

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Wanda Jacobs, :
Relator, :
v. : No. 11AP-262
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Cenveo, Inc., :
Respondents. :
:

D E C I S I O N

Rendered on August 21, 2012

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, and Christopher B. Ermisch, for relator.

Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

William W. Johnston, for respondent Cenveo, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Wanda Jacobs, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's motion for temporary total disability ("TTD") compensation and ordering the commission to award TTD compensation for a period beginning December 30, 2006.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission abused its discretion in denying TTD compensation because (1) relator did not voluntarily abandon her employment with respondent, Cenveo, Inc. ("Cenveo"), (2) Cenveo did not present a sufficient written job offer of suitable alternative employment, and (3) relator's mandamus action was not barred by laches. Accordingly, the magistrate recommended this court issue a writ of mandamus.

{¶ 3} Both respondents have filed objections to the magistrate's decision, and relator has not filed any memoranda in opposition. The commission raises the following three objections to the magistrate's conclusions of law:

1. The magistrate erred in finding that Jacobs did not abandon her former position of employment.
2. The magistrate erred in finding that Cenveo was required to show a written good faith job offer as a prerequisite to the denial of TTD compensation.
3. The magistrate erred in finding that laches did not bar this action.

{¶ 4} Cenveo presents similar challenges to the magistrate's conclusions of law in the following three objections:

1. The Magistrate's Decision does not comply with the law of Ohio including this Court's own decision rendered in [*State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-795, 2008-Ohio-4260].
2. The Magistrate's Decision is inconsistent with his own Findings of Fact.
3. The conduct of Wanda Jacobs clearly bars any recovery under the doctrine of laches.

{¶ 5} Because both sets of objections are related, we will address them together. None of the parties have filed objections to the magistrate's findings of fact, and, following an independent review of the record, we adopt those findings as our own.

{¶ 6} In their first objections, respondents argue that the magistrate erred by finding that relator did not voluntarily abandon her employment. "Voluntary departure from employment can bar temporary total disability compensation." *State ex rel. Galligan v. Indus. Comm.*, 124 Ohio St.3d 233, 2010-Ohio-3, ¶ 11, citing *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44, 45-46 (1988). An employee's firing can be considered a voluntary abandonment if it originates from behavior that the employee willingly undertook. *Id.*, citing *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 121 (1993). This rule arises from the principle that "'one may be presumed to tacitly accept the consequences of his voluntary acts.'" *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 403 (1995), quoting *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 44 (1987).

{¶ 7} Respondents assert that the magistrate, in finding no voluntary abandonment, erroneously relied on *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, and *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, which address situations where the injured worker refuses an offer of suitable alternative employment. According to respondents, relator did not refuse a job offer in this case, but was discharged for violating Cenveo's absenteeism policy after agreeing to work in a light-duty position. As such, respondents assert that the magistrate should have followed this court's decision in *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-795, 2008-Ohio-4260, which upheld the denial of TTD compensation in a similar scenario. We agree.

{¶ 8} In *Adkins*, the injured worker accepted light-duty work but was later fired for violating her employer's attendance policy. The commission denied her subsequent request for TTD compensation on the grounds that her firing constituted voluntary abandonment under the Supreme Court of Ohio's decision in *Louisiana-Pacific Corp.* We upheld the commission's decision and found the case distinguishable from those in *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), and *Ellis Super Valu*. Unlike those cases where the claimants had not accepted alternative employment, we found that *Adkins*' acceptance of light-duty work required her to follow her employer's absenteeism policy, and that it was unnecessary to determine whether the job offer was in good faith or whether *Adkins* had a legal justification for her refusal. *Akins* at ¶ 54, 56.

Finding that Adkins was presumed to intend the consequences of her voluntary act, i.e., her absence from work without notification, we determined that the commission did not abuse its discretion by finding she voluntarily abandoned her employment. *Id.*

{¶ 9} We reach a similar conclusion here. Unlike the cases relied on by the magistrate, relator did not refuse a job offer of light-duty work. Instead, she reported to the light-duty position and, after working for approximately one hour, left work complaining of pain and leading Cenvéo to believe she was going to follow up with her physician that week. After not hearing from relator that week and learning that relator never scheduled any follow-up appointment, Cenvéo mailed relator a letter informing her that she was considered "Absen[t] Without Notification." Relator did not respond, and, after waiting over two weeks since her last day of work, Cenvéo mailed her another letter, this time advising her that she would be terminated if she did not respond by October 23, 2007. When relator again failed to respond, Cenvéo terminated her employment. Thus, Cenvéo's decision to discharge relator was not based on a refusal of a job offer; it was based on relator's unexplained absence in the weeks that followed, which resulted in a violation of Cenvéo's work rules. Accordingly, we find the magistrate's reliance on *OmniSource* and *Ellis Super Valu* misplaced. Like the scenario in *Adkins*, relator's conduct amounted to a voluntary abandonment of employment that precluded an award of TTD compensation. Therefore, we sustain respondents' first set of objections.

{¶ 10} Because relator did not refuse an offer of alternative employment, we also sustain respondents' second set of objections, which challenge the magistrate's conclusion that Cenvéo failed to present a written job offer. Ohio Adm.Code 4121-3-32(A)(6) requires an employer to put an offer of light-duty work in writing *only if* the injured worker "refuses an oral job offer" and the employer intends to seek termination of TTD compensation. As explained above, however, relator did not refuse a job offer—she decided not to return to work without contacting Cenvéo or providing any explanation. As such, the written-job-offer requirement in Ohio Adm.Code 4121-3-32(A)(6) was not implicated. Therefore, respondents' second set of objections are sustained.

{¶ 11} Having sustained respondents' first and second objections, we reject the magistrate's conclusion that the commission improperly denied TTD compensation. Because the magistrate erred by recommending the issuance of a writ of mandamus,

respondents' objections to the magistrate's laches determination are moot. *See State ex rel. Laughlin v. James*, 115 Ohio St.3d 231, 2007-Ohio-4811, ¶ 44 (denial of writ of mandamus "renders moot respondents' argument that laches bars the [relators'] mandamus claim").

{¶ 12} Upon review of the magistrate's decision and an independent review of the record, we find that the magistrate has properly determined the pertinent facts and adopt them as our own. However, in accordance with our decision, we sustain respondents' first and second objections to the magistrate's conclusions of law, render respondents' third objections as moot, and reject the magistrate's recommendation to issue a writ of mandamus. Accordingly, the requested writ of mandamus is denied.

*Objections sustained in part, rendered moot in part;
writ of mandamus denied.*

FRENCH and DORRIAN, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Wanda Jacobs,	:	
Relator,	:	
v.	:	No. 11AP-262
Industrial Commission of Ohio and Cenveo, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on January 27, 2012

Nager, Romaine & Schneiberg Co., L.P.A., Jerald A. Schneiberg, and Christopher B. Ermisch, for relator.

Michael DeWine, Attorney General, and Colleen C. Erdman, for respondent Industrial Commission of Ohio.

William W. Johnston, for respondent Cenveo, Inc.

IN MANDAMUS

{¶ 13} In this original action, relator, Wanda Jacobs, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying on eligibility grounds relator's March 19, 2007 motion for temporary total

disability ("TTD") compensation, and to enter an order awarding TTD compensation starting December 30, 2006.

Findings of Fact:

{¶ 14} 1. On September 6, 2006, relator strained her lower back while employed as a machinist for respondent, Cenveo, Inc., a self-insured employer under Ohio's Workers' Compensation laws.

{¶ 15} 2. On September 29, 2006, a Cenveo employee, Kathy Talabac, refused to certify the industrial claim (No. 06-864285) on the "First Report of an Injury, Occupational Disease or Death" ("FROI-1"). The FROI-1 of record appears to have been completed in its entirety by Cenveo.

{¶ 16} 3. The FROI-1 is divided into three sections. At the bottom of the first section are blank spaces for the "[I]njured worker signature" and "[D]ate" of the signature. On the first section of the FROI-1 of record, all responses to the queries are typewritten. Section one is unsigned and undated in the spaces provided.

{¶ 17} The second section of the FROI-1 requests information from the "[H]ealth care provider." At the bottom of the second section are blank spaces for the "[H]ealth care provider signature" and the "[D]ate" of the signature. On the second section of the FROI-1 of record, all responses to the queries are typewritten. Section two is unsigned and undated in the spaces provided.

{¶ 18} The third section of the FROI-1 is to be completed by the employer. On the FROI-1 of record, in the space provided for the "Employer signature and title," the following is typed: "Kathy Talabac – KOT (Electronic Signature)."

{¶ 19} The FROI-1 of record states that the employer was notified of the injury on September 8, 2006. "Dr. Tur[c]" is listed as the health care provider.

{¶ 20} In response to the pre-printed query, "[W]ill the incident cause the injured worker to miss eight or more days of work?" the "[Y]es" box is marked.

{¶ 21} 4. Following a December 4, 2006 hearing, a district hearing officer ("DHO") issued an order allowing the claim for "strain low back." The DHO further states:

Currently there is no request for compensable lost time. The District Hearing Officer finds insufficient evidence to award temporary total disability compensation. Temporary total disability compensation may be considered upon submission of competent evidence such as a C-84 form.

The District Hearing Officer relied on the Euclid Hospital records of 9/7/06 as well as the physician of record records of Dr. Turc from September and October of 2006.

{¶ 22} 5. Earlier, treating physician Marinela L. Turc, M.D. wrote on a prescription slip: "May return to work 10/2/06 if better light work for now please, next [appointment] 10/6/06."

{¶ 23} As indicated by Cenveo's date-stamp, Dr. Turc's return-to-work slip was received by Cenveo on October 2, 2006.

{¶ 24} 6. The record contains a Cenveo memorandum to relator dated October 5, 2006 from Human Resources Manager Laurie Yant. The memorandum states:

On October 2, 2006, Dr. Turc, your treating physician released you to return to work on light duty. We accommodated this restriction by assigning you to the Inspection Area. By working in the Inspection Area, you are able to sit and stand as often as necessary. After working for about an hour, you came to the Human Resources Department stating that you could not work because you were in so much pain.

You stated that you would be following up with Dr. Turc that day. I spoke to Dr. Turc on Monday, October 2, 2006 and Friday, October 6, 2006. She has confirmed that you have not contacted her to schedule an appointment.

Dr. Turc's paperwork states that you are able to return to work on light duty. Because I have not received any updated paperwork from Dr. Turc and you have not contacted me directly, you are currently AWOL (Absence Without Notification).

Please contact me at [telephone number] to discuss.

{¶ 25} 7. The record contains a Cenveo letter dated October 17, 2006 from Ms.

Yant to relator. The letter states:

I recently sent you a certified letter on October 5, 2006, asking you to contact me to discuss your time away from work. According to Dr. Turc, you were able to return to work on restricted duty on October 2, 2006. You have failed to return to work or provide any updated information on your current condition.

You are currently AWOL (absent without notification).

If I do not hear from you by Monday, October 23, 2006, your employment with Cenveo will be terminated.

If you have any further questions, please contact me at [telephone number].

{¶ 26} 8. The record contains a document captioned "Cenveo Personnel Action Request Form" signed and approved by Ms. Yant on October 23, 2006. This document indicates that relator's employment was terminated effective October 23, 2006. The document states "Termination Reason: Abandoned job."

{¶ 27} 9. On December 30, 2006, relator completed and signed a "Notice to Change Physician of Record" on a form ("C-23") provided by the Ohio Bureau of Workers'

Compensation ("bureau"). On the C-23, relator indicated that she had changed her physician of record from Dr. Turc to Rafik Massoun, M.D.

{¶ 28} 10. On January 3, 2007, Dr. Massoun completed a C-84 that certifies a period of temporary total disability beginning December 30, 2006, to an estimated return-to-work date of February 28, 2007. The C-84 certification was based upon a December 30, 2006 examination.

{¶ 29} 11. On March 19, 2007, citing the January 3, 2007 C-84 of Dr. Massoun, relator moved for TTD compensation beginning December 30, 2006.

{¶ 30} 12. Following a June 11, 2007 hearing, a DHO issued an order denying relator's March 19, 2007 motion. The DHO's order explains:

The District Hearing Officer denies claimant's C86 request (03/19/2007) for payment of temporary total disability compensation for the period 12/30/2006 to present. The District Hearing Officer finds that claimant was terminated from her employment, on or about 10/23/2006, for violation of the employer's absenteeism policy. Additionally, claimant was offered employment (sedentary) within the restrictions specified by Dr. Turc (return to work slip 09/06 specifying "light" duty work). While claimant asserted that she was unable to work in this sedentary position for more than several hours (on 10/02/2006), there is no medical evidence from Dr. Turc to indicate that this restricted duty work was not appropriate.

The certified mail receipt now of file documents claimant's receipt of the employer's written offer of restricted duty work (letter dated 10/02/2006).

The claimant's failure to abide by the employer's attendance policy, as well as her failure to accept the restricted duty work offered (via certified mail) constitutes an abandonment of employment that bars payment of the requested temporary total disability compensation.

{¶ 31} 13. Relator administratively appealed the DHO's order of June 11, 2007.

{¶ 32} 14. Following an August 3, 2007 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of June 11, 2007, and denying relator's motion on eligibility grounds. The SHO's order explains:

The Staff Hearing Officer denies claimant's C86 request (03/19/2007) for payment of temporary total disability compensation for the period 12/30/2006 to present. The Staff Hearing Officer finds that claimant was terminated from her employment, on or about 10/23/2006, for violation of the employer's absenteeism policy. Additionally, claimant was offered employment (sedentary) within the restrictions specified by Dr. Turc (return to work slip 09/06 specifying "light" duty work). While claim[ant] asserted that she was unable to work in this sedentary position for more than several hours (on 10/02/2006), there is no medical evidence from Dr. Turc to indicate that this restricted duty work was not appropriate.

The certified mail receipt now on file documents claimant's receipt of the employer's written offer of restricted duty work (letter dated 10/02/2006).

The claimant's failure to abide by the employer's attendance policy, as well as her failure to accept the restricted duty work offered (via certified mail) constitutes an abandonment of employment that bars payment of the requested temporary total disability compensation.

{¶ 33} 15. On August 21, 2007, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of August 3, 2007.

{¶ 34} 16. On March 17, 2011, relator, Wanda Jacobs, filed this mandamus action.

Conclusions of Law:

{¶ 35} Three issues are presented: (1) did relator voluntarily abandon her employment at Cenveo? (2) did relator refuse an offer of suitable employment? and (3) is this action barred by the equitable doctrine of laches?

{¶ 36} The magistrate finds: (1) relator did not voluntarily abandon her employment at Cenveo, (2) relator did not refuse an offer of suitable employment, and (3) this action is not barred by laches. Accordingly, it is the magistrate's decision that this court issue a writ of mandamus as more fully explained below.

{¶ 37} This case involves a job offer in which the commission, through its SHO, determined that relator had voluntarily abandoned her employment. The SHO found that relator had failed to abide by Cenveo's attendance policy and had unjustifiably failed to accept Cenveo's job offer.

{¶ 38} Because the SHO's order improperly combines two separate eligibility defenses that an employer can use to defeat a request for TTD compensation, analysis begins with a case that explains the distinction between the two eligibility defenses. That case is *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, which is very instructive here.

{¶ 39} In *Ellis*, the claimant, Susan B. Hudgel, was industrially injured while employed with Ellis Super Valu, Inc. ("ESV"). ESV offered Hudgel a light-duty position, but, on September 23, 2004, Hudgel declined because the position required her to work evenings when her two teenage children were at home.

{¶ 40} The commission awarded TTD compensation after September 23, 2004, finding that Hudgel had a valid reason for refusing the job offer and hence did not abandon her former position of employment. ESV then filed a mandamus action in this court alleging that the commission abused its discretion in awarding TTD compensation despite Hudgel's voluntary abandonment. This court disagreed and ESV appealed as of right to the Supreme Court of Ohio.

{¶ 41} In *Ellis*, at ¶6-12, the court explains the distinction between the two eligibility defenses:

We clarify at the outset that this is not a case of voluntary abandonment. Rather, the facts of this case raise the possibility of a different defense: refusal of suitable alternate employment. R.C. 4123.56(A) prohibits the payment of temporary total disability compensation "when work within the physical capabilities of the employee is made available by [an] employer." Both defenses affect a claimant's eligibility for temporary total disability compensation, but they derive from different compensatory theories and involve distinct analyses.

Fundamental to receipt of any workers' compensation benefits is a causal relationship between injury and disability. Temporary total disability compensation is no exception and is designed to compensate for the temporary loss of earnings sustained while the claimant is unable to return to the former position of employment due to injury. *State ex. rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517 N.E.2d 533. For many years, there were three main defenses to the payment of temporary total disability compensation: (1) the claimant is medically able to return to the former position, (2) the claimant's condition is no longer temporary, and (3) the claimant's inability to return to the former position of employment is not due to injury. See *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 632, 23 O.O.3d 518, 433 N.E.2d 586; *Ashcraft*.

The defense of voluntary abandonment derives from the last of the three. In a case of voluntary abandonment, the claimant's inability to return to the former position of employment is never in dispute. What is instead always at issue is the reason for that inability. Common to every voluntary-abandonment controversy is the existence of two independent reasons for the claimant's inability to return to the former position of employment. One is medical and one is not, with the two most common nonmedical reasons being an employment termination or a voluntary refusal to return. The issue in every voluntary-abandonment case is which cause was primary and which was secondary.

That is not the case with the defense of refusal of suitable alternate employment. This defense does not ask why the

claimant has not returned to his former position of employment, because the answer is inherent in the mere fact of a job offer. There is no need to propose alternate employment if the claimant's inability to return to the former position is attributable to anything other than the injury. Instead, the relevant inquiry in this situation is why the claimant has rejected an offer to ameliorate the amount of wages lost. This, in turn, can involve considerations of, for example, employment suitability, the legitimacy of the job offer, or whether the position was offered in good faith. The causal-relation question in this situation is different because it derives from a different compensatory intent, which is to facilitate the claimant's return to the work force. As critical as compensating injured workers and their dependents is, it is not the only goal addressed by the workers' compensations system. Assisting a claimant's return to gainful employment is also important, benefiting not only the employer and employee, but society at large.

Unfortunately, for many years, this latter goal was hampered by a major shortcoming in the temporary total disability scheme: it did not accommodate claimants who could not return to the former position of employment but were medically capable of other work. Unless other employment at least matched a claimant's weekly temporary total disability benefits, claimants had no incentive to return to the work force and often remained unemployed rather than jeopardize temporary total disability.

The General Assembly addressed this problem in 1986 with major amendments to R.C. 4123.56. Foremost was the creation of a new form of wage-loss compensation that encouraged return to the work force by paying the difference between a claimant's former wages and the earnings in the new job. R.C. 4123.56(B), now (B)(1), 141 Ohio Laws, Part I, 767. As a further incentive to return to the work force, R.C. 4123.56(A) was amended to provide that a claimant who was offered a job within his or her physical capacities could not receive temporary total disability compensation if he or she refused that job. 141 Ohio Laws, Part I, 766.

Given these distinct inquiries, a finding that a claimant has unjustifiably refused an offer of suitable alternate employment does not translate into a finding that the claimant voluntarily abandoned the former position of employment. In fact, they are mutually exclusive. An offer of

alternate employment would occur only when a claimant is medically unable to return to the former position of employment. In such a case, a finding of voluntary abandonment could not be sustained, since a claimant cannot voluntarily abandon a position that he or she is medically incapable of performing. *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 OhioSt.3d 303, 2007-Ohio-1951, 865 N.E.2d 41.

{¶ 42} Turning to the first issue: did relator voluntarily abandon her employment at Cenveo? In *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, the Supreme Court of Ohio succinctly explains an adjunct principle to the judicial doctrine of voluntary abandonment of employment. The *OmniSource* court states at ¶10:

A claimant who is already disabled when terminated is not disqualified from temporary total disability compensation. *State ex rel. Pretty Prods., Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466; *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 623 N.E.2d 55. That is because "a claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal." *Id.* at 48, 623 N.E.2d 55. Once a claimant is disabled, "it is of no consequence that a subsequent event may arise, such as the claimant's incarceration, which may further impair his or her ability to work, because the subsequent event does not negate the causal relationship between the work-related injury suffered by the claimant and his or her absence from the work force." *Id.* at 49, 623 N.E.2d 55. *Pretty Prods.* expressly extended these principles to discharges for violations of work rules.

{¶ 43} Applying the principle here, the commission cannot find that relator voluntarily abandoned her employment at Cenveo.

{¶ 44} As indicated by the *Ellis* court at ¶9, "inherent in the mere fact of a job offer" is that the claimant cannot medically return to the former position of employment:

There is no need to propose alternate employment if the claimant's inability to return to the former position is attributable to anything other than the injury.

Id.

{¶ 45} As indicated by the October 5, 2006 memorandum, Cenveo "accommodated" relator's medical restrictions by assigning her to the "Inspection Area" which Cenveo represented to be a light-duty job within Dr. Turc's restrictions.

{¶ 46} By offering relator the light-duty job that relator worked for about one hour on October 2, 2006, Cenveo was accepting that relator was medically unable to return to her former position of employment as a machinist at the time the verbal offer was made.

{¶ 47} Even though relator never requested TTD compensation until December 30, 2006, Cenveo is precluded, for eligibility purposes, from asserting an ability to return to the former position of employment that is a prerequisite for a determination of voluntary abandonment.

{¶ 48} Thus, based upon the above analysis, relator did not voluntarily abandon her employment at Cenveo.

{¶ 49} Turning to the second issue, did relator refuse an offer of suitable employment?

{¶ 50} R.C. 4123.56(A) provides that TTD compensation shall not be paid "when work within the physical capabilities of the employee is made available by the employer."

{¶ 51} Supplementing the statute, Ohio Adm.Code 4121-3-32(A) provides the following definitions:

(3) "Suitable employment" means work which is within the employee's physical capabilities.

* * *

(6) "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

{¶ 52} Ohio Adm.Code 4121-3-32(B)(2)(d) provides that TTD compensation may be terminated after hearing: "Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment."

{¶ 53} In *State ex rel. Coxson v. Dairy Mart Stores of Ohio, Inc.*, 90 Ohio St.3d 428, 2000-Ohio-188, the commission denied Marlyne Coxson her request for TTD compensation on grounds that she had refused her employer's offers of light-duty employment. The *Coxson* court held that the letters offering employment could not be considered offers of suitable employment because (1) the letters did not identify the position offered or describe its duties, and (2) some of the terms used by the employer in its letters were ambiguous or vague.

{¶ 54} The *Coxson* court rejected the employer's position that any deficiency with the letters was cured by its written promise to "work with the physician to modify jobs within given restrictions or limitations." *Id.* at 433. The *Coxson* court stated:

* * * The difficulty with accepting this argument is that it essentially legitimizes any job offer-no matter how inappropriate-under the guise of later modification. As noted previously, if a job offer is to be sufficient to stop TTC, it must be clear that the job is indeed within claimant's restrictions.

Id.

{¶ 55} In *State ex rel. Professional Restaffing of Ohio, Inc. v. Indus. Comm.*, 152 Ohio App.3d 245, 2003-Ohio-1453, ¶4, this court had occasion to apply the *Coxson* requirements. This court stated:

Here, relator offered claimant a "left-handed position" without identifying the specific position or the duties required of that position. Although claimant's medical restrictions relate to the use of his right hand, the job offer extended by relator is not specific enough to allow claimant, his doctor, or the commission to assess whether the job is, in fact, within claimant's restrictions. As noted by *Coxson*, for a job offer to be sufficient to terminate TTD compensation, it must be clear that the job is indeed within claimant's restrictions. The only way to assess this is to know the position being offered and the general nature of the duties required of the position.

{¶ 56} In *State ex rel. Ganu v. Willow Brook Christian Communities*, 108 Ohio St.3d 296, 2006-Ohio-907, the employer offered Gracie Ganu a light-duty job based upon the medical restrictions of Dr. Holzaepfel who examined Ganu at the request of the employer. Because Ganu did not accept the offer, the commission terminated TTD compensation on the employer's motion.

{¶ 57} In *Ganu*, the court found that Dr. Holzaepfel's report could not properly form the basis for a good-faith job offer because he failed to consider all allowed conditions. The court also found that the job offer failed to meet the specific job requirements under *Coxson*.

{¶ 58} The *Ganu* court summarizes the *Coxson* holding:

* * * *Coxson* held that a written offer of suitable employment must clearly identify the physical demands of the job and, moreover, that an offer lacking the requisite clarity could not be rehabilitated by an employer's verbal assurances that the claimant's limitations would be honored.

Id. at ¶41.

{¶ 59} In *State ex rel. Nifco, LLC v. Woods*, 10th Dist. No. 02AP-1095, 2003-Ohio-6468, the claimant, Tracey Woods, was awarded TTD compensation beginning April 30, 2002. The commission found that Woods had not voluntarily abandoned her employment notwithstanding that she had accumulated seven points under the attendance policy at Nifco.

{¶ 60} In its order, the commission found that three missed work days were industrially related and thus could not be used by Nifco to assess points against Woods. Nifco filed in this court a mandamus action challenging the commission's determination that Woods had not abandoned her job.

{¶ 61} In denying the writ, this court adopted the decision of its magistrate. Speaking through its magistrate, this court stated:

Here, despite claimant's alleged refusal of Nifco's April 24, 2002 verbal job offer, Nifco never gave claimant a written offer. The magistrate recognizes that the commission's job offer rule is written in the context of an employer's motion to terminate TTD compensation. Here, the employer never moved to terminate TTD compensation. Rather, the employer endeavored to preclude the payment of TTD compensation. Nevertheless, Nifco attempts to use evidence of a verbal job offer to, in effect, justify its ultimate termination of employment and a finding that the termination is voluntary so as to preclude the payment of TTD compensation. In the magistrate's view, the written job offer rule effectively precludes Nifco from claiming that its verbal job offer bars the commission from finding that the April 25, 2002 and April 26, 2002 missed days of work were industrially related.

Id. at ¶107.

{¶ 62} Here, to the extent that the October 5, 2006 Cenveo memorandum and the October 17, 2006 letter can be viewed as a written job offer, they do not meet the *Coxson* standards and therefore do not constitute a written offer of suitable employment.

{¶ 63} While the October 5, 2006 memorandum states that relator is being assigned to the "Inspection Area" and that the job allows one "to sit and stand as often as necessary," there is no indication as to the lifting that would be required.

{¶ 64} Ohio Adm.Code 4121-3-34(B)(2)(b) provides:

"Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

{¶ 65} Given the commission's definition of "light work" and that Dr. Turc released relator to perform "light work," Cenveo's October 5, 2006 job offer fails to show that the "Inspection Area" job actually falls within the "light work" definition. Thus, Cenveo's written job offer failed to meet the *Coxson* standards.

{¶ 66} Moreover, in his August 3, 2007 order, the SHO states that Cenveo offered relator a sedentary position in the "Inspection Area." However, Cenveo's written offer does not state that the position is a sedentary one or that it meets the sedentary requirement.

{¶ 67} Based upon the above analysis, it is clear that there is no evidence of ineligibility for the requested TTD compensation.

{¶ 68} Because the commission has yet to address the merits of relator's request for TTD compensation based upon the C-84 from Dr. Massoun, this cause must be returned to the commission for further proceedings.

{¶ 69} The third issue is whether this action is barred by the equitable doctrine of laches.

{¶ 70} The elements of laches are: (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive of the injury or wrong, and (4) prejudice to the other party. *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 1995-Ohio-269.

{¶ 71} As earlier noted, on August 21, 2007, an SHO mailed an order refusing relator's administrative appeal from the SHO's order of August 3, 2007. Relator filed this mandamus action on March 17, 2011. Thus, relator delayed the filing of this action by some three and one-half years. Relator did not file a reply brief in this action and has offered no response to respondents' laches claim.

{¶ 72} On June 20, 2011, respondents filed a supplemental stipulation of evidence. The supplemental stipulation shows that, on May 4, 2009, relator moved for TTD compensation beginning February 14, 2008.

{¶ 73} Following a June 22, 2009 hearing, a DHO issued an order denying the May 4, 2009 motion for TTD compensation. The DHO's order of June 22, 2009 explains that relator remains ineligible for TTD compensation because the commission had previously found that she had voluntarily abandoned her employment.

{¶ 74} The DHO's order of June 22, 2009 was administratively affirmed by an SHO following an August 13, 2009 hearing.

{¶ 75} Presumably, should this court issue a writ of mandamus ordering the commission to vacate its ineligibility finding contained in its SHO's order of August 3, 2007, relator would then have grounds for the commission's exercise of continuing

jurisdiction over its SHO's order of August 13, 2009 that denied TTD compensation on eligibility grounds. Conceivably, relator could prevail on her May 4, 2009 motion for TTD compensation beginning February 14, 2008 such that the self-insured employer, Cenveo, would be required to pay TTD compensation to relator for a period beginning February 14, 2008.

{¶ 76} Thus, it is conceivable that the issuance of a writ of mandamus to correct the commission order at issue here could have consequences beyond the matter at issue here.

{¶ 77} According to respondents, Cenveo is prejudiced by relator's delay in filing this action because allegedly Cenveo would have scheduled one or more medical examinations to assess whether the industrial injury was at maximum medical improvement ("MMI"). The inference is that, somehow, Cenveo was misled to forego exercising its right to schedule examinations because of its reliance upon the commission's determination that relator was ineligible for TTD compensation due to the job offer refusal.

{¶ 78} Ineligibility for TTD compensation is not necessarily forever. The syllabus of *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305 states:

A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶ 79} Thus, a self-insured employer should know that a commission determination of TTD ineligibility is always subject to the reinstatement of eligibility if the claimant returns to the work force. Thus, Cenveo's claim that it was prejudiced through no fault of its own is baseless. Cenveo was not prohibited from scheduling an MMI examination simply because relator had been declared ineligible for TTD compensation.

{¶ 80} In short, this action is not barred by the equitable doctrine of laches.

{¶ 81} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of August 3, 2007, and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's request for TTD compensation based upon the medical evidence of record.

/s/ Kenneth W. Macke

KENNETH W. MACKE
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).