

In the
Supreme Court of Ohio

STATE OF OHIO, EX REL.
RICHARD PIERRON,

Appellant-Relator,

v.

INDUSTRIAL COMMISSION OF OHIO,
et al.,

Appellees-Respondents.

Case No. 2007-1460

On Appeal from the Franklin County Court
of Appeals, Tenth Appellate District
Case No. 06APD04-391

**BRIEF OF APPELLEE-RESPONDENT,
INDUSTRIAL COMMISSION OF OHIO**

JOSEPH E. GIBSON (0047203)
GIBSON LAW OFFICES
545 Helke Road
Vandalia, Ohio 45377-1503
(937) 264-1122
(937) 264-0888 (fax)
gibsonlawoffices@sbcglobal.net

Counsel for Relator-Appellant,
Richard Pierron

MARC DANN
Attorney General of Ohio

ERIC C. HARRELL (0070641)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
(614) 466-6696
(614) 752-2538 (fax)
eharrell@ag.state.oh.us

Counsel for Appellee-Respondent,
Industrial Commission of Ohio

SARA L. ROSE (0065208)
SARA L. ROSE, LLC
P.O. Box 188
Pickerington, Ohio 43147
(614) 834-1200
(614) 834-1274 (fax)
sara.rose@slroselaw.com

Counsel for Appellee-Respondent,
Sprint / United Telephone Company

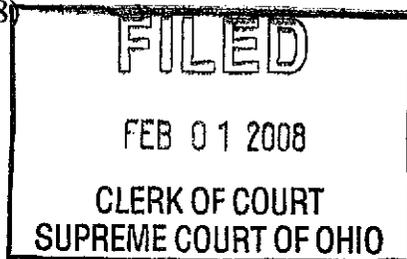


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF FACTS.....	1
LAW AND ARGUMENT.....	3
A. Standard of review.....	3
Appellee Industrial Commission’s Proposition of Law No. 1.....	4
<i>The commission does not abuse its discretion in denying temporary total disability compensation to an injured worker who voluntarily retires from employment for reasons unrelated to his or her industrial injuries.</i>	4
Appellee Industrial Commission’s Proposition of Law No. 2.....	7
<i>The commission does not abuse its discretion in denying temporary total disability compensation to an injured worker who voluntarily retired and is not gainfully employed at the time of his or her alleged disability.</i>	7
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Allerton v. Indus. Comm.</i> (1982), 69 Ohio St.2d 396	3
<i>State ex rel. Ashcraft v. Indus. Comm.</i> (1987), 34 Ohio St.3d 42	4, 5
<i>State ex rel. Baker v. Indus. Comm.</i> (2000), 89 Ohio St.3d 376	7
<i>State ex rel. Burley v. Coil Packing, Inc.</i> (1987), 31 Ohio St.3d 18	3, 4
<i>State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.</i> (1989), 45 Ohio St.3d 381	6
<i>State ex rel. Eckerly v. Indus. Comm</i> (2005), 105 Ohio St.3d 428	8
<i>State ex rel. Elliott v. Indus. Comm.</i> (1986), 26 Ohio St.3d 76	3
<i>State ex rel. Hassan v. Marsh Building Products</i> (2003), 100 Ohio St. 3d 300	9
<i>State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.</i> (1985), 29 Ohio App.3d 145.....	4, 5
<i>State ex rel. McCoy v. Indus. Comm.</i> (2002), 97 Ohio St.3d 25	passim
<i>State ex rel. Moss v. Indus. Comm.</i> 75 Ohio St.3d 414, 416, 1996-Ohio-306	3
<i>State ex rel. Noll v. Indus. Comm.</i> (1991), 57 Ohio St.3d 203	4, 6
<i>State ex rel. Pleban v. Indus. Comm.</i> (1997), 78 Ohio St.3d 406	8
<i>State ex rel. Pressley v. Indus. Comm.</i> (1967), 11 Ohio St.2d 141	3

State ex rel. Ramirez v. Indus. Comm.
(1982), 69 Ohio St.2d 6304

State ex rel. Rockwell Internatl. v. Indus. Comm.
(1988), 40 Ohio St.3d 445

State ex rel. Stephenson v. Indus. Comm.
(1987), 31 Ohio St.3d 1673

State ex rel. Williams v. Indus. Comm.
(2006), 111 Ohio St.3d 4915, 6

State v. Freeman
(1980), 64 Ohio St.2d 2916

INTRODUCTION

In this workers' compensation case, Appellant, Richard Pierron ("Pierron"), challenges the Industrial Commission's ("commission") denial of his request for temporary total disability compensation ("TTC") benefits. Pierron is not entitled to TTC for two reasons.

First, Pierron voluntarily retired from his employment with Sprint/United Telephone Company ("United"), for reasons unrelated to his industrial injury. This retirement constitutes a voluntary abandonment, making him initially ineligible for TTC. Second, to qualify for TTC following his abandonment, Pierron must re-enter the workforce and have his original industrial injury prevent him from continuing in his new position; neither of which Pierron can show. Pierron did not obtain gainful employment following his retirement. Additionally, should Pierron successfully argue his attempt at work can be considered a return to the workforce, there is no evidence showing that his industrial injury caused him to cease those new "work" activities.

STATEMENT OF FACTS

Pierron sustained an industrial injury during the course of his employment with Appellee-Respondent, United, on September 21, 1973. (Second Supplement at p. 1; hereinafter, "Sec. Supp. at p. ##").¹ To date, his claim has been allowed for "fracture dorsal vertebra; lumbar subluxation; T-12 post traumatic syringomyelia; lumbar strain; traumatic myelopathy." (Sec. Supp. at p.5).

In April of 1997, Pierron took regular retirement from Sprint. (Sec. Supp. at pp.15, 19). Pierron last worked for Sprint on March 31, 1997. (Sec. Supp. at p.11). After his regular retirement, he served as a delivery driver for House of Flowers. He performed these services for House of Flowers approximately five hours a week on an "as-needed" basis, for approximately

¹ While Appellant has not filed a supplement, Appellee is still referring to its supplement as a "Second Supplement."

six months in 1997-98. (Sec. Supp. at p.16). He was paid three dollars per hour by House of Flowers. (Sec. Supp. at p.15).

On June 13, 2003, Pierron completed a C-86 motion requesting temporary total disability (TTC) compensation. (Sec. Supp. at p.13). On August 29, 2003, a district hearing officer (“DHO”) for the commission granted Pierron’s request for TTC from June 5, 2003 through July 23, 2003, and from “June 17, 2001 through June 4, 2003 and continuing TTC compensation after July 24, 2003 upon submission of medical evidence.” (Sec. Supp. at pp. 1-2).

A staff hearing officer (“SHO”) for the commission considered United’s appeal from the DHO order and on October 10, 2003, it modified the DHO order. (Sec. Supp. at p.3). The SHO denied TTC compensation from June 5, 2003, through July 24, 2003, and continuing, finding that Pierron retired from employment for reasons unrelated to his industrial injury. *Id.* On the day of the SHO hearing, Pierron’s chiropractor, Dr. Fantasia completed a medical form known as a C-84, in which he certified that Pierron was medically eligible for TTC from June 17, 2001, through an estimated return to work date of December 30, 2003. (Sec. Supp. at p.14).

Pierron’s appeal of the SHO’s order was heard by the commission on February 19, 2004. (Sec. Supp. at pp.5-10). The commission denied Pierron’s request for TTC, finding he failed to prove (1) that his regular retirement from Sprint was related to his industrial injury, (2) his voluntarily abandonment from the entire work force was related to his industrial injury, and (3) “he was not employed on either of the two possible dates to start the payment of [TTC] compensation (06/17/2001 or 06/05/2003).” *Id.*

Pierron’s request for reconsideration was denied on June 23, 2004. Pierron then filed this action in mandamus. The Tenth District Court of Appeals referred the matter to a magistrate who issued a recommendation in Pierron’s favor. Upon consideration of objections filed by the

commission and United, the Court of Appeals did not adopt the magistrate's decision and denied Pierron's request for a writ of mandamus. Pierron appealed from that decision, and the matter is before this Court.

LAW AND ARGUMENT

A. Standard of review

For a writ of mandamus to issue, Pierron must demonstrate 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. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. To establish a basis for mandamus relief, Pierron must show that the commission abused its discretion by issuing an order that is unsupported by any evidence in the administrative record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76, 78-79.

In *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170, in referring to the commission, this Court stated, "its actions are presumed to be valid and performed in good faith and judgment, unless shown to be otherwise; and that so long as there is some evidence in the file to support its findings and orders, this Court will not overturn such." Thus, it has been held that a writ of mandamus will not be granted if "some evidence" supports an order of the commission. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

The determination of disputed facts is within the final jurisdiction of the commission. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St.2d 396. Therefore, this Court has refused to reevaluate and reweigh the evidence before the commission, holding that the commission is the "exclusive evaluator of disability." See e.g., *State ex rel. Moss v. Indus. Comm.*, 75 Ohio St.3d 414, 416, 1996-Ohio-306. The commission is only required to state what

evidence it relied upon and a brief explanation as to why the claimant is or is not entitled to the requested benefits. *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 204.

Appellee Industrial Commission's Proposition of Law No. 1

The commission does not abuse its discretion in denying temporary total disability compensation to an injured worker who voluntarily retires from employment for reasons unrelated to his or her industrial injuries.

The voluntary nature of abandonment is a factual question within the commission's final jurisdiction. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, defined "temporary total disability" as a "disability which prevents a worker from returning to his former position of employment." *Id.* at syllabus. In *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 147, the Tenth District Court of Appeals held:

A worker is prevented by an industrial injury from returning to his former position of employment where, but for the industrial injury, he would return to such former position of employment. However, where the 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 temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment. Such action would include such situations as the acceptance of another position, as well as voluntary retirement.

Id. Thus, where an employee voluntarily resigns (or retires) from a position of employment, and gives no indication that his resignation is due to an industrial injury, the employee's voluntary act has prevented a return to the former job. The employee has relinquishing entitlement to TTC compensation.

Jones & Laughlin was approved by this Court in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, with the Court stating:

The crux of this decision [Jones & Laughlin] was the court's recognition of the two-part test to determine whether an injury qualified for temporary total disability compensation. The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position.

In *Ashcraft*, an incarcerated inmate was found to have voluntarily abandoned his employment through his incarceration. The Court stated, "while the prisoner's incarceration would not normally be considered a 'voluntary' act, one may be presumed to tacitly accept the consequences of his voluntary acts." *Id.* at 44. The *Ashcraft* Court reiterated that when a claimant does something to remove himself from the workplace, the claimant's inability to work is due to that removal, not the industrial injury. *Id.*

One year after *Ashcraft*, this Court further clarified the holdings of *Jones & Laughlin Steel Corp.* and *Ashcraft* in *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. The *Rockwell* Court held: "when a claimant's retirement is causally related to an industrial injury, the retirement is not 'voluntary' so as to preclude eligibility for temporary total disability compensation." *Id.* at syllabus. Thus, the Court differentiated between "voluntary" and "involuntary" retirements, finding that only a voluntary retirement will preclude TTC. *Id.*

This Court recently addressed the *Rockwell* holding in *State ex rel. Williams v. Indus. Comm.* (2006), 111 Ohio St.3d 491. Williams took a regular retirement for health reasons unrelated his industrial injury. While citing *Rockwell* for the proposition that involuntary retirement will not foreclose TTC, the Court affirmed the denial of William's TTC due to his abandonment of his position. *Id.* The court stated: "while William'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.” *Williams* at 492. Without the “causal relationship” to an injured worker’s industrial injury, retirement is an abandonment of his or her position.

The question of whether a claimant voluntarily abandoned his former position of employment is “primarily one of intent that may be inferred from words spoken, acts done, and other objective facts.” *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381. “The presence of such intent, being a factual question, is a determination for the commission.” *Id.* at 383, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 297.

Evidence in the record supports the commission’s determination that Pierron’s retirement from United was unrelated to his industrial injury. Pierron admitted in his November 4, 2003 affidavit that he took regular retirement. (Sec. Supp. at p.15). Pierron cannot now argue that this was a disability retirement. He was clearly not disabled at the time of his retirement. To the contrary, he was working. The commission stated the evidence upon which it relied and provided a brief explanation for its decision, thereby complying with the *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. The commission’s finding of voluntary retirement was not an abuse of discretion.

Pierron argues that he should be entitled to TTC because he was involuntarily forced to abandon his position with Sprint. This argument must fail. It is irrelevant that Pierron was provided with a choice of taking a regular retirement or having his position eliminated through a layoff. While Pierron may not like the choices he was provided, he did choose to take the retirement. The record indicates it was a regular retirement. There is no medical evidence supporting his contention that his departure from United was due to his industrial injury. The commission found that Pierron failed to submit medical evidence to prove that his departure was indeed related to the industrial injury. As such, he voluntarily abandoned his position.

Appellee Industrial Commission's Proposition of Law No. 2

The commission does not abuse its discretion in denying temporary total disability compensation to an injured worker who voluntarily retired and is not gainfully employed at the time of his or her alleged disability

When a claimant voluntarily abandons employment he or she will be precluded from eligibility for TTC until such time as he or she re-enters the workforce and obtains gainful employment. *State ex rel. McCoy v. Indus. Comm.* (2002), 97 Ohio St.3d 25. This essentially creates a two-step process for regaining eligibility for TTC following a voluntary abandonment. First, the claimant must re-enter the workplace by securing gainful employment. Second, the claimant's industrial injury must prevent him or her from working in this new position. Pierron fails to meet either step, and is therefore precluded from receiving TTC.

When a claimant returns to the workforce, and is thereafter prevented from working due to the original industrial injury, it is the injury and not the prior abandonment (whether due to work rule violation, retirement, or another reason) that prevents the claimant from working. This Court was first presented with such a fact pattern in *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376. The *Baker* Court awarded TTC to a claimant who "voluntarily abandoned" employment by quitting his original position to take a job with a different employer. *Id.* The *McCoy* Court then applied the holding of *Baker* to a claimant who was fired from his original position, secured other employment and became disabled while working in his new position. *McCoy* at 32. While *Baker* and *McCoy* provide that a claimant who has removed himself from the workplace is not forever precluded from seeking TTC, that eligibility is dependent on the claimant having re-entered the workplace at the time the previously sustained injury prevents him from working.

For Pierron to be eligible for TTC, he must do more than claim he is working; he must actually obtain gainful employment. *McCoy* at 35. In qualifying its decision to allow some claimants who previously voluntarily abandoned their employment to become eligible for TTC, the *McCoy* Court said “[i]t is important to note that this holding is limited to claimants who are *gainfully* employed at the time of their subsequent disabilities.” *Id.* (emphasis added).

The claimant in *McCoy* argued that he re-entered the workforce by driving a truck for his cousin on 12-15 days over a two and one-half month period. Despite this evidence the Court concluded McCoy was not “gainfully employed” at the time of his later disability. *Id.* Likewise, Pierron argues that working less than part-time for a flower shop should qualify as re-entry into the workforce. The court below rejected this argument, finding “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.” Court of Appeal’s Decision at ¶ 27. Such sporadic, minimal, unreported work resulting in, at most, \$15 a week, does not constitute gainful employment.

Should this Court find that Pierron’s flower delivery activities constitute a re-entry to the workforce, he still bears the burden of showing his industrial injury in some way removed him from this “employment.” Pierron has not shown this.

The injured worker has the burden of proving entitlement to TTC. *State ex rel. Pleban v. Indus. Comm.* (1997), 78 Ohio St.3d 406. To be eligible for TTC, Pierron must not only return to “gainful employment” but must also show that his disability arose during this subsequent employment. *State ex rel. Eckerly v. Indus. Comm* (2005), 105 Ohio St.3d 428. Additionally, “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.*” *Id.* Absent any evidence that his disability arose during his subsequent employment, and that it removed him from this employment, Pierron has not proven entitlement to TTC.

Pierron has requested TTC for dates no earlier than June of 2001, but alleges he ceased his work activity delivering flowers in 1998. Pierron has submitted no medical evidence to support his assertion that his industrial injury prevented him from continuing in this position. The commission was not persuaded by Pierron’s affidavit that his removal from the workforce was due to his original injury. Again, the commission found no medical evidence that Pierron’s departure from House of Flowers was specifically related to the industrial injury. Without some evidence to support his position, the commission had no choice but to deny his request and properly found that his industrial injury did not prevent him from working delivering flowers a few hours a week.

In his brief, Pierron argues that the Ohio Supreme Court’s decision in *State ex rel. Hassan v. Marsh Building Products* (2003), 100 Ohio St. 3d 300, supports his alleged return to the workplace. Pierron’s reliance on *Hassan* is misplaced. Hassan took a position with a new company, worked for a short period of time, and was unable to continue due to disability. *Id.* Without much analysis, the Court indicated that any employment would invoke *McCoy*. *Id.* at 301. The court did not specifically overrule any portion of *McCoy*, nor did it overrule the “gainful employment” requirement for TTC. The holding in *Hassan* in no way absolves Pierron from needing to show a disability that arose during the course of gainful employment and that the injury removed him from that employment.

Hassan was placed by a temporary agency with an employer and worked over the course of three weeks (working 8, 19.5 and 24 hours, respectively). This activity was found to be

gainful employment sufficient to consider it a return to the workplace for purposes of TTC. In addition, Hassan alleged he could not continue at work due to the work-related disability; something Pierron has not shown in the instant case.

Finally, Pierron's argument that any work, regardless of how little, should be considered a return to gainful employment, may create a windfall for such claimants. As is discussed above, TTC is to compensate an employee for missing work due to an injury. It compensates for the lost income. In *McCoy*-type situations, TTC compensates for loss of income from the new position. To grant Pierron TTC to compensate for time away from less-than-part-time work, possibly at a rate higher than that which he was sporadically earning several years before the period for which he is requesting compensation, would operate as a windfall. The purpose of TTC is to replace lost earnings, not grant a windfall to an injured worker for time away from work that may or may not have existed for him during his disability.

CONCLUSION

For all of the foregoing reasons, the commission submits that it did not abuse its discretion when it denied Pierron's request for TTC. The commission did not abuse its discretion when it found that Pierron voluntarily retired from United and that his retirement was unrelated to his industrial injury. Nor did the commission abuse its discretion when it found Pierron failed to show that he abandoned his part-time employment with House of Flowers for reasons related to his industrial injury. The Court of Appeals Decision should be affirmed, with the requested writ of mandamus denied.

Respectfully submitted,

MARC DANN
Attorney General of Ohio



ERIC C. HARRELL (0070641)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
(614) 466-6696
(614) 752-2538 (fax)
eharrell@ag.state.oh.us

Counsel for Appellee-Respondent,
Industrial Commission of Ohio

CERTIFICATE OF SERVICE

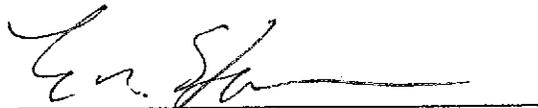
This is to certify that a true copy of the foregoing Brief of Appellee-Respondent, Industrial Commission of Ohio, has been sent by regular U.S. Mail, postage prepaid, this 1st day of February, 2008, to the following counsel:

Joseph E. Gibson
GIBSON LAW OFFICES
545 Helke Road
Vandalia, Ohio 45377-1503

Sara L. Rose
SARA L. ROSE, LLC
P.O. Box 188
Pickerington, Ohio 43147

Counsel for Appellant-Relator,
Richard Pierron

Counsel for Appellee-Respondent,
Sprint / United Telephone Company



ERIC C. HARRELL
Assistant Attorney General