Commission was required to make a determination that the claimant had not voluntarily abandoned her position.

State ex rel. Sears Roebuck & Co. v. Indus. Comm., 2015-Ohio-1661, concerned an employee who was injured at work in August, 2011. A workers' compensation claim was filed, and allowed for "lumbosacral strain, cervical strain, and upper trapezius strain." The claimant returned to work at her former position in September, 2011, under restrictions, but continued to complain of symptoms, and continued to treat. Her treating physician asked for a cervical MRI and orthopedic consult in March, 2012, but these requests were denied. The physician then extended and imposed further work restrictions which the employer accepted, although there were allegedly complaints that the claimant did not "move fast enough." The MRI and consult were ultimately granted in October, 2012, but the claimant voluntarily retired from her position in November, 2012. Based upon the MRI, in March, 2013, the claimant filed a motion seeking to have her claim allowed for substantial aggravation of pre-existing cervical stenosis at multiple levels. These conditions were allowed over the objections of the employer. In January, 2014, the claimant filed a motion seeking TTD based upon the newly allowed conditions, a motion that was contested by the employer based upon a lack of contemporaneous medical evidence and that the claimant had "voluntarily abandoned" her employment when she retired in November, 2012. The TTD was granted, prompting a mandamus action into the Tenth District Court of Appeals. A magistrate affirmed the awards, prompting an objection and consideration by the Court.

The Tenth District affirmed the award of TTD despite the claimant's retirement, finding that there was evidence to support the award. Considering first the sufficiency of the evidence, the Court noted that an injury-induced retirement is not voluntary, and does not preclude subsequent TTD compensation. *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 2012-Ohio-2469. The nature of the claimant's retirement is a factual question that involves the claimant's intent at the time, and this question is within the discretion of the Industrial Commission. "It is not this Court's role to consider facts and determine the [claimant's] motivation in retiring ... or whether

it was induced or voluntary.” *Id.* In this case, the Court found that the retirement was based at least in part on the subsequently-allowed conditions, basing this finding on the claimant’s testimony and medical records. A lack of evidence that any doctor told her to retire because of her conditions was relevant, but not determinative as to whether the retirement was voluntary. As to the “abandonment” issue, the Court rejected the employer’s contention that a lack of findings on the issue required a remand, finding that the facts in *Floyd, supra*, are factually distinguishable from the case at bar. In this case, there was no gap (such as the ten (10) year gap in *Floyd*) before seeking additional TTD. In addition, the claimant continually sought treatment that was denied up until just before her retirement, and the request was made promptly after the additional conditions were allowed. This lack of a “distinct temporal break” and the presence of evidence of ongoing treatment was sufficient to distinguish *Floyd* from the case at bar.

As noted by the Court in *Sears*, it appears that it is necessary to demonstrate a “distinct temporal break” between the retirement and request for TTD to constitute a voluntary abandonment of employment. Because the treatment was ongoing (and likely because the testing and consult were granted just before the retirement) the Court in *Sears* was unwilling to find that break, or that the claimant had voluntarily removed herself from the workforce.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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