

IN THE SUPREME COURT OF OHIO

State of Ohio, ex. rel.
RICHARD PIERRON : Case No. 07-1460

Relator-Appellant :

vs. : On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

INDUSTRIAL COMMISSION OF OHIO :
ET AL. : Court of Appeals Case No.
06AP-391

Respondent-Appellees :
Original Action in Mandamus

MERIT BRIEF OF PLAINTIFF-APPELLANT, RICHARD PIERRON

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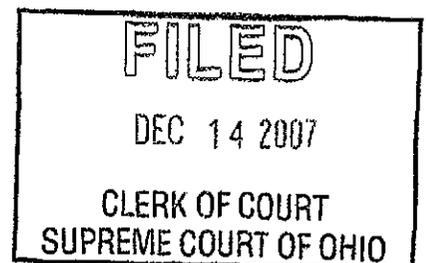


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STATEMENT OF FACTS

On September 2, 1973, Relator was injured while in the course of and arising out of his employment with his employer, United Telephone/Sprint Telephone Communication Company (See Mandamus Complaint, Paragraph 5). The claim has been allowed for the conditions of "fracture, dorsal vertebra, lumbar subluxation, T-12 post traumatic syringomyelia, lumbar strain, and traumatic myelopathy." The allowed conditions have not been in dispute per the medical on file (See Dr. Steiman's IME report dated July 23, 2003, Exhibit 34, Page 82 in the Record, See also Industrial Commission Order of 2/19/04, attached as Exhibit 29 page 67 of the Record). Although it took place almost thirty-five years ago, it was a serious injury, and treatment has continued as evidenced by the record (See requests for treatment, (both allowed, amended, and disapproved throughout the record, including Exhibit 2 (page 6), Exhibit 3 (page 7), Exhibit 12, and 13 (pages 24-25) and others in the record).

The Appellant attempted to continue working for on with the employer (hereinafter referred to as "Sprint"), and worked in its warehouse for another 23 years at a light duty position. Eventually Sprint approached Appellant informing him that his light duty job was being done away with, and he was either going to be laid off or terminated (See Record, Page 40). His medical conditions got to the point where he could not do other work at Sprint (See Record, Page 40, Paragraphs 2 and 4). Faced with this prospect, Appellant took a "regular" retirement, as opposed to a disability retirement or "medical retirement", but it was indeed precipitated by his difficulties arising from his work injury (Id.). It was either doing this, or be terminated outright. (Id.) Rather than face certain discharge, he retired from Sprint in 1997 at the age of 53.

On June 17, 2003, Appellant filed a C-86 Motion in his workers' compensation claim requesting that the claim be amended to include the above-noted additional conditions, and the payment of Temporary Total Disability Compensation (See C-86 Motion, Exhibit 5, Page 14 in the Record). This request was supported by medical evidence from Relator's then-treating physician, Dr. Robert A. Fantasia, D.C., which included a narrative report dated June 5, 2003 (Page 41 of the Record). Appellant also submitted a C-84 form completed by Dr. Fantasia on October 10, 2003 which certified the period of disability from June 17, 2001 onward up through December 30, 2003 (See Exhibit 10 in the Record, at Page 6). On said C-84 Dr. Fantasia states "Patient's condition is totally disabling. Patient did attempt to return to work delivering flowers after leaving his job with the phone company, but was unable to do so". (Id at Box #7 on form). Pursuant to Section 4123.52 of the Ohio Revised Code, the Appellant's request for compensation was limited to two years prior to the date of the filing of the application. Thus, the request was limited by the aforementioned statute to the period of June 17, 2001 onward. In response to said request, Sprint had the Appellant evaluated by Dr. Gerald Steiman, M.D., who performed an Independent Medical Evaluation on their behalf on 7/18/03. See Exhibit 34, (page 82 in the record). In the report generated as a result of this examination, Dr. Steiman opined that the requested additional conditions were present, and attributable to the original 1973 work injury. Dr. Steiman also went on to find that "credible evidence that the Appellant has a significant myelopathic condition which creates a significant work impairment/disability" (See Record at page 86). Thus there is no question that the Appellant has the conditions in question and they render him disabled (Id. at page 86 in the Record). Nonetheless, the

matter was set for a District Hearing Officer hearing on August 29, 2003. After considering Appellant's testimony as to his attempted return to work at the Flower Shop, and reviewing all the evidence, the District Hearing Officer granted the additional conditions as requested. The District Hearing Officer also ordered Temporary Total Disability Compensation as requested from June 17, 2001 through July 24, 2003 and continuing upon the submission of medical evidenced documenting disability (See Exhibit 8, page 19 in the Record). Sprint appealed that determination (See Notice of Appeal Exhibit 9, page 21 in the Record). The Staff Hearing Officer affirmed the DHO to the extent that the requested conditions remained granted, however she modified the Order of the DHO and denied any and all Temporary Total Disability Compensation. The Staff Hearing Officer found that "the injured worker retired from his position of employment for reasons unrelated to the industrial injury on 04/01/1997." See the record, (page 29). The Appellant appealed the Order of the SHO and submitted a Memorandum in Support. See Exhibit 19 through 21, (pages 33-56 in the record). In the Memorandum in Support of his appeal was an Affidavit from the Appellant testifying that his departure from Sprint was not a voluntary removal from the workforce. Rather it was due to the 1973 work injury and the medical conditions for which the claim was allowed (See Page 40 of the Record). The Appellant goes on to state that if he were not injured he would probably still be working at Sprint today (Id.). The Affidavit also states that he worked delivering flowers at an establishment called House of Flowers and Gifts in Versailles, Ohio. (Id.) Confirmation of the Appellant's employment was also submitted, (see Record page 39). Neither Sprint, nor the Ohio Bureau of Workers' Compensation has submitted any proof or documentation refuting this. In fact,

correspondence between parties' counsel indicates that Sprint knew full-well that Appellant had worked at the House of Flowers, and his employment was confirmed by the Rose Law Firm (See Record, Pages 31 and 32). In fact Counsel had characterized it as "sporadic work, only a few hours a week" (See Page 32 of the Record). There is no contrary evidence disputing this testimony and this employment confirmation. The matter was then set for hearing before the Full Industrial Commission on February 19, 2004, see Exhibit 29 (page 67 in the record). The Industrial Commission amended the claim to include the requested additional conditions, but went on to deny the request for Temporary Total. The Commission found that "there is no medical evidence that the injured worker left his job at the flower shop due to the allowed conditions in the claim. In addition, there is no medical evidence to support disability at the time of the injured workers' employment at the Flower Shop." (Id.) The Full Industrial Commission went on to find that "the injured worker has not established that he is eligible for Temporary Total Disability Compensation. It is found that the injured worker did abandon and retire from his position of employment for reasons unrelated to the injury in this claim on or about 04/01/1997, and he was not employed on either of the two possible dates to start the payment of Temporary Total Disability Compensation (06/17/2001 or 06/05/03)." It should be noted that the Full Commission's vote was 2 to 1, and the Record of Proceedings contains a rare and lengthy dissent from Commissioner Gannon which is precisely on point with Appellant's position in this action (See Record, Page 69-71).

Appellant filed a Request for Reconsideration of that Order. See Exhibit 33, (page 77 in the record). The Full Commission denied the Request for Reconsideration,

again, in a two to one vote. See Exhibit 35, (page 87 in the record). The Appellant then filed an action in Mandamus with the Court of Appeals. The matter was referred to a Magistrate, who found that Appellant did not in fact voluntarily remove himself from the work force when he left Sprint in 1997. Sprint objected, and on review, the Court of Appeals sustained Sprint's objections, overturned the Magistrate's decision, and denied Appellant's writ. It is from this series of hearings that the Appellant Richard Pierron appeals, and seeks relief.

ARGUMENT

In a workers' compensation case, in order for the Court to issue a Writ of Mandamus as a remedy from a determination of the Industrial Commission, a Relator-Appellant must show that he has a clear legal right to the relief sought and that the Commission had a clear legal duty to provide such relief. State ex rel. Presley v. Indus. Comm. (1967) 11 Ohio St.2d 141. A clear legal right to a Writ Of Mandamus exists where Relator shows that the Commission abused its discretion by entering an Order which is not supported by any evidence in the record. State ex rel. Elliott v. Indus. Comm. (1986) 26 Ohio St.3d 76. In the case at bar, the Industrial Commission and Court of Appeals' determination that Appellant had abandoned the work force ignores the Appellant's unrefuted testimony, and the medical documentation in the record. Thus, the determinations are not supported by evidence in the record. Secondly, the Commission's and Court of Appeals' determinations that Appellant's work at delivering flowers was not "enough" to constitute "work" or "gainful employment" is contrary to the case law which clearly addresses this subject. Because of this, a grave error has been committed, and it needs to be corrected with the proper writ of madamus which either orders the payment of temporary total disability compensation outright, or remands the matter back to the Industrial Commission for an analysis of entitlement to Temporary Total Disability Compensation in light of the finding that the Appellant had not voluntarily removed himself from the work force, and in fact secured follow-up employment at the House of Flowers. The Appellant respectfully asserts that his request for a writ should be granted.

PROPOSITION OF LAW #1

**WHEN AN EMPLOYEE IS FORCED TO ACCEPT A
RETIREMENT THAT IS THE ONLY ALTERNATIVE TO
LOSING YEARS OF ACCRUED BENEFITS AND SENIORITY,
THEN SUCH A RETIREMENT IS NOT VOLUNTARY, AND THUS
DOES NOT PRECLUDE PAYMENT OF TEMPORARY TOTAL
DISABILITY COMPENSATION**

Appellant starts off by immediately pointing to the logic and reasoning of The Magistrate's decision rendered in The Court of Appeals on December 20, 2006 (Attached as Appendix A to the June 28, 2007 Court of Appeals decision). Appellant also cites Commissioner Patrick Gannon in the Dissent written to the Order of the Full Commission issued May 27, 2004 (Page 69 through 71 of the Court of Appeals Record). This summarizes Appellant's position nearly perfectly in the assertion that when he retired from United Telephone, he was forced to do so. This is also set forth in Appellant's unrefuted sworn testimony (Page 40 of the Record) and elsewhere. Appellant re-states and incorporates Commissioner Gannon's opinions as if fully re-written herein. Appellant implores this Honorable Court to adopt the reasoning set forth therein.

In the case at bar it is the claimant's position (as accepted by the dissenting Commissioner and the Court of Appeals Magistrate) that the claimant's retirement was his only viable option, and thus was not voluntary. Moreover, the reason he was offered "retire or be fired" option was because of his injury. Clearly, if he would have still been a lineman with no back injury, he would be still working there today.

The claimant had worked for the phone company for many years. He was injured and sustained considerable impairments as a result. He eventually returned to

work for the same employer at a much lighter duty job. The reason for the light duty job was because the claimant had permanent, long term, and significant physical limitations and medical restrictions from this injury which necessitated the light duty work. It was from this light duty job that Appellant was going to be laid off.

It is well-settled law in Ohio that if a claimant is no longer employed by the employer where the injury occurred, inquiry into the character of the departure is the norm. *State ex rel. Pretty Products Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 670 N.E. 2d 466 (1996). Case law has held that retirement itself is not a bar to the payment of Temporary Total Disability *State ex rel. General American Transport v. Indus. Comm.* 48 Ohio St.3d 25, 548 N.E. 2d 928 (1990). If the retirement is injury-induced, it is not voluntary and does not act as a bar to Temporary Total Disability Compensation. *State ex rel Rockwell International v. Indus. Comm.* 40 Ohio sSt.3d 44, 513 N.,E.2d 678 (1988). But while voluntary departure generally bars TTD compensation, an involuntary departure does not. *Id.*, and *State ex rel Rockwell International v. Indus. Comm.* 40 Ohio St.3d 44, 531 N.E.2d 678 (1988).

Courts have wrestled with retirements, and whether they truly preclude later payment of Temporary Total Disability benefits in several cases since the 1980's. In evaluating this issue, courts have focused on whether the retirement was due to the injury which is the subject of the underlying workers' compensation claim. In *State, ex rel. Rockwell Internatl., v. Indus. Comm.* (1988), 40 Ohio St.3d 44 the injured worker sustained a low back injury and was off work several months. She was released to light duty, and returned to work. Thereafter she filed an application to reactivate her claim, requesting, among other things, temporary total disability compensation. In

contesting the requested compensation, the employer argued that the claimant had voluntarily retired and was precluded from receiving temporary total disability benefits. In making its determination, the Rockwell court cited the cases of State, ex rel. Jones & Laughlin Steel Corp., v. Indus. Comm. (1985), 29 Ohio App.3d 145, 29 OBR 162, 504 N.E. 2d 451, and State ex rel Ashcraft v. Indus. Comm. (1987) 34 Ohio St.3d 42, 517 N.E.2d 533. The Rockwell Court found that voluntary retirement may be a basis for denying continued payment of temporary total disability compensation "where the claimant by such retirement has voluntarily removed himself from the work force. The Rockwell court went on to note the issue was whether an injury-induced retirement is "voluntary" so as to preclude a claimant's eligibility for temporary total disability benefits. They found that it was not voluntary, and granted the T.T. benefits. In the case at bar, appellant, by such retirement in 1997 did not in fact remove himself from the work force. There is no evidence that the appellant would never work again, especially when retiring at the age of 53 as in Pierron's case. Moreover, Appellant's unrefuted testimony confirms that he was forced to do so, or lose all of his benefits. The Rockwell court went on to find that neither Ashcraft nor Jones & Laughlin state that any abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. A proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. The Rockwell Court went on to hold that where a claimant's

retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

The Rockwell Court also reiterated the principle that a disability determination does not hinge on the resolution of whether a claimant resigned or was involuntarily removed from their position. Instead, the determination rests on whether the fact that the worker left the employment was causally connected to the injury. Accordingly, where the Industrial Commission determines that a claimant has not left a former position of employment due to a work-related injury, it may properly deny an award of temporary total disability." (Citation omitted.) Id. at 4-5. Again, this is not present in the case at bar. This broader focus set forth in Rockwell takes into consideration a claimant's physical condition at the time of the departure. It recognizes the inevitability that some claimants will never be medically able to return to their former positions of employment, and thus dispenses with the necessity of a claimant's remaining on the company roster in order to maintain temporary total benefit eligibility. This logic flies in the face of the employer's assertion that the appellant could have forced the employer to lay him off and thus could have gotten unemployment and other workers comp benefits (which were not statutorily in place for this injury). Under Rockwell, and the cases cited therein, a claimant need not be forced to take a lay-off, and thus "remain on the employer's books" in order to maintain TTDC eligibility.

Since Rockwell, the Courts have reviewed various types of job terminations in terms of "voluntary" or "involuntary": retirement, layoff, firing, incarceration, and resignation. The Courts have addressed cases in which the claimant was seeking

TTD compensation when working at a job other than the one at which the injury occurred. In *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51, this Court examined the evolution of the voluntary-abandonment doctrine as a bar to TTD compensation. *McCoy* held that to be eligible for TTD compensation, "the claimant must show not only that he or she lacks the medical capability of returning to the former position of employment but that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings. In other words, it must appear that, but for the industrial injury, the claimant would be gainfully employed." *Id.* at ¶35. The *McCoy* court goes on to caution that the voluntary abandonment rule is potentially implicated whenever TTD compensation is requested by a claimant who is no longer employed in the position that he or she held when the injury occurred. But characterizing the claimant's departure from the former position of employment as 'voluntary' does not automatically determine the claimant's eligibility for TTD compensation. Instead, voluntary departure from the former position can preclude eligibility for TTD compensation only so long as it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss." *Id.* at ¶38.

In *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, the claimant was laid off by her employer for reasons unrelated to her industrial injury. Nevertheless, the commission awarded TTD compensation for a period subsequent to the layoff. In a mandamus action, the employer contended that the layoff precluded entitlement to TTD compensation. The court disagreed. Relying on *Rockwell*, the employer in *B.O.C.* asserted that temporary total disability

compensation is always improper if claimant's departure was not injury-related. The Court ruled that this is incorrect. An employer-initiated departure is still considered involuntary as a general rule. Rockwell did not narrow the definition of "involuntary," it expanded it. While certain language in Rockwell may be unclear, its holding is not. The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant. Id. In the case at bar, Pierron's departure was indeed-employer initiated. To present a worker with the time-honored "retire or be laid-off" option (much like the even-more-popular "quit or be fired") hardly makes his departure from that job voluntary. This is especially true when the job being eliminated is a light-duty position offered by an employer due to a work injury. Thus, under B.O.C. Appellant's departure from Sprint should be deemed involuntary since it was ultimately due to his original work injury.

In the case of State ex rel. Pretty Products v. I.C. (1996) 77 Ohio St.3d 5 this Court ruled that a claimant who is already disabled when terminated is not disqualified from temporary total disability compensation. The court said that the receipt of temporary total disability ("TTD") compensation rests on a claimant's inability to return to his or her former job as a direct result of an industrial injury. State ex rel. Ramirez v. Indus. Comm. (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586, syllabus. However, eligibility may be compromised when the claimant is no longer employed at that job. Once a claimant is separated from the former position of employment, future TTD compensation eligibility hinges on the timing and character of the claimant's departure. Pretty Products at 6-7. The timing of a claimant's separation from employment can, in some cases, eliminate the need to

investigate the character of departure. For this to occur, it must be shown that the claimant was already disabled when the separation occurred. Applying this to the case at bar, it has been established that Appellant had significant impairments and restrictions that required him to work at the light duty job. Thus, he was already disabled, and could not perform the job at which he was injured. Thus, Appellant could not have abandoned his former position of employment because he did not have the physical capacity for such employment at the time of the retirement.

In *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951] the court echoed this sentiment, even with misconduct of the claimant later on resulting in termination from the job at which he was injured. The court, again citing *Pretty Products*, and *Brown*, found that 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. Thus *Pretty Products* expressly extended these principles to discharges for violations of work rules. This Court should extend them to forced-retirement as well.

In this age of down-sizing, factory closings, sending jobs overseas and mass lay-offs it is not uncommon to see a worker who was "forced to take a retirement" from a company in order to maintain the insurance, savings, pension, or other benefits which were paid into or on during his tenure at a particular job. This in no way constitutes a voluntary removal from that job, or from the work force in general. In the case at bar, Appellant, who was not at his original position of work, and in fact

on light duty, was forced to take his retirement at the urging of his employer. So while he is on a light duty job (due to his work injury) which is being phased out by the employer, Appellant must either be fired and lose everything he has worked for, and paid into over the years, or take whatever pension is available. This is hardly voluntary choice, and the fact that he is not at full duty, but rather on light duty due to impairments occasioned by the work injury, invokes *Pretty Products* and *Brown*. Appellant did not have the capacity to work at his original job, and thus could not have abandoned it. These cases, and their progeny have held time and time again that a claimant who is already disabled when terminated is not disqualified from temporary total disability compensation. Here Appellant was permanently precluded from returning to his former position of employment at which he was injured due to his impairments. His attempt at staying on with the instant employer, at a light duty job should not be held against him.

As it was so eloquently presented by the Court of Appeals Magistrate the voluntary retirement issue was summed up as follows.

The commission concluded that relator had a choice when he was informed by Sprint that his job was being phased out and that he would be laid off. According to the commission's order "[h]e could have accepted a lay-off and sought other work but he chose otherwise." Implicit in the commission's quoted statement is the notion that relator had a realistic hope of someday returning to light-duty work at Sprint if he were to accept the layoff and not take a regular retirement. There is no evidence in the record to even suggest that the layoff was going to be temporary. The undisputed evidence is that the light-duty warehouse job that relator held for some 23 years was "being phased out." Given the absence of any evidence that relator had a realistic hope of returning to employment at Sprint after the lay-off, refusing to take a regular retirement would seem to

be foolish, if not financially unsound. The "choice" that the commission finds is not based upon evidence in the record. The retirement in early 1997 was clearly an employer-initiated departure, and under B.O.C. Group appellant was not required under those circumstances to show that his retirement in early 1997 was injury-induced, as the commission seems to suggest.

The dissent of Industrial Commissioner Gannon summed it up even better, and Appellant requests that, in addition to the Magistrate's logic, Commissioner Gannon's line of thinking be adopted by This Court: The rationale behind the voluntary abandonment theory is that temporary total disability compensation should not be paid to an injured worker if the injured worker's loss of income is due to a voluntary action the injured worker undertook rather than being due to the industrial injury. If an injured worker, for example, voluntarily retires and then later requests temporary total disability compensation, then under current case law compensation is not payable because the reason the injured worker is not working is not because of his industrial injury, but rather is because he voluntarily chose to leave his job. This is not what has happened in this case. In this case, it is the employer that abandoned the injured worker, not the injured worker who abandoned the employer. The injured worker is being penalized, not for his own voluntary actions, but for the employer's voluntary actions. This decision turns the entire theory of voluntary abandonment on its head. The injured worker was working for the employer in a light duty job. There is no evidence that the injured worker ever desired to, or took any actions toward, terminating his employment. It is not the injured worker that undertook the voluntary act of retiring, rather it is the employer that terminated its employment relationship with the injured worker. It is the employer who approached

the injured worker and informed the injured worker that the light duty job the injured worker was performing was being done away with. It is the employer who told the injured worker that the injured worker would either have to be laid off or would have to take a regular retirement. R.C. 4123.56(A) provides that temporary total disability compensation is not payable "for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached maximum medical improvement." No evidence was presented that the injured worker has ever been released to perform his former position of employment or has ever been found to be at maximum medical improvement. Rather the injured worker was not receiving temporary total disability compensation in this claim only because he had been working for his employer in a light duty job within his restrictions. Once the employer did away with the injured worker's light duty job, none of the statutory criteria for denying temporary total disability compensation applied in this case. Since the injured worker is still unable to perform his former position of employment, and light duty work within the injured worker's restrictions is no longer being offered by the employer, the injured worker is again entitled to receive temporary total disability compensation. There would be a voluntary choice by the injured worker resulting in a voluntary abandonment of employment in this case if the employer had given the injured worker a third choice (continue doing your light duty job), which the employer did not do. Under the definition of "voluntariness" being espoused in this claim, if a

prisoner on death row is given the choice of dying by lethal injection or dying by electrocution, if the prisoner chooses to die by lethal injection because such a method is the least painful of the two choices, by making that choice the condemned prisoner has converted what was his involuntary execution by the State into a voluntary choice by the prisoner to commit suicide. There is no authority being cited that can support the assertion that voluntary abandonment applies in the instant case. An injured worker who is unable to perform his former position of employment is not forbidden from receiving temporary total disability compensation simply because the employer offers, and then removes, an offer of light duty work. This is a dangerous, unprecedented and unsupported expansion of the voluntary abandonment theory. This decision would now permit all employers in this State to avoid paying temporary total disability compensation by simply bringing injured workers back to token light duty jobs and then turning around and doing away with those jobs shortly thereafter. This decision turns the voluntary abandonment theory from a situation where it is the injured worker's own actions that terminate his eligibility to receive temporary total disability compensation into a situation where it is the employer's actions that terminate the injured worker's eligibility to receive compensation. It is fundamentally unfair to put the employer in control of the injured worker's receipt of temporary total disability compensation by permitting the employer to force a "voluntary" abandonment upon an injured worker. (Emphasis added)

Even recently, the Courts have looked with some skepticism the blanket assertion by an employer that a separation was "voluntary" and precludes temporary

Total disability. In *State ex rel. Gross v. Industrial Commission*, 2005-Ohio-3936 the Court acknowledged that the claimant had sustained a disabling injury. But, similar to the case at bar, the issue was whether his injury or his departure was the cause of his loss of earnings. The *Gross* court found that distinctions between voluntary and involuntary departure are complicated and fact-intensive. An underlying principle, however, is that if an employee's departure from the workplace "is causally related to his injury," it is not voluntary and should not preclude the employee's eligibility for TTD compensation. See *Gross* , citing *state ex rel. Rockwell*, 40 Ohio St.3d at 46, 531 N.E.2d 678; *state ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51. In the case at bar, Pierron's departure from Appellee's employment was in no way initiated by him, and with little choice as to what to do, it was indeed not voluntary. Since his departure was not voluntary, he, under the aforementioned case law should be entitled to further temporary total disability compensation in his claim.

It is also well-settled that the claimant does not have the burden of disproving a voluntary abandonment of the former position of employment in order to show entitlement to TTD compensation. The burden of proof with respect to voluntary abandonment falls on the employer or the administrator. See *State ex rel. Monroe v. Indus. Comm.* 2005-Ohio 5157, citing *Superior* (cited above). In the case at bar, as Commissioner Gannon observed, Relator has testified without contradiction that he was working light duty at the time of his job being terminated, and there is no evidence that he intended on removing himself from the work force, especially at only 53 years of age. As Mr. Gannon put it "an injured worker who is unable to perform his former position of employment is not forbidden from receiving Temporary Total Compensation

simply because his employer offers, then removes an offer of light duty work.” (See Gannon dissent, Page 69-71 in the Record). When faced with being fired, or taking a retirement because the light duty job you have been assigned to is done away with, it is hardly a voluntary removal of the work force. There is no evidence to even remotely dispute this testimony. Thus, the finding that he removed himself from the work force voluntarily is not supported by some evidence, (or any evidence), and constitutes an abuse of discretion. The Court of appeals erred in failing to find this. As such, it must be remedied with the appropriate writ.

PROPOSITION OF LAW # 2

IF AN EMPLOYEE RETIRES FROM THE JOB FROM WHICH HE IS INJURED, BUT THEN RETURNS TO WORK AT ANOTHER POSITION WITH ANOTHER EMPLOYER THE HOURS OF WORK EACH WEEK ARE NOT DETERMINATIVE OF ELIGIBILITY FOR TEMPORARY TOTAL DISABILITY COMPENSATION TO RESUME IF HE BECOMES DISABLED AGAIN BECAUSE OF THE ALLOWED CONDITIONS IN THE CLAIM

Even assuming *arguendo* that Appellant did voluntarily retire from his job for reasons wholly unrelated to the work injury, thereby removing himself from the work force, case law clearly finds that this "removal" status can change with a workers' return to the work force. Appellant did just that. He returned to work at another job with the House of Flowers. It is undisputed that Appellate performed services for the House of Flowers in exchange for monetary compensation. Of course this is work. Sprint hopes to characterize Appellant's efforts at the House of Flowers as something other than a job, something other than work. Their position all along has been that his efforts are "not enough". See record, Page 31 & 32.

In *State ex rel. McCoy v. Dedicated Transport, Inc.* 97 Ohio St.3d 25 (2002) the Court ruled that a claimant who voluntarily abandoned his former position of employment will be eligible to receive temporary total if he re-enters the work force, and due to the original injury, becomes temporarily totally disabled while working at his new job. See also *State ex rel. Ohio Treatment Alliance v. Paasewe* 99 Ohio St.3d 19 (2003). Thus, if a claimant retires from the job at which he was injured, but then re-enters the work force by working again elsewhere, entitlement to T.T. is not precluded. This is what Appellant Richard Pierron did.

But this begs the question, "what is 'work'?" Ohio Revised Code Section 4123.01, the definition section of the Ohio Workers' Compensation Act is silent on this word. The concept of work itself is defined by gathering various rulings and principles set forth in the statute and case law. "Employment" is defined in the Ohio Administrative Code at Rule 4125-1(A)(2) for purposes of wage loss compensation, a companion benefit set forth in O.R.C. Section 4123.56(B). The Rule states employment means "work performed or to be performed pursuant to a contract of hire between an employee and employer" as those terms are defined in the Workers' Comp Act. What constitutes work for temporary total purposes has been more clearly addressed in the case law dealing with claimants who are drawing disability at the time, and are accused of "working" while doing so.

In the case of *State ex rel. Blabac v. Indus. Comm.* (1999), 87 Ohio St.3d 113, 1999-Ohio-249 this Court held that a claimant cannot receive temporary total disability compensation when he or she is unable to return to the job at which he or she was injured, but continues to work elsewhere (in that case as a scuba instructor) In *Blabac* the claimant injured his back in an industrial accident and began receiving temporary total disability compensation ("TTC"). Two months later, it was discovered that claimant was also earning wages as a scuba diving instructor. The Court ruled that Temporary Total disability compensation compensates for loss of earnings. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586. Accordingly, TTC is unavailable to one who has returned to work, i.e., is earning wages. In *Blabac*, the Claimant (much like the employer in the instant case) contended that not just any "work" bars TTC but only that which is "substantially

gainful employment." Arguing that his labor was neither "substantial" nor "gainful," claimant asserted an entitlement to TTC. The Blabac Court found otherwise. They cited Ramirez, the preeminent TTC case, which refers simply to a "return to work," without any qualification to the word "work." Ohio Revised Code Section 4123.56(A) mirrors this language.

In State ex rel. Johnson v. Rawac Plating Co. (1991), 61 Ohio St. 3d 599, 575 N.E.2d 837, the court addressed "work" focusing on whether the claimant is required to return to the job at which he was injured, or any job. Citing Ramirez the court ruled that disability compensation does stop when the claimant returns to work. The Johnson Court went on to cite State ex rel. Nye v. Indus. Comm. (1986), 22 Ohio St.3d 75, 22 OBR 91, 488 N.E.2d 867, where it was held that 'work' as used in Ramirez referred to any 'substantially gainful employment,' not merely the former position of employment." Id. at 600, 575 N.E.2d at 839. The Johnson court went on to find that to hold otherwise would permit the payment of temporary total disability benefits to a claimant who has chosen to return to full-time work at a job other than his former employment. In such a case, the claimant is no longer suffering the loss of earnings for which temporary total disability benefits are intended to compensate. In Nye, the commission determined that the claimant had returned to what was characterized as 'substantially gainful remunerative employment,' i.e., full-time work." 22 Ohio St.3d at 77-78, 22 OBR at 93, 488 N.E.2d at 870. But Nye merely confirmed that substantially gainful employment barred TTC. It did not, as claimant argued, create two categories of employment whereby only substantially gainful employment terminated TTC and more sporadic employment did not. This is what the

Appellee/Employer in the case at bar is trying to establish. There is work, and there is work. One type of work will allow for McCoy to be invoked, and Ramirez to be triggered, the other, well is just doesn't mean a thing. This simply is not the law in Ohio. Ramirez states that a "return to work" bars TTC, and the cases have all held that work is work, whether it is a little or a lot. In the Blabac case, claimant did not dispute that his paid scuba diving instruction constitutes "work." The claimant tried to argue that it just was not enough (like Sprint is arguing). The Blabac Court found otherwise, and ruled that work "does not have to be full-time, or even regular part-time to foreclose TTC; even sporadic employment can bar benefits. In the case at bar, Appellant Pierron calls on the same line of thinking to be employed when evaluating whether a claimant has "returned to work" or "re-entered the work force".

If the above analysis is not sufficient to establish Appellant's efforts at the House of Flowers "work" a case much more on point is State ex rel Hassan v. Marsh Building Products 100 Ohio St. 3d 300 (2003). There the Ohio Supreme Court addressed "how much work is work" for purposes of re-entering the work-force for temporary total purposes. In Hassan Appellee-claimant, ten days after his industrial injury, voluntarily abandoned his former position of employment with the appellant, Marsh Building Products. Approximately seven weeks later, a temporary employment agency placed claimant with Airborne Express. For the next three weeks, he worked eight, nineteen and one-half, and 24 hours respectively. He allegedly could no longer continue after the third week due to his allowed conditions. However, claimant's condition had worsened, and later that year, Hassan successfully moved for the additional allowance of additional conditions (like Pierron in the case at bar), and

temporary total disability compensation ("TTC"). The Industrial Commission found that claimant's voluntary departure from his former position of employment foreclosed the need for any evaluation of TTC on the merits, as well as any chance of TTC. Among the employer's objections to disability was the abandonment argument, and they argued that the claimant's less-than-full-time hours contradicted claimant's assertion of a return to work sufficient to trigger McCoy. This Court quickly, easily, and clearly addressed this concern. It ruled that "the final objection to TTC payment involves the extent of claimant's subsequent employment with Airborne Express. In this case, we are persuaded by claimant's assertion that because any employment-no matter how insubstantial -bars TTC, see *State ex rel. Blabac v. Indus. Comm.* (1999), 87 Ohio St.3d 113, 717 N.E.2d 336, then any employment should be sufficient to invoke *McCoy*." Thus employment, no matter how little, inconsequential, or miniscule, is still employment such that one can not draw T.T. Similarly, it should be enough to allow for T.T. later on if one becomes disabled. The bottom line is this: whatever job it is that you're doing, you can not draw T.T. while you're doing it. Similarly, you can draw T.T. afterwards if your work injury keeps you from keeping doing it. This is precisely on all fours with the instant case. Even if Appellant, Richard Pierron may have retired and "voluntarily removed himself from the work force", he re-entered it by working at the House of Flowers job in Versailles. Even though it was not full-time, and even though it was for a very small amount of money, it is still a job, and it is still work. Thus, it should constitute a re-entry into the work force such that T.T. should not be precluded later.

Thus, while a claimant must re-enter the work force after a voluntary abandonment before regaining eligibility for TT, the new work activity need not be full time, and there is no specific duration of work activity at the new job which must be met before TT can again be sought.

In *State ex rel. Ford Motor Co. v. Indus. Comm* 98 Ohio St.3d 20, 2002-Ohio-7038 the Court summarized all of the above-noted case nicely. "Temporary Total Compensation is prohibited to one who has returned to work. R.C. 4123.56(A), *State ex rel. Ramirez v. Indus. Comm.* (1982) 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586. Work is not defined for workers' compensation purposes. We have held, however, that any remunerative activity outside the former position of employment precludes TTC. *State ex rel. Nye v. Indus. Comm.* (1986) 22 Ohio St.3d 7 5, 22 OBR 91, 488 N.E.2d 867." Citing *Blabac*, the *Ford* Court ruled that "Work, moreover, does not have to be full time or even regular part-time to foreclose TTC; even sporadic employment can bar benefits." *Id.* (Emphasis added) Appellant finds it ironic that the Court uses the very word "sporadic" because this is the term used by Sprint in the case at bar to describe Appellant's flower delivery efforts as "not enough". See October 27, 2003 letter from defense counsel, in the Court of Appeals Record, Page 32,

Appellant is compelled to point out here parenthetically the sad reality that if he were drawing Temporary Total Disability and tried to do what he did for the House of Flowers, the employer would have a very strong argument to stop the TT due to the claimant "working". If Richard Pierron were being paid TT while delivering flowers at \$3.00 per hour, the employer would no-doubt have raised allegations of fraud and

overpayment, and accused the claimant of "working while collecting TT. The employer, the Commission, and the Court of Appeals were all strangely silent on this point.

Finally, the employer in the case at bar, as well as the Industrial Commission and the Court of Appeals all have asserted that Appellant could have "forced" the employer to lay him off, and he would have been entitled to wage loss compensation under O.R.C. 4123.56(B) [which was not in place for a 1973 work injury, and for which Appellant is not eligible], but also unemployment benefits. However, Pierron was on light duty with considerable medical restrictions at the time of the choice between lay-off and retirement. Case law has addressed this clearly in *State, ex rel. Diversitech Gen. Plastic Film Div., v. Indus. Comm.* (1989), 45 Ohio St.3d 381 where temporary total was contested by the employer as well in a lay-off situation. "Appellee's contention that claimant should have instead sought unemployment benefits is without merit. As a prerequisite to such benefits, R.C. 4141.29(A)(4)(a) requires an ability to work and an availability of suitable work. Moreover, an employee is not entitled to such benefits unless capable of employment in his or her usual trade or occupation or any other employment for which he is reasonably fitted. *Craig v. Bureau of Unemp. Comp.* (1948), 83 Ohio App. 247, 38 O.O. 356, 81 N.E. 2d 615. Claimant's injury precluded him from making such a representation. This was the case in *Diversitech*, and it is also the situation in the case at bar. To argue that Appellant could apply for unemployment and also Wage Loss Compensation under O.R.C. 4123.56(B) is incorrect. He would not qualify for unemployment under the above-noted case law, and Wage Loss is not available for injuries prior to 1986.

This man suffered a terrible injury while in the employ of Respondent, United Telephone Company. He fell from a telephone pole and broke his back, literally. His claim is allowed for rather severe and unusual medical conditions. He had surgery, and eventually returned to work with the same employer on light duty. When the light duty job was eliminated, he was forced to retire because there were no other jobs available for him to do. Thereafter he found a job delivering flowers. However, he was unable to continue doing this, and had to quit. Thus, he involuntarily abandoned the work force, but then re-entered it. However, he could not continue on. Thus he should be entitled to temporary total disability compensation from the date he was unable to work at the House of Flowers onward. He has done everything he was told to do by his employer. He has gone to every examination, worked at every light duty job they assigned to him, and is now permanently impaired as a result.

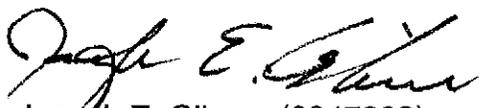
Alternatively, if his facts do not necessarily allow for the payment of T.T. under, Appellant respectfully requests that This Honorable Court indicate so specifically. Appellant requests that This Court specifically find that his retirement was not voluntary, and that he did in fact re-enter the work force by virtue of his job at the House of Flowers and Gifts in Versailles. As Appellant is compelled to point out, his condition is indeed disabling. Doctor after doctor has found that, as we stand here today, Appellant can not do any kind of work. A request for Permanent Total Disability compensation is pending at the Industrial Commission level. In a worst-case-scenario if he is found to not be entitled to Temporary Total disability compensation as per the Court of Appeals, he would be precluded from Permanent Total Disability as well. Appellant believes that this is too harsh of a result of being put in the predicament in 1997 that was presented

to him, through no fault of his own. In 1997, without the benefit of the undersigned counsel, Appellant made a decision to retire that will haunt him for the rest of his life. He had no alternatives, and thought it was the right thing to do. Appellant is adamant that he did work for the House of Flower after his departure from Sprint and did attempt to re-enter the work force. To find otherwise would unduly and unfairly preclude him from Permanent Total disability as well. Appellant requests that the Court specifically address this either way.

CONCLUSION

For the foregoing reasons, Appellant avers that there was no evidentiary basis for the Commission's decision or that of the Court of Appeals, and an abuse of discretion on the part of the Industrial Commission has occurred. Accordingly, the Relator, Richard Pierron, respectfully requests this Court reverse the Decision of the Court of Appeals rendered on July 28, 2007. Appellant requests that This High Honorable Court accept and adopt the findings of Industrial Commission Member Patrick Gannon in his dissent of February 19, 2004, and those of the Court of Appeals Magistrate in his decision of December 20, 2006. Appellant further requests that This Court find that Appellant did not voluntarily abandon his position of employment at Sprint. Appellant further requests that this Court find that Appellant returned to work at the House of Flowers in Versailles. Appellant requests that This Court issue a Writ of Mandamus, commanding the Industrial Commission to vacate its Order of October 10, 2003 (and subsequent Order affirming same dated February 19, 2004) Order the Commission be ordered to direct payment of Temporary Total Disability Compensation for aforementioned period (from June 17, 2001 through December 20, 2003 and continuing) to the Appellant, Richard Pierron.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing merit brief of Relator was served upon Eric Tarbox, Assistant Attorney General of Ohio, Counsel for Respondent, Industrial Commission of Ohio, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, and Sara Rose, Counsel for Appellee, Sprint Telephone, P.O. Box 188 Pickerington, Ohio 43147 on this 14th day of December, 2007.



Joseph E. Gibson (0047203)

19990A02

IN THE SUPREME COURT OF OHIO
(ON APPEAL FROM THE TENTH APPELLATE DISTRICT)
CIVIL DIVISION

State of Ohio, ex. rel.
RICHARD PIERRON
531 N. Center St.
Versailles, OH 45380

Case No.

07-1480

Relator-Appellant

vs.

NOTICE OF APPEAL

INDUSTRIAL COMMISSION OF OHIO :
30 W. Spring Street :
Columbus, Ohio 43215 :

Court of Appeals # 06AP-391

and

ORIGINAL ACTION
IN MANDAMUS

UNITED TELEPHONE COMPANY :
OF OHIO/SPRINT :
6480 Sprint Parkway :
Overland Park, KS 66251-6106 :

Respondents-Appellees

Now comes the Plaintiff-Appellant, Richard Pierron, by and through counsel, who hereby appeals the Judgment Entry of the Court of Appeals filed/entered on June 28, 2007, which journalized the Decision dated June 28, 2007 denying Relator-Appellant's Writ of Mandamus. This case originated in the Court of Appeals of Ohio, Tenth Appellate District.

Respectfully submitted,

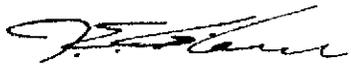

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ON COMPUTER 6

CERTIFICATE OF SERVICE

Pursuant to the Ohio Rules of Civil Procedure, and the Ohio Rules of Appellate Procedure the undersigned hereby certifies that a true and accurate copy of the foregoing has been served, regular U.S. Mail, first-class postage pre-paid to Sara Rose, Counsel for Respondent-Appellee at P.O. Box 188, Pickerington, Ohio 43147, and Marc Dann, Attorney General of Ohio, Counsel for Respondent-Appellee, Industrial Commission at 150 E. Gay Street, 22nd Floor, Columbus, Ohio 43215



Joseph E. Gibson

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY
2007 JUN 28 PM 1:25
CLERK OF COURTS

State of Ohio ex rel. Richard Pierron, :
 :
 Relator, :
 :
 v. : No. 06AP-391
 :
 Industrial Commission of Ohio : (REGULAR CALENDAR)
 and United Telephone Company, :
 :
 Respondents. :
 :

D E C I S I O N

Rendered on June 28, 2007

*Gibson Law Offices, and Joseph E. Gibson; Gloria
Castrodale, for relator.*

*Marc Dann, Attorney General, and Eric J. Tarbox, for
respondent Industrial Commission of Ohio.*

*Sara L. Rose, LLC, and Sara L. Rose, for respondent
Sprint/United Telephone Company.*

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} In this original action, relator, Richard Pierron, asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying him temporary total disability ("TTD") compensation on

grounds that he voluntarily abandoned his employment with respondent Sprint/United Telephone Company ("employer") and to enter an order granting that compensation.

{¶2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court grant a writ ordering the commission to adjudicate relator's claim. (Attached as Appendix A.)

{¶3} In brief, relator sustained an industrial injury in 1973, when he fell from a telephone pole while working for the employer. After spinal fusion surgery, he returned to a light-duty position with the employer in 1974. He worked in that light-duty position until 1997, when the employer informed relator that his position was being phased out and that he would be laid off. Relator took regular retirement and has since received a pension from the employer.

{¶4} As we detail below, relator presented evidence that, after his retirement, he worked about five hours per week delivering flowers during some period of time in 1997 and 1998.

{¶5} On June 17, 2003, relator moved for the allowance of additional conditions and for TTD compensation. In support, he cited the June 5, 2003 report of Robert Fantasia, D.C., who had begun treating relator in 1990. Dr. Fantasia concluded that medical conditions beyond those allowed originally were present and that these conditions were the direct and proximate result of relator's 1973 injury. Gerald S. Steiman, M.D., also examined relator and concluded that relator's medical conditions created a significant work impairment.

{¶6} A district hearing officer ("DHO") issued an order allowing the additional conditions, granting TTD compensation beginning June 5, 2003, and finding that relator's departure from his 1997-1998 flower delivery work was involuntary and related to his 1973 injury. Upon review, a staff hearing officer ("SHO") also allowed the additional conditions, but denied TTD compensation on grounds that relator's 1997 retirement was voluntary. On appeal, as detailed in the magistrate's decision, the commission denied TTD compensation, with one member dissenting.

{¶7} In this original action, the magistrate found that relator did not voluntarily leave his employment when he retired in 1997. Having determined that relator did not abandon his employment voluntarily, the magistrate recommended issuance of a writ ordering the commission to consider the medical evidence of relator's alleged disability.

{¶8} The employer submitted five objections, three of which essentially argue that the magistrate erred in determining that relator's retirement was involuntary. The commission similarly argued that relator's retirement was voluntary because it was unrelated to his injuries and was not employer-initiated, that relator abandoned the entire labor market when he retired, and that he was not eligible for TTD compensation.

{¶9} Under R.C. 4123.56(A), TTD compensation is awarded during the period of healing and recovery following an industrial injury. It is well-established, however, that when a claimant's voluntary actions, rather than an industrial injury, cause a loss of wages, the claimant may not be eligible for TTD compensation regardless of whether he can show a temporary and total disability. *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376.

{¶10} In this case, once relator sought TTD compensation, the employer argued that relator's voluntary retirement in 1997, and not his industrial injury, caused his loss in wages; relator argued that the retirement was not voluntary. This court has previously explained the considerations involved in determining whether TTD compensation should be awarded to a claimant who alleges that he retired from a job involuntarily. In *State ex rel. Williams v. Coca-Cola Ent., Inc.*, Franklin App. No. 04AP-1270, 2005-Ohio-5085, at ¶8-9, affirmed, 111 Ohio St.3d 491, 2006-Ohio-6112, we stated:

When dealing with TTD compensation, the first determination that must be made is whether or not the relator's departure from, or abandonment of, his employment was voluntary. If his abandonment was involuntary (which includes retirement taken because of industrial injuries), TTD compensation would be appropriate. *State ex rel. Wooster College v. Gee*, Franklin App. No. 03AP-389, 2004-Ohio-1898, at ¶36-37. On the other hand, if his abandonment was voluntary (which includes retirement for non-industrial injuries), TTD compensation is generally inappropriate.

The voluntary nature of relator's abandonment is a factual question which revolves around relator's intent at the time he retired. The Supreme Court of Ohio has directed: "All relevant circumstances existing at the time of the alleged abandonment should be considered. * * * The presence of such intent, being a factual question, is a determination for the commission." *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383 * * *.

{¶11} Once it is determined that a claimant's retirement from a job was voluntary, an award of TTD compensation becomes less likely, but it is not precluded entirely. Instead, a claimant who voluntarily retired will be eligible to receive TTD compensation, pursuant to R.C. 4123.56, if he or she re-enters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working

at that new job. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, at ¶39-40.

{¶12} However, a claimant's complete abandonment of the entire work force will preclude TTD compensation altogether. *Baker* at 380; *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 147 ("voluntary retirement may preclude a claimant from receiving temporary total disability benefits to which he otherwise might be entitled, if by such retirement the claimant has voluntarily removed himself permanently from the work force"). This is so "because the purpose for which TTD was created (compensation for loss of income during temporary and total disability) no longer exists." *Baker* at 380. Thus, we must consider not only whether a claimant's retirement from a specific job was voluntary, but also whether, by retiring, the claimant intended to abandon the entire work force.

{¶13} With these principles in mind, we turn to relator's claim, and the magistrate's conclusion, that relator's retirement was involuntary.

{¶14} The magistrate concluded that relator's retirement was involuntary because the employer gave relator a choice between a layoff and retirement, a choice the magistrate found to be no real choice at all. As the magistrate explained, in *State ex rel. B.O.C. Group, Gen. Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 202, the court found that an "employer-initiated departure is still considered involuntary as a general rule. * * * The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant." We cannot disagree with this well-established principle: where an employer lays off an employee, the resulting departure is involuntary.

{¶15} Here, however, the employer did not lay off relator. Instead, the employer gave relator a choice between a layoff (an employer-initiated departure) and regular retirement (an employee-initiated departure). We cannot conclude (and note that the magistrate did not hold) that an employer's act of offering retirement as an alternative to a layoff creates an involuntary departure as a matter of law. Instead, consistent with *Williams* and the Ohio Supreme Court cases on which it relies, the voluntary nature of relator's retirement remains a factual question that "revolves around relator's intent at the time he retired." *Williams*, 2005-Ohio-5085, at ¶9.

{¶16} In *Williams*, the commission had found the relator's retirement to be unrelated to his industrial injury and entirely voluntary. While the relator introduced evidence that his retirement was involuntary because it was related to his industrial injury to his left knee, this court concluded that "there was also some evidence that his retirement was unrelated to his left knee injuries. The choice between the two was properly made by the fact finder, and we will not now disturb that result." *Id.* at ¶12.

{¶17} The Ohio Supreme Court affirmed, stating:

An involuntary retirement does not foreclose [TTD] compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44 * * *. But while [the claimant's] retirement may have been involuntary in the sense that it was due to circumstances beyond his control, it lacks the element that would preserve his eligibility for [TTD] compensation - - a causal relationship to his industrial injury. *Id.* Accordingly, the commission did not abuse its discretion in denying [TTD] compensation.

Williams, 111 Ohio St.3d at 491.

{¶18} Here, the commission made a factual determination that relator's retirement was voluntary in two respects: first, as to whether the employer induced the retirement; and second, as to whether relator's industrial injuries caused him to retire.

{¶19} First, as to inducement by the employer, the commission found: "The injured worker's choice to retire was his own. He could have accepted a layoff and sought other work but he chose otherwise." Admittedly, there is little evidence in the stipulated record before us to support the commission's finding; in particular, our record does not include the hearing transcripts. And we note that a six-year delay between retirement and an application for benefits would impede any examination of a claimant's intentions at the time of retirement.

{¶20} Nevertheless, "we need only find some evidence in the record to support the commission's determination that relator's departure was voluntary." *Williams*, 2005-Ohio-5085, at ¶10. The commission's order cites to "the evidence submitted by the parties and the evidence in the file[.]" Before this court, the commission cites to relator's own affidavit, which states that relator "took a 'regular' retirement," albeit for reasons rejected by the commission. The commission also argues:

* * * [Relator] could have chosen to force [the employer] to lay him off. In that case, he would have maintained his entitlement to [TTD] benefits, he would have been eligible for unemployment compensation benefits under [R.C. Chapter 4141] and, if he found work that paid less than he made at [the employer], he would be entitled to two hundred weeks of wage loss compensation (R.C. 4123.56). Alternatively, he could forego these possible benefits and choose to retire and receive a pension. The evidence before the Commission was that [relator] chose to retire.

{¶21} Questions of credibility and the weight to be given evidence are within the commission's discretion as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Thus, while the evidence is sparse, we conclude that there is some evidence in the record to support the commission's determination that relator's retirement was voluntary.

{¶22} Second, as to whether relator's injuries caused the retirement, relator contends that his injuries prevented him from performing the lineman job he held when he was injured in 1973 and forced him to hold a light-duty position, which the employer phased out in 1997; thus, in relator's view, his 1973 injuries "caused" his 1997 retirement. We do not accept this attempt at establishing a causal connection, for purposes of TTD eligibility, between relator's injuries and his decision to retire. As the commission found, there is "no medical evidence in the file that the injured worker was temporarily disabled at the time he elected to retire from his job with this employer." Thus, the commission did not abuse its discretion in finding no causal connection between relator's injuries and his retirement, nor in concluding that relator's retirement was voluntary.

{¶23} The commission's finding that relator's retirement was voluntary does not end the matter of TTD compensation, however. As we stated at the outset, only complete abandonment of the entire work force precludes subsequent TTD compensation altogether. And, where a claimant demonstrates that, subsequent to his voluntary retirement, he re-entered the work force and suffered a temporary disability while on that new job, that claimant becomes re-eligible for TTD compensation. Relator fails on both accounts.

{¶24} First, relator attempted to show that he did not intend to abandon the entire work force by presenting evidence that he re-entered the work force shortly after his retirement. Relator's affidavit states that he worked at a job delivering flowers "from April 1997 to March 1998 and was paid \$3.00 per hour for my work." A facsimile transmission from the flower business owner states that relator worked "for approximately 6 months. He made deliveries as needed; perhaps 5 hrs. a week." However, the commission found that this part-time work at below-minimum wages did not demonstrate relator's intent to remain in the work force, as the commission concluded that "there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired."

{¶25} In *State ex rel. McAtee v. Indus. Comm.* (1996), 76 Ohio St.3d 648, the court noted that the commission had not explicitly addressed the issue of whether the claimant had abandoned the entire work force when it determined that the claimant was not entitled to permanent total disability compensation. Nevertheless, the court affirmed that denial, stating:

* * * However, the commission relied on all of the evidence in the file and adduced at the hearing, and that evidence can only lead to the conclusion that [the claimant] abandoned the work force. His early retirement and receipt of Social Security benefits, his application for pension benefits, and his failure to seek other employment following his departure from [employer], all demonstrate his intent to leave the labor force. * * *

Id. at 651.

{¶26} Similarly, here, the commission relied on relator's decision to retire, rather than accept a layoff, as well as his failure to seek viable employment following his

departure, as evidence of his intent to abandon the entire work force. Thus, there is some evidence to support the commission's finding that relator intended to abandon the entire work force when he retired in 1997, and, therefore, that he is not eligible for TTD compensation.

{¶27} But even if relator had not intended to abandon the work force entirely, his claim for TTD compensation would fail for two additional reasons. First, only claimants who are "gainfully employed" at the time of re-injury become re-eligible for TTD compensation. *McCoy* at ¶40. Accord *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, at ¶5. Here, we agree with respondents that relator's part-time work delivering flowers—where the evidence shows that he worked about five hours per week for some period of time in 1997-1998, earned less than minimum wage, and the "employer" made no withholdings—did not constitute "gainful employment" for these purposes.

{¶28} Our conclusion that relator did not re-enter the work force is also consistent with numerous references in his medical records (including records from 1998 and 1999) that he stopped working when he retired in early 1997. See, e.g., November 16, 1998 Ohio Rehabilitation Services Commission teledictation report ("[h]e last worked on 3/31/97"); April 1, 1999 report by David C. Randolph, M.D., M.P.H. ("[h]e states he has had no other employment since" retiring in April 1997); March 4, 2002 report by Aivars Vitols D.O., Inc. ("[c]laimant's last date of work was March 1997"); July 23, 2003 report by Dr. Steiman ("[h]e stopped working in March 1997").

{¶29} Furthermore, even if relator's work delivering flowers did amount to a re-entry into the work force, relator did not show that he suffered a disability at the new job.

Recognizing that an employee who voluntarily retires can become re-eligible for TTD benefits if he or she re-enters the work force and becomes disabled at a subsequent job, the commission found "no medical evidence that the injured worker left his job at the flower shop due to the allowed conditions in the claim. In addition, there is no medical evidence supporting disability at the time of the injured worker's employment at the flower shop."

{¶30} We agree with these conclusions. Relator offers the June 5, 2003 report by Dr. Fantasia, which states that relator "has been totally disabled due to this injury since we have been treating [him,]" presumably since 1990, seven years before his retirement. Relator also offers his own affidavit, in which he states that his injuries forced him to quit the flower delivery work as his "low back pain and leg problems worsened[.]"

{¶31} However, as the employer notes, relator offered no contemporaneous medical evidence to support his claim that he became disabled from his flower delivery work. And, with the exception of the October 2003 C-84 signed by Dr. Fantasia, none of the medical evidence in our record refers to a re-injury when relator worked delivering flowers or to an alleged inability to do this work. Thus, the commission did not abuse its discretion in determining that relator did not re-enter the work force or suffer a new period of temporary disability while at a new job.

{¶32} For these reasons, we sustain the commission's objection and the employer's second, third, and fourth objections. In light of our decision, we conclude that we need not address the employer's first and fifth objections. We adopt the magistrate's findings of fact as our own, except to clarify the evidence relating to

relator's part-time flower delivery employment. We sustain objections to the magistrate's conclusions of law, as discussed above, and we deny the requested writ.

*Objections sustained,
writ of mandamus denied.*

KLATT, J., concurs.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

{¶33} While I agree with the majority's conclusion that the requested writ be denied, I do so for slightly different reasons, and I therefore write separately.

{¶34} Relator's employer presented relator with two options: to be laid off or to retire early. Without question, had relator's employer simply laid relator off from his light-duty job, relator would be deemed to have been involuntarily separated from his employment. He thus would be eligible for temporary total disability compensation under the Ohio Supreme Court's decision in *State ex rel. B.O.C. Group, Gen. Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199.

{¶35} By contrast, had relator's employer offered relator only the opportunity to retire early, relator's accepting the opportunity would render his retirement voluntary, precluding the receipt of temporary total disability compensation unless relator met the requirements of *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305.

{¶36} Here, relator's employer combined the two options and presented them to relator. The fact that the employer presented the two options in tandem does not change the fundamental nature of either. The layoff, had relator chosen it, would still be

an involuntary separation; the early retirement, in the absence of evidence that relator's injury caused him to choose retirement, remains a voluntary separation.

{¶37} On that premise, a couple of observations are pertinent. Initially, the commission appears to premise its finding of voluntary separation in part on the fact that his departure was wholly unrelated to relator's injury. *B.O.C. Group*, however, makes clear that a separation may be involuntary even though it is unrelated to the employee's injury. Similarly, although the commission notes that the record contains no medical evidence that relator was temporarily disabled at the time he retired, relator was performing a light-duty job, having never been released to his former position of employment.

{¶38} Secondly, relator's failure to seek employment following his separation is, in my opinion, largely irrelevant to determining whether he was voluntarily separated from his light-duty position. While a job search is a prerequisite to receiving wage loss, the decisions from the Supreme Court to date do not impose that requirement to prove an involuntary separation. Rather, relator's failure to maintain employment following a voluntary separation precludes his receiving temporary disability compensation under *McCoy*.

{¶39} In the final analysis, I am compelled to agree with the majority that the commission did not abuse its discretion in refusing relator's request for temporary total disability compensation because relator chose an early retirement rather than a layoff.

A P P E N D I X A
 IN THE COURT OF APPEALS OF OHIO
 TENTH APPELLATE DISTRICT

State of Ohio ex rel. Richard Pierron,	:	
	:	
Relator,	:	
	:	
v.	:	No. 06AP-391
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and United Telephone Company of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION
 Rendered on December 20, 2006

Gibson Law Offices, and Joseph E. Gibson; Gloria Castrodale, for relator.

Jim Petro, Attorney General, and Eric J. Tarbox, for respondent Industrial Commission of Ohio.

Sara L. Rose, LLC and Sara L. Rose, for respondent Sprint / United Telephone Co.

IN MANDAMUS

{¶40} In this original action, relator, Richard Pierron, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation on grounds

that he voluntarily abandoned his employment with respondent Sprint/United Telephone Company and to enter an order granting said compensation.

Findings of Fact:

{¶41} 1. On September 21, 1973, relator sustained an industrial injury while employed as a telephone lineman for respondent Sprint/United Telephone Company ("Sprint"), a self-insured employer under Ohio's workers' compensation laws. On that date, relator fractured two vertebra when he fell 12 to 15 feet from a telephone pole.

{¶42} 2. The industrial claim was initially allowed for "fracture dorsal vertebra; lumbar subluxation," and was assigned claim number 535180-22.

{¶43} 3. In February or March 1974, relator underwent a spinal fusion.

{¶44} 4. In October or November 1974, relator returned to light-duty employment at a warehouse operated by Sprint.

{¶45} 5. In early 1997, relator accepted Sprint's offer of a regular retirement after Sprint informed him that his light-duty position was being phased out and that he would be laid off.

{¶46} 6. From approximately April 1997 to March 1998, relator worked approximately five hours per week making deliveries for "House of Flowers & Gifts" located in Vandalia, Ohio. He was paid \$3 per hour for his work.

{¶47} 7. Earlier, in 1990, relator began chiropractic treatments with Robert Fantasia, D.C.

{¶48} 8. On June 5, 2003, Dr. Fantasia wrote:

* * * The other medical conditions which are present and attributable to his formentioned [sic] work injury should

include lumbar strain, traumatic myelopathy [sic] and T-12 post traumatic syringomyelia.

These conditions are a direct and proximate result of the work injury as the patient fell from a great height injuring the lower thoracic and lumbar regions. The patient has been totally disabled due to his injury since we have been treating this patient.

{¶49} 9. On June 17, 2003, citing Dr. Fantasia's report, relator moved for the allowance of additional conditions and for TTD compensation.

{¶50} 10. Relator's motion prompted Sprint to have relator examined by Gerald S. Steiman, M.D., on July 23, 2003. Dr. Steiman wrote:

* * * Mr. Pierron's history, medical record review, physical examination and pain assessment provide strong credible evidence to support the presence of a T12 post traumatic syringomyelia with traumatic myelopathy.

It is my neurological opinion that Mr. Pierron's progressive myelopathic appearance renders his condition serious and significant. * * *

When considering Mr. Pierron's objective physical findings, the history, medical record review, physical examination and pain assessment provide credible evidence that he has a significant myelopathic condition which creates a significant work impairment/disability.

{¶51} 11. On August 29, 2003, relator's June 17, 2003 motion was heard by a district hearing officer ("DHO"). Thereafter, the DHO issued an order additionally allowing the claim for "T-12 post traumatic syringomyelia, lumbar strain and traumatic myelopathy [sic]." The DHO also awarded TTD compensation beginning June 5, 2003, based upon Dr. Fantasia's June 5, 2003 report. The DHO's order states in part:

The District Hearing Officer finds that the injured worker testified at hearing that he has not voluntarily left the work force but was involuntarily removed from a part-time job

delivering flowers due to increasing pain radiating through his legs.

{¶52} 12. Sprint administratively appealed the DHO's order of August 29, 2003.

{¶53} 13. On a C-84 dated October 10, 2003, Dr. Fantasia certified TTD from June 17, 2001 to an estimated return-to-work date of December 30, 2003.

{¶54} 14. Following an October 10, 2003 hearing, a staff hearing officer ("SHO") issued an order stating that the DHO's order is modified. The SHO granted the additional claim allowances as granted by the DHO. However, the SHO denied TTD compensation, explaining:

* * * The Staff Hearing Officer finds that the injured worker retired from his position of employment for reasons unrelated to the industrial injury on 04/01/1997.

{¶55} 15. Relator administratively appealed the SHO's order of October 10, 2003 to the three-member commission. The commission decided to hear the appeal.

{¶56} 16. Following a February 19, 2004 hearing, the commission issued an order additionally allowing the claim. That portion of the order explains:

It is the order of the Industrial Commission that this claim is additionally allowed for "T-12 post traumatic syringomyelia, lumbar strain, and traumatic myelopathy." This is supported by the 06/05/2003 report of Dr. Fantasia, and the 07/23/2003 report of Dr. Steiman.

{¶57} The commission, with one member dissenting, denied TTD compensation with the following explanation:

As to the request for the payment of temporary total disability compensation, the Industrial Commission finds that the injured worker had a low back surgery in this claim in 1974, and that he then returned to work for this employer in a lighter-duty capacity until 1997. The job he was performing was then being phased out, and the injured worker was

given the option of being laid off or taking a regular (not disability) retirement. He chose the regular retirement. The injured worker testified that he found a part-time job delivering flowers from approximately April of 1997 to March of 1998. A fax communication in the file from Kathy Magoto of the House of Flowers confirms that the injured worker did work for approximately six months making deliveries as needed, perhaps five hours a week. There is no other evidence of employment since the injured worker's retirement. The injured worker has not worked since leaving the flower delivery activity.

A review of the claim file reveals that the injured worker originally received an award for permanent partial disability of 30% in 1977. After a hearing on 11/22/1985, the injured worker was granted an increase in his percentage of permanent partial disability of 10%. The order noted that the injured worker was last paid temporary total disability compensation in 1974. There is no medical evidence in the file that the injured worker was temporarily disabled at the time he elected to retire from his job with this employer. Furthermore, there is no medical evidence of disability at or around the time of the injured worker's flower delivery activity.

From the evidence submitted by the parties and the evidence in the file, the Commission finds that the injured worker voluntarily abandoned the work force when he retired in 1997. Despite the dissent's attempt to characterize the departure from the work force as involuntary, there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired. The injured worker's choice to retire was his own. He could have accepted a lay-off and sought other work but he chose otherwise. It is not just the fact of the retirement that makes the abandonment voluntary in this claim, as the passage of time without the injured worker having worked speaks volumes. The key point which the dissent recognized though refuses to accept here, is that the injured worker's separation and departure from the work force is wholly unrelated to his work injury.

In State ex reff]. McCoy v. Dedicated Transport, 97 Ohio St.3d 25, 2002-Ohio-5305, the Ohio Supreme Court held in the syllabus:

A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to voluntary abandonment of the former position would be eligible to receive temporary total disability compensation pursuant to R.C. 42123.56 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.

(Emphasis added.) Subsequently, in State ex rel. Jennings v. Indus. Comm. 98 Ohio St.3d 288, 20[0]3-Ohio-737, the Supreme Court clarified its holding in McCoy: "It is important to note that this holding is limited to claimants who are gainfully employed at the time of their subsequent disabilities." In this case, there is no medical evidence that the injured worker left his job at the flower shop due to the allowed conditions in the claim. In addition, there is no medical evidence supporting disability at the time of the injured worker's employment at the flower shop.

Therefore, the injured worker has not established that he is eligible for temporary total disability compensation. Accordingly, it is the order of the Industrial Commission that the request for temporary total compensation from either 06/17/2001 (according to the C84 signed by Dr. Fantasia on 10/10/2003) or from 06/05/2003 (based on the narrative report of Dr. Fantasia of that date) is denied. It is found that the injured worker did abandon and retire from his position of employment for reasons unrelated to the injury in this claim on or about 04/01/1997, and he was not employed on either of the two possible dates to start the payment of temporary total disability compensation (06/17/2001 or 06/05/2003). Therefore, the injured worker's request for temporary total disability compensation is denied.

(Emphasis sic.) The dissenting commission member wrote:

I respectfully dissent from the decision to deny the injured worker's request for temporary total disability compensation based on a finding of voluntary abandonment.

The rationale behind the voluntary abandonment theory is that temporary total disability compensation should not be paid to an injured worker if the injured worker's loss of

income is due to a voluntary action the injured worker undertook rather than being due to the industrial injury. If an injured worker, for example, voluntarily retires and then later requests temporary total disability compensation, then under current case law compensation is not payable because the reason the injured worker is not working is not because of his industrial injury, but rather is because he voluntarily chose to leave his job. This is not what has happened in this case.

In this case, it is the employer that abandoned the injured worker, not the injured worker who abandoned the employer. The injured worker is being penalized, not for his own voluntary actions, but for the employer's voluntary actions. This decision turns the entire theory of voluntary abandonment on its head.

The injured worker was working for the employer in a light duty job. There is no evidence that the injured worker ever desired to, or took any actions toward, terminating his employment. It is not the injured worker that undertook the voluntary act of retiring, rather it is the employer that terminated its employment relationship with the injured worker. It is the employer who approached the injured worker and informed the injured worker that the light duty job the injured worker was performing was being done away with. It is the employer who told the injured worker that the injured worker would either have to be laid off or would have to take a regular retirement.

R.C. 4123.56(A) provides that temporary total disability compensation is not payable "for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached maximum medical improvement." No evidence was presented that the injured worker has ever been released to perform his former position of employment or has ever been found to be at maximum medical improvement. Rather the injured worker was not receiving temporary total disability compensation in this claim only because he had been working for his employer in a light duty job within his restrictions. Once the

employer did away with the injured worker's light duty job, none of the statutory criteria for denying temporary total disability compensation applied in this case. Since the injured worker is still unable to perform his former position of employment, and light duty work within the injured worker's restrictions is no longer being offered by the employer, the injured worker is again entitled to receive temporary total disability compensation.

There would be a voluntary choice by the injured worker resulting in a voluntary abandonment of employment in this case if the employer had given the injured worker a third choice (continue doing your light duty job), which the employer did not do.

Under the definition of "voluntariness" being espoused in this claim, if a prisoner on death row is given the choice of dying by lethal injection or dying by electrocution, if the prisoner chooses to die by lethal injection because such a method is the least painful of the two choices, by making that choice the condemned prisoner has converted what was his involuntary execution by the State into a voluntary choice by the prisoner to commit suicide.

There is no authority being cited that can support the assertion that voluntary abandonment applies in the instant case. An injured worker who is unable to perform his former position of employment is not forbidden from receiving temporary total disability compensation simply because the employer offers, and then removes, an offer of light duty work. This is a dangerous, unprecedented and unsupported expansion of the voluntary abandonment theory. This decision would now permit all employers in this State to avoid paying temporary total disability compensation by simply bringing injured workers back to token light duty jobs and then turning around and doing away with those jobs shortly thereafter.

This decision turns the voluntary abandonment theory from a situation where it is the injured worker's own actions that terminate his eligibility to receive temporary total disability compensation into a situation where it is the employer's actions that terminate the injured worker's eligibility to receive compensation. It is fundamentally unfair to put the employer in control of the injured worker's receipt of

temporary total disability compensation by permitting the employer to force a "voluntary" abandonment upon an injured worker.

Based upon the law, I would grant the injured worker's 06/17/2003 C86 motion in full.

{¶58} 17. On June 14, 2004, relator moved for reconsideration. Thereafter, the commission denied reconsideration.

{¶59} 18. On April 25, 2006, relator, Richard Pierron, filed this mandamus action.

Conclusions of Law:

{¶60} The issue is whether the commission abused its discretion by finding that relator voluntarily abandoned his employment with Sprint, and thus is precluded from obtaining an award of TTD compensation.

{¶61} The magistrate finds that the commission abused its discretion by finding that relator voluntarily abandoned his employment with Sprint. Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶62} Where an employee has taken action that would preclude his returning to his former position of employment even if he were able to do so, he is not entitled to continued TTD compensation since it is his own action, rather than the industrial injury, which prevents his returning to his former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145 (the claimant's voluntary retirement from his employer precluded TTD compensation).

{¶63} However, an injury-induced retirement is not considered to be voluntary. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44.

{¶64} In *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, the claimant was laid off by her employer for reasons unrelated to her industrial injury. Nevertheless, the commission awarded TTD compensation for a period subsequent to the layoff. In a mandamus action, the employer contended that the layoff precluded entitlement to TTD compensation. The court disagreed:

Relying on *Rockwell*, B.O.C. asserts that temporary total disability compensation is improper since claimant's departure was not injury-related. This is incorrect. An employer-initiated departure is still considered involuntary as a general rule. *Rockwell* did not narrow the definition of "involuntary," it expanded it. While certain language in *Rockwell* may be unclear, its holding is not. The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant.

Id. at 202.

{¶65} In *State ex rel. General Mills, Inc. v. Indus. Comm.*, Franklin App. No. 02AP-127, 2002-Ohio-4727, the claimant, as here, was laid off from his light-duty job that the employer had provided him following his industrial injury. Subsequent to his layoff, the commission awarded TTD compensation. In mandamus, the employer attempted to distinguish *B.O.C. Group*, by arguing that some of its employees were not laid off due to the fact that they had seniority over the claimant. The employer asserted that the layoff was due to claimant's lack of seniority and, thus, he should be precluded from TTD compensation. This court rejected the employer's argument.

{¶66} In *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, the syllabus reads:

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.

{¶67} In *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, the claimant was fired for unexcused absenteeism. There was no evidence that she secured other employment. Thereafter, the commission denied TTD compensation finding that the firing constituted a voluntary abandonment of her former position of employment. Quoting the syllabus in *McCoy*, the *Jennings* court upheld the commission's decision based upon the claimant's failure to secure another job after she was fired.

{¶68} In *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587, the claimant was fired for unexcused absenteeism. The commission declared that the claimant's discharge constituted a voluntary abandonment of his former position of employment pursuant to *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and, on that basis, denied TTD compensation.

{¶69} In upholding the commission's decision, the *Eckerly* court, at ¶19, explained:

The present claimant seemingly misunderstands *McCoy*. He appears to believe that so long as he establishes that he obtained another job—if even for a day—at some point after his departure from Tech II, TTC eligibility is forever after

reestablished. Unfortunately, this belief overlooks the tenet that is key to *McCoy* and all other TTC cases before and after: that the industrial injury *must remove the claimant from his or her job*. This requirement obviously cannot be satisfied if claimant had no job *at the time of the alleged disability*.

(Emphasis sic.)

{¶70} Here, the commission focused its analysis on both the retirement in early 1997 and relator's subsequent employment history. The magistrate will first address the retirement in early 1997.

{¶71} In explaining why it found the retirement to be voluntary, the commission concluded that relator had a choice when he was informed by Sprint that his job was being phased out and that he would be laid off. According to the commission's order "[h]e could have accepted a lay-off and sought other work but he chose otherwise."

{¶72} Implicit in the commission's quoted statement is the notion that relator had a realistic hope of someday returning to light-duty work at Sprint if he were to accept the layoff and not take a regular retirement. There is no evidence in the record to even suggest that the layoff was going to be temporary. The undisputed evidence is that the light-duty warehouse job that relator held for some 23 years was "being phased out."

{¶73} Given the absence of any evidence that relator had a realistic hope of returning to employment at Sprint after the layoff, refusing to take a regular retirement would seem to be foolish, if not financially unsound. The "choice" that the commission finds is not based upon evidence in the record.

{¶74} The retirement in early 1997 was clearly an employer-initiated departure under *B.O.C. Group*. Relator was not required under those circumstances to show that his retirement in early 1997 was injury-induced, as the commission seems to suggest.

{¶75} Given that relator's retirement in early 1997 must be found to be involuntary, there was no cause for the commission to engage in an analysis under *McCoy* and *Jennings*. As previously noted, *McCoy* permits a claimant to reinstate his entitlement to TTD compensation following a voluntary work departure by returning to gainful employment. Because claimant did not voluntarily abandoned his employment at Sprint, there was no cause for the commission to determine whether it might be found that relator reinstated his TTD eligibility by returning to gainful employment.

{¶76} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order to the extent that it determines relator to be ineligible for TTD compensation, and to enter an amended order that adjudicates relator's request for TTD compensation based upon the medical evidence before the commission.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(E)(2) provides that a party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).

19847A13

FILED

COURT OF APPEALS
TENTH APPELLATE DISTRICT

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

CLERK OF COURTS

State of Ohio ex rel. Richard Pierron,

:

Relator,

:

v.

:

No. 06AP-391

Industrial Commission of Ohio
and United Telephone Company,

:

(REGULAR CALENDAR)

:

Respondents.

:

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 28, 2007, the objections to the decision of the magistrate are sustained, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs shall be assessed against relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

Judith L. French

Judge Judith L. French

Peggy Bryant

Judge Peggy Bryant

William A. Klatt

Judge William A. Klatt

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 535180-22
LT-ACC-SI-COV
PCN: 2032051 Richard Pierron

Claims Heard: 535180-22

RICHARD PIERRON
531 N CENTER ST
VERSAILLES OH 45380

Date of Injury: 9/21/1973

Risk Number: 20003038-0

This claim has been previously allowed for: FRACTURE DORSAL VERTEBRA;
LUMBAR SUBLUXATION; T-12 POST TRAUMATIC SYRINGOMYELIA; LUMBAR STRAIN;
TRAUMATIC MYELOPATHY.

This matter was heard on 02/19/2004, before the Industrial Commission pursuant to the provisions of Ohio Revised Code 4121.03, 4123.511 and 4123.52 on the following:

IC-12 Notice Of Appeal filed by Injured Worker on 10/31/2003.

- Issue: 1) Additional Allowance - T-12 POST TRAUMATIC SYRINGOMYELIA
2) Additional Allowance - LUMBAR STRAIN
3) Additional Allowance - TRAUMATIC MYELOPATHY
4) Request For Temporary Total

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 at the hearing:

APPEARANCE FOR THE INJURED WORKER: Mr. Gibson, Injured Worker
APPEARANCE FOR THE EMPLOYER: Ms. Baker
APPEARANCE FOR THE ADMINISTRATOR: N/A

HEARD BY: Mr. Thompson and Mr. Gannon

02/19/2004: It is the decision of the Industrial Commission that the injured worker's appeal filed 10/31/2003 is taken under advisement for further review and discussion and that an order be published without further hearing.

03/11/2004: After further review and discussion, it is the decision of the Industrial Commission that the injured worker's appeal, filed 10/31/2003, is granted. The order of the Staff Hearing Officer, dated 10/10/2003, is modified, and the C86 motion filed 06/17/2003 is granted to the extent of this order.

All evidence on file has been reviewed.

It is the order of the Industrial Commission that this claim is additionally allowed for "T-12 post traumatic syringomyelia, lumbar strain, and traumatic myelopathy." This is supported by the 06/05/2003 report of Dr. Fantasia, and the 07/23/2003 report of Dr. Steiman.

EXHIBIT

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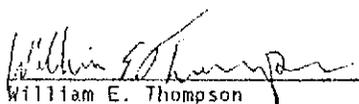
Case No. 85-82-2084

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 535180-22

This action is based upon the motion made by Mr. Thompson, seconded by Mr. Gannon and voted on as follows:


William E. Thompson YES
Chairperson


Patrick J. Gannon YES
Commissioner

Not Present

Donna Owens
Commissioner

As to the request for the payment of temporary total disability compensation, the Industrial Commission finds that the injured worker had a low back surgery in this claim in 1974, and that he then returned to work for this employer in a lighter-duty capacity until 1997. The job he was performing was then being phased out, and the injured worker was given the option of being laid off or taking a regular (not disability) retirement. He chose the regular retirement. The injured worker testified that he found a part-time job delivering flowers from approximately April of 1997 to March of 1998. A fax communication in the file from Kathy Magoto of the House of Flowers confirms that the injured worker did work for approximately six months making deliveries as needed, perhaps five hours a week. There is no other evidence of employment since the injured worker's retirement. The injured worker has not worked since leaving the flower delivery activity.

A review of the claim file reveals that the injured worker originally received an award for permanent partial disability of 30% in 1977. After a hearing on 11/22/1985, the injured worker was granted an increase in his percentage of permanent partial disability of 10%. The order noted that the injured worker was last paid temporary total disability compensation in 1974. There is no medical evidence in the file that the injured worker was temporarily disabled at the time he elected to retire from his job with this employer. Furthermore, there is no medical evidence of disability at or around the time of the injured worker's flower delivery activity.

From the evidence submitted by the parties and the evidence in the file, the Commission finds that the injured worker voluntarily abandoned the work force when he retired in 1997. Despite the dissent's attempt to characterize the departure from the work force as involuntary, there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired. The injured worker's choice to retire was his own. He could have accepted a lay-off and sought other work but he chose otherwise. It is not just the fact of the retirement that makes the abandonment voluntary in this claim, as the passage of time without the injured worker having worked speaks volumes. The key point which the dissent recognized though refuses to accept here, is that the injured worker's separation and departure from the work force is wholly unrelated to his work injury.

In State ex re. McCoy v. Dedicated Transport, 97 Ohio St.3d 25; 2002-Ohio-5305, the Ohio Supreme Court held in the syllabus:

A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to voluntary abandonment of the former position would be eligible to receive temporary

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The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 535180-22

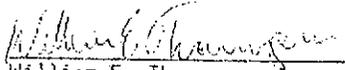
total disability compensation pursuant to R.C.4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

(Emphasis added.) Subsequently, in State ex rel. Jennings v. Indus. Comm. 98 Ohio St.3d 288, 203-Ohio-737, the Supreme Court clarified its holding in McCoy: "It is important to note that this holding is limited to claimants who are gainfully employed at the time of their subsequent disabilities." In this case, there is no medical evidence that the injured worker left his job at the flower shop due to the allowed conditions in the claim. In addition, there is no medical evidence supporting disability at the time of the injured worker's employment at the flower shop.

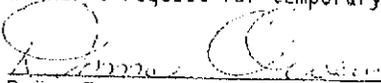
Therefore, the injured worker has not established that he is eligible for temporary total disability compensation. Accordingly, it is the order of the Industrial Commission that the request for temporary total compensation from either 06/17/2001 (according to the C84 signed by Dr. Fantasia on 10/10/2003) or from 06/05/2003 (based on the narrative report of Dr. Fantasia of that date) is denied. It is found that the injured worker did abandon and retire from his position of employment for reasons unrelated to the injury in this claim on or about 04/01/1997, and he was not employed on either of the two possible dates to start the payment of temporary total disability compensation (06/17/2001 or 06/05/2003). Therefore, the injured worker's request for temporary total disability compensation is denied.

Typed By: BC/pg
Date Typed: 05/04/2004

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


William E. Thompson YES
Chairperson

On 03/11/2004, I discussed this claim with Staff Hearing Officer Cromley, who was present at the 02/19/2004 hearing. Hearing Officer Cromley summarized the testimony and arguments presented at the hearing. After this discussion and a review of all the evidence contained within the claim, I second the motion made by Mr. Thompson to deny the injured worker's request for temporary total disability compensation.


Donna Owens YES
Commissioner

DISSENTING OPINION:

I respectfully dissent from the decision to deny the injured worker's request for temporary total disability compensation based on a finding of voluntary abandonment.

The rationale behind the voluntary abandonment theory is that temporary total disability compensation should not be paid to an injured worker if the injured worker's loss of income is due to a voluntary action the injured worker undertook rather than being due to the industrial injury. If an injured worker, for example, voluntarily retires and then later

RECORD OF PROCEEDINGS

Claim Number: 535180-22

requests temporary total disability compensation, then under current case law compensation is not payable because the reason the injured worker is not working is not because of his industrial injury, but rather it is because he voluntarily chose to leave his job. This is not what has happened in this case.

In this case, it is the employer that abandoned the injured worker, not the injured worker who abandoned the employer. The injured worker is being penalized, not for his own voluntary actions, but for the employer's voluntary actions. This decision turns the entire theory of voluntary abandonment on its head.

The injured worker was working for the employer in a light duty job. There is no evidence that the injured worker ever desired to, or took any actions toward, terminating his employment. It is not the injured worker that undertook the voluntary act of retiring, rather it is the employer that terminated its employment relationship with the injured worker. It is the employer who approached the injured worker and informed the injured worker that the light duty job the injured worker was performing was being done away with. It is the employer who told the injured worker that the injured worker would either have to be laid off or would have to take a regular retirement.

R.C. 4123.56(A) provides that temporary total disability compensation is not payable "for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached maximum medical improvement." No evidence was presented that the injured worker has ever been released to perform his former position of employment or has ever been found to be at maximum medical improvement. Rather the injured worker was not receiving temporary total disability compensation in this claim only because he had been working for his employer in a light duty job within his restrictions. Once the employer did away with the injured worker's light duty job, none of the statutory criteria for denying temporary total disability compensation applied in this case. Since the injured worker is still unable to perform his former position of employment, and light duty work within the injured worker's restrictions is no longer being offered by the employer, the injured worker is again entitled to receive temporary total disability compensation.

There would be a voluntary choice by the injured worker resulting in a voluntary abandonment of employment in this case if the employer had given the injured worker a third choice (continue doing your light duty job), which the employer did not do.

Under the definition of "voluntariness" being espoused in this claim, if a prisoner on death row is given the choice of dying by lethal injection or dying by electrocution, if the prisoner chooses to die by lethal injection because such a method is the least painful of the two choices, by making that choice the condemned prisoner has converted what was his involuntary execution by the State into a voluntary choice by the prisoner to commit suicide.

There is no authority being cited that can support the assertion that voluntary abandonment applies in the instant case. An injured worker who is unable to perform his former position of employment is not forbidden from receiving temporary total disability compensation simply because the employer offers, and then removes, an offer of light duty work. This is a dangerous, unprecedented and unsupported expansion of the voluntary abandonment theory. This decision would now permit all employers in this State to avoid paying temporary total disability compensation by simply bringing injured workers back to token light duty jobs and then turning around and doing away with those jobs shortly thereafter.

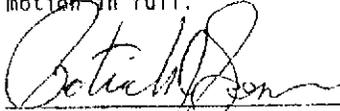
SCAN ZONE 96.82/2884

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

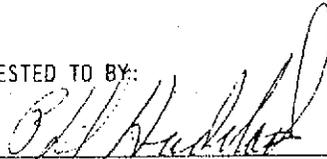
Claim Number: 535180-22

This decision turns the voluntary abandonment theory from a situation where it is the injured worker's own actions that terminate his eligibility to receive temporary total disability compensation into a situation where it is the employer's actions that terminate the injured worker's eligibility to receive compensation. It is fundamentally unfair to put the employer in control of the injured worker's receipt of temporary total disability compensation by permitting the employer to force a "voluntary" abandonment upon an injured worker.

Based upon the law, I would grant the injured worker's 06/17/2003 C86 motion in full.


Patrick J. Gannon
Commissioner

INDUSTRIAL COMMISSION
OF OHIO
MAY 27 2004
FINDINGS MAILED 2

ATTESTED TO BY:

Executive Director

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 OHIO REVISED CODE 4123.512.
Findings Mailed:

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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