

Memo D5 | Voluntary Abandonment

Voluntary abandonment is an affirmative defense to requests for compensation for temporary total disability and permanent total disability. There are three types of voluntary abandonment. When an employer or the Bureau of Workers' Compensation asserts the defense of voluntary abandonment, hearing officers shall specifically identify the type(s) of abandonment the employer or the Bureau of Workers' Compensation is asserting and then address each type separately in their order. What follows are the types of actions the courts have deemed to constitute a voluntary abandonment.

1. **1. Voluntary Retirement:** A voluntary retirement is one that is not causally related to the allowed conditions in the claim. If an injured worker retires due to his or her allowed conditions, the retirement is considered to be involuntary and is not a bar to the receipt of compensation. Conversely, when an injured worker retires due to a reason other than the allowed conditions, the retirement is considered to be voluntary and will bar the receipt of compensation.
2. **2. Termination:** A discharge from employment can constitute a voluntary abandonment if the termination is the result of the injured worker's violation of a written work rule that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.
 - The work rule must be in writing regardless of whether the rule should be common sense.
 - The requirement of a written work rule can be satisfied by a written job description containing specific job duties combined with a written employee handbook that sets out specific behavior expectations. This requirement can also be satisfied by a series of formal "write-ups" or progressive discipline, which placed the employee on notice that further infractions may result in termination. Hearing officers must determine that an injured worker has actually engaged in conduct prohibited by a written work rule in order to make a finding of voluntary abandonment.
 - As to negligent or careless actions that result in termination, there may be situations in which the nature or degree of the conduct, though not characterized as willful, may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment.
 - When an employee is terminated after a workplace injury for conduct prior to and unrelated to the workplace injury, his or her termination does not amount to a voluntary abandonment of employment for purposes of temporary total disability compensation when (1) the discovery of the dischargeable offense occurred because of the injury and (2) at the time of the termination, the employee was medically incapable of returning to work as a result of the workplace injury.

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Claim Number: 18-138908

Date of Injury: 3/16/2018

This claim has been previously **allowed for: LUMBAR SPRAIN; LEFT HIP SPRAIN.**

This matter was heard on 12/04/2018 before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511 and 4123.52 on the following:

APPEAL of SHO order from the hearing dated 09/11/2018, filed by Employer on 09/20/2018.

Issue: 1) Injury Or Occupational Disease Allowance

APPEAL of SHO order from the hearing dated 09/11/2018, filed by Injured Worker on 10/01/2018.

Issue: 1) Injury Or Occupational Disease Allowance

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Howenstein,
Ms. [REDACTED] via telephone hearing
APPEARANCE FOR THE EMPLOYER: Mr. Ermisch
APPEARANCE FOR THE ADMINISTRATOR: No Appearance.

HEARD BY: Mr. Bainbridge, Ms. Taylor, Mrs. Gillmor

11/04/2018 - It is the decision of the Industrial Commission the Employer's Appeal, filed 09/20/2018, and the Injured Worker's Appeal, filed 10/01/2018, are taken under advisement for further review and discussion and an order be issued without further hearing.

11/04/2018 - After further review and discussion, it is the decision of the Commission the Employer's Appeal, filed 09/20/2018, and the Injured Worker's Appeal, filed 10/01/2018, are granted and the Staff Hearing Officer order, issued 09/14/2018, is vacated as follows.

The FROI-1 First Report of Injury, Occupational Disease or Death, filed 04/19/2018, is **GRANTED** to the following extent of this order.

The Commission finds the Injured Worker sustained a compensable injury on 03/16/2018 while working as a veterinarian technician. While lifting a boxer (dog) in the front lobby and carrying the dog to the scale, the Injured Worker felt a sprain in her left lower back and hip area.

The claim is **ALLOWED** for **LUMBAR SPRAIN** and **LEFT HIP SPRAIN.**

The Commission relies upon the FROI-1, filed 04/25/2018, wherein Elias Arnitsis, D.C., states the Injured Worker sustained a lumbar sprain and left hip sprain as a result of the industrial injury.

The Commission also relies upon the 04/04/2018 report of Seth Levine, M.D., the 04/24/2018 narrative report of Dr. Arnitsis, and, in part, on the independent medical examination and report, dated 06/25/2018, from Todd Conley, D.C.

Dr. Levine's 04/04/2018 report indicates the Injured Worker had lower left back pain for two weeks after she picked up a dog. Dr. Levine's physical examination of the Injured Worker revealed left paralumbar spasm and tenderness. Dr. Levine diagnosed a back strain.

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The Commission also relies upon Dr. Arnitsis' 04/24/2018 report, indicating he initially examined the Injured Worker on Friday 04/20/2018. Dr. Arnitsis indicates the Injured Worker was lifting and carrying a dog to the scale to weigh him, the dog weighed between 40-50 pounds, after she put the dog down and walked back to the treatment room, she felt an immediate onset of dull pain. Dr. Arnitsis opined the Injured Worker sustained lumbar and left hip sprains as a direct result of this incident.

Based upon a physical evaluation of the Injured Worker and review of the medical records, Dr. Conley opined there was sufficient evidence to support allowance of a lumbar sprain and a left hip sprain secondary to the 03/16/2018 incident.

The Commission finds the 03/16/2018 industrial injury prevented the Injured Worker from returning to her former position of employment as a veterinarian technician for a closed period of time from 04/20/2018 through 05/30/2018.

The Commission orders payment of temporary total disability compensation from 04/20/2018 (the date of Dr. Arnitsis' initial examination of the Injured Worker) through 05/30/2018, closed period. The Injured Worker was released to return to her former position of employment on 05/31/2018 per the 05/01/2018 and 06/01/2018 MEDCO-14 Physician's Reports of Work Ability from Dr. Arnitsis.

Dr. Arnitsis' 04/24/2018 report states the Injured Worker worked full duty on Saturday (03/17/2018) but woke up on Sunday (03/18/2018) following the injury with severe pain, preventing her from sitting and walking. On Monday (03/19/2018), the Injured Worker called into work and told them she could not work that day due to severe low back pain. The Injured Worker returned to work on Tuesday (03/20/2018), but had continued lower back pain. Dr. Arnitsis' 04/24/2018 report also indicates the Injured Worker performed light duty work but was told by the Employer they no longer had any light duty work and she had to return to full duty work. Dr. Arnitsis states the Injured Worker last worked on 04/03/2018.

Per Dr. Arnitsis' 05/01/2018 MEDCO-14, the Injured Worker was rendered temporarily and totally disabled from 03/16/2018 to 05/31/2018 (when the Injured Worker should be able to return to the job held on the date of injury). However, Dr. Arnitsis did not initially examine the Injured Worker until 04/20/2018. Furthermore, the Injured Worker worked after the 03/16/2018 industrial injury according to Dr. Arnitsis' 04/24/2018 narrative report and the Injured Worker's testimony at hearing.

The Commission also relies upon Dr. Arnitsis' 06/01/2018 MEDCO-14, which indicates the Injured Worker was released to full duty work.

The Employer argued the Injured Worker voluntarily abandoned her employment when she resigned from her employment on 05/10/2018 for reasons unrelated to the industrial injury. Based upon *State ex rel. Klein v. Precision Excavating & Grading Co.*, Slip Opinion 2018-Ohio-3890, the Employer argued the Injured Worker is not entitled to payment of temporary total disability compensation after 05/09/2018 since the Injured Worker voluntarily removed herself from her former position of employment for reasons unrelated to the workplace injury. The Employer relied upon the Injured Worker's 05/10/2018 written letter of resignation, which did not indicate the reason for the Injured Worker's resignation from her former position of employment. The Employer asserted the Injured Worker's resignation was not related to the industrial injury and after the Injured Worker's 05/10/2018 resignation she flew approximately nine hours to Peru to visit family.

The Commission finds the Injured Worker did not voluntarily abandon her employment with the Employer as she found another job earning more money than her former position of employment.

The Commission distinguishes the present case from the *Klein* decision wherein

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the injured worker resigned from his employment after his industrial injury but had intended to resign from his employment before the industrial injury in order to move to Florida and to search for other employment. The evidence in the *Klein* case demonstrated that before the industrial injury, Klein had intended and planned to move to Florida. Klein informed co-workers he was planning on moving to Florida for better weather and more job opportunities before the industrial injury. However, Klein did not in fact resign from his former position of employment until after the industrial injury. The Court held Klein's move to Florida combined with other circumstances and evidence demonstrated his intention to leave Precision Excavating permanently and constituted a voluntary abandonment of his employment unrelated to the industrial injury. Therefore, Klein was no longer eligible for temporary total disability compensation.

The Commission relies upon the Injured Worker's testimony at hearing that she resigned from her former position of employment on 05/10/2018 after the date of injury to accept another position earning more money with a different employer. Here, the Injured Worker sustained an injury, which rendered her physically unable to return to her former position as a veterinarian technician. Ultimately, the Injured Worker decided not to return to her former position in order to accept a higher paying job with a different employer. The Commission finds that *Klein* hinges on a claimant's intent to remain in the workforce. The Injured Worker also testified she left for Peru after her physical limitations, due to the industrial injury, had ended in approximately late May of 2018. The Injured Worker testified she went to Peru for approximately two weeks before starting her new employment position. Per the Injured Worker's brief in support of her appeal to the Commission, the Injured Worker began her new position on 06/18/2018. Based upon the fact the Injured Worker resigned from her employment with the Employer to accept a better paying position with a different employer, the Commission finds the Injured Worker did not voluntarily abandon her former position of employment.

All evidence was reviewed and considered prior to rendering this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed by: cm
Date Typed: 12/04/2018

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor, and voted on as follows:

Thomas H. Bainbridge Yes
Chairman

Jodie M. Taylor Yes
Commissioner

**Electronically signed by
Thomas H. Bainbridge**

**Electronically signed by
Jodie M. Taylor**

CONCURRING AND DISSENTING OPINION OF COMMISSIONER GILLMOR:

I concur with the majority opinion's granting of the FROI-1, First Report of Injury, Occupational Disease or Death, filed 04/19/2018, and allowance of the claim for LUMBAR SPRAIN and LEFT HIP SPRAIN. I also concur with the majority

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opinion's award of temporary total disability compensation for the closed period 04/20/2018 through 05/09/2018.

I, however, respectfully dissent from the majority opinion's award of temporary total disability compensation as of the effective date of the Injured Worker's resignation, 05/10/2018. Instead, I find the Injured Worker voluntarily removed herself from her former position of employment, for reasons unrelated to the claim, rendering the Injured Worker ineligible for temporary total disability compensation.

I disagree with the majority opinion, which finds *State ex rel. Klein v. Precision Excavating & Grading Co.*, 2018-Ohio-3890, reconsideration denied, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554, hinges on a claimant's intent to remain in the workforce.

An injured worker is not eligible for temporary total disability compensation when her voluntary actions are the cause of lost wages. Put another way, lost wages must be caused by the industrial injury. *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, 881 N.E.2d 861, and *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, created an exception to this rule that allowed eligibility for temporary total disability compensation for an injured worker who is already disabled when her separation from employment occurs. *Klein* overruled *Reitter Stucco* and *OmniSource*, eliminating the exception, and nothing more. In the Court's analysis of *Klein*'s eligibility for temporary total disability compensation, the Court referenced *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 54 N.E.2d 677 (1989), and *State v. Freeman*, 64 Ohio St.2d 291, 414 N.E.2d 1044 (1980), for the longstanding rule that voluntary abandonment is primarily a question of intent that " 'may be inferred from words spoken, acts done, and other objective facts,' " and " '(a)ll relevant circumstances existing at the time of the alleged abandonment should be considered.' " The Court further noted an injured worker's intent is a factual question to be determined by the Commission.

In the factual analysis of the Injured Worker's intent herein, the majority focuses solely upon the Injured Worker's testimony she resigned to accept a better-paying job and concludes the Injured Worker intended to remain in the workforce. The majority does not evaluate whether the Injured Worker intended to permanently leave her former position of employment, nor does the majority discuss any other relevant circumstances. In reviewing the totality of the relevant circumstances, I find the evidence establishes the Injured Worker permanently and voluntarily abandoned her former position of employment for reasons unrelated to the workplace injury. My finding is based upon the Injured Worker's letter of resignation, dated 05/10/2018, which did not reference the Injured Worker's injuries, her disciplinary record, and the two-week vacation the Injured Worker took to Peru sometime in May, 2018. Accordingly, the workplace injury was no longer the cause of the Injured Worker's disability, and temporary total disability compensation should be denied from the date of the Injured Worker's resignation, 05/10/2018, through 05/31/2018.

Karen L. Gillmor, Ph.D. No
Commissioner

**Electronically signed by
Karen L. Gillmor, Ph.D.**

OFFICIAL REDACTED VERSION

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Claim Number: 18-138908

ATTESTED TO BY:

Findings Mailed: 04/16/2019

Executive Director

**Electronically signed by
Tim Adams**

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RECORD OF PROCEEDINGS

Claim Number: 15-832749

Date of Injury: 6/24/2015

This claim has been previously **allowed for: SPRAIN/STRAIN RIGHT KNEE; LATERAL MENISCUS TEAR, RIGHT KNEE; SUBSTANTIAL AGGRAVATION OF PRE-EXISTING RIGHT KNEE ARTHRITIS.**

The claim has been previously **disallowed for: MEDIAL MENISCUS TEAR, RIGHT KNEE.**

This matter was heard on 02/07/2019 before the Industrial Commission pursuant to the provisions of R.C. 4121.03, 4123.511 and 4123.52 on the following:

Request for Reconsideration filed by Injured Worker on 11/19/2018.
Issue: 1) Continuing Jurisdiction Pursuant To R.C. 4123.52
2) Terminate Temporary Total Disability

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Ms. [REDACTED], Mr. Moro
APPEARANCE FOR THE EMPLOYER: Mr. Lavelle
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

HEARD BY: Mr. Bainbridge, Ms. Taylor, Mrs. Gillmor

02/07/2019 - It is the decision of the Industrial Commission the Injured Worker's Request for Reconsideration, filed 11/19/2018, is taken under advisement for further review and discussion and an order be issued without further hearing.

02/07/2019 - After further review and discussion, it is the decision of the Commission the Injured Worker has met her burden of proving the Staff Hearing Officer order, issued 10/18/2018, contains a clear mistake of law of such character that remedial action would clearly follow. Specifically, the Staff Hearing Officer misapplied the holding in *State ex rel. Klein v. Precision Excavating & Grading Co.*, 2018-Ohio-3890, reconsideration denied, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554, to the facts of the present case, as it regards the Injured Worker's entitlement to temporary total disability compensation, after accepting an early retirement buyout pursuant to the Employer's Special Attrition Program. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 692 N.E.2d 188 (1998), *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999), and *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398, in order to correct this error.

The Injured Worker's Request for Reconsideration, filed 11/19/2018, is granted. The Injured Worker's Appeal, filed 10/26/2018, from the Staff Hearing Officer order, issued 10/18/2018, is granted to the extent of this order. It is further ordered the Staff Hearing Officer order, issued 10/18/2018, is vacated.

It is the decision of the Commission to deny the Employer's C-86 Motion, filed 07/17/2018.

The Employer requests termination of temporary total disability compensation in the claim, asserting the Injured Worker voluntarily abandoned her former position of employment as a line technician, by accepting an early retirement buyout, pursuant to the Employer's 2018 Special Attrition Program. Specifically,

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the Injured Worker signed paperwork on 06/01/2018, whereby she agreed to retire from employment with the Employer no later than 07/01/2018, in return for a cash payment (less applicable taxes) of \$60,000.00. The Injured Worker is also eligible for supplemental post-employment payments, including health care insurance, until customary retirement age.

The Employer specifically notes, as part of the buyout agreement, the Injured Worker signed the "Conditions of Participation Release Form", attesting to the following:

I am satisfied with the terms of this separation and acknowledge I am voluntarily accepting it. This acceptance is not under duress and I am able to work and suffer from no disability that would preclude me from doing my regularly assigned job. As such, I acknowledge that I am not entitled to disability pay or benefits.

The Commission finds the Injured Worker voluntarily signed the agreement, but questions the Employer's wisdom in proposing to the Injured Worker terms that were clearly inaccurate. The Injured Worker had been receiving temporary total disability compensation since December 2017, and was receiving temporary total disability compensation when all parties signed the agreement. The Employer knew the Injured Worker had a workers' compensation injury that prevented her from returning to her former position of employment as a line technician. Accordingly, the Commission does not find the quoted language controlling in this matter.

The thrust of the Employer's voluntary abandonment argument centers on the recent decision in *Klein, supra*. Klein sustained rib and lung injuries at work on 11/05/2014. His physician submitted documentation stating Klein was temporarily and totally disabled until 01/05/2015. Klein's last day of work for the employer was 11/05/2014.

Prior to his injury, Klein had intentions to move to Florida for better weather and more job opportunities. There was no evidence Klein actually had a job in Florida. He informed the employer of his plan on 10/31/2014, and inquired as to the proper procedures for quitting his job. Moreover, Klein had informed co-workers of his intentions to move to Florida. One co-worker completed a notarized statement indicating Klein told him on 11/03/2014, he had recently given his two-week notice and planned on moving to Florida with his mother. On 11/13/2014, Klein also informed the Bureau of Workers' Compensation he was moving to Florida on 11/20/2014. The exact date of his departure was not clear, but by 11/26/2014, Klein had asked the BWC to send all future correspondence to his new address in Florida.

The Supreme Court found Klein was not entitled to temporary total disability compensation, and in so doing, overruled prior decisions in *Reitter Stucco*, 117 Ohio St.3d 71, 2008-Ohio-499, 881 N.E.2d 861; and *OmniSource*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, which held if a claimant is already disabled when the separation of employment occurs, he is not disqualified from receiving temporary total disability compensation. The Court found the decisions were not consistent with the fundamental principle of temporary total disability compensation that the industrial injury must cause the worker's loss of earnings. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51, ¶ 35. For an injured worker to be eligible for compensation, it must appear that, but for the industrial injury, the claimant would be gainfully employed. As a corollary, when a claimant removes himself from employment for reasons unrelated to the work-related injury, he is no longer eligible for temporary total disability compensation. In those circumstances, the claimant's voluntary action, and not the injury, causes the loss of wages. *Id.*

In overruling *Reitter Stucco* and *OmniSource*, the Court in *Klein* specifically held:

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When a workers' compensation claimant voluntarily removes himself from his former position of employment for reasons unrelated to a workplace injury, he is no longer eligible for temporary total disability compensation, even if the claimant remains disabled at the time of his separation from employment.

The Court also noted voluntary abandonment of employment is primarily a question of intent that, "may be inferred from words spoken, acts done, and other objective facts," and, "all relevant circumstances existing at the time of the alleged abandonment should be considered." *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 383, 544 N.E.2d 677 (1989). The presence of that intent is a factual determination for the commission. *Id.*

The Court found the totality of Klein's statements and actions demonstrated that even before his injury, Klein intended to leave his position of employment permanently. Therefore, it was Klein's own actions, and not the industrial injury, that prevented him from returning to his former position of employment. Accordingly, Klein was not entitled to temporary total disability compensation.

The Commission finds the facts in *Klein* are not analogous to the facts in the present matter. Klein had already decided he was quitting his job and moving to Florida before his injury occurred. Evidence from other witnesses confirmed his intent. He followed through with his plan, and moved to Florida within a couple weeks of his injury.

Klein's move to Florida had nothing to do with his industrial injury. It was pre-planned, and he would have been unemployed and incurring lost wages, even if he had not been injured as there was no evidence he had employment in Florida. Under the circumstances, Klein removed himself from his former position of employment for reasons unrelated to the workplace injury. It was his voluntary action, and not the injury, that caused the loss of wages.

In the instant claim, the Injured Worker was already injured and receiving temporary total disability compensation when she accepted and signed the buyout agreement with her Employer on 06/01/2018. She had been placed on temporary total disability in December 2017, because her allowed right knee conditions had gradually deteriorated and required surgery. On 12/12/2017, she underwent a right knee arthroscopic partial lateral meniscectomy, partial medial meniscectomy, and chondroplasty of trochlea and lateral femoral condyle. Unfortunately, the Injured Worker did not have a favorable outcome, as documented in the treatment notes of her physicians, who report persistent pain and instability, effusion, and an inability to stand or walk well (See office note of James Kerrigan, M.D., dated 04/02/2018; and office note of John Dunne, D.O., dated 05/22/2018).

Dr. Kerrigan and Dr. Dunne opined the Injured Worker suffered a substantial aggravation of pre-existing right knee arthritis. The Injured Worker filed a motion for additional allowance, and while her request was pending, the Employer offered, and the Injured Worker accepted the buyout package. Nine days after the buyout agreement took effect, the claim was additionally allowed for "substantial aggravation of pre-existing right knee arthritis", pursuant to a final Staff Hearing Officer order, issued 07/10/2018. The Injured Worker remains temporarily and totally disabled due to the allowed conditions, and currently receives Synvisc injections to treat her ongoing right knee pain.

The Injured Worker testified she would not have accepted the early retirement buyout, but for her injury. She testified she planned to continue working at her former position of employment, because she enjoyed the financial rewards of her job, which included profit sharing and performance bonuses. The Injured Worker is 60 years old, and had worked 38 1/2 years for the Employer. She testified her objective was to work until age 66, at which point she would have received her full retirement from the Employer. The Commission has no reason to doubt the Injured Worker's testimony that for economic reasons, she would have continued

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to work for the Employer, if not for her injury. The Commission also has no reason to doubt the Injured Worker's testimony that it is still her intent, once she receives medical clearance, to find a new job and reenter the workforce.

The Injured Worker has a significant injury to her right knee, and she has not reached maximum medical improvement. Additional surgery has not been ruled out. It is unclear what the Injured Worker's ultimate residual physical functional capacity will be, once she has reached a treatment plateau. Given the uncertainty of her allowed right knee condition, it is understandable why the Injured Worker accepted the Employer's 2018 Special Attrition Program. It provided a degree of financial security and certitude that otherwise had been put at risk because of the workplace injury.

Under the circumstances, the Commission finds the Injured Worker, unlike the injured worker in *Klein*, removed herself from her former position of employment for reasons specifically related to the workplace injury, and did not intend to voluntarily abandon her employment or the entire workforce. Therefore, *Klein* does not apply.

For all of these reasons, the Employer's C-86 requesting temporary total disability compensation be terminated, is denied.

The Commission orders reinstatement of temporary total disability compensation, from the date last paid through 10/29/2018, and to continue with submission of appropriate medical evidence supporting a finding of ongoing temporary total disability from the allowed conditions in the claim. The payment of temporary total disability compensation is based on the MEDCO-14 Physician's Reports of Work Ability of Dr. Dunne, dated 05/22/2018 and 08/16/2018.

All evidence was reviewed and considered prior to rendering this decision.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN R.C. 4123.512.

Typed by: stz
Date Typed: 02/12/2019

The action is based upon the motion made by Mr. Bainbridge, seconded by Ms. Taylor, and voted on as follows:

| | | | |
|----------------------------------|-----|---------------------------------|-----|
| Thomas H. Bainbridge Chairman | Yes | Jodie M. Taylor Commissioner | Yes |
|----------------------------------|-----|---------------------------------|-----|

**Electronically signed by
Thomas H. Bainbridge**

**Electronically signed by
Jodie M. Taylor**

DISSENTING OPINION BY COMMISSIONER GILLMOR:

I disagree with the majority opinion's granting of the Injured Worker's Request for Reconsideration, filed 11/19/2018, and the vacation of the Staff Hearing Officer order, issued 10/18/2018. I do not find the Staff Hearing Officer misapplied the holding in *State ex rel. Klein v. Precision Excavating & Grading Co.*, 2018-Ohio-3890, reconsideration denied, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554, to the facts of the present case, as it regards the Injured Worker's entitlement to temporary total disability compensation, after accepting an early retirement buyout pursuant to the Employer's Special Attrition Program.

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I disagree with the majority opinion's denial of the Employer's C-86 Motion, filed 07/17/2018, requesting termination of payment of temporary total disability compensation. Hence, I must dissent from the majority opinion.

In the present claim before the Commission, the Injured Worker voluntarily abandoned her former position of employment on 07/01/2018, when she participated in the "GM-UAW National - Agreement and the Memorandum of Understanding -- 2018 Special Attrition Program, Lordstown Complex and Parma Stamping - Other Than Skilled." Under this Program, the Injured Worker accepted the "Conditions of Participation Release Form" and executed the forms on 06/01/2018. On Form A, the Injured Worker selected her option of preference, which was Option 1:

Retire no later than July 1, 2018 under the Normal or Voluntary provisions of the 2015 GM-UAW Pension Plan. I understand that under this option I will receive a cash payment (less applicable taxes) as follows:

- Other Than Skilled Classification \$60,000

On 06/01/2018, the Injured Worker also accepted and executed the 2018 Special Attrition Program, Conditions of Participation Release Form. On Form B, the Injured Worker acknowledged the following in the fifth paragraph:

I am satisfied with the terms of this separation and acknowledge I am voluntarily accepting it. This acceptance is not under duress and I am able to work and suffer from no disability that would preclude me from doing my regularly assigned job. As such, I acknowledge that I am not entitled to disability pay or benefits. I acknowledge no prior representations, promises or agreements relating to my employment and separation have been made by GM or the UAW which are contrary to this agreement and the provisions of the Special Attrition program, and my acceptance constitutes the entire and only agreement between me and GM. I understand that I shall not be eligible for recall to work or re-employment by GM, or any of their subsidiaries or any other entity in which the GM has an ownership interest.

In *State ex rel. Klein v. Precision Excavating & Grading Co.*, 2018-Ohio-3890 at ¶ 1, 2018 WL 4627287, the Supreme Court of Ohio considered "whether an injured worker who voluntarily leaves his position of employment for reasons unrelated to his workplace injury is entitled to continued temporary-total-disability compensation." The Court held, "when a workers' compensation claimant voluntarily removes himself from his former position of employment for reasons unrelated to a workplace injury, he is no longer eligible for temporary-total-disability compensation, even if the claimant remains disabled at the time of his separation from employment. *Id* at ¶ 29. The *Klein* Court found that Klein's move to Florida, combined with all of the evidence showing that he intended to quit his current job permanently, constituted a voluntary abandonment of his employment unrelated to his industrial injury. As a result, the *Klein* holding is controlling in this claim.

I would grant the Employer's C-86 Motion and terminate payment of temporary total disability compensation, effective 07/01/2017, based upon a finding under *Klein* that the Injured Worker voluntarily abandoned her former position of employment with the Employer for reasons unrelated to the workplace injury when she voluntarily retired, effective 07/01/2017, under the terms of the collectively bargained Special Attrition Program. I would find temporary total disability compensation paid after 06/30/2017 overpaid and to be recouped pursuant to the non-fraud provisions of R.C. 4123.511(K).

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RECORD OF PROCEEDINGS

Claim Number: 15-832749

Karen L. Gillmor, Ph.D. No
Commissioner

**Electronically signed by
Karen L. Gillmor, Ph.D.**

ATTESTED TO BY:

Executive Director

Findings Mailed: 04/19/2019

**Electronically signed by
Tim Adams**