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

APPELLANT'R REQUEST FOR RECONSIDERATION

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REQUEST FOR RECONSIDERATION

Now comes the Relator, Richard Pierron, by and through counsel, who pursuant to Rule XI of the Rules of Practice of the Supreme Court of Ohio, hereby requests that This High Honorable Court reconsider its decision rendered/filed on October 15, 2008. Relator has not yet received the final decision of the Court, but through an on-line review of the Court's web-site, noted the slip opinion on file. A call to the Clerk's office confirmed Relator's worst-fear and that any Reconsideration Request must be filed TODAY. Relator is at a loss as to why he has not gotten the Court's determination, as it would appear that more than sufficient time has passed since the filing date of the determination. In either event, Relator respectfully avers that the Court's determination is incomplete with regard to the issue at hand.

This is a Workers' Compensation case arising as an Original Action on Mandamus, and deals with a request for Temporary Total Disability Compensation from June 17, 2001 through July 17, 2003 and continuing. Richard Pierron ("Relator") contends that the Industrial Commission abused its discretion by denying Temporary Total Disability Compensation, which was requested/filed June 17, 2003.

In its determination, The Supreme Court ruled that the Relator did in fact remove himself from the work-force when he took his retirement from Sprint-United Telephone. The retirement was, in the Court's determination, due to reasons not involving Relator's disability or work injury involving this case. However, in its decision, the Supreme Court did state in the facts portion of the opinion that although he retired, he did return to the work-force in some capacity, which re-opens his eligibility for further Temporary Total

Disability Compensation. In the decision, The Court found that he was (1) seriously injured in 1973 [see paragraph 1], that (2) his injuries imposed limitations incompatible with the job at which he was injured [see paragraph 2], that (3) he was forced to retire from his job rather than be fired [See paragraph 2], that (4) he remained unemployed except for a brief part-time stint as a flower delivery person. [see paragraph 4, emphasis added]. Thus the Court does acknowledge that he did attempt to work after his retirement from the instant employer. Relator asserts that this attempt at working constitutes a re-entry into the work force such that his eligiblitiy to Temporary Total Disabillity Compensation is re-opened.

Despite this finding, Ohio Supreme Court goes on in its decision to discuss at great length about the nature of his departure from Sprint/United, and the case law about voluntary abandonment of employment. While relator may not agree with this interpretation, this is only "part One" of the Relator's argument. Further analysis of the Relator's situation is necessary in order to completely address this case.

Even assuming, *arguendo*, that the Relator voluntarily abandoned the work-force by his departure from Sprint-United, the fact remains that he returned to the work-force by his attempt at work delivering flowers. Since the Court specifically found this in Paragraph 4 of the slip opinion, the question arises as to what this attempt at work means for his eligibility for further Temporary Total Disability Compensation. The Court is silent on this question, even though it is addressed by all parties in their Briefs. Relator himself addressed this at length in Proposition of Law #2 Case law holds that a person can in fact voluntarily abandon the work-force, but can then re-enter it be attaining new employment elsewhere. A valid question can indeed exist as to whether

that new employment is truly "employment" such that eligibility for further Temporary Total Disability Compensation arises. However, if one quits the job at which he was injured for reasons unrelated to the injury, he can still be eligible for further Temporary Total Disability if he secures further employment. In the case at bar, this is exactly what is alleged to have happened.

Relator respectfully asserts that the Court did not address this in the decision rendered/filed October 15, 2008, and since this issue of re-entering the work-force is still outstanding, a reconsideration of the October 15, 2008 determination must occur. Again, there are two parts in the anaylsis of this case. First is whether the relator voluntarily abandoned the work-force by taking the retirement offered to him, thereby precluding his eligilibity for further Temporary Total Disability Compensation? The Court addressed this. However, the second part then arises which is does the relator's actions by taking the job delivering flowers constitute a re-entering the work-force, thus renewing his eligibility for Temporary Total Disability Compensation? The Court did not answer this, and it must be addressed in this case. A valid, legitimate issue is still outstanding on this case, and it could be determinative of the outcome of this and other cases similarly situated that are currently pending in the courts.

Based on the foregoing, Relator respectfully requests that the Ohio Supreme Court reconsider its decision filed October 15, 2008, and that further evaluation and analysis be given to the issue of whether Relator re-entered the work-force. In doing so, Relator requests that the Supreme Court indeed find that his work delivering flowers does constitute work, and a re-entry back into the work-force. Thus, he would be eligible for further Temporary Total Disability Compensation, and even Permanent Total

Compensation. Relator requests that the Court grant Reconsideration, and issue the requested writ.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reqauest ofr Reconsideration was served upon Eric Tarbox, Assistant Attorney General of Ohio, Counsel for Respondent, Industrial Commission of Ohio, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215, and Sara Rose, Counsel for Respondent Spring/United at P.O. Box 188 Pickerington, OH 43146 this 27th day of October, 2008:

Joseph E. Gibson (0047203)

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Pierron v. Indus. Comm.*, Slip Opinion No. 2008-Ohio-5245.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2008-OHIO-5245

THE STATE EX REL. PIERRON, APPELLANT, *v.* INDUSTRIAL COMMISSION OF OHIO ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. Pierron v. Indus. Comm.*, Slip Opinion No. 2008-Ohio-5245.]

Workers' compensation — Voluntary retirement from work force — Compensation for temporary total disability denied.

(No. 2007-1460 – Submitted August 26, 2008 – Decided October 15, 2008.)

APPEAL from the Court of Appeals for Franklin County, No. 06AP-391, 172 Ohio App.3d 168, 2007-Ohio-3292.

Per Curiam.

{¶ 1} At issue is appellant Richard Pierron's eligibility for temporary total disability compensation. Pierron was seriously injured in 1973 while working as a telephone lineman for appellee Sprint/United Telephone Company.

{¶ 2} After Pierron's injury, his doctor imposed medical restrictions that were incompatible with his former position of employment as a lineman.

Sprint/United offered Pierron a light-duty warehouse job consistent with those restrictions, and Pierron continued to work in that position for the next 23 years.

{¶ 3} In 1997, Sprint/United informed Pierron that his light-duty position was being eliminated. No one disputes Pierron's assertions that Sprint (1) did not offer him an alternate position and (2) gave him the option to retire or be laid off. Pierron chose retirement.

{¶ 4} In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, he moved for temporary total disability compensation commencing June 17, 2001. A district hearing officer for appellee Industrial Commission of Ohio granted the motion. A staff hearing officer reversed, finding that Pierron voluntarily abandoned his former position of employment when he retired.

{¶ 5} The commission affirmed that order:

{¶ 6} "[T]he injured worker voluntarily abandoned the work force when he retired in 1997. Despite the dissent's attempt to characterize the departure from the work force as involuntary, there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired. The injured worker's choice to retire was his own. He could have accepted a lay-off and sought other work but he chose otherwise. It is not just the fact of the retirement that makes the abandonment voluntary in this claim, as the passage of time without the injured worker having worked speaks volumes. The key point * * * is that the injured worker's separation and departure from the work force is wholly unrelated to his work injury."

{¶ 7} Pierron's request to the Court of Appeals for Franklin County for a writ of mandamus compelling the commission to order compensation was denied. The court of appeals ruled that because Pierron's retirement from his light-duty warehouse job was not due to injury, his retirement could not be considered involuntary. It also held that because Pierron worked only minimally after

retirement, he evinced an intent to abandon the entire labor market that barred all future temporary total disability compensation.

{¶ 8} Pierron now appeals to this court as of right.

{¶ 9} Temporary total disability compensation is intended to compensate an injured worker for the loss of earnings incurred while the industrial injury heals. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533. There can be no lost earnings, however, or even a potential for lost earnings, if the claimant is no longer part of the active work force. As *Ashcraft* observed, a claimant who leaves the labor market "no longer incurs a loss of earnings because he is no longer in a position to return to work." When the reason for this absence from the work force is unrelated to the industrial injury, temporary total disability compensation is foreclosed. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 531 N.E.2d 678. As we stated in *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 380-381, 732 N.E.2d 355, when a claimant "chooses for reasons unrelated to his industrial injury not to return to any work when able to do so, that employee has abandoned both his employment and his eligibility for [temporary total disability]."

{¶ 10} We are confronted with this situation in the case before us. The commission found that after Pierron's separation from Sprint/United, his actions — or more accurately inaction — in the months and years that followed evinced an intent to leave the work force. This determination was within the commission's discretion. Abandonment of employment is largely a question "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, 383, 544 N.E.2d 677, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 414 N.E.2d 1044. In this case, the lack of evidence of a search for employment in the years following Pierron's departure from Sprint/United supports the commission's decision.

{¶ 11} We recognize that Pierron did not initiate his departure from Sprint/United. We also recognize, however, that there was no causal relationship between his industrial injury and either his departure from Sprint/United or his voluntary decision to no longer be actively employed. When a departure from the entire work force is not motivated by injury, we presume it to be a lifestyle choice, and as we stated in *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 216, 648 N.E.2d 827, workers' compensation benefits were never intended to subsidize lost or diminished earnings attributable to lifestyle decisions. In this case, the injured worker did not choose to leave his employer in 1997, but once that separation nevertheless occurred, Pierron had a choice: seek other employment or work no further. Pierron chose the latter. He cannot, therefore, credibly allege that his lack of income from 2001 and beyond is due to industrial injury. Accordingly, he is ineligible for temporary total disability compensation.

{¶ 12} The judgment of the court of appeals is affirmed.

Judgment affirmed.

LUNDBERG STRATTON, O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

PFEIFER, J., concurs in judgment only.

MOYER, C.J., dissents.

Joseph E. Gibson, for appellant.

Nancy Hardin Rogers, Attorney General, and Eric C. Harrell, Assistant Attorney General, for appellee Industrial Commission.

Sara L. Rose, L.L.C., and Sara L. Rose, for appellee Sprint/United Telephone Company.