

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

REPLY BRIEF OF PLAINTIFF-APPELLANT, RICHARD PIERRON

Joseph E. Gibson (0047203)
545 Helke Road
Vandalia, Ohio 45377-1503
Phone: (937) 264-1122
Fax: (937) 264-0888
COUNSEL FOR RELATOR-APPELLANT,
RICHARD PIERRON

Sara Rose (0065208)
P.O. Box 188
Pickerington, Ohio 43147
COUNSEL FOR RESPONDENT-APPELLEE, GTE/SPRINT
Phone: (614) 834-1200
Fax: (614) 834-1274

Eric Tarbox, (0041459)
150 E. Gay Street, 22nd Floor
Columbus, Ohio 43215
COUNSEL FOR RESPONDENT-APPELLEE
INDUSTRIAL COMMISSION OF OHIO
Phone: (614) 466-6696
Fax: (614) 752-2538

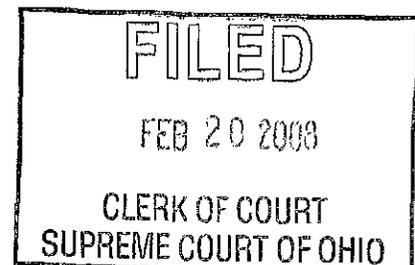


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ARGUMENT.4

CONCLUSION.....12

CERTIFICATE OF SERVICE.....13

TABLE OF AUTHORITIES

Ohio Workers' Compensation Act, generally12

Ohio Revised Code Section 4123.52.....6, 7

Ohio Revised Code Section 4123.56(B)10

Ohio Revised Code Section 4123.61.....9

Ohio Revised Code Section 4123.62.....9

State ex rel. Hassan v. Marsh Building Products
100 Ohio St.3d 300 (2003).....4, 5, 6, 8, 13

State ex rel McCoy
97 Ohio St. 3d. 25 (2002), 2002-Ohio-5305.....6, 8, 12, 13

State ex rel Bing v. Industrial Commission
61 Ohio St. 3d 424, 575N.E.2d177 (1991).....11

State ex rel Pitts. Plate Glass Indus. Inc. v. Indus. Comm
71 Ohio App.3e 385, 594 N.E.2d 51 (1991).....12

ARGUMENT

Now comes Appellant/Relator, Richard Pierron, by and through counsel, who hereby submits his response to the Merit Briefs both Appellee/Respondents, Industrial Commission of Ohio and Appellee Respondent, Sprint United Telephone Company. The Merit Briefs both of the Appellee/Respondents failed to adequately rebut Relator's position with regard to his "involuntary" retirement from the phone company, and his return back to the work force by delivering flowers. Relator maintains that the case of *Hassan v. Marsh Building Products* 100 Ohio St.3d 300 (2003) is on all fours with this case, and should clearly and easily control the outcome. He urges the Court to apply *Hassan* as it should be applied here, and grant the writ.

Respondent/Appellee Sprint United Telephone presents three (3) propositions of law in its merit brief. They all lack merit under the circumstances of this case and are not supported by the record, the Ohio Workers' Compensation Act, or the case law. Relator will address each one in the order that it has been presented.

On Proposition of Law Number One, Respondent/Appellee Sprint-United Telephone states that "when an injured worker accepts a "regular retirement" in lieu of a lay-off, presents no contemporaneous medical of his inability to work, and fails to seek new employment for several years, a finding that the injured worker had voluntarily abandoned the work force is proper. Again, Plaintiff cites the logic and reasoning of Commissioner Gannon, and that of the Court of Appeals Magistrate with regard to the concept that Pierron's retirement was "indeed voluntary". The claimant had literally no

"choice" in this decision, and this lack of choice itself makes his "retirement" involuntary. He was on restrictions and "light duty" at the time that he was presented with the choice of being fired, or "retiring". Case law has found that this is hardly a voluntary situation, and this should not be held against the claimant presently. To apply the employer's logic would encourage employers to offer light duty jobs to all claimant's on disability, only to have them "eliminated" later on, thereby forcing retirement and unduly preclude any and all Temporary Total Disability later on. This does not appear to be what the legislature intended in drafting the temporary total disability statute.

Additionally, Appellee/Respondent Sprint United Telephone mischaracterizes the situation in its First Proposition of Law. The record shows he has presented contemporaneous medical evidence of the inability to work, and he has shown that he in fact had a job at the House of Flowers in Versailles. It may not have been for much money, or over many hours during the week, but it was a job, and it was gainful employment under *Hassan*. Relator again begs the question: If he were drawing Temporary Total Disability Compensation, and had this "job" at the House of Flowers, would he be entitled to continued TTC? Of course not! The employer would allege fraud due to the claimant "working" while collecting T.T. and Pierron would probably be sitting in a jail cell right now. Just ask Raymond Goodwin, BWC Claim number 01-455446, who is alleged to have earned a whopping \$250.00 over a 3 week period in his claim, It overlapped a period of Temporary Total Disability Compensation, and as a result, the BWC and Industrial Commission alleged fraud and found a \$15,000.00 overpayment in his case. The decision of the Commission is itself now the subject of a mandamus action before the Court of Appeals in Franklin County (Court of Appeals

Case #08APD02-90). In the mean-time, he has been labeled a fraud, and now faces criminal prosecution. If this is "work" then why isn't Pierron's activities "work"? How can there be two definitions of "work" in this system? If it is enough to preclude T.T. on the one hand, then it should be enough to re-start it on the other, under *McCoy* (See *State ex rel McCoy* 97 Ohio St. 3d. 25 (2002), 2002-Ohio-5305). Strangely enough, this is exactly what the *Hassan* case holds.

Moreover, the medical information from Dr. Fantasia clearly establishes that he was indeed disabled. The C-84 form completed by Dr. Fantasia specifically states that the patient attempted a job delivering flowers but was unable to continue doing so (See C-84 and supporting medical information form from Dr. Fantasia, as part of the Court of Appeals Record, Exhibit 10).

With regard to Proposition of Law Number Two, the Respondent/Appellee Sprint United Telephone submits "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." This also is true under the general provisions of the law, but is not the precise situation the claimant presents. The period of disability in this case indeed began when the claimant stopped working delivering flowers for the House of Flowers in Versailles. Unfortunately, he did not have the benefit of current counsel to properly advise him that he can pursue Temporary Total Disability Compensation from the moment he stopped working. As soon as medical documentation was presented in support of disability, the claimant submitted same. The District Hearing Officer properly found that some periods of disability were more than two years prior to the filing date of the request. Under O.R.C. 4123.52, the District Hearing Officer went back the

maximum two years prior to the filing date and awarded Temporary Total Disability Compensation from that date. But the disability period as alleged is indeed when he stopped working for the House of Flowers. This is noted in the aforementioned C-84 form, and medical information from Dr. Fantasia.

With regard to Proposition of Law Number Three, Respondent/Appellee Sprint United states "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". This proposal is ridiculous, and contrary to law. As stated above, Section 4123.52 of the Ohio Revised Code allows the Industrial Commission continuing jurisdiction to consider period of disability two years prior to the filing date of a request. Thus if an injured worker files a request for Temporary Total Disability Compensation on February 20, 2008, the aforementioned Ohio Revised Code Section limits his request to going back only to February 20, 2006. There is no case law in support of "laches" with regard to Relator's present situation. This also isn't a question of the claimant sitting on his rights as characterized by the employer. In fact, Pierron did not know what his rights were. He did not have the benefit of current counsel to tell him his rights, and the employer was certainly not about to tell him anything.

Additionally, the employer can hardly argue that they were denied the right to have the claimant undergo a medical examination during this period. Throughout this very same period the employer had the claimant examined on more than one occasion. The record shows medical evaluations by Dr. David Randolph, M.D. (see Record at Page 1/Exhibit 1), Dr. Gerald Steiman, M.D. (See Record at Page 82, Exhibit 34), and

Dr. Aviars Vitols, D.O. (See Record, Page 8/Exhibit 4). To argue that they were somehow denied the right to examine Relator within the accrued period of disability is ludicrous. This employer always has been aggressive in fully exercising its rights for medical examinations.

Based on the foregoing, Relator states that Appellee/Respondent, Sprint United Telephone has not established that there is some evidence in support of the Industrial Commission's determinations. Relator now turns to the arguments made by the other Appellee/Respondent, the Ohio Industrial Commission.

Appellee/Respondent Industrial Commission seems to take issue with Relator's citing of *Hassan*, and states that "Pierron's reliance on *Hassan* is misplaced". This is nonsense. As the Industrial Commission astutely points out, *Hassan* took a position with a new company, worked for a short period of time, and was unable to continue due to disability". This Court ruled that Hassan's brief, part-time employment, is enough to invoke *McCoy* (See *State ex rel. McCoy* 97 Ohio St. 3d. 25 (2002), 2002-Ohio-5305) and make him eligible for a restart of Temporary Total Disability Compensation. The Respondent/Industrial Commission tries to minimize the holding in *Hassan* by stating "without much analysis, the Court indicated that any employment would invoke *McCoy*". Emphasis added. The Respondent/Appellee Industrial Commission goes on to state "the Court did not specifically overrule any portion of *McCoy*, nor did overrule the gainful employment requirement for TTC". This is true, and it is precisely Relator's situation in this case. Pierron at first retired but then returned to gainful employment. The Industrial Commission also argues that 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 injury removed him from that employment. This is exactly what he has established with Dr. Fantasia's notation on the C-84 form. See Record, Exhibit 10). Even though it has been characterized by Respondent/Employer as "only two pieces of paper" it is indeed evidence on which the Industrial Commission should have relied. Dr. Fantasia clearly notes that Relator attempted to delivery flowers but was unable to do so because of the allowed injuries. *Id.* If this is not showing that disability arose during gainful employment, Relator doesn't know what is.

Respondent-Appellee Industrial Commission goes on to state "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". Respondent-Appellee Industrial Commission states "TTC is to compensate an employee for missing work due to an injury, and it compensate for lost income. To grant Pierron TTC would compensate time away from less-than-part-time work, possibly a rate higher than that which he sporadically earned several years before the period for which he is requesting compensation, and would thus be a windfall". This also is ludicrous. The purpose of Temporary Total Disability Compensation is to compensate the injured worker for the wages lost due to disability which arose in the course of his employment. Under Ohio Revised Code Section 4123.61, and 62, as well as the applicable case law, Relator's wage rate and disability earnings would be based on his earnings for the year prior to the date of injury. Thus it would be based almost entirely on wages from his position of employment at Sprint United Telephone Company, from 1973. See O.R.C. 4123.61 and O.R.C. 4123.62. A simple reading of the record would clearly show that his weekly wage in that situation is less than \$200.00 per week. This is hardly a windfall in today's

economy. Moreover, to follow Appellee/Respondent Industrial's logic means that any subsequent employment must be at a wage level equal to or greater than the wage at which he was injured originally, which makes no sense in today's era of down-sizing and/or retiring and taking a part-time job to pay bills. This logic would also emasculate the entire wage loss statute (O.R.C. 4123.56(B)) which is designed specifically to address these situations. Like it or not, many people are injured at a job, end up retiring, and then re-enter the work force working at Wal-Mart, McDonald's, or the local hardware store. They could also be driving a school bus, cutting lawns, or waiting tables. These new jobs are all still sustained remunerative employment under the case law, and just because it is lower than the wage rate as set in the original injury should not preclude the receipt of Temporary Total Disability Compensation later on. It also creates the need for the Court to evaluate each and every job to which a claimant returns after an injury to determine whether it earns sufficient wages to satisfy the sense of avoiding a windfall. The potential to create "a windfall" is simply non-existent, and this Honorable High Court should not be frightened by this inaccurate parade of horrors offered by Respondent/Appellees in this case.

Respondent/Appellee Industrial Commission also proposes that when an injured worker voluntarily retires from employment for reasons unrelated to his industrial injuries, the Commission does not abuse its discretion in denying Temporary Total Disability Compensation. Relator/Appellant does not dispute this. However in his particular fact situation, the Relator did not in fact voluntarily retire from employment for reasons unrelated to his industrial injuries. As the Magistrate in the Court of Appeals below found, (and as did Commissioner Gannon) the Relator/Appellant simply had no

choice which in no way makes his departure from Sprint-United a "voluntary" retirement. Respondent's arguments are now silent as to the idea that the Relator could have simply accepted the lay-off, drawn unemployment, and drawn "Wage Loss Compensation" if he got a job at a different employer at a lower rate of pay". As pointed out previously, Wage Loss Compensation is not available to injuries prior to 1986 (this is a 1973 injury) and interestingly, that particular argument is conspicuously silent from the analysis now.

Apparently, Pierron should have went ahead and taken the lay-off, gotten twenty-six weeks of unemployment, and flushed his twenty-plus years of service to the phone company down the toilet of Workers' Compensation law in order to preserve a potential (yet unrealized) possibility of Temporary Total Disability Compensation in the future for his injuries. This is ridiculous. No one knows that they are going to be disabled in the next year, six years, or fifteen years. To chain an injured worker to his place of employment after he is injured because of the potential for possible TTC later on (as the initial decision in *State ex rel Bing v. Industrial Commission* 61 Ohio St. 3d 424, 575N.E.2d177 (1991) did) is contrary to public policy, and should not be the law in this state.

Respondent-Industrial Commission also states that there is no medical evidence supporting his contention that his departure from United was due to his industrial injury. This is false. Relator was on a light duty position which was in fact eliminated in 1997, thereby causing his "choice" to retire or become unemployed. As Commissioner Gannon and the Magistrate below properly noted, if it weren't for the industrial injury, he would not have been on a light duty position in the first place. It is a job which can

easily be eliminated by the employer at any time. To follow the Industrial Commission's logic would permit any all employers to force disabled workers back to a "light duty job" only to have that job "eliminated" later on, thereby forcing a worker to chose to retire in order to preserve whatever benefits he may have accrued at that position of employment, or be fired. This would preclude any and all long-term employees for ever asking for Temporary Total Disability Compensation in a Workers' Compensation claim again. Clearly this is not the intent of the legislature in establishing Workers' Compensation benefits, nor the Court's in interpreting the section code on Temporary Total Disability Compensation. As case law holds, it is the intention of the claimant which determines whether termination of employment is unrelated to the allowed conditions so as to preclude the receipt of temporary total disability. *State ex rel Pitts. Plate Glass Indus. Inc. v. Indus. Comm* 71 Ohio App.3e 385, 594 N.E.2d 51 (1991).

CONCLUSION

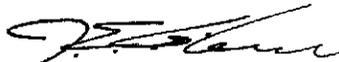
Neither Respondent/Appellee Sprint United Telephone, nor Respondent/Appellee Industrial Commission of Ohio has shown that "some evidence" exists to support the Commission's determinations. As such a Writ of Mandamus should be granted and Plaintiff be found to be eligible for Temporary Total Disability Compensation. Relator-Appellant requests that this High Honorable Court find that (1) Relator's retirement from the Sprint-United Telephone Company was not voluntary, (2) that he did "return" to the work-force by taking on and performing the job of delivering flowers for the House of Flowers in Versailles and (3) as a result, he became temporarily and totally disabled. Relator further requests that the requested Writ of

Mandamus be granted, and that the Industrial Commission be compelled to order the payment of the temporary total disability compensation as requested.

In the alternative, the Relator/Appellant respectfully requests that, if this Court find that he did in fact voluntarily retire, and thus abandon the work force, that he be found under *Hassan* to have attempted to re-enter it delivering flowers for the House of Flowers in Versailles. Finally, if This Court has problems or concerns with Relator-Appellant's eligibility for temporary total disability compensation based on specific requirements of *McCoy*, (or related case law) to specifically delineate these problems. Relator-Appellant's rights to Permanent Total Disability Compensation are also being affected by this decision. If he is not entitled to Temporary Total benefits, but is still eligible for Permanent Total, the parties need to know in order to receive guidance in the request for Permanent Total Disability which is currently pending.

Based on the foregoing Relator/Appellant, Richard Pierron, respectfully requests that this high Honorable Court vacate the Order and determination of the Court of Appeals, and grant the requested writ accordingly.

Respectfully submitted,



Joseph E. Gibson
545 Helke Road
Vandalia, Ohio 45377
(937) 264-1122 phone
(937) 26-0888 fax
gibsonlawoffices@sbcglobal.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served, via fax and/or regular U.S. Mail, first-class postage pre-paid to the following persons this 20th day of February, 2008:

Sara Rose (0065208)
P.O. Box 188
Pickerington, Ohio 43147
COUNSEL FOR RESPONDENT-APPELLEE, GTE/SPRINT

Eric Tarbox, (0041459)
150 E. Gay Street, 22nd Floor
Columbus, Ohio 43215
COUNSEL FOR RESPONDENT-APPELLEE
INDUSTRIAL COMMISSION OF OHIO



Joseph E. Gibson