

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Richard Pierron, : Case No.: 07-1460
: :
Relator/Appellant, : On Appeal from the Franklin
: County Court of Appeals,
vs. : Tenth Appellate District
: :
Industrial Commission of Ohio and : Court of Appeals Case No.
Sprint / United Telephone Co., : 06AP-391
: :
Respondents/Appellees. : Original Action in Mandamus
: :

BRIEF OF APPELLEE
SPRINT / UNITED TELEPHONE CO.

COUNSEL FOR APPELLANT:

Joseph E. Gibson (0047201)
Gibson Law Offices
545 Helke Road
Vandalia, Ohio 45377
Phone: (937) 264-1122
Fax: (937) 264-0888
e-mail: gibsonlawoffices@sbcglobal.net

COUNSEL FOR APPELLEES:

Sara L. Rose (0065208)
Sara L. Rose, LLC
P.O. Box 188
Pickerington, Ohio 43147
Phone: (614) 834-1200
Fax: (614) 834-1274
e-mail: sara.rose@slroselaw.com
Attorney for Sprint / United Telephone

and

Eric C. Harrell, Esq. (0070641)
Attorney General's Office
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215-3130
Phone: (614) 466-6696
Fax: (614) 752-2538
e-mail: charrell@ag.state.oh.us
Attorney for Industrial Commission

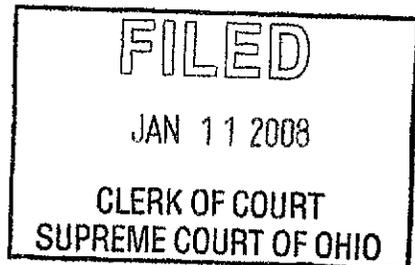


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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A. **PROPOSITION OF LAW NO. 1: WHEN AN INJURED WORKER ACCEPTS A “REGULAR” RETIREMENT IN LIEU OF LAYOFF, PRESENTS NO CONTEMPORANEOUS MEDICAL EVIDENCE OF HIS INABILITY TO WORK, AND FAILS TO SEEK NEW EMPLOYMENT FOR SEVERAL YEARS, A FINDING THAT THE INJURED WORKER HAS VOLUNTARILY ABANDONED THE WORK FORCE IS PROPER.**
- B. **PROPOSITION OF LAW NO. 2: AN INJURED WORKER IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION IF HE IS NOT GAINFULLY EMPLOYED AT THE TIME A NEW PERIOD OF DISABILITY BEGINS.**
- C. **PROPOSITION OF LAW NO. 3: WHERE AN INJURED WORKER SITS ON HIS RIGHTS FOR SIX YEARS, THEREBY DENYING HIS EMPLOYER THE RIGHT TO HAVE HIM MEDICALLY EXAMINED, HIS REQUEST FOR TEMPORARY TOTAL DISABILITY SHOULD BE BARRED BASED ON THE DOCTRINE OF LACHES.**

STATEMENT OF FACTS

Appellant Pierron was injured in 1973, while working for Appellee Sprint.¹ He underwent surgery shortly thereafter, then returned to full-time employment with Sprint in 1974 and continued working until a company downsizing on or about March 31, 1997. Due to the number of years worked for the company, Sprint offered and Pierron accepted a regular (*i.e.*, non-disability) retirement package. (Stip. p. 40.) At no time during his 23 years of employment did he request a disability retirement. Pierron was not totally disabled on the date of his retirement; he suffered no flare-up of his condition, and no doctor advised him to quit working. Nothing related to Pierron's acceptance of the retirement benefits precluded him from working elsewhere while collecting retirement pay.

After retiring from Sprint, and while collecting retirement benefits, Pierron worked a few hours each week for six to eleven months delivering flower arrangements for House of Flowers. (Stip. p. 39, 40.) This work was performed illegally for cash under the table, and at significantly less than the statutory minimum wage. *Id.* The nature of this work was more akin to the sort of work in which a retired person might engage to keep busy, rather than the sort of work a person would perform to feed his family (\$15 per week is hardly enough to live off). Pierron claims his work for House of Flowers constituted a re-entry into the work force, such that he would be entitled to TTD due to later disability. Sprint contends Pierron did not re-enter the work force through his flower delivery activity, but this determination is irrelevant as Pierron did not become disabled while working for House of Flowers and made no attempt at working or even seeking work after he left House of Flowers in March, 1998. (Stip. p. 40.)

Interestingly, after Pierron's visit to treating Chiropractor Fantasia on November 4, 1998, Dr. Fantasia not only failed to mention Pierron's deliveries for House of Flowers, but specifically denied

¹ In the 34 years since Appellant's injury, Appellee has gone through corporate restructuring and several name changes, including United Telephone Company, Sprint, and now Embarq. For purposes of this brief, the company will be referred to throughout as Sprint.

knowledge of such activity when he stated Pierron "last worked on 3/31/97." (Stip. p. 63.) Numerous other doctors with whom Pierron has treated or consulted over the years similarly indicate that Pierron did not work after retiring from Sprint. In fact, not one of the doctors examining Pierron even knew about his occasional flower deliveries. For example:

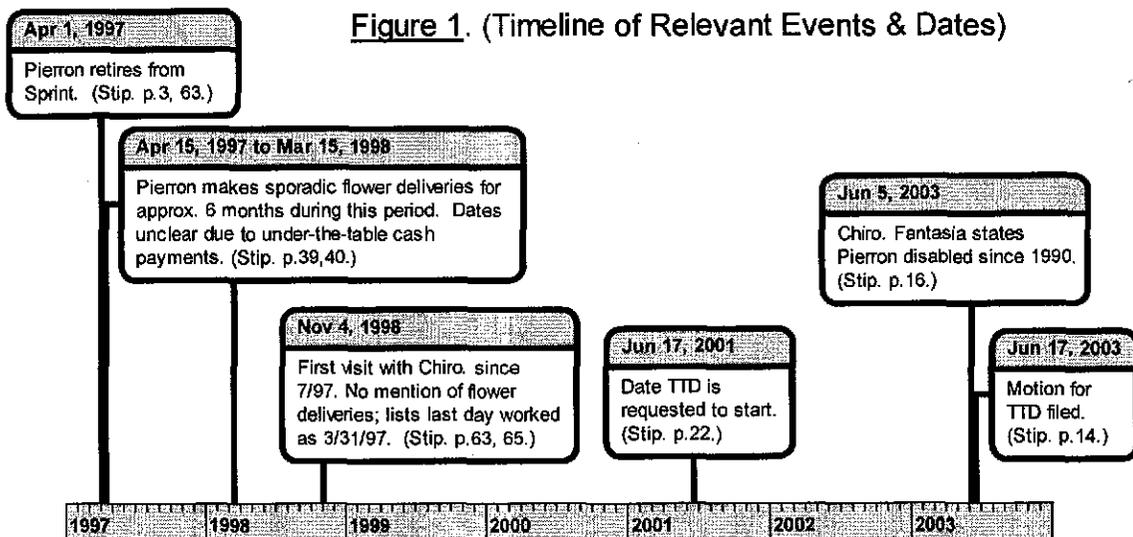
- Pierron stated he was "Retired" on a Case History Update dated 11/4/98. (Stip. p. 65.)
- Pierron's work status was listed as "Retired" on C-9 requests for treatment signed by Dr. Fantasia 10/28/99, 11/10/98, 7/5/00, 12/18/00, 8/14/02, 1/14/03, and 7/21/03. (Stip. p. 6, 76, 74, 7, 24, 25, 73.)
- Pierron "retired from this position in April of 1997. *** He states he has had no other employment since then." (Report of Dr. Randolph dated 4/1/99, Stip. p. 3.)
- "Claimant was able to work until 1997. *** Claimant reports that he retired that year since his job was terminated." "Claimant's last date of work was March 1997." (Report of Dr. Vitols dated 3/4/02, Stip. p. 8, 9.)
- Pierron stated he was "Retired" after working "27½ years," the length of time he worked for Sprint. (Case History form dated 6/24/02, Stip. p. 23.)
- Pierron "stopped working in March 1997." (Examination report from Dr. Steiman dated 7/23/03, Stip. p. 52.)
- Pierron "last worked on 3/31/97." (Report of Dr. Fantasia dated 11/4/03, Stip. p. 63.)

As with the time surrounding his retirement from Sprint, Pierron did not seek medical treatment with any provider during his "employment" with House of Flowers. Pierron was not told by any physician that he should stop working for either Sprint or House of Flowers, and he never went to see a physician because his work duties were more than he could handle. Although there was no reason for an examination on extent of disability during this time, Dr. Vitols did note in his March 4, 2002 report that Pierron was at maximum medical improvement. (Stip. p. 12.) No change was noted in Pierron's condition between his retirement and his later request for TTD.

On June 17, 2003 – more than six years after last working for Sprint and 33 years after the date of injury – Pierron filed a motion with the Bureau of Workers' Compensation asking for an

unspecified period of temporary total disability compensation (TTD). (Stip. p. 22.) Attached to the motion was a June 5, 2003 statement from his treating chiropractor claiming that Pierron had been totally disabled since 1990 (despite having worked full-time through March, 1997). (Stip. p. 16.) No C-84 form was presented in support of the request for TTD.

At the first hearing on this issue, a district hearing officer awarded Pierron seven weeks of TTD, from June 5 through July 23, 2003. (Stip. p. 19.) Pierron appealed, and a staff hearing officer (SHO) denied the request for TTD. (Stip. p. 29.) On the date of the SHO hearing in October, 2003, Pierron's chiropractor signed a C-84 certifying Pierron as disabled from June 17, 2001 through December 30, 2003. (Stip. p. 22.) This disability period began more than four years after Pierron last worked for Sprint, and (by even the most generous account), more than three years after he last "worked" for anyone. (Fig. 1.)



The SHO denied the request for TTD because she found that Pierron left the work force for reasons unrelated to his industrial injury. (Stip. p. 29.) After further appeal and yet another hearing, the Industrial Commissioners denied the request for TTD because:

- "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," (Stip. p. 68); and
- "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." (Stip. p. 69.)

Based on the complete lack of evidence to support his request for TTD, the Commissioners denied Pierron's request, concluding that his "separation and departure from the work force is wholly unrelated to his work injury." (Stip. p. 68.)

Pierron filed a complaint in mandamus with the Franklin County Court of Appeals, contesting the denial of TTD, arguing that he should be entitled to TTD despite a gap of at least three years (and perhaps as many as six years) between his last date of work and his first potential medical evidence of total disability. (Fig. 1.) A magistrate ruled in Pierron's favor, and Sprint filed objections to the magistrate's decision. The court of appeals sustained Sprint's objections, denied Pierron's requested writ of mandamus, and ruled that there was evidence in the record to support the commission's determination that Pierron's retirement was voluntary. Pierron's retirement from Sprint, coupled with his failure to seek viable employment thereafter was evidence of Pierron's intent to abandon the entire work force. (Decision, ¶26.) Additionally, the court found that Pierron's work for House of Flowers was not gainful employment; even if it were, there was no evidence that Pierron became disabled while working for House of Flowers. Id. at ¶27, 29.

LAW AND ARGUMENT

Pierron's position can be summarized as follows: because his departure from Sprint was related to a lay-off, it was involuntary; therefore, he should be entitled to receive TTD years later. However, Pierron overlooks the critical requirement that there be contemporaneous medical evidence establishing that he left Sprint and/or House of Flowers due to his injuries. Combining (1)

the complete lack of such medical evidence, (2) Pierron's statement to numerous doctors that he retired from Sprint, and (3) the complete lack of subsequent work or even a job search indicating an intent to remain in the work force, the commission was required to find that Pierron's departure from the work force (and not just one particular job or another) was voluntary and unrelated to his work injury. Pierron bears the burden of proving his entitlement to TTD. *State ex rel. Foor v. Indus. Comm.* (1997), 78 Ohio St.3d 396.

It does not matter whether Pierron left Sprint because he retired, was terminated, was laid off, or went to jail. The sole question – and the only issue that matters in this case – is whether the commission's file contains *any* evidence that Pierron voluntarily abandoned the work force. Pierron's request for relief by this court should not be taken lightly; he has a significant burden to overcome to establish his right to the relief requested:

A writ of mandamus is an *extraordinary* remedy, and the burden of showing a clear legal right to this writ as a remedy from a determination by the Industrial Commission . . . is upon relator. "It is well established that mandamus will not lie where there is some evidence to support the finding of the Industrial Commission." *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 167 (citations omitted, emphasis added).

The Industrial Commission has fact-finding authority. *Id.* Whether an employee has abandoned the work force is a factual determination for the commission. *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383; *State ex rel. Cliff v. Auburndale Co.*, 10th Dist. App. No. 03AP-365, 2005-Ohio-3984, at ¶4. The commission's findings of fact should only be overturned on mandamus if there is no evidence to support such findings – even if there is contrary evidence in greater quantity and/or quality. *State ex rel. Teece*; *State ex rel. Jeany v. Cleveland Concrete Constr., Inc.*, 10th Dist. App. No. 02AP-159, 2002-Ohio-6029, at ¶49. The commission's determination that Pierron abandoned

the work force is supported by evidence, as cited in the commission's order. (Pierron voluntarily retired from Sprint and failed to seek or obtain work for four years; he was not taken off work due to the allowed conditions in the claim.) Not only is there some evidence to support the commission's order in this case, but there is no evidence to support an award for TTD beginning at least three years after Pierron last worked, and approximately 23 years after his last period of TTD in this claim.

A. PROPOSITION OF LAW NO. 1: WHEN AN INJURED WORKER ACCEPTS A "REGULAR" RETIREMENT IN LIEU OF LAYOFF, PRESENTS NO CONTEMPORANEOUS MEDICAL EVIDENCE OF HIS INABILITY TO WORK, AND FAILS TO SEEK NEW EMPLOYMENT FOR SEVERAL YEARS, A FINDING THAT THE INJURED WORKER HAS VOLUNTARILY ABANDONED THE WORK FORCE IS PROPER.

Pierron's first proposition of law is too restricted and is misleading. He claims that a forced retirement, when it is the only alternative to losing years of accrued benefits and seniority, is not voluntary and therefore does not preclude payment of TTD. (Brief, p. 11.) First, there is no evidence that Pierron would have lost years of accrued benefits and seniority if he had not chosen to retire. Nor is there any evidence, as Pierron claims, that his only options were to either "be fired and lose everything he has worked for, and paid into over the years" or start collecting retirement benefits. (Brief, p. 18.) Sprint could not have denied Pierron his accumulated and vested benefits – even as part of a layoff. Second, he focuses too narrowly on only his departure from Sprint, not the work force as a whole.

This court, like the court of appeals and commission, should focus on Pierron's departure from the work force, not just his departure from Sprint. Pierron's departure from the work force was voluntary, even if his departure from Sprint was due at least in part to a company downsizing. Pierron argues that his retirement from Sprint was involuntary as it was tied to a layoff over which he had no control. What he continually overlooks, however, is the distinction between

abandonment of a job and abandonment of the entire work force. This court has stated that “the question of abandonment is primarily one of intent that may be inferred from words spoken, acts done, and other objective facts. All relevant circumstances existing at the time of the alleged abandonment should be considered.” *State ex rel. Diversitech*, 45 Ohio St.3d at 383 (emphasis added). In analyzing whether an injured worker has abandoned the work force, the commission is to consider “evidence of intention to abandon as well as of acts by which the intention is put into effect.” *Id.* The presence of an intent to abandon is a factual question, which “is a determination for the commission.” *Id.*; *State ex rel. Cliff*, at ¶4.

The commission did exactly what this court has mandated that it do. It considered the evidence of Pierron’s intent to abandon the work force, including the fact that Pierron took a regular retirement and not a disability retirement, and Pierron’s acts subsequent to his retirement (namely, the failure to seek or obtain additional employment). The commission could have found that Pierron did not abandon the work force, but based on the evidence, it did not. In *State ex rel. Williams*, the court reviewed a commission decision in which “there was some evidence to support relator’s theory that he retired due to his left knee, [and] there was also some evidence that his retirement was unrelated to his left knee injuries.” *State ex rel. Williams v. Coca-Cola Ent., Inc.*, 10th Dist. App. No. 04AP-1270, 2005-Ohio-5085, at ¶12; affirmed 111 Ohio St.3d 491, 2006-Ohio-6112. Because “the choice between the two was properly made by the fact finder,” the court ruled that it would “not now disturb that result.” *Id.* As in *Williams*, this court should uphold the commission’s fact-finding and its ultimate decision that Pierron voluntarily abandoned the work force.

1. Pierron’s retirement.

It is undisputed that Pierron retired from Sprint. The question is whether the retirement was

voluntary or involuntary; a secondary question is whether, through his retirement, Pierron removed himself only from his job at Sprint or whether he removed himself from the work force as a whole. The court of appeals ruled that the voluntary nature of Pierron's retirement was a question of fact the commission had authority to decide. Decision, ¶15; *State ex rel Williams*, 2005-Ohio-5085, at ¶9. As there was evidence supporting the commission's finding that Pierron's retirement was voluntary, Pierron's appeal to this court should be denied. Additionally, the commission properly decided that Pierron's actions around the time of his retirement evidenced his intent to remove himself from the entire work force.

"A retirement may be a departure from a particular job *or* from the labor market as a whole, and the retirement may be voluntary or involuntary. *** Thus, when there is evidence of retirement and the issue is raised at hearing, the commission must determine whether the person was leaving that position or the entire labor market, and whether the departure was voluntary or involuntary." *State ex rel. Navistar v. Indus. Comm.*, 10th Dist. App. No. 03AP-809, 2004-Ohio-4218, at ¶48. The key question is whether, by his "retirement, the claimant has voluntarily removed himself permanently from the work force." *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 147 (emphasis added). This court similarly has distinguished cases based on whether a particular claimant "abandoned his employment and the work force." *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 382 (emphasis added).

Pierron argues that this court should adopt the dissenting opinion of Commissioner Gannon. (Brief, p. 12.) Gannon, as the majority opinion points out, "recognized though refuses to accept, *** that the injured worker's separation and departure from the work force is wholly unrelated to his work injury." (Stip. p. 69.) Gannon argues that in denying TTD, Pierron "is being penalized" for

the employer's actions. (Stip. p. 70.) He therefore uses the wrong legal standard for determining whether Pierron is entitled to TTD. Rather than require Pierron to prove his entitlement to TTD, Gannon incorrectly starts with the assumption that Pierron is automatically entitled to receive such compensation and that Sprint must prove otherwise.

In order to establish his entitlement to TTD, Pierron must prove that he stopped working because of his injury. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, at ¶35. He cannot do this, however, because like the other (uninjured) employees who left the company, Pierron stopped working due to the layoffs. He did not stop working because of his industrial injury. As this court held in *State ex rel. Williams*, 2006-Ohio-6112, at ¶8, while the injured worker'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 temporary total disability compensation – a causal relationship to his industrial injury." The lower court cited *Williams* with approval, as should this court. Decision, at ¶17. Pierron is not entitled to TTD any more than the other laid-off employees.

Sprint continued to employ Pierron for 23 years after his industrial injury. Filing a workers' compensation claim does not guarantee an employee a job for life, and sometimes employers are forced to lay off good employees due to changing business climates. Such was the case here. Pierron was not "penalized" any more than the other employees laid off around the same time. Contrary to his contention that "it was the employer who abandoned the injured worker, not the injured worker who abandoned the employer," (Brief, p. 19), the employer gave Pierron the option of collecting an early retirement to which he would not otherwise have been entitled. This is hardly an abandonment.

Pierron argues that "the reason he was offered 'retire or be fired' option [sic] 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.” (Brief, p. 11.) This argument is completely lacking in evidentiary support. First, Pierron was not laid off because of his injury; if he had, the employer would have engaged in illegal retaliation and/or discrimination. Rather, Pierron and several other employees were laid off due to economic necessity. Second, there is no evidence that Pierron would have continued as a lineman for Sprint during the 23 years he worked in the warehouse, or in the ten years since his retirement – particularly in light of the frequent changes within the telecommunications industry. Such speculation should not be considered.

Pierron’s last date of work with Sprint was on or about March 31, 1997. Despite having attorney representation, he did not request TTD when he retired in 1997. Pierron then delivered flowers for an average of five hours per week, for cash under the table at less than minimum wage, for approximately six months sometime between his retirement from Sprint and March 1998. Despite having attorney representation, he did not request TTD when he stopped making deliveries in 1998. Nor did he file a request for TTD in 1999, 2000, 2001, or 2002. It was not until half-way through 2003 that Pierron filed a request for TTD. Other than the flower deliveries, Pierron has never provided any evidence of any work or attempted work over the six years between his retirement and his request for TTD. Pierron claims he did not abandon the work force when he retired from Sprint. However, there is no evidence to the contrary and his own (in) actions speak volumes. Similarly, his medical records over those six years are full of documentation from his physicians (often based on Pierron’s own statements) that he was retired and had not worked since retiring from Sprint. Not only have multiple physicians stated that Pierron retired, (Stip. p. 3, 6, 7, 8, 9, 24, 25, 45, 46, 52, 73, 74, 76, 83), but Pierron admits in his affidavit and on his own medical forms that he retired and the retirement was due to his job being eliminated. (Stip. p. 23, 40, 65,

66.)

Pierron states that the court of appeals noted that he could have accepted the layoff rather than retirement, and then collect unemployment compensation. (Brief, p. 30.) He then argues that he would not be entitled to unemployment because he was incapable of employment “in his usual trade or occupation or any other employment for which he is reasonably fitted.” *Id.* This argument should be rejected, as claimant was able to work for Sprint for 23 years after his injury. This argument is also inconsistent with Pierron’s position that he worked for House of Flowers and intended to remain in the work force.

In making his argument about unemployment, Pierron cites *State ex rel. Diversitech*. In *Diversitech*, this court held that “an abandonment is proved by evidence of intention to abandon as well as of acts by which the intention is put into effect. The presence of such intent, being a factual question, is a determination for the commission.” *Id.* at 383 (citations and internal quotations omitted). Pierron chose to collect retirement benefits, and failed to work or seek additional work over the next several years. Clearly, there is nothing wrong with a man who has worked hard his whole life taking advantage of an early retirement plan and enjoying more free time. However, a person in this situation is not entitled to receive TTD several years later. Accordingly, the commission properly determined that Pierron abandoned the work force when he retired from Sprint.

2. Lack of medical evidence.

In a case such as this where the claimant requests TTD after he stops working, the commission must decide whether he left the work force due to the injury, or for some other reason. *State ex rel. McCoy*, at ¶35; *State ex rel. McGraw v. Indus. Comm.* (1990), 56 Ohio St.3d 137. It does not matter what that “other” reason is – a layoff, retirement, jail, an unrelated medical

condition, or a termination. Unless Pierron can prove through competent medical evidence that he left the work force because of his industrial injury, he is not entitled to TTD. To establish an entitlement to TTD, Pierron must provide evidence of treatment contemporaneous with the requested period of disability. *State ex rel. Apcompower, Inc. v. Indus. Comm.*, 10th Dist. App. No. 03AP-718, 2004-Ohio-5257, at ¶32 ("a lack of any examinations or treatment during the disputed period of time may be fatal to a request for TTD compensation.")

Pierron submitted only two pieces of medical evidence to support his request for TTD: (1) a report from Dr. Fantasia dated June 5, 2003; and (2) a C-84 form signed by Dr. Fantasia on October 10, 2003, which certified disability from June 17, 2001 through December 30, 2003. (Stip. p. 41, 22.) Neither of these documents is credible medical evidence in support of Pierron's request for TTD, and the commission properly rejected both.

In his June 5, 2003 report, Dr. Fantasia states that Pierron "has been totally disabled due to this injury since we have been treating this patient." (Stip. p. 41.) In that same report, Dr. Fantasia states that he began treating Pierron in 1990 – seven years before Pierron retired! Despite treatment beginning in 1990, Dr. Fantasia admits that the treatment had not been regular, because "the patient has not been allowed to continue chiropractic care." *Id.* This court has held that a doctor's report which certifies disability over a lengthy period during which he did not treat the claimant and which certifies disability over a period of time during which the claimant worked is "too flawed to support the payment of temporary total disability compensation." *State ex rel. Kroger Co. v. Morehouse* (1995), 74 Ohio St.3d 129, 134. Because Dr. Fantasia's June 5, 2003 letter certifies total disability over the last seven years of Pierron's employment with Sprint and confirms the infrequent nature of treatment, the commission properly rejected this report as evidence supporting Pierron's request for TTD.

The C-84 submitted by Dr. Fantasia was likewise properly rejected. Pierron last worked for Sprint in 1997 and he admits that he last worked *at all* in early 1998. Pierron never saw his physician during the entire time he made flower deliveries, nor did he see him for approximately the next eight months. When Pierron was finally seen by his chiropractor on November 4, 1998, Dr. Fantasia stated that Pierron “last worked on 3/31/97”, the date he retired from Sprint. (Stip. p. 63.) Despite not knowing of the flower deliveries during the time in which Pierron was engaged in such activity, or for a lengthy time thereafter, 5½ years later Dr. Fantasia signed a C-84 form certifying disability beginning on the arbitrary date of June 17, 2001. (Stip. p. 22.) A medical report prepared so far after the fact, which contradicts the doctor’s contemporaneous medical records, cannot be considered evidence supporting a claim for TTD. *State ex rel. Apcompower*; *State ex rel. Simon v. Indus. Comm.* (1994), 71 Ohio St.3d 186; *State ex rel. Graves v. Indus. Comm.*, 10th Dist. App. No. 05AP-1102, 2006-Ohio-5941.

Pierron has produced no medical evidence that, after 23 years of regular full-time work subsequent to the industrial injury, he was suddenly unable to continue working for Sprint due to his injury. Nor is there any medical evidence to support Pierron's contention that he had to quit working for either Sprint or House of Flowers because of a worsening in his allowed conditions. There is likewise no evidence or explanation as to why Pierron suddenly became disabled on June 17, 2001. (Stip. p. 22.) No evidence has been submitted to indicate his condition worsened on that date, or that he was working such that he might be eligible to start receiving a new period of TTD.

Pierron's injury did not remove him from his employment of 23 years – a company downsizing did. Pierron did not suffer a flare-up of his allowed conditions, and he was not advised by any doctor to quit working due to the allowed conditions in his claim. Accordingly, he has not sustained his burden of proving that his departure from Sprint was injury-induced, and his request

for TTD was properly denied. *State ex rel. Basile v. Indus. Comm.*, 10th Dist. App. No. 05AP-464, 2006-Ohio-1029, at ¶6; *State ex rel. DeLany v. Indus. Comm.*, 10th Dist. App. No. 05AP-281, 2006-Ohio-427, at ¶107, 115.

As with his retirement from Sprint, Pierron has produced no medical evidence that he was unable to continue making deliveries for House of Flowers due to his industrial injury. He claims in an affidavit that his “low back pain and leg problems worsened, and it got to the point where I could not even to [sic] this job. I was forced to quit because of my injuries.” (Stip. p. 40, ¶3.) However, his assertion, without supporting medical evidence, is insufficient evidence of entitlement to TTD. As with his retirement from Sprint, Pierron's industrial injury did not remove him from his “job” at House of Flowers. Pierron neither suffered a flare-up of his allowed conditions, nor was he advised by his doctor to quit working due to the allowed conditions in the claim. In fact, not one of the doctors examining Pierron even knew he had been making deliveries.

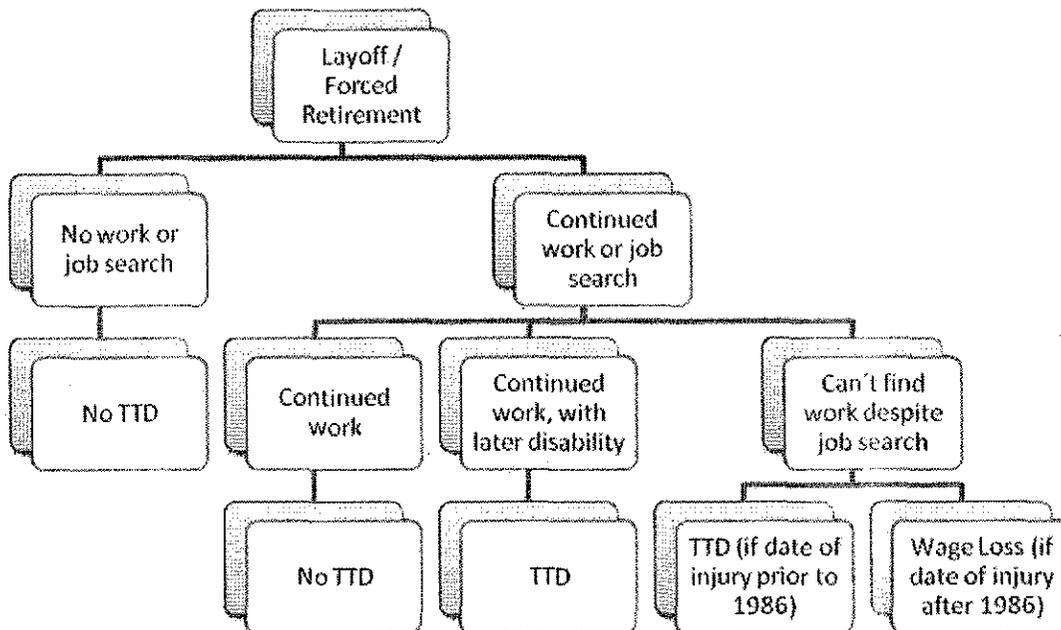
Regardless of whether this court finds that Pierron’s departure from Sprint was involuntary, Pierron is still not entitled to the requested TTD. He has not sustained his burden of proving that he left either Sprint or House of Flowers because of his injury. Based on a lack of medical evidence, the commission and the court of appeals properly denied Pierron’s request for TTD.

3. Failure to either work or seek work.

Even in situations such as employer-initiated layoffs, a claimant can abandon the work force by retiring and then failing to seek new work. For example, in *State ex rel. The Andersons*, the claimant was awarded wage loss compensation after he was laid off. In granting wage loss, the court noted that “layoff is *often* [but not always] considered involuntary since it is initiated by the employer, not the employee. In this case, claimant’s departure was initiated by the employer, without evidence of any intent on claimant’s part to abandon employment.” *State ex rel. The*

Andersons v. Indus. Comm. (1992), 64 Ohio St.3d 539, 542 (citations omitted, emphasis added).

Unlike in *The Andersons*, there is evidence in this case that Pierron intended to abandon the work force. Pierron claims there is “no evidence that [he] would never work again” after retiring in 1997. (Brief, p. 13.) However, he overlooks the fact that he did not work again after retiring. In the six years between his retirement and his request for TTD, there is no evidence of employment or even a job search – other than the occasional flower deliveries that stopped in early 1998. Sprint submits the following graphic accurately represents how the law applies in various situations:



Pierron did not seek additional work or make any effort to remain in the work force. In *State ex rel. Thomas*, the court ruled that “the commission here did not abuse its discretion in its reasoning by placing significance upon the factors identified in the order such as the type of retirement taken and the failure to seek other employment after the retirement.” *State ex rel. Thomas v. Gen. Motors Assembly Div.*, 10th Dist. App. No. 02AP-269, 2003-Ohio-407, citing *State ex rel. McAtee v. Indus. Comm.* (1996), 76 Ohio St.3d 648.

Dissenting Commissioner Gannon argued that the commission’s 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.” His conclusion, however, requires a severe stretching of the facts in this case. First, Sprint did not create a “token light duty job” for Pierron and then “do away with it shortly thereafter.” Pierron worked for Sprint for 23 years after his injury. It is a far stretch to claim that the job that encompassed potentially all of Pierron’s career was a token job. Similarly, 23 years is no short time; in fact, it is unusual for anyone to work for one employer for such a long period. Moreover, in the situation which Gannon describes, the injured worker would likely be entitled to TTD; such is not the case here. As the majority of commissioners and the court of appeals found, it was not just the departure from Sprint (or House of Flowers) that precludes Pierron from receiving TTD, but rather that departure coupled with a lack of contemporaneous medical evidence and his failure to seek or obtain additional employment that demonstrates his intent to abandon the work force. The entire set of facts must be considered, not exaggerated hypotheticals. Because the facts in this case are rather unique, contrary to Pierron’s and Commissioner Gannon’s assertions, it is unlikely this case would have a far-reaching application.

B. PROPOSITION OF LAW NO. 2: AN INJURED WORKER IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION IF HE IS NOT GAINFULLY EMPLOYED AT THE TIME A NEW PERIOD OF DISABILITY BEGINS.

Regardless of whether Pierron’s departure from Sprint was voluntary or involuntary, the court ruled that Pierron was not entitled to TTD for two separate reasons:

- Pierron was not “gainfully employed” at the time he claimed his disability began. His work for House of Flowers – where “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 – was not “gainful employment.” (Decision, ¶27.)
- Even if the work for House of Flowers was gainful employment, Pierron did not establish that he suffered a disability while at the new job. (Decision, ¶29.)

Either of these reasons alone is sufficient to uphold the commission's denial of TTD.

Despite Pierron's abandonment of his employment with Sprint, he would be entitled to TTD if he re-entered the work force and, due to the industrial injury, became "temporarily and totally disabled while working at his *** new job." *State ex rel. McCoy*, syllabus. The court in *McCoy* was careful to note that injured workers who re-enter the work force after a voluntary abandonment are only eligible for TTD if they "are gainfully employed at the time of their subsequent disabilities." *Id.* at ¶40. Pierron was not. He did not become temporarily and totally disabled while making deliveries for House of Flowers. He did not even seek treatment during his "employment" with House of Flowers – or for more than seven months after he stopped making deliveries.

Pierron requests that TTD start on June 17, 2001, based on a C-84 form signed by treating chiropractor Fantasia on October 10, 2003. (Stip. p. 22.) According to Pierron's own affidavit, (Stip. p. 40, ¶3), he last performed work in 1998 delivering flowers. Pierron acknowledges in his brief "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." (Brief, p. 24, emphasis added.) *State ex rel. McCoy*, syllabus. In his second proposition of law, Pierron erroneously claims that an injured worker is entitled to TTD "if he becomes disabled again because of the allowed conditions in the claim." (Brief, p. 24.) Certainly, any TTD must be based on the allowed conditions in the claim. However, if the disability occurs after the worker has left his employer of record, he must provide evidence that his new period of disability began while he was working at a new job. *State ex rel. McCoy*, at ¶ 40. Pierron last worked in 1997 or 1998. There is no evidence whatsoever that he was working in 2001 when he allegedly became disabled.

Likewise, there is no evidence whatsoever that he became disabled while "working" for

House of Flowers. Medical records from Pierron's visit to his chiropractor on November 4, 1998 fail to mention the deliveries for House of Flowers and in fact specifically note that Pierron's last date worked was March 31, 1997 (his last date of work for Sprint). If the chiropractor was unaware of such "employment" and Pierron denied engaging in such work, there is no evidence that Pierron became disabled while performing such work. Accordingly, he is not entitled to TTD.

Even if there was evidence that Pierron's disability began in 1998 while making deliveries for House of Flowers, his delivery activity was not "gainful employment" such that a new period of TTD could be awarded if Pierron became disabled while performing such duties. Based on information from both House of Flowers and Pierron, Pierron earned approximately fifteen dollars per week making deliveries. Neither House of Flowers nor Pierron reported these payments or paid the required taxes on such payments. Despite the illegal nature of the income, Pierron now seeks to benefit by claiming that his earnings were sufficient to prove that he re-entered the work force. Part-time sporadic work, which provides income well below a living wage (such as Pierron's \$15 per week) is not gainful employment, and should be scrutinized particularly closely where the injured worker and "employer" hide such income from the government. There is no evidence that Pierron's flower deliveries for \$3 per hour were profitable; if Pierron used his own vehicle and paid the reasonably associated expenses, it is likely he broke even at best. No evidence has ever been submitted on this point, however. Regardless, an average of \$15 per week is not "gainful employment." *State ex rel. McCoy*, at ¶41 (driving a cousin's truck for 12 to 15 days over a two month period for \$12 per day "did not constitute sustained gainful employment").

Pierron argues extensively in his Brief that because any amount of earned compensation can be used to deny TTD during the period over which the compensation is earned, any amount of earned compensation should be evidence that he returned to the work force. (Brief, p. 24-29.)

Specifically, he argues that his work for House of Flowers “should constitute a re-entry into the work force such that T.T. should not be precluded later.” (Brief, p. 28, emphasis added.) This argument is irrelevant to the case. Pierron ignores the legal requirement that he be gainfully employed at the time the alleged subsequent disability begins. As stated above, in order for Pierron to be eligible to receive TTD based on an alleged re-entry into the work force through his flower delivery activity, he had to prove that he became disabled while performing such work. *State ex rel. McCoy*, syllabus. Evidence of disability starting more than three years later is insufficient as a matter of law.

The final argument in Pierron’s Brief is that this court should overturn the lower court’s decision upholding the commission’s decision out of sympathy. (Brief, p. 31-32.) While sympathy has its place in life, it is not an appropriate basis for a legal decision when it would require overlooking the facts and law in a particular case. Pierron claims, and rightfully so, that his voluntary removal from the work force will result in a denial of his pending application for permanent total disability compensation (PTD). This does not mean, however, that Pierron is without income. He has been receiving, and will continue receiving, his regular retirement benefits from Sprint.

To play up on the sympathy factor, Pierron argues that “[i]n 1997, without the benefit of the undersigned counsel, Appellant made a decision to retire that will haunt him for the rest of his life.” (Brief, p. 32.) This argument is misleading in that Pierron has had counsel in this case since at least 1976.² Although he has changed counsel a few times, Pierron retained one attorney (Horowitz) on February 18, 1997 and continued with him until October 7, 1998 – shortly before attorney Gibson was retained. Pierron was clearly represented at the time he decided to retire, and throughout his

² Sprint recognizes that the “evidence” referred to in this paragraph is not contained within the record before this court. However, neither is evidence supporting Pierron’s claim. Pierron’s misleading and unsupported statement should not be allowed to go unanswered.

“employment” with House of Flowers. Moreover, the fact that Pierron retained Attorney Gibson in late 1998 or early 1999,³ yet failed to request TTD until 2003 is indicative of Pierron’s intent to abandon the work force during those years and/or Atty. Gibson’s recognition that a request for TTD was inappropriate.

C. PROPOSITION OF LAW NO. 3: WHERE AN INJURED WORKER SITS ON HIS RIGHTS FOR SIX YEARS, THEREBY DENYING HIS EMPLOYER THE RIGHT TO HAVE HIM MEDICALLY EXAMINED, HIS REQUEST FOR TEMPORARY TOTAL DISABILITY SHOULD BE BARRED BASED ON THE DOCTRINE OF LACHES.

Pierron is requesting an order granting him TTD "from June 17, 2001 through July 17, 2005 and continuing." (Brief, p. 6.) This request is unreasonable and prejudicial, and therefore barred by the doctrine of laches. Laches is "an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes. It is lodged principally in equity jurisprudence." *State ex rel. Case v. Indus. Comm.* (1986), 28 Ohio St.3d 383, 385. "To successfully invoke the equitable doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Id.*

This case has been fraught with delays by Pierron. Initially, he filed his motion for TTD more than four years after he retired. The statute of limitations restricted his request for TTD for the two years prior to the date he filed his motion. R.C. 4123.52. By the date of the commission hearing on his request for compensation, Pierron was requesting more than 2½ years of compensation from Sprint – despite the fact Pierron continued to collect regular retirement benefits from the company.

Pierron then waited more than two years from the date of the commission decision to file his

³ The BWC’s file does not contain an authorization of representation card for Atty. Gibson around this time, but Sprint’s attorney sent Gibson correspondence in this case as early as 1/27/99.

request for mandamus relief. All told, he is now requesting more than 6½ years of compensation! Sprint, a self-insured employer, is unable to defend itself against this prolonged period of disability, since it has been deprived of an opportunity to obtain an independent medical examination during these lengthy delays.

An employer is entitled to obtain an independent medical examination only once on any given issue. R.C. 4123.651(A). Thus, Sprint had one opportunity to have Pierron examined on the issue of TTD. When TTD was denied by the commission, Sprint lost its ability to have Pierron evaluated to determine whether he had reached maximum medical improvement, or was otherwise no longer temporarily and totally disabled. However, had the TTD been granted, Sprint could have had Pierron examined every 90 days to determine whether he was still temporarily and totally disabled. R.C. 4123.53(B).

By sitting on his rights as he did, Pierron has deprived Sprint of the ability to defend itself against more than 6½ years of potential TTD. Such is the type of situation where laches applies: "prejudice is ordinarily represented by respondent's inability to defend due to the passage of time." *State ex rel. Roadway Express v. Indus. Comm.* (1998), 82 Ohio St.3d 510, 514. Accordingly, Pierron's requested writ should be denied.

CONCLUSION

Pierron last worked for Sprint in 1997, at which time he accepted a regular retirement. For some uncertain – but brief – time, Pierron made sporadic deliveries for House of Flowers for sub-minimum wage. Neither at the time he retired from Sprint, nor at the time he ceased making deliveries for House of Flowers, did Pierron seek medical treatment. Accordingly, there is no medical evidence of temporary total disability anywhere near the time he stopped working.

Because no worsening of his condition caused Pierron to either retire from Sprint or quit making deliveries for House of Flowers, the commission properly determined that he voluntarily left such positions. Moreover, the fact that Pierron chose to live the life of a retired person, rather than seek new employment after his departure from Sprint and House of Flowers, supports the commission's determination that Pierron voluntarily abandoned the work force as a whole.

Pierron bears the burden of proving his entitlement to TTD. The commission had the discretion to examine the facts and determine whether Pierron met his burden. Basing its decision on the evidence before it, the commission properly ruled that Pierron removed himself from the work force for reasons unrelated to the industrial injury so as to preclude an award of TTD years later. Accordingly, judgment should be entered in Sprint's favor, and Pierron's request for TTD should remain denied.

Moreover, Pierron's requested writ is barred by the equitable doctrine of laches, as his significant delays have prejudiced Sprint by depriving it of its ability to defend itself through medical examinations. For this reason also, Pierron's appeal should be denied.

Respectfully submitted,



Sara L. Rose (0065208)
Sara L. Rose, LLC

P.O. Box 188
Pickerington, Ohio 43147
Telephone: (614) 834-1200
Fax: (614) 834-1274
sara.rose@slroselaw.com
*Attorney for Appellee,
Sprint / United Telephone Co.*

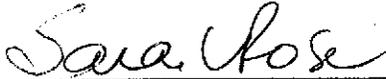
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served by regular U.S. mail, postage pre-paid,
this 11th day of January, 2008, upon:

Joseph E. Gibson, Esq.
545 Helke Road
Vandalia, OH 45377-1503
Attorney for Appellant

and

Eric C. Harrell, Esq.
Attorney General's Office
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215-3130
*Attorney for Appellee
Industrial Commission of Ohio*



Sara L. Rose (0065208)
*Attorney for Appellee,
Sprint / United Telephone Co.*