

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. BILLY G. BLACK,

Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO,

-and-

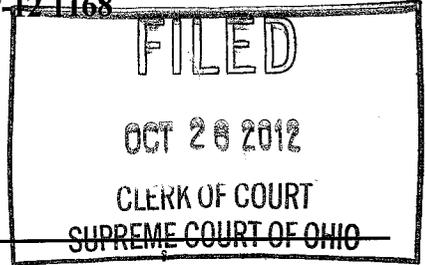
PARK OHIO INDUSTRIES, INC.,

Appellants.

CASE NO. 2012-1163

On appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals (Original Action) Case No. 10AP-12-1168



MERIT BRIEF OF APPELLANT PARK OHIO INDUSTRIES, INC.

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INTRODUCTION

Appellant Park Ohio Industries, Inc. ("Park Ohio") employed Appellee Billy Black ("Black") from approximately 1964 to 2001. On October 17, 2000, Black sustained a work related low back injury which resulted in a workers' compensation claim. After 38 years of service, Black retired from his employment at Park Ohio effective February 28, 2001.

Eight years after his retirement, Black filed an application for permanent total disability (PTD) compensation on August 19, 2009. In an Order dated July 21, 2010, the Ohio Industrial Commission ("Commission") denied Appellee's application for PTD based upon the Staff Hearing Officer's finding that Appellee was ineligible to receive PTD compensation because he took a voluntary retirement and abandoned the work force in 2001. Black brought a mandamus action in the court of appeals to challenge the order of the Commission denying his application for PTD. On October 24, 2011, the magistrate's decision ordered the Commission to vacate the Staff Hearing Officer's Order and enter a new order that properly determines Black's eligibility for PTD compensation. The court of appeals, in its June 19, 2012 Judgment Entry, adopted the magistrate's decision and issued a limited writ of mandamus ordering the Commission to vacate the Staff Hearing Officer's Order mailed July 21, 2010 and enter a new order.

STATEMENT OF THE FACTS

Black injured his back while working for Park Ohio on October 17, 2000. (Supplement to the Brief, page 01, (hereinafter, "Supp. #")). At the time of this injury Black was 54 years old with a birth date of February 10, 1946. (Supp. 01-02). His workers' compensation claim was initially allowed for lumbar strain, aggravation of pre-existing lumbar degenerative joint disease, and aggravation of pre-existing spondylolisthesis L5-S1. (Supp. 19-20). His initial application for PTD was denied in 2006. (Supp. 39). On May 7, 2008, his claim was additionally allowed

for major depressive disorder, single episode. *Id.* Appellee reapplied for PTD on August 14, 2009. (Supp. 02-09). After a hearing on the merits, the Staff Hearing Officer (“SHO”) issued her order mailed July 21, 2010 denying Black’s PTD application because he voluntarily retired and abandoned the work force. (Supp. 70-71).

On the date of injury (October 17, 2000), Black sought medical treatment at Concentra Medical Center and was treated by Elizabeth Mease, M.D. (Supp. 72). Dr. Mease placed him on several restrictions for his return to work which included the following: no repetitive lifting over 10 pounds, no pushing/pulling over 10 pounds of force, no squatting/kneeling, and alternate sitting/standing. *Id.* Black returned to work on October 19, 2000, was assigned to clean restrooms, and returned to Dr. Mease that day in pain. (Supp. 73). Dr. Mease prescribed no activity and scheduled a return visit for an evaluation. *Id.* On November 10, 2000, Dr. Mease released Black to restricted work which included no bending, no repetitive lifting over 10 pounds, no pushing/pulling over 10 pounds of force, and sitting 75% of the time and referred him to Mark Panigutti, M.D., an orthopedic surgeon associated with Concentra Medical Center. (Supp. 74).

On November 15, 2000, Dr. Panigutti saw Black and opined the claimant was “unable to return to light or modified job duties,” indicating “dates of disability from 10/17/2000 to 12/12/2000 (Estimated)” with a “return to full duty work” on “12/13/2000 (Estimated).” (Supp. 75). Black followed up with Dr. Panigutti on December 11, 2000 and Dr. Panigutti opined Black was “unable to perform regular job duties,” but could “return to light or modified job duties with no lift > 20 lbs, no stand > 2hrs for 4 weeks then full duty.” (Supp. 76). Dr. Panigutti issued Black disability dates “from 10/17/2000 to 12/12/2000 (Actual)” and a “return to work date” of “12/13/2000 (Actual).” (Supp. 77).

On December 11, 2000, before his return to work, Black executed an “EMPLOYEE NOTICE OF INTENT TO RETIRE” giving 60 days notice of his intent to retire from Park Ohio on February 28, 2001. (Supp. 21, 57). Black “returned to work with Park Ohio in December of 2000,” “cleaning the bathrooms and pushing brooms and doing . . . whatever they could find for” him. (Supp. 32). Black returned to Dr. Panigutti on January 22, 2001, complaining of “pain” and “groin pain in his testicle.” (Supp. 77). Dr. Panigutti also noted Black had no significant leg pain. *Id.* Dr. Panigutti told Black the groin pain was “unrelated to his back pain” and increased his physical capabilities by reducing his work restrictions: “no lifting greater than 50 pounds and no work greater than 8 hours for four weeks.” *Id.* (Emphasis added). Black last worked on February 9, 2001, and his official retirement from Park Ohio commenced on February 28, 2001. (Supp. 21, 33-34).

After retiring, Black received Social Security Disability (“SSD”) in September, 2001. (Supp. 02, 35). Black failed to introduce corroborating evidence to support his assertion that he received SSD solely because of his back. (Supp. 35, 70-71). Prior to applying for SSD, Black had “a long history of gastroesophageal reflux, elevated cholesterol, heart disease, and hypertension,” he had “had angioplasty in the late 1990s,” and he had “a remote history of a right knee medial meniscectomy . . . nose surgery and kidney stones.” (Supp. 15, 51-52). More recently, he “has been diagnosed with lung disease, chronic obstructive pulmonary disease, and emphysema.” *Id.*

On July 1, 2010, the SHO heard Black’s second PTD application. (Supp. 22-69). At the hearing on direct testimony, Black alleged he “took a retirement in February 2001” from Park Ohio because he “was in too much pain at the time, and . . . couldn’t maintain my job.” (Supp. 28). However, on cross-examination, Black admitted February 9, 2001 was the last day he

worked, and his retirement was effective February 28, 2001. (Supp. 33-34). Black admitted he never sought temporary total disability (“TTD”) compensation from Park Ohio after he retired. (Supp. 34). He did acknowledge that he applied for and was approved for SSD. (Supp. 35). He admitted he suffers from a number of medical conditions not involving his back. (Supp. 35-36). He admitted that since his retirement in February, 2001, he has never sought vocational training, enrolled in a literacy program, or attempted to get a GED. (Supp. 36-37). Finally, he admitted he had neither looked for work nor worked anywhere since his retirement from Park Ohio. (Supp. 37-38).

The SHO denied Black’s PTD application, concluding “the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.” (Supp. 70). In support of this conclusion of law, the SHO makes the following findings of fact. (Supp. 70-71):

1. Black received TTD “until he returned to work on 12/13/00.”
2. “On 12/11/00,” he notified the employer “he intended to take retirement” based on his years of service with the company.”
3. At the time Black notified the company of his intent to retire, he was “fifty-six years old and had been with the Employer for 38 years.”
4. He “last worked on 2/9/01 and officially retired on 2/28/01.”
5. No TTD “was paid after he stopped working.”
6. No medical evidence indicates that the retirement “was induced by the industrial injury” or that “any of his treating physicians advised him to retire.”
7. In January 2001, Black “saw his treating orthopedist...at that time the lifting restrictions were increased to fifty pounds...”
8. The January 2001 restrictions from the treating orthopedist were “due to groin pain . . . unrelated to the Injured Worker’s back condition.”

9. Black started receiving SSD “benefits later in 2001” but did not document the basis for the award.

10. Black testified that “he has neither worked nor looked for work since his retirement.”

Black filed a complaint in mandamus on December 10, 2010. (Appx. 1). A magistrate of the court of appeals then decided that the court of appeals should issue a writ of mandamus. (Appx. 36). Park Ohio and the Commission filed objections to the magistrate’s decision regarding the recommendation to issue a writ of mandamus. (Appx. 49). The court of appeals, however, adopted the magistrate’s decision and issued a limited writ of mandamus ordering the Commission to vacate the SHO’s order mailed July 21, 2010, and enter a new order that properly determines Black’s eligibility for PTD compensation. (Appx. 66). Park Ohio subsequently filed this Appeal on July 11, 2012. (Appx. 87).

LAW AND ARGUMENT

Appellant’s Proposition of Law No. 1:

The Industrial Commission’s finding that Black’s retirement was voluntary in nature based on a lack of contemporaneous medical evidence of disability is lawful, does not “suggest” the SHO did not consider or review medical evidence contemporaneous to Black’s retirement and therefore does not constitute an abuse of discretion.

The court of appeals erred in failing to allow the Industrial Commission discretion in making the factual determination that Black’s retirement was voluntary and not induced by his industrial injury. The court of appeals erroneously found that the SHO’s factual determination regarding the voluntariness of Black’s retirement was not in accordance with Ohio Administrative Code 4121-3-34(D)(1)(d).

Ohio Administrative Code 4121-3-34(D)(1)(d) sets forth:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into

issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

Further, retirement initiated by a claimant for reasons unrelated to the industrial injury is considered voluntary. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 531 N.E.2d 678. A voluntary retirement from the work force prior to asserting PTD precludes the payment of compensation for that disability. *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, 631 N.E.2d 138, paragraph two of syllabus. The character of a claimant's retirement is critical to a PTD analysis. *State ex rel. Cinergy Corporation/Duke Energy v. Herber*, Slip Opinion No. 2011 Ohio- 5027.

The character of a claimant's retirement or abandonment of employment is a factual question that revolves around the claimant's intent at the time he/she retired. *State ex rel. Williams v. Coca-Cola ENT., Inc.*, 111 Ohio St.3d 491, 2006 Ohio 6112, 857 N.E.2d 136. The Supreme Court of Ohio has directed that the presence of such intent to retire is a factual question for the Commission to determine. *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St. 3d 381, 544 NE 2d 677.

In the instant case, the court of appeals erroneously found the SHO's factual analysis did not comply with Ohio Administrative Code 4121-3-34(D)(1)(d). Specifically, the court of appeals held that the SHO did not consider or review evidence of relator's medical condition at or near the time of his retirement. This is inaccurate. First, the court of appeals bases its holding on its interpretation on the following findings contained in the SHO's order: "(1) there is no medical evidence that relator's retirement was induced by the industrial injury, and (2) there is no evidence that any of relator's treating physicians advised him to retire." However, the court of appeals fails to recognize that the above findings are conclusions based upon the SHO's

review and consideration of medical evidence contemporaneous to Black's retirement. And by doing so, the appeals court fails to keep in mind that the Commission is the exclusive evaluator of the weight and credibility of the evidence presented and has substantial leeway to draw inferences from that evidence. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 31 OBR 70, 508 N.E.2d 936; *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004 Ohio 6086, 817 N.E.2d 880.

Secondly, the court of appeals wholly ignores the fact that the SHO order references Dr. Panigutti's January 22, 2001 treatment note, the treatment most contemporaneous to Black's last day of work February 9, 2001, and official retirement date of February 28, 2001. (Supp. 70). In his January 2001 treatment note, Dr. Panigutti indicates physical improvement on Blacks behalf and reduces Black's previous 20-pound lifting restriction to a 50-pound lifting restriction. (Supp. 70, 77). The SHO specifically cites to this treatment note when finding a lack of medical evidence to support claimant's industrial injury induced his retirement stating, "[t]he Injured Worker saw his treating orthopedist in January 2001. At that time the lifting restriction was increased to fifty pounds due to groin pain which the doctor stated was unrelated to the Injured Worker's back condition." (Supp.70). The SHO's reference to Dr. Panigutti's January 2001 treatment note clearly establishes the SHO has satisfied the requirements of Ohio Administrative Code 4141-3-34(D)(1)(d) by considering medical evidence contemporaneous to his retirement when making the determination that Black's retirement was voluntary in nature and therefore does not constitute an abuse of discretion.

Appellant's Proposition of Law No. 2:

The Industrial Commission's finding that there was a lack of medical evidence to demonstrate that Black's retirement was induced by his industrial injury does not constitute a wrongful shifting of the burden of proof from Park Ohio to Black and therefore does not constitute an abuse of discretion.

The court of appeals erred in finding that the SHO established a requirement contrary to law. In *Mid-Ohio Wood Products*, the court of appeals held "[t]he burden of proof with respect to voluntary abandonment falls upon the employer * * * The claimant's burden is to persuade the commission that there is a proximate casual relationship between his or her work-connected injuries and disability, and to produce medical evidence to this effect. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83, 1997 Ohio 71, 679 N.E.2d 706. * * * Where a claimant establishes a prima facie casual connection based upon medical evidence, the burden should then properly fall upon the employer to raise and produce evidence on its claim that other circumstances independent of the claimant's allowed conditions caused him to abandon the job market. *Id.*" *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 07AP-478, 2008 Ohio 2453, 2008 Ohio App. LEXIS 2086 at ¶ 17.

In the present case, Black was seen by Dr. Panigutti on December 11, 2000, and was released to return to work with restrictions on December 13, 2000. (Supp. 76). After receiving his return to work slip, but before actually returning to work, Black submitted his Notice of Intent to Retire effective February 28, 2001. (Supp. 21). Black indeed returned to work in December 2000 and worked through February 9, 2001. (Supp. 33-34). Black's Notice of Intent to Retire indicated that he was eligible to retire because he was at least fifty-five (55) years of age and had a minimum

of fifteen (15) years of service.¹ (Supp. 21). The notice did not include any reference to disability. *Id.*

The SHO's order does not indicate the Commission requires objective medical evidence corroborating that Black's retirement was induced by his industrial injury and therefore does not wrongfully shift the burden of proof from Park Ohio to Black. (Supp. 70-71). On the contrary, the SHO's order establishes that Park Ohio met its burden of proof in establishing Black voluntarily abandoned the work force. *Id.* This is evidenced by the SHO's conclusion that Black voluntarily abandoned the work force based on Black's failure to work and/or look for work after his retirement. *Id.* Additionally, the SHO also referenced the January 2001 medical record of Dr. Panigutti, and Black's December 11, 2000 notification of intent to retire based upon his years of service. *Id.*

The SHO's finding that there was no medical evidence advising Black to retire is simply one of the surrounding circumstances she took into consideration in her determination that Black failed to establish a causal connection between claimant's injury and his retirement. The SHO, through her order, does not wrongfully require medical evidence that physician(s) advised Black to retire, but simply arrives at the factual conclusion that the medical evidence considered did not sufficiently connect Black's retirement to his injury. Contrary to the court of appeals conclusion, the SHO does not imply the only way Black can establish that his retirement was involuntary is through submission of evidence that a physician advised him to retire due to his injury. The SHO within her order correctly addresses whether Black voluntarily abandoned his employment and

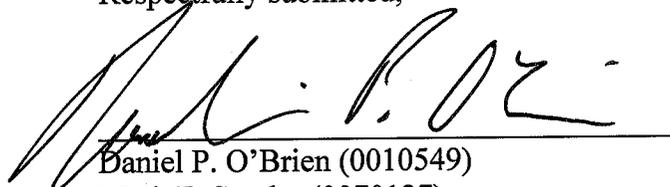
¹ Black's intent to retire is for reasons other than his injury which is further exemplified by the fact he did so immediately upon turning age 55 (DOB: 02/09/10), the earliest age at which he could retire.

identifies all the evidence she considered in reaching her conclusion that Black's retirement was voluntary, and therefore, her decision does not constitute an abuse of discretion.

CONCLUSION

The court of appeals' issuance of the writ of mandamus is in error as the Industrial Commission did not abuse its discretion when it found that Black was precluded from receiving PTD benefits in light of his voluntary retirement. The court of appeals' decision is erroneous as it is based upon the magistrate order which substitutes the Industrial Commission's evaluation of the evidence with the magistrate's own interpretation of the evidence. Therefore, Park Ohio respectfully requests this Court to reverse the decision of the court of appeals and deny the writ of mandamus and affirm the underlying decision of the Industrial Commission denying Black PTD benefits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this *Merit Brief of Appellant Park Ohio Industries, Inc.* was sent by ordinary U.S. mail this 26th day of October to:

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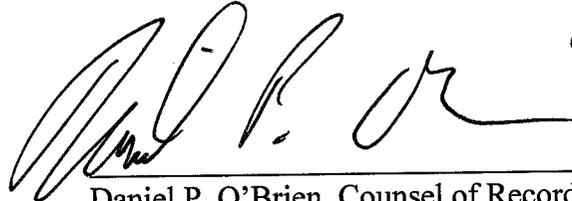
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**IN THE OHIO COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY**

STATE EX REL.
BILLY G. BLACK
6610 Lear Nagle Road, Lot 184
North Ridgeville, Ohio 44039-3285

CASE NO.
COMPLAINT IN MANDAMUS

Relator

vs.

10 APD 12 - 1168

**INDUSTRIAL COMMISSION OF
OHIO**
30 West Spring Street
Columbus, Ohio 43215

and

PARK OHIO INDUSTRIES INC.
1370 Chamberlain Blvd.
Conneaut, OH 44030-1100

Respondents

Relator, Billy G. Black, hereby states as his Complaint against Respondents, Industrial Commission of Ohio (hereinafter the "Commission") and Park Ohio Industries Inc. (hereinafter the "Employer"), as follows:

1. Relator, Billy G. Black, is the claimant in workers' compensation claim No. 00-816839, carried on the docket of the Commission.
2. The Commission is charged by law with the administration of the workers' compensation laws of the State of Ohio as it pertains to the Commission and to awarding or denying workers' compensation benefits.

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3. The Employer was at all times material hereto the employer of Relator and was subject to the workers' compensation laws of the State of Ohio.

4. Relator had sustained serious and disabling spinal cord injuries and afflictions during the course and scope of his employment with the Employer, which culminated on October 17, 2000 when his back pain and immobility required him to temporarily take time off work. Relator had been working as a welder and laborer, which had subjected him to substantial physical stress and strains. Relator was not allowed by his physician to return to work until December 13, 2000. He was unable to cope with the physical demands of the position and had to leave his position with the Employer on February 9, 2001. He was 53 years old at the time.

5. On August 19, 2009, Relator submitted an Application for Compensation for Permanent Total Disability (PTD), a copy of which is appended hereto as Exhibit A. By that point in time, his workers' compensation claim had been allowed for:

MAJOR DEPRESSIVE DISORDER SINGLE
LUMBOSACRAL SPONDYLOSIS
ACQ SPONDYLOLISTHESIS
SPRAIN LUMBAR REGION

6. Included with the application was a report from M.P. Patel, M.D. dated June 10, 2008, a copy of which is appended hereto as Exhibit B. Based upon his review of Relator's medical history and his examination of him, Dr. Patel concluded that he "has significant physical limitations and is permanently and totally disabled from engaging into any gainful employment." *Id.* p. 2. Relator had also secured a Psychological Evaluation from James M. Medling, Ph.D., a copy of which is appended hereto as Exhibit C. The psychologist had found that the allowed psychiatric condition

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"renders [Relator] permanently and totally disabled from all forms of gainful employment." *Id.*, p. 5.

7. As is the customary practice, the Employer arranged for physicians to opine that Relator was still capable of gainful employment. An "Independent Medical Examination" which had been prepared by Dean W. Erickson, M.D., was submitted on October 26, 2009 and a "Psychological Specialist Report" from Michael A. Murphy, Ph.D. followed on November 2, 2009.

8. At the request of the Commission, a further examination was conducted by R. Scott Krupkin, M.D. In his Independent Medical Examination dated March 26, 2010, the State's specialist confirmed that: "This Injured Worker is incapable of work." *Exhibit D, p. 5, appended hereto.* No credence was given to the highly suspect findings of the Employer's experts. *Id.*

9. Based upon the reports of Drs. Patel, Medling, and Krupkin, the PTD claim was granted by a Staff Hearing Officer (SHO) on April 21, 2010. *Exhibit E, appended hereto.*

10. The Employer appealed this determination on April 26, 2010. The Employer then submitted additional evidence in opposition to the PTD claim, including a Vocational Report from Janet Kilbane, M.Ed., dated April 25, 2010.

11. Relator Responded with a Vocational Report which had been prepared by Daniel L. Simone, M.Ed., dated May 22, 2010, a copy of which is appended hereto as Exhibit F. Consistent with the SHO's prior Tentative Order, Simone found that as a result of the Relator's allowed conditions, vocational limitations, and the current labor

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market, he "has experienced a total inability to perform substantial gainful activity on a sustained bases." *Id.*, p. 6.

12. A hearing was then held before SHO Robin A. Nash on July 1, 2010. Relator testified about his employment history and injuries during the proceeding. No witnesses were called by the Employer.

13. In an Order dated July 21, 2010, the Commission reversed the SHO's prior Tentative Order and denied the application for PTD benefits. *Exhibit G, appended hereto.* Significantly for purposes of the instant proceedings, none of the medical, psychological, or vocational reports which had been submitted by the Employer were found to be credible. Instead, benefits were denied solely because Relator had purportedly "retired" voluntarily on February 28, 2010, at the age of 54. The Commission thus concluded that "he is ineligible to receive permanent and total disability compensation." *Id.*, p. 2.

14. Upon the issuance of the Commission's order on July 21, 2010, Relator had exhausted his administrative remedies.

15. Pursuant to R. C. §4123.58(C)(2), Relator was entitled to receive PTD benefits upon a demonstration that his allowed conditions and vocational considerations prevented him "from engaging in sustained remunerative employment utilizing the employment skills that [he] has or may reasonably be expected to develop." The Commission has further defined the phrase "permanent total disability" to mean "the inability to perform sustained remunerative employment due to the allowed conditions in the claim." *Ohio Admin. Code 4121-3-34(B)(1).*

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injury "voluntary retirement," the Commission misconstrued the limited scope of the relevant inquiry and committed an unmistakable error of law. Under the plain and ordinary terms which were adopted by the General Assembly, R.C. §4123.582(C)(2) does not preclude an award of PTD benefits for those who have "voluntarily retired" following the onset of their disability. *State ex rel. Baker Material Handling Corp v. Industrial Commn.*, 69 Ohio St. 3d 202, 213, 1994-Ohio-437, 631 N.E. 2d 138, 147; *State ex rel. Reliance Elec. Co. v. Wright*, 92 Ohio St. 3d 109, 111-112, 2001-Ohio-108, 748 N.E. 2d 1105, 1108-1109.

19. In the manner aforementioned, the Commission committed an abuse of discretion and arbitrarily denied Relator's application for PTD benefits.

20. The Commission's denial of Relator's application for PTD benefits was unjustified and contrary to law.

21. Relator possesses a clear and unmistakable right to PTD benefits based upon the evidence which was submitted with the application of August 19, 2009 (*Exhibit A*) and cited in the Tentative Order of April 21, 2010 (*Exhibit E*).

22. Relator has no adequate and appropriate remedy at law to correct the Commission's violation of controlling legal standards and unlawful, arbitrary, and gross abuse of discretion.

PRAYER

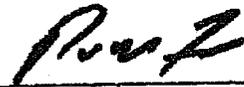
WHEREFORE, Relator, Billy G. Black, prays for a writ of mandamus compelling the Commission to vacate the order of July 21, 2010 (*Exhibit G*) and approve his application for Permanent Total Disability benefits (*Exhibit A*). Relator further requests any additional relief to which he may be entitled, including the costs of this action.

Respectfully submitted,

Frank Gallucci, III, Esq. (per authority)

Frank Gallucci, III, Esq. (#0072680)
Bradley E. Elzeer, II, Esq. (#0052138)
PLEVIN & GALLUCCI
55 Public Square, Suite 2222
Cleveland, Ohio 44113
(216) 861-0804
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*Attorneys for Relator,
Billy G. Black*



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The Industrial Commission of Ohio

APPLICATION FOR COMPENSATION FOR PERMANENT TOTAL DISABILITY

*Please type or print clearly and answer all questions to the best of your ability.
Your cooperation in completing this form will aid in processing this application.
*To assure prompt processing, this application should be filed directly with:

TRACKED ON IR
MOTION/APPEAL
DATE 8/19/09
INITIAL F.G.

TO SCANNING
DATE / INITIALS

The Industrial Commission of Ohio
Claims Management
30 W. Spring St. 5th floor
Columbus, Ohio 43216-2213

Form with fields: Claimant's Name (Billy Black), Social Security Number, Date of Birth (2/10/1946), Address (6610 Lear Nagle, Lot 184), City (North Ridgville), State (Ohio), Zip Code (44039)

All Claims (If you check this box, list only your most recent claim number below)

Claim Number 00-816839 Date of Injury 10/17/00 Employer Park Ohio Industries, Inc.
Claim Number Date of Injury Employer
Claim Number Date of Injury Employer
Claim Number Date of Injury Employer

Medical examinations will only be conducted for conditions allowed in the above listed claims.

I am permanently and totally disabled as the result of the injuries sustained in the forgoing claim(s) and request that the Industrial Commission grant compensation for such disability. I further state that Dr. James M. Medling, PH.D has certified that I will never be able to return to my former position of employment and attached to this form is a copy of the doctor's report. When was the last date you worked anywhere? March 2001 M.F. Patel M.D.

Have you ever filed for Social Security Disability benefits? yes no

If you are now, or ever have, received Social Security Disability payments, complete the following section.

This does not apply to Social Security Retirement
STARTING DATE 9/2001
TERMINATION DATE AND REASON FOR TERMINATION
RATE PER MONTH

Do you receive disability benefits other than Social Security? (i.e., VA, Fireman & Police Officer Disability, etc.) yes no

What is the highest grade of school you completed? 7th When? 1962
Where? Lenora, West Va.

Did you graduate from high school? yes no
If no did you receive a certificate for passing the General Educational Development test (GED)? yes no

Why did you end your schooling? 1962
Have you gone to trade or vocational school or had any type of special training? yes no



If yes, what type of trade school or special training have you received and when? _____

How has this schooling or training been used in any of the work you have done? _____

Can you read? yes not well no
 Can you write? yes not well no
 Can you do basic math? yes not well no

Doctor's Name Dr. Carroccio Address Emerald

Date first seen _____ Date last seen 8/25/05

Reason Family doctor

Doctor's Name Dr. Panigutti Address 8/18/05

Date first seen _____ Date last seen _____

Reason back injury

Doctor's Name Dr. Shah Address _____

Date first seen _____ Date last seen _____

Reason Pain management

List all operations and surgical procedures you have undergone, beginning with the most recent.

Date 8/15/02 Name of surgical procedure heart stent

Date 1984 Name of surgical procedure knee

Date 1982 Name of surgical procedure bone

Date 1995 Name of surgical procedure kidney stones

Date _____ Name of surgical procedure _____

Do you use a cane, brace, TENS unit, traction device, oxygen machine, or any other appliance or device on a regular basis? yes no

If yes, please specify. Back brace

What other medical conditions prevent you from working? Both my physical conditions and my depression.

Have you ever participated in rehabilitation services? yes no Please explain _____

If you have not sought or participated in rehabilitation services, are you interested in rehabilitation services offered by the employer or the Bureau of Workers' Compensation and do you desire to undergo rehabilitation evaluation? yes no

Describe other limitations or changes in your lifestyle. _____

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Has your treating physician told you to cut back or limit your activities in any way? Yes ___ No
 If yes, give the name of the doctor and tell below what he told you about cutting back or limiting your activities.
 Can you drive a car? Yes ___ No
Dr. Panigutti - don't lift anything more than 10 pounds.

Describe your daily activities in the following areas and how much you do of each and how often.
 Housekeeping Chores: (meal preparation, laundry, home repairs, etc.) T.V. watching -
Oftan do not follow the programs due to thoughts of injury
related matters.

Recreational Activities and Hobbies: (bowling, hunting, etc.) None.

Describe other limitations or changes in your life style, if any, resulting from the allowed conditions in your claim.
Walking, standing, bending limited. Unable to ride a bike,
hunt or bowl. Significant tensions in my marriage. Poor sleep.
Loss of contact with former friends, I do not socialize and rarely
leave home. I am depressed about the way my injuries have change
my life.

Part 1 INFORMATION ABOUT YOUR WORK HISTORY

List all the jobs you have had. Start with your most recent job first and then work backwards to the first job you ever held.
 List SELF-EMPLOYMENT as you would any other job.

	Job Title (Be sure to begin with your most recent job)	Type of Business or Industry (Example: auto, insurance, construction, etc.)	Dates Worked (Month and Year)		Days Per Week	Specify Rate of Pay (per hour, day, week, month or year)
			From	To		
1	Straightening Press Operator	Forge	1964	2002	5	\$16.00/hr
2	Wire Products	Bending Wires	1964	1964	5	\$1.30/hr
3						
4						
5						
6						
7						
8						

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T-941 P 006/016 F-208

Do you have military experience? yes no If yes, provide dates of service, positions held and description of duties _____

Job Title No. 1 (from Part 1) Straightening Press Operator

Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties: Welder, operating straightening machines, set up the machine, set the cutters, straighten the piece.

2. Machines, tools, equipment you used: Straightening machines, electric overhead crane

3. Exact operations you performed: Sat up machine, blockpress, set the cutters according to the thickness of the piece, take piece from furnace to machine, use crank to get proper alignment, move piece to skid, shovel out the slag from the pit beneath the machine.

4. Technical knowledge and skills you used: _____

5. Reading / Writing you did: _____

6. Number of people you supervised: None.

Walking (circle the number of hours a day spent walking)	0	1	2	3	4	5	6	7	8
Standing (circle the number of hours a day spent standing)	0	1	2	3	4	5	6	7	8
Sitting (circle the number of hours a day spent sitting)	0	1	2	3	4	5	6	7	8
Bending (circle how often a day you had to bend)	Never - Occasionally - Frequently - Constantly								

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:		Weight frequently lifted / carried:	
<input type="checkbox"/> 10 lbs.	<input type="checkbox"/> 100 lbs.	<input type="checkbox"/> Up to 10 lbs.	<input type="checkbox"/> Up to 50 lbs.
<input type="checkbox"/> 20 lbs.	<input type="checkbox"/> Over 100 lbs.	<input type="checkbox"/> Up to 25 lbs.	<input type="checkbox"/> Over 50 lbs.
<input type="checkbox"/> 50 lbs.			

Job Title No. 2 (from Part 1) _____

Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties: _____

2. Machines, tools, equipment you used: _____

3. Exact operations you performed: _____

4. Technical knowledge and skills you used: _____

5. Reading / Writing you did: _____

6. Number of people you supervised: _____

Describe the kind and amount of physical activity this job involved during a typical day in terms of:

Walking (circle the number of hours a day spent walking)	0	1	2	3	4	5	6	7	8
Standing (circle the number of hours a day spent standing)	0	1	2	3	4	5	6	7	8
Sitting (circle the number of hours a day spent sitting)	0	1	2	3	4	5	6	7	8
Bending (circle how often a day you had to bend)	Never - Occasionally - Frequently - Constantly								

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:	Weight frequently lifted / carried
<input type="checkbox"/> 10 lbs.	<input type="checkbox"/> Up to 10 lbs.
<input type="checkbox"/> 20 lbs.	<input type="checkbox"/> Up to 25 lbs.
<input type="checkbox"/> 50 lbs.	<input type="checkbox"/> Up to 50 lbs.
<input type="checkbox"/> 100 lbs.	<input type="checkbox"/> Over 50 lbs.
<input type="checkbox"/> Over 100 lbs.	

Job Title No. 3 (from Part 1) _____

Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

- Your basic duties: _____
- Machines, tools, equipment you used: _____
- Exact operations you performed: _____
- Technical knowledge and skills you used: _____
- Reading / Writing you did: _____
- Number of people you supervised: _____

Describe the kind and amount of physical activity this job involved during a typical day in terms of:

Walking (circle the number of hours a day spent walking)	0	1	2	3	4	5	6	7	8
Standing (circle the number of hours a day spent standing)	0	1	2	3	4	5	6	7	8
Sitting (circle the number of hours a day spent sitting)	0	1	2	3	4	5	6	7	8
Bending (circle how often a day you had to bend)	Never - Occasionally - Frequently - Constantly								

20740 - H19

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:

Weight frequently lifted / carried:

10 lbs.

100 lbs.

Up to 10 lbs.

Up to 50 lbs.

20 lbs.

Over 100 lbs.

Up to 25 lbs.

Over 50 lbs.

50 lbs.

Job Title No. 4 (from Part 1)

Describe your basic duties - what you did and how you did it. Please provide as much detail as possible.

1. Your basic duties:

2. Machines, tools, equipment you used:

3. Exact operations you performed:

4. Technical knowledge and skills you used:

5. Reading / Writing you did:

6. Number of people you supervised:

Describe the kind and amount of physical activity this job involved during a typical day in terms of:

Walking (circle the number of hours a day spent walking) 0 1 2 3 4 5 6 7 8

Standing (circle the number of hours a day spent standing) 0 1 2 3 4 5 6 7 8

Sitting (circle the number of hours a day spent sitting) 0 1 2 3 4 5 6 7 8

Bending (circle how often a day you had to bend) Never - Occasionally - Frequently - Constantly

Check below the heaviest weight lifted, weight frequently lifted and / or carried.

Heaviest weight lifted:

Weight frequently lifted / carried:

10 lbs.

100 lbs.

Up to 10 lbs.

Up to 50 lbs.

20 lbs.

Over 100 lbs.

Up to 25 lbs.

Over 50 lbs.

50 lbs.

Please use this space for comments, explanations or special factors you wish to add to support your application (social, economic, psychological)

I certify that the information on this page and the preceding pages are true to the best of my knowledge. By signing this application, I expressly waive all provisions of law which forbid any person, persons or medical facility who has medically attended, treated, or examined me, or who may have medical information of any kind which may be used to render a decision in my claim, from disclosing such knowledge or information to the Industrial Commission or employer(s) in my claim(s).

Attached to this application is medical evidence in support of the application.

Person Completing This Form

Bill B. Black
Claimant's Signature

08-14-09
Date

DO NOT submit this application without the following:

- * Supporting medical evidence signed by the physician.
- * Your signature on this application. (above)

ATTENTION

This application will be dismissed if medical evidence supporting the request for Permanent Total Disability is not attached.

To assure prompt processing, this application should be filed directly with:

The Industrial Commission of Ohio
Claims Management
30 W. Spring St. 5th floor
Columbus, Ohio 43215-2233

Help Us Help You!
Please take a minute to give us your correct address in the space provided on the first page of this application.



June 10, 2008

Frank L. Gallucci III
Attorney at Law
Plevin & Gallucci Company, L.P.A.
The Illuminating Building
55 Public Square, Suite 2222
Cleveland, Ohio 44113

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Permanent Total Disability Evaluation

Claimant: Billy Black
Claim Number: 00-816639 S1
Employer: Park Ohio Ind., Inc./Park Drop Forge
Date of Injury: October 17, 2000
Date of Exam: June 8, 2008
Conditions Allowed: Sprain lumbar region, lumbosacral spondylosis,
ACQ spondylolisthesis, major depressive disorder,
single episode
Examination For: Permanent Total Disability

History and Clinical Course:

Mr Black indicated during course of his employment with Park Ohio Ind., Inc./Park Drop Forge as a laborer, on October 17, 2000, he was working in a hole and sustained injury to back. His initial examination and treatment were at Occupational Health Centers. Mr. Black continued further treatment with his family physician

Mr. Black underwent MRI lumbar spine on November 10, 2000 which revealed spondylolisthesis with mild to moderate anterior subluxation of L5 on S1 with moderate impingement on the caudal aspects of the right and left L5 neural foramina without central stenosis

Mr. Black was referred to Dr. Parigudi and lumbar spine surgery was recommended Mr. Black was reluctant to undergo surgery.

Mr Black was referred to Dr. Shah, Pain Management Clinic and further treatment with lumbar epidural injections was recommended.

Present Complaints:

Mr. Black related that over a period of time, low back pain was progressively worse Low back pain was associated with radiating pain to legs, numbness and tingling sensation legs He experienced significant difficulty with activities of daily living such as walking, standing bending, lifting, climbing or descending stairs. Low back pain was particularly worse upon arising in the morning He had experienced episodes of the legs giving out on him while walking.

THE HILLIARD BUILDING
1419 West Ninth Street
First Floor
Cleveland, Ohio 44113-1210
216-685-1653
Fax: 216-685-1653

LIBERTY MEDICAL CENTER
50 Normandy Drive
Suite # 3
Fairportville, Ohio 44077
440-334-1343 • 440-933-3872
Fax 440-334-2721



Billy Black
Page Two
June 10, 2008
Claim No : 00-816839 SI

Past History:

Mr. Black's social, family history were non-contributory. Medical history was positive for previous MI, high cholesterol and knee surgery.

Examination:

Examination revealed a 62-year-old male in significant pain and discomfort, walking with an antalgic gait. BP 130/80 mmHg., Pulse 88/m. He is guarded in his movements.

In the standing posture, spinal alignment was abnormal with flattening of the lumbar lordotic curve. Spinal tenderness was noted over lumbosacral level with tenderness extended to both sacroiliac joints and sciatic notches. There was tenderness on palpation over the midline at the lumbosacral region and in the paraspinous muscles and myofascial paralumbar muscles.

Forward flexion was carried out cautiously to 30 degrees. Lumbar hyperextension was painful and can be carried out to 10 degrees. Lateral bending to the right and lateral bending to the left caused paralumbar stretch muscular pain and were limited to 10 degrees. Straight leg raising test was positive bilaterally at 25 degrees. Deep tendon reflexes were 1+ both lower extremities. He had difficulty attempting heel-toe walking.

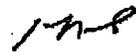
Review of Medical Records:

The following medical records were available for review at the time of this examination, M.P. Inc. report 09/16/2006, medical reports from Dr. Erikson 01/19/2006, report from Dr. Nemunaitis 02/08/2006.

Opinion:

After reviewing history of accident, clinical course, diagnostic studies, subjective and objective findings, in my opinion, Mr. Black with regards to claim number: 00-816839 SI, sprain lumbar region, lumbosacral spondylosis, ACQ spondylolisthesis, major depressive disorder, single episode, has significant physical limitations and is permanently and totally disabled from engaging into any gainful employment.

Sincerely,


M.P. Patel, M.D.

MPP/mc

James M. Medling, Ph.D.
Clinical Psychologist

Professional Plaza
71157 West 130th Street, Suite 201
Parma Hts., OH 44130
(440) 842-2222

Territorial Tower
Suite 852
Cleveland, OH 44113
Fax (440) 842-5547

PSYCHOLOGICAL EVALUATION

Claimant Information

Name: Billy Black
Claim Number: 00-816839 S1
Date of Birth: 2/10/46
Date of Evaluation: 6/14/08

Procedure: Record Review
Clinical Interview
Referred by: Bradley E. Elzeck, II
Examiner: James M. Medling, Ph.D.

2008 AUG 14
1:41 P.M.

Claim Allowances: Lumbar Strain; Agg of Degenerative Joint Disease, Lumbar; Agg of Preexisting Spondylolisthesis; Major Depressive Disorder, Single Episode

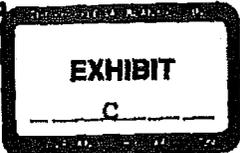
Reason for Referral: Mr. Black is a 62-year-old Caucasian male who was injured on 10/17/00 while employed as a straightening press operator. He injured his lower back shoveling steel slag into a bin. He was off work for 6 weeks before returning to a light duty position. He remained between 12/00-3/01 when he was forced off work due to increased complaints of pain and accepted retirement. He has been off work since that time. He denied claim related surgery. He began his employment with Park Drop Forge in 1964.

This evaluation is to assess his ability to return to work based upon his complaints of Major Depressive Disorder, Single Episode alone.

Biological Patterns/Medical Status: His chief complaint centered around a sharp, stabbing, throbbing pain in his lower back that extends down both legs, left more so than right with achiness and tingling in both feet. He rated his pain as varying between a 5-8 on an ascending scale of 0-10, 6 through an average day. He finds prolonged standing, sitting, walking, bending or stooping increase his pain. He relies on Morphine Sulphate, Neurontin and Percocet for pain. He is prescribed Trazodone for sleep. Pain is reported through a range of verbal and nonverbal behaviors. His family avoids him when he is in pain due to his irritability.

Areas of Functioning: He resides in a single family home with his 2nd wife, Lucy, age 37, of 11 years. The couple have been together for 19-20 years and have an 18-year-old son. He has two daughters from his first marriage, ages 35 and 40.

ADL's: His sleep is disrupted in both onset and maintenance. He retires to bed around midnight and requires one hour to fall asleep. He has trouble getting comfortable while distressing



B. Black
Continued

thoughts over his pain and an uncertain future delay sleep onset. His sleep is broken and fitful most nights and he awakens every 2-3 hours. He reported the presence of recurring nightmares of falling from a great height and accompanying feelings of panic and fear which startles him awake. Anxiety and depressive worry over his pain, future and the possible loss of his family delay a return to sleep. He usually awakens early about 6:30 a.m. He may nap for 5-10 minutes several times during the day. He reported reduced interest in sex due to a combination of pain and depression that has stressed the marriage.

Poor sleep leaves him chronically tired and easily fatigued during the day. He attempts to offset chronic tiredness with caffeine and consumes 2-3 cups of coffee and cans of cola a day. He denied the use of alcohol.

His wife is employed full time as a security guard and leaves for work about 6 a.m. His son recently graduated from high school and works part time. He is home alone most days. His wife is responsible for all household chores and his son, the yard work. He has no formal home or family responsibilities. As noted, he reported reduced drive and energy through the day due to pain and depression. He often procrastinates on tasks due to depressive apathy. He finds that "sometimes just getting up and going to the bathroom" requires more energy than he has available. With respect to household activities, "I am not able to do much, it's no good to start things you can't finish." He estimates he completes approximately one-quarter of what he begins. He becomes easily discouraged as his frustration tolerance is low. He often discontinues activities disgusted with himself due to his limitations and may curse or throw things. He is easily irritated which contributes to lowered feelings of self-worth, uselessness and a loss of self-esteem.

While he reports to "have the TV on most of the day," he often finds his thoughts are taken up with claim related worries so he does not always follow programs. He described his situation as "awfully discouraging, I just feel bad." He tries to resist thinking about injury related matters but has no way of clearing his mind or refocusing his attention. He is plagued by daily feelings of depression and associated worry over his pain and limitations.

He dresses daily but showers and bathes every three days in response to his wife's prodding. Depressive apathy has caused him to care little about his appearance. He does not eat meals at any regularly scheduled times or with family since his wife often works 12 hour shifts. He eats when hungry, "a bowl of cereal or sandwich." He described his appetite as "poor" while his weight has been stable. He described his days as long and boring. He denied pleasure or enjoyment from life. He reports to do "nothing" for fun. He lives an idle and ineffectual life pattern in which he attempts and accomplishes very little.

He presents with high-moderate to marked impairment in ADL's, compatible with levels that impede most useful functioning.

Socialization: He reported significant tensions in his marriage due to his complaints of pain, depressive withdrawal and irritability. A significant age difference of 25 years is present with his 37-year-old wife. He reported the marriage had been good prior to his work injury but has deteriorated significantly since he can no longer work or accompany his wife on outings and shopping trips.

B. Black
Continued

Page 3

Depressive withdrawal has created distance in his relationship while chronic irritability has created significant tensions. He described the marriage as "rocky." Divorce has been broached on more than one occasion by his wife. He believes she remains in the marriage for the sake of their son but now that he has graduated, he would not be surprised if she filed for divorce. He does not want a divorce but feels helpless to stop her if that is her intent. He added he and his wife argue frequently and may go for several days without talking. He blamed himself for tensions "we don't do a whole lot of things together anymore." He reported his relationship with his son is little better, noting tensions flare at least weekly. He is visited by his oldest daughter who lives nearby for approximately 10 minutes. He has no contact with his younger daughter.

He believes his wife works extra hours to avoid being home with him; she may work 10-12 hour shifts. He has no close friends or associates. He lost relationships with work acquaintances following his retirement since he no longer feels he has anything in common with them. He has become more introverted and socially withdrawn since that time. He does not socialize and rarely leaves home. He generally avoids interacting with others and is anxious and uncomfortable in social settings. He has given up and lost interest in riding his bicycles, going out on long trips and outings with his family. He has not replaced these activities with any others. He does not belong to any groups or organizations. He does not attend Church service.

He presents with marked impairment in Socialization, compatible with levels that significantly impede most useful functioning.

Concentration, Persistence, Pace: His Concentration is variable to poor due to the presence of depressive worry and concerns over his health and future. He is discouraged, if not hopeless, over his future and doubts that much will change for the better over time. He presents with frequent disruptions in concentration that plague him both day and night. As noted, he is easily frustrated and upset with a tendency to withdraw from activities in discouragement or disgust. He estimated that he completes one-quarter of what he begins. He is ineffectual at pacing his activities.

He presents with marked impairment in this area, compatible with levels that significantly impede most useful functioning.

Adaptation to Stress: He is coping with a great deal of difficulty. He has no effective way of elevating his mood. He typically defers decision making to his wife due to a loss of confidence, self-esteem and depression. He feels both worthless and guilty over his loss of bread winner status and believes that his prospects for the future are poor. He reported daily thoughts of suicide with a plan to poison himself (e.g., antifreeze). While he has "come close" at times to making an attempt on his life, his Christian values have prevented his acting out. He stays "worried all the time" due to his pain and fears of the future. He does not confide in others. He has no effective way of elevating his mood.

His ability to market himself in today's competitive workplace given his pain and feelings of depression are judged to be poor. His ability to pass any probationary period is judged to be poor. He will experience significant difficulties in adhering to any work schedules, interacting with coworkers, supervisors and completing assigned tasks in a timely manner.

B. Black
Continued

Page 4

He presents with marked impairment in Adaptation to Stress, compatible with levels that significantly impede most useful functioning. He judged to be not work stable.

Mental Status: He arrived promptly for his appointment. He presented as an overweight man of average height (5'8", 180 lbs.). He was casually dressed in black jeans and tee shirt. He is a balding man who wore wire-rimmed glasses. He had a goatee and appeared older than his stated age. He rose and may his way slowly to the interview room. He remained seated during the one hour interview. He was cooperative, polite and responded to all questions. His motor movements were unremarkable. He spoke with a regional accent.

His affect was blunted while his mood was depressed. He appeared dysphoric and weighed down by concerns over his injury, limitations and restrictions. His thoughts were somewhat impoverished although he provided additional information when asked to do so. He is generally unaccustomed to disclosing information about himself and tends to keep thoughts and feelings hidden, both from himself and others. Due to this personal style, tensions build over time and result in increased levels of psychological and physical distress. He demonstrated moderate disruptions in attention focus and concentration. He complained of short term memory loss and forgetfulness. He often walks into rooms and then forgets what he came in for. Mr. Black is illiterate and formal mental status testing was not attempted. His level of intellectual functioning is estimated to fall within the lower end of the Borderline range.

Developmental History: He is the youngest of 6 children with five full and two step siblings born to an intact family in rural West Virginia. His mother died when he was 4-years-of age and his father when he was 12. He described an abusive relationship with his stepmother following his mother's death and moved in with his sister and brother-in-law following his father's death. He struggled through school and believes he may have been undiagnosed with ADHD.

He performed poorly in school and failed both the 7th and 8th grade twice. He subsequently withdrew from school and moved to Cleveland for better opportunity. He does not possess a GED. He is illiterate.

He was married to his first wife for 15 years and divorced due to recurring arguments and disagreements.

Work History: He was hired by Park Drop Forge in 1964 and remained with the company until his 3/01 retirement.

Summary and Opinion: Mr. Black remains in the throes of a Major Depressive Disorder, Single Episode. He lives an idle and ineffectual life pattern due to his experience of pain and depression.

His ADL's are of high-moderate to marked impairment due to poor sleep which leaves him chronically tired and easily fatigued through the day. He demonstrated a loss of interest in sex. Depressive apathy has caused him to care little over his appearance. His day is without direction, meaning or purpose. He attempts and accomplishes little during the day.

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Page 5

B. Black
Continued

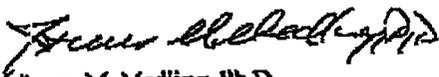
His Socialization is of marked impairment. Marital tensions are significant since his injury due to a combination of his depression, social withdrawal and irritability. He believes his wife has remained in the marriage for the sake of their son but now that he has graduated, he would not be surprised if she filed for divorce. He has lost contact with former friends and has become increasingly withdrawn and socially avoidant.

His Concentration is variable to poor due to the press of depressive worry. He reports that while the TV is on, he rarely watches shows as he is caught in a web of depressive worry and anxiety over his future. His concentration is also disrupted by his injury and experience of pain. He estimates he completes one-quarter of what he begins while his persistence is disrupted due to a lowered tolerance for frustration, pain and depressive withdrawal. He is ineffectual in pacing his activities. He presents with marked impairment in Concentration-Persistence-Pace.

He is coping with a great deal of difficulty and has few strategies for the relief of physical or emotional distress. He has few strategies for the relief of his psychological difficulties and does not confide in others. His ability to find and maintain employment is poor. He is judged to be not work stable.

Based upon AMA Guidelines as to the Evaluation of Permanent Impairment, 5th Edition, it is this examiner's opinion that his current complaints of Major Depressive Disorder, Single Episode renders him permanently and totally disabled from all forms of gainful employment. He can manage any monies awarded.

Thank you for the opportunity to evaluate Mr. Black. Please do not hesitate to contact me if you have any questions.



James M. Medling, Ph.D.
Psychologist

JMM/jmm

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PAGE2

R. SCOTT KRUPKIN, M.D.

4458 ST. CLAIR AVE.
CLEVELAND, OHIO 44103
PHONE (216) 881-8098 -- FAX (216) 881-8092

INDEPENDENT MEDICAL EXAMINATION

CLAIMANT NAME:	Billy G. Black
CLAIM NUMBERS/ALLOWANCES:	00-816839 (DOI 10/17/00) lumbar strain; aggravation of degenerative joint disease lumbar; aggravation of pre-existing spondylolisthesis L5-S1.
DISALLOWED CONDITIONS:	Bulging discs at L3-L4 and L4-L5.
DATE OF BIRTH:	02/10/1946
PLACE OF EXAMINATION:	Industrial Commission, Cleveland, Ohio.
DATE OF EXAMINATION:	03/23/10
EXAMINER NAME:	R. Scott Krupkin, M.D.
PURPOSE OF EXAMINATION:	To assist the Industrial Commission of Ohio in their determination of Permanent Total Disability.

Mr. Black is a 64-year-old right-handed male with a Workers' Compensation claim noted above. Medical records provided by the Industrial Commission of Ohio were reviewed.

HISTORY: Mr. Black was working as a press operator for Park Ohio Ind, Inc. He confirmed that his injury involved shoveling scrap from a hole underneath his press when he developed low back pain. He was initially treated at the company dispensary and subsequently sent to Dr. Elizabeth Moore for further treatment. Treatment included medications, physical therapy, diagnostic imaging and restrictions. Mr. Black stated that he returned to work briefly but could not keep up with his required job activities even at light duty. He subsequently was referred to Dr. Panigutti, a local orthopedist for treatment. Currently, Mr. Black is being seen by Dr. Shah, a pain management specialist. Other treatment has included psychological counseling with Dr. McCafferty. Mr. Black reported depression, anxiety and also occasional suicidal ideation.

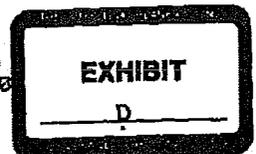
REVIEW OF SYSTEMS: Negative for bowel or bladder control problems. Positive for constipation, tingling in the left leg, sleep disturbance, anxiety and depression.

Mr. Black reported constant low back pain with radiation and tingling in the left leg and bilateral proximal muscle with tightness in stiffness. He reported flare ups of more severe pain every two to three months that improves over two to three weeks. His pain is worse with stairs and lifting. He reported some relief with medications, TENS, real,

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and movement (positional changes). Pain rating today was 6/10, which is about "average".

Overall, treatments have included medications, physical therapy, modalities, TENS, imaging and counseling.

Functionally, Mr. Black is independent with driving short distances, personal hygiene and activities of daily living. He receives assistance from his son in regard to housework, cleaning and grocery shopping.

PAST MEDICAL HISTORY: Coronary artery disease status post MI and stent placement, hypertension, gastroesophageal reflux. Primary care physician is Dr. Korocho.

MEDICATIONS: Tizanidine, Avina, hydroxyzine, pamoate, trazodone, Lexapro, Neurontin, and cardiac/anti-hypertensive medication.

ALLERGIES: No known drug or food allergies.

SOCIAL HISTORY: Separated from his wife, one son, seventh grade education, quit smoking 1995, occasional ethanol use, no military experience.

PHYSICAL EXAMINATION: Alert, oriented, and in no acute distress. Affect was subdued, Mr. Black was cooperative and communicative during the examination. Reported height 68 inches, weight 180 pounds.

Examination of the lumbar region was normal for skin color and temperature without deformity or scarring. Lordosis was diminished. Palpatory examination revealed tenderness bilaterally at the lumbosacral junction but worse on the left than the right. Motor strength was 4/5 with restricted giveaway during resisted muscle testing in both lower extremities. Light touch sensation was diminished in the left S1 dermatome. Deep tendon reflexes were 2+ at the knees and ankles on the right and a 1+ on the left. Hamstring tightness was noted with straight leg raising. Straight leg raising negative, except for low back pain. Distal pulses were normal. Gait and mobility was slow, guarded and antalgic. Posture tended to be flexed at the waist. Lumbar active range of motion was flexion 20 degrees, extension -10 degrees, right lateral 8 degrees, and left lateral 6 degrees.

MEDICAL RECORDS REVIEWED:

1. Application for permanent total disability.
2. IME per M. P. Patel, M.D. 06/10/08. Dr. Patel opined the claimant was permanently and totally disabled.
3. X-ray lumbar spine 05/04/87 showed first-degree spondylolisthesis at L5 and S1. Bilateral intra-articular defects noted.

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Re: Slack, Billy G
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4. X-ray lumbosacral spine Concenter Medical Center 10/17/00 showed diffused D/D intravertebral joints, narrowing of the L5-S1 disk space, and first-degree spondylolisthesis at L5 and S1.
5. MRI lumbar spine 11/10/00 showed mild to moderate anterior subluxation of L5 on S1 with moderate impingement of the L5 foramina bilaterally. No associated canal stenosis. Consistent with spondylolisthesis.
6. X-rays lumbar spine 08/13/01 showed spondylolisthesis L5-S1 grade I with no increased translation with flexion or extension.
7. Independent medical examination per Dean Brisson, M.D. 09/18/02.
8. IME per John Nemutalis, M.D. 02/06/06. Dr. Nemutalis opined that the claimant was capable of sedentary work activity.
9. Physician note from Comprehensive Pain Care Center per Bharat Shah, M.D. 04/25/08. Treated with Neurontin, morphine sulfate and Percocet. Also treated with TENS.
10. IME per Sheldon Kaffen, M.D. 05/27/08.
11. Addendum report per Dr. Kaffen 11/10/08.
12. Permanent partial impairment exam per Dr. Patel 01/27/09 opined a 22% whole person impairment.
13. Permanent partial impairment examination per Khalid Vahl, M.D. 08/14/09 opined a 9% whole person impairment. Noted previous award of 13%.
14. Independent medical examination per Dr. Erickson 10/01/09.
15. Various psychiatric and/or psychological reports were included from Michael Murphy, Ph.D. 10/15/08, E. A. Deacelle, D.O. 10/04/09, James Medling, Ph.D. 01/06/09 and 06/14/08, Walter Belay, Ph.D. 03/03/08 and Michael Leach, Ph.D. 03/24/07.

DIAGNOSIS: Allowed conditions as noted above.

OPINION:

1. It is my opinion that the claimant has achieved maximum medical improvement (MMI) to the allowed conditions in this claim.
2. Based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition -

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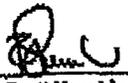
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Re: Black, Billy G
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A. Lumbar strain, aggravation lumbar degenerative joint disease, and aggravation of pre-existing spondylolisthesis L5-S1 with persistent pain, tenderness, diminished range of motion and confirmatory diagnostic findings is consistent with DRE lumbar category IV for a 20% whole person impairment.

3. Strength rating sheet attached.


R. Scott Krupkin, M.D.

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No 2091 P. 6/6

PHYSICAL STRENGTH RATING

INJURED WORKER: Billy G. Black

CLAIM NUMBER(S): 00-116839

the Injured Worker's age, education, or work training:

- () This Injured Worker has no work limitations.
- This Injured Worker is incapable of work.
- () This Injured Worker is unable of work as indicated below.

() "SEDENTARY WORK"

Sedentary work means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

Further limitations, if indicated:

() "LIGHT WORK"

the constant pushing and/or pulling of materials even though the weight of these materials is negligible.

Further limitations, if indicated:

() "MEDIUM WORK"

Medium work means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

() "HEAVY WORK"

Heavy work means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently, and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

() "VERY HEAVY WORK"

Very heavy work means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

PHYSICIAN'S SIGNATURE [Signature]

DATE 3/27/2010

PHYSICIAN'S NAME Richard S. Krupkin

RECEIPT

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The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 00-816839
LT-ACC-SC-COV
PCN. 2092391 Billy G. Black

Claims Heard: 00-816839

BILLY G BLACK
6610 LEAR NAGLE RD LOT 184
N RIDGEVILLE OH 44039-3285

Date of Injury: 10/17/2000

Risk Number: 20003050-1

TENTATIVE ORDER

This claim has been previously allowed for: LUMBAR STRAIN, AGGRAVATION OF DEGENERATIVE JOINT DISEASE LUMBAR; AGGRAVATION OF PRE-EXISTING SPONDYLOLISTHESIS L5-S1, MAJOR DEPRESSIVE DISORDER SINGLE EPISODIC. (DISALLOWED) BULGING DISCS AT L3-4 AND L4-5

This claim came before Staff Hearing Officer Joseph S Laskox pursuant to R.C. Sections 4121.35 and 4123.58 on:

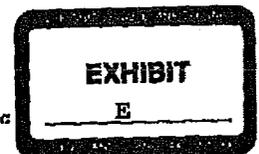
IC-2 App For Compensation Of Permanent Total Disability filed by Injured Worker on 08/14/2009.
Issue 1) Permanent Total Disability

After review and consideration of all the evidence in the claim file, the Staff Hearing Officer makes the following specific findings

It is the order of the Staff Hearing Officer that the Application for Permanent and Total Disability filed on 08/14/2009 be GRANTED. This order is based specifically upon the reports of Dr. Krupkin (03/23/2010), Dr. Patel (06/10/2008) and Dr. Medling (06/14/2008) who found that the Injured Worker is prevented from returning to sustained, remunerative employment as a result of the allowed conditions in the claim. Permanent total disability compensation is hereby awarded from 06/10/2008 and to continue without suspension unless future facts or circumstances should warrant the stopping of the award, and that payment be made pursuant to Ohio Revised Code Section 4123.58. This award shall be reduced by any outstanding overpayment of prior compensation and/or compensation previously paid over the award period now granted by this order.

A POWER OF ATTORNEY IS ON FILE FOR THE ABOVE LISTED INJURED WORKER

An objection may be filed with the Industrial Commission within fourteen (14) days of the receipt of this order. If a timely objection is filed, the IC-2 Application for Permanent Total Disability will be scheduled for hearing.



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The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number. 00-816839

Typed by lbc
Date Typed. 04/16/2010

Joseph S. Laszcz
Staff Hearing Officer

Findings Mailed 04/21/2010

Electronically signed by
Joseph S Laszcz

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

00-816839
Billy G Black
6610 Lear Negle Rd Lot 184
N Ridgeville OH 44039-3285

ID No: 10317-90
Frank L Colucci Jr L P A
54 Public Sq Ste 2222
Cleveland OH 44113-1901

Risk No 20003050-1
Park Ohio Ind Inc/Park Drop Forge D
1378 Chamberlain Blvd
Conneaut OH 44030-1100

ID No 900-80
Compmanagement, Inc.
PO Box 884
Dublin OH 43017-6884

ID No 20634-91
M.Llisor & Mobil
9150 S Hills Blvd Ste 300
Cleveland OH 44147-3599

ID No 4000-05
BWC - DWRF Section
30 W Spring St
Columbus OH 43215-2264

BWC, LAW DIRECTOR

NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S)

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SIMONE & ASSOCIATES

Daniel L. Simone, M.Ed., CRC, LPC
Beth A. Simone, M.Ed., CRC, LPC

Vocational Consultants

4135 Chesterland Blvd., Ste. OH 44224-1820
Phone: (330) 689-2006 Fax: (330) 688-9459

LABOR MARKET ACCESS REPORT

May 22, 2010

To: Mr. Frank Gallucci III, Esq.
Flevin & Gallucci Co., L.P.A.
55 Public Square, Suite 2222
Cleveland, Ohio 44113

Re: Billy Black
Claim #: 00-816839

Summary and Assessment

Mr Billy Black is a 64-year-old man who sustained a compensable injury on October 17, 2000 while he was working as a Straightening Machine Operator (D O T, 615 382-010) for Park Ohio Industries. His claim is allowed for the following—lumbar strain; aggravation of pre-existing degenerative joint disease lumbar; aggravation of pre-existing spondylolisthesis L5-S1; and, major depressive disorder single episode. Medical information reviewed indicates that this injury has resulted in the following impairments—an antalgic gait; difficult heel and toe walking; tenderness in the lumbosacral spine; decreased sensation in the left L5 dermatome; reduced flexion, extension and bending of the lumbar spine; spondylolisthesis L5-S1, degenerative joint disease of the lumbar spine; decreased patellar and Achilles tendon reflexes in the left lower extremity; decreased strength in the left lower extremity; depression; fatigue; chronic pain; decreased socialization, reduced concentration and attention; decreased persistence and pace, lowered stress tolerance; feelings of worthlessness; and, blunted affect. These impairments have resulted in the following limitations— inability to engage in any prolonged sitting, standing or walking; a need to change positions frequently; inability to repelively lift in excess of 10 pounds, inability to perform any climbing or crawling; inability to work around dangerous machinery or at unprotected heights, reduced ability to perform repetitive reaching; inability to perform complex activities; reduced ability to work in close contact of other individuals, inability to work in moderately stressful environments; reduced ability to maintain even moderate production goals; and, reduced ability to perform tasks requiring frequent changes in daily routine.

The purpose of this report is to evaluate this individual's degree of impaired labor market access as a result of limitations arising from this injury. Used in the preparation of this report were the following— medical documents provided and itemized in this report; an assessment interview with the client; the computer technology of the OASYS Program plus transferable trait analysis; and, current labor market information. As a result of this information the following observations are made.

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1. Mr. Black has experienced a 100% reduction in his ability to utilize his acquired skills as a Straightening Machine Operator as a result of his limitations based on the medical information reviewed. Prior to his injury his worker trait profile compared favorably to 125 *Dictionary of Occupational Titles* (D.O.T.'s), representing 27,834 semi-skilled jobs in the Cleveland SMSA (Standard Metropolitan Statistical Area). These are positions that could directly use his acquired skills as a Straightening Machine Operator. Following his injuries Mr. Black's worker trait profile would not compare favorably to any D.O.T. title which could use those acquired skills.
2. In analyzing a full range of unskilled occupations Mr. Black has experienced a 100% reduction in his ability to access the labor market as a result of his limitations, based on the medical information reviewed. Prior to his injury his worker trait profile compared favorably to 1,827 D.O.T.'s, representing 90,142 unskilled jobs in the Cleveland SMSA. Currently his worker trait profile would not compare favorably to any D.O.T. title.
3. The reasons for this total reduction in Mr. Black's ability to access the labor market are due to his combined physical and psychological limitations. From a physical standpoint Mr. Black would be unable to meet the standing, walking, lifting or carrying requirements of light work. He would also be unable to meet the sitting or reaching requirements of most sedentary jobs. From a psychological perspective Mr. Black would be reduced to performing simple, routine tasks in a lowered stress environment with reduced people contact, limited performance demands and with few changes in daily routine.
4. Mr. Black sustained an injury to his lumbar spine which has not responded positively to a variety of rehabilitation services including physical therapy, injections and pain management. In an orthopedic consultation Dr. Panigutti recommended that Mr. Black undergo surgery on his lumbar spine to try and increase his functioning. However, Mr. Black remains hesitant to undergo such surgery. The claimant was recently evaluated by the ICRD Specialist, Dr. R. Scott Krupkin. In a report dated 3-23-10 Dr. Krupkin opined that as a direct result of his compensable injury Mr. Black is incapable of sustained work. In a report dated 6-10-08 Dr. M. P. Patel also concluded that Mr. Black would be unable to perform sustained work activity due to his limitations. In an IME dated 10-6-09 Dr. Dean Erickson concluded that Mr. Black's back strain is resolved; that there is no evidence of radiculopathy; and, that limitations from general medical conditions (and not from the claimant's compensable injury) are preventing Mr. Black from returning to work.
5. In addition to his physical limitations Mr. Black is also experiencing marked psychological limitations. In a report dated 3-23-10 the ICRD Specialist Dr. Robert Byrnes noted moderate levels of impairment in the following areas of functioning: activities of daily living, socialization, concentration, attention, persistence and pace. Dr. Byrnes limited Mr. Black to work activities which would be low stress with limited interpersonal interactions. In a report dated 6-14-08 Dr. James Medling indicated in his opinion Mr. Black would be unable to perform sustained work activities due to the psychological limitations arising from his compensable injury. Dr. Medling noted in particular that Mr. Black would likely have difficulty interacting appropriately with coworkers and supervisors and that he would also have difficulty completing tasks in a timely manner. An IME from Dr. Michael Murphy dated 10-15-09 stated in his opinion Mr. Black had only mild levels of impairment in most functional areas (activities of daily living, socialization, concentration, persistence and pace).

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6. Mr. Black has a very limited education completing only the 7th or 8th grade. He stated that he failed both the 7th and the 8th grades twice. Mr. Black also acknowledged that he is functionally illiterate. He said he can read or write very little in English. Given his age, physical limitations and the extent of his educational deficiencies Mr. Black would not be considered a realistic candidate for additional formalized education or training.
7. At the present time Mr. Black is 64 years of age. Generally in order for such individuals to successfully return to work there must be little or no vocational adjustment. Mr. Black worked as a Straightening Machine Operator from 1964 to 2002 (he has not performed any sustained work activity since 2002). This is the only type of employment performed by the claimant in the past 46 years. He is unable to return to his past work activities. The skills he developed would not transfer into other occupations given the extent of his physical and psychological limitations. Mr. Black has never worked in any type of office or clerical position. Therefore in order for Mr. Black to successfully return to alternate work it would require a significant amount of vocational adjustment be made by him.
8. The fact that Mr. Black is unable to return to his previous work activity, that his skills would not transfer into other occupations given the extent of his limitations, that he has a very limited education, that he has difficulty reading or writing in English, that he is currently 64 years of age, that he has not worked in 8 years and the current labor market would further reduce his employability.

File Material Reviewed--

File material regarding Mr. Black was provided for this Counselor for review pursuant to the development of a labor market access evaluation. Provided for review were the following:

1. ICRD Specialist Report of Dr. R. Scott Krupka, dated 3-23-10
2. ICRD Specialist Report of Dr. Robert Byrnes, dated 3-23-10.
3. I/M/S of Dr. Michael Murphy, dated 10-15-09
4. I/M/S of Dr. Deaa Erickson, dated 10-6-09.
5. PTD Application, dated 8-14-09.
6. Psychological Report of Dr. James Medling, dated 6-14-08.
7. Medical Report of Dr. M. P. Patel, dated 6-10-08

Medical Background--

According to the medical information reviewed and information obtained from the claimant Mr. Black sustained a compensable injury on October 17, 2000 as he was under one of the machines attempting to shovel sand. He indicated he felt a sudden onset of pain in his lumbar spine. Initially he was treated conservatively with medications, physical therapy and pain management. When he failed to demonstrate improvement Mr. Black was referred to Dr. Panigutti to determine if surgery was a viable option. Dr. Panigutti felt that surgery had some merit but the claimant was hesitant to undergo surgical intervention. Mr. Black was referred back to Dr. Shah for pain management. He underwent an evaluation from Dr. M. P. Patel. In a report dated 6-10-08 Dr. Patel stated that over the past couple years Mr. Black's symptoms have worsened causing him to experience difficulty completing even rou-

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other responsibilities required Mr. Black to crawl underneath the machines and shovel out the slag. The claimant stated this was very physically demanding work. In addition to standing and walking the entire work day Mr Black had to use tools and lift materials which frequently weighed in excess of 75 to 150 pounds.

Vocational Analysis

All occupations in the *Dictionary of Occupational Titles* are classified according to specific occupational traits. These traits related to educational development, vocational preparation, aptitudes, strengths, physical demands, working conditions, temperaments and interest of the worker. These trait profiles were created by the Department of Labor and are accepted as foundation data in the field. An individual's trait profile can be inferred from his or her past work experience and training, and is assumed to be a minimal assessment of the individual's capabilities. This trait profile is termed "pre-access" and represents the individual's profile prior to the injury in question. This can then be compared to a "post-access" profile that takes into consideration the functional impairments arising out of the injury. By comparing these two profiles, it is possible to identify those jobs that were available prior to the injury and those which remain available to the individual subsequent to his or her injury.

Mr Black's Labor Market Access is enclosed as Appendix A. The pre-access profile was based on traits exhibited during past jobs. The post-access profile was modified in the following manner, based upon the medical information that was reviewed:

- 1 "Strength" was reduced from heavy to sedentary.
- 2 Reasoning Ability was reduced from average to below average
- 3 Motor Coordination was reduced from average to below average
- 4 Manual Dexterity was reduced from average to below average.
- 5 Eye-Hand-Foot Coordination was reduced from average to below average
6. Prohibited from climbing and crawling
- 7 Reduced ability to perform balancing, stooping, kneeling or crouching.
8. Reduced ability to perform repetitive reaching.
- 9 Inability to work in extremes of temperature.
- 10 Inability to work around vibratory equipment
- 11 Inability to work around dangerous machinery.
12. Inability to direct the actions of others.
- 13 Inability to perform a variety of work activities
14. Inability to work in moderately stressful environments.
15. Inability to attain precision tolerances.
16. Inability to work in close contact of other individuals.
- 17 Inability to make work judgments.

These changes in Mr Black's profile reflect the changes in his physical and psychological capabilities resulting from his conditions in light of the medical information which was provided. The profile was then compared to the database of jobs in the Cleveland SMSA

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Conclusion

The preponderance of information reviewed indicates that Mr. Black is experiencing marked physical and psychological limitations as a direct result of his compensable injury. From a physical standpoint he would have difficulty meeting the demands of sedentary work. He has participated in a variety of treatments without experiencing any significant improvement in his functional capability. The most recent report from the ICRD Specialist Dr. Knapton indicates in his opinion the claimant is incapable of sustained work activity. From a psychological perspective Mr. Black would have difficulty performing more than simple, routine tasks in a low stress environment with reduced people contact, limited performance demands and with few changes in his daily routine. Mr. Black worked in one job setting as a Straightening Machine Operator from 1964 to 2002. This is the only type of work he has performed in 46 years. He is unable to return to his past work activities. The skills he developed would not transfer into other occupations given the extent of his limitations. In addition, Mr. Black has a very limited education completing only the 7th grade of school. He has very limited ability to read or write in English. Given his current age of 64 he would not be considered a realistic candidate for additional formalized education or training. Therefore as a result of these factors and the current labor market Mr. Black has experienced a total inability to perform substantial gainful activity on a sustained basis.

Daniel Simone
Daniel Simone, M.Ed., CRC, CDMS
Vocational Consultant

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Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number: 00-816839
LT-ACC-SI-COV
MCN 2092391 Billy G. Black

Claims Heard 00-816839

BILLY G BLACK
6610 LEAR NAGLE RD LOT 184
N RIDGEVIEW OH 44039 3285

Date of Injury 10/17/2000

Risk Number 20003050 1

This matter was heard on 07/01/2010, before Staff Hearing Officer Robin Nash, pursuant to the provisions of R.C. 4121 35(B) (1) on

IC-2 App For Compensation Of Permanent Total Disability filed by Injured Worker on 08/14/2009
Issue 1) Permanent Total Disability

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER Mr. M. Elzoor, Mr. R. Black, court reporter
APPEARANCE FOR THE EMPLOYER Ms. M. Farley
APPEARANCE FOR THE ADMINISTRATOR. No Appearance

It is the finding of the Staff Hearing Officer that this claim has been allowed for: LUMBAR STRAIN; AGGRAVATION OF DEGENERATIVE JOINT DISEASE LUMBAR; AGGRAVATION OF PRE-EXISTING SPONDYLOLISTHESIS L5-S1; MAJOR DEPRESSIVE DISORDER SINGLE EPISODE. DISALLOWED: BULGING DISCS AT L3-4 AND L4-5; POST TRAUMATIC STRESS DISORDER.

After full consideration of the issue it is the order of the Staff Hearing Officer that the application filed 08/14/2009, for permanent total disability compensation, be denied. This decision is based upon the following findings:

It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.

The Injured Worker sustained the instant injury on 10/17/00. Following the injury he received temporary total disability compensation until he returned to work on 12/13/00. When he returned to work he had a restriction of no lifting over twenty pounds. On 12/11/00 the Injured Worker notified the Employer that he intended to take retirement based on his years of service with the company. At the time the Injured Worker was fifty-six years old and been with the Employer thirty eight years. There is no medical evidence that any physician advised the Injured Worker to retire as a result of the allowed injuries. The Injured Worker saw his treating orthopedist in January 2001. At that time the lifting restriction was increased to fifty pounds due to groin pain which the doctor stated was unrelated to the Injured Worker's back condition.

The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing Officer finds that the Injured Worker's retirement was voluntary. There is no medical evidence that it was induced by the industrial

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Ohio Industrial Commission

RECORD OF PROCEEDINGS

Claim Number. 00-816839

Injury There is no evidence that any of his treating physicians advised him to retire and no temporary total disability was paid after he stopped working. The permanent total disability application indicates that the Injured Worker began receiving Social Security Disability benefits later in 2001, but the file is silent as to the basis for those benefits since the Injured Worker never looked for work after his retirement he abandoned the work force in this situation he is ineligible to receive permanent total disability compensation. The application is denied.

Typed By me
Date Typed- 07/19/2010
Date Received- 08/19/2009
Findings Nailed 07/21/2010

Robin Nash
Staff Hearing Officer

Electronically signed by
Robin Nash

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

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT www.ohioic.com ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I C O W AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

OCT 24 AM 11:12

State ex rel. Billy G. Black,

:

CLERK OF COURTS

Relator,

:

v.

:

No. 10AP-1168

Industrial Commission of Ohio and
Park Ohio Industries, Inc.,

:

(REGULAR CALENDAR)

:

Respondents.

:

MAGISTRATE'S DECISION

Rendered on October 24, 2011

Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Millisor & Nobil Co., L.P.A., Mark E. Snyder, and Nicole H. Farley, for respondent Park Ohio Industries, Inc.

IN MANDAMUS

In this original action, relator, Billy G. Black, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation on eligibility grounds, and to enter an order granting the compensation.

Findings of Fact:

1. On October 17, 2000, relator injured his lower back while employed as a press operator for respondent Park Ohio Industries, Inc. ("Park Ohio"), a self-insured employer under Ohio's workers' compensation laws.

2. The industrial claim (No. 00-816839) is allowed for "lumbar strain; aggravation of degenerative joint disease lumbar; aggravation of pre-existing spondylolisthesis L5-S1; major depressive disorder single episode."

3. On the date of injury, relator was treated at Concentra Medical Centers by Elizabeth W. Mease, M.D. Dr. Mease diagnosed a "[l]umbar [s]train" and placed relator on "[m]odified activity." The restrictions were no repetitive lifting over ten pounds, no pushing/pulling over ten pounds, no squatting or kneeling with alternate sitting and standing.

4. On October 19, 2000, relator returned to modified duty at Park Ohio cleaning bathrooms. After a few hours of this modified duty, relator returned to Concentra Medical Centers and saw Dr. Mease again. On October 19, 2000, Dr. Mease prescribed "[n]o activity" and a return follow-up visit.

5. On November 10, 2000, Dr. Mease indicated that relator could return to work but with restrictions of no repetitive lifting over ten pounds and no pushing/pulling over ten pounds. Relator should be sitting 75 percent of the time.

6. On November 15, 2000, relator saw orthopedic surgeon Mark A. Panigutti, M.D., at the referral of Dr. Mease. On November 15, 2000, Dr. Panigutti wrote:

Billy Black was seen in our office today for evaluation of his back pain and leg weakness. Billy Black was first seen on

10/17/2000. Billy Black was last seen on 11/15/2000. His date of injury was 10/17/2000.

The current diagnoses are:

[One] 847.2 Lumbar Sprain

[Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc.

Billy Black complained of back pain and leg weakness. Billy Black had the following objective physical findings of spondylolisthesis, decreased motion, leg weakness and aggravation of preexisting condition. Billy Black has a fair prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

We are recommending the following treatments:

[One] Continue [physical therapy] at Concentra 2xweek for 4 weeks

Billy Black is unable to perform regular job duties. Billy Black is unable to return to light or modified job duties. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Estimated). The return to full duty work date is 12/13/2000 (Estimated).

7. On December 11, 2000, relator returned to see Dr. Panigutti. On that date, Dr. Panigutti wrote:

Billy Black was seen in our office today for evaluation of his back pain. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 12/11/2000. His date of injury was 10/17/2000.

The current diagnoses are:

[One] 847.2 Lumbar Sprain

[Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc

Billy Black complained of back pain. Billy Black had the following objective physical findings of improved pain, motion and strength. Billy Black has a good prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

Billy Black is unable to perform regular job duties. Billy Black is able to return to light or modified job duties with no lift > 20 lbs. nos stand > 2 hrs for 4 weeks then full duty. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Actual). The return to work date is 12/13/2000 (Actual).

8. Also on December 11, 2000, relator signed a document captioned "Employee Notice of Intent to Retire." The document lists February 9, 2001 as the "[l]ast [d]ay [w]orked" and February 28, 2001 as the "[r]etirement [d]ate." The document also lists "55" as the "[r]etirement [a]ge," based upon relator's February 10, 1946 date of birth. The document states:

Pursuant to Article 25D (under Retiree Health Care) of the Labor Agreement, I, Billy S. Black, an hourly employee of Park Drop Forge, do hereby give 60 (sixty) days notice of my intent to retire. I understand to be eligible I must be 55 (fifty-five) years of age and have a minimum of 15 (fifteen) years of service.

9. Apparently, on December 13, 2000, relator returned to modified duty at Park Ohio. According to relator's testimony, the modified duty included cleaning bathrooms and pushing brooms.

10. On January 22, 2001, relator returned to see Dr. Panigutti. On that date, Dr. Panigutti wrote:

He comes back today. He still has back pain. He is also getting some groin pain in his testicle.

On examination today there is some question of bulging into the groin.

Assessment and Plan: This is a gentleman with back pain with no significant leg pain. He does do heavy work and this dose [sic] cause his symptoms to increase. We explained to him that his groin pain is unrelated to his back pain and he may have a hernia and should be checked by his primary care physician. At this time we will limit activities and no lifting greater that [sic] 50 pounds and no work greater than 8 hours for four weeks. We will see him back as needed. * * *

11. On June 6, 2008, at relator's request, he was examined by M.P. Patel, M.D. In his two-page narrative report dated June 10, 2008, Dr. Patel concludes:

After reviewing history of accident, clinical course, diagnostic studies, subjective and objective findings, in my opinion, Mr. Black with regards to claim number: 00-816839 SI, sprain lumbar region, lumbosacral spondylosis, ACQ spondylolisthesis, major depressive disorder, single episode, has significant physical limitations and is permanently and totally disabled from engaging into any gainful employment.

12. On June 14, 2008, at relator's request, he was examined by psychologist James M. Medling, Ph.D. In his five-page narrative report, Dr. Medling concludes:

Based upon AMA Guidelines as to the Evaluation of Permanent Impairment, 5th Edition, it is this examiner's opinion that his current complaints of Major Depressive Disorder, Single Episode renders him permanently and totally disabled from all forms of gainful employment. He can manage any monies awarded.

13. On August 14, 2009, relator filed an application for PTDC compensation. On the application, relator indicated that he had been receiving Social Security Disability Benefits since September 2001.

14. On March 23, 2010, at the commission's request, relator was examined by R. Scott Krupkin, M.D. Dr. Krupkin conducted a physical examination. In his four-page narrative report, Dr. Krupkin opines that relator has a "20% whole person impairment" based upon the allowed physical conditions of the claim.

15. On March 23, 2010, Dr. Krupkin completed a physical strength rating form on which he indicated by his mark that "[t]his Injured Worker is incapable of work."

16. On April 21, 2010, pursuant to Ohio Adm.Code 4121-3-34(C)(6), a staff hearing officer ("SHO") issued a tentative order awarding PTD compensation beginning June 10, 2008:

*** [T]he Application for Permanent and Total Disability filed on 08/14/2009 be GRANTED. This order is based specifically upon the reports of Dr. Krupkin (03/23/2010), Dr. Patel (06/10/2008) and Dr. Medling (06/14/2008) who found that the Injured Worker is prevented from returning to sustained, remunerative employment as a result of the allowed conditions in the claim. Permanent total disability compensation is hereby awarded from 06/10/2008 and to continue without suspension unless future facts or circumstances should warrant the stopping of the award.

(Emphasis sic.)

17. Park Ohio filed a timely objection to the tentative order.

18. On July 1, 2010, another SHO heard relator's PTD application. The hearing was recorded and transcribed for the record.

19. On direct examination of relator by his counsel, the following exchange occurred:

Q. What percentage of the work hour, just ballpark it, were you on your feet?

A. The biggest part of it; biggest part of it.

Q. Okay.

A. I struggled all day long. Sometimes I'd sneak off somewhere and try to hide and sit down. But if they caught me doin' that, then I was in trouble so . . .

Q. And it looks like you took a retirement in February 2001. Why was that? You were only 56 years old.

A. Well, I was just in too much pain at the time, and I couldn't maintain my job that they expected me to there.

Q. After they found that out, at any time did they offer you a sitting job in the office?

A. No. There was never no sit-down jobs.

Q. The company just doesn't have it, I would imagine?

(Tr. 6-7.)

20. On cross-examination of relator by Park Ohio's counsel, the following exchange occurred:

Q. After your retirement, did you apply for Social Security benefits?

A. Yes, I did.

Q. And when was that?

A. Oh, it was a while after I was off work that I applied for it. I don't recall exactly how long it was.

Q. What were the reasons you sought the Social Security?

A. Well, because of the - - my condition, my back condition. I wasn't able to, you know, perform things around the house or do things that I needed to do. And someone suggested to me I go to Social Security. So I went to Social Security and they approved me, you know.

Q. Was your back the sole reason that you were awarded Social Security disability? Were there any other conditions?

A. I think they might have considered my background in not being able to read and write and different things like that, you know.

Q. And after your retirement in February of 2001, did you ever seek any vocational training?

A. No, no.

Q. Have you ever enrolled in a literacy program?

A. No.

Q. Have you ever attempted - - I understand you haven't obtained your GED, but have you ever attempted?

A. I'm not hearing with them talking.

Q. I'm sorry. I understand that you do not have a GED, but did you ever attempt to get a GED?

A. No. I never thought I was able to do anything like that, you know.

Q. Would you be interested in vocational training?

A. I don't think it would do me any good. I - - you know, when I went to school, I mean, I doubled up on the years that I went there. And I wasn't able to learn, so I don't go - - I don't figure after all these years I'm going to be able to learn anything either. So along those lines . . .

[Park Ohio's counsel] I have no further questions.

HEARING OFFICER: I have just a couple. Mr. Black, did you work anywhere after you left Park Drop Forge?

[Relator] No, ma'am.

HEARING OFFICER: Did you look for work anywhere?

[Relator] No, ma'am.

(Tr. 14-17.)

21. Following the July 1, 2010 hearing, the SHO issued an order denying the PTD application on eligibility grounds. The SHO's order of July 1, 2010 explains:

It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.

The Injured Worker sustained the instant injury on 10/17/00. Following the injury he received temporary total disability compensation until he returned to work on 12/13/00. When he returned to work he had a restriction of no lifting over twenty pounds. On 12/11/00 the Injured Worker notified the Employer that he intended to take retirement based on his years of service with the company. At the time the Injured Worker was fifty-six years old and [had] been with the Employer thirty-eight years. There is no medical evidence that any physician advised the Injured Worker to retire as a result of the allowed injuries. The Injured Worker saw his treating orthopedist in January 2001. At that time the lifting restriction was increased to fifty pounds due to groin pain which the doctor stated was unrelated to the Injured Worker's back condition.

The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing Officer finds that the Injured Worker's retirement was voluntary. There is no medical evidence that it was induced by the industrial injury. There is no evidence that any of his treating physicians advised him to retire and no temporary total disability was paid after he stopped working. The permanent total disability application indicates that the Injured Worker began receiving Social Security Disability benefits later in 2001, but the file is silent as to the basis for those benefits. Since the Injured Worker never looked for work after his retirement he abandoned the work force. In this situation he is ineligible to receive permanent total disability compensation. The application is denied.

22. On December 20, 2010, relator, Billy G. Black, filed this mandamus action.

Conclusions of Law:

The main issue is whether the commission abused its discretion in determining that relator's job abandonment at Park Ohio was not induced by the allowed conditions of the industrial claim.

Finding an abuse of discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) states:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

Paragraph two of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, states:

An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market. * * *

In *State ex rel. Garrison v. Indus. Comm.*, 10th Dist. No. 08AP-419, 2009-Ohio-2898, ¶54, this court, speaking through its magistrate, states:

The case law indicates that a two-step analysis is involved in the determination of whether a claimant has voluntarily removed himself from the workforce prior to becoming PTD such that a PTD award is precluded. The first step requires the commission to determine whether the retirement or job departure was voluntary or involuntary. If the commission determines that the job departure was involuntary, the inquiry ends. If, however, the job departure is determined to be voluntary, the commission must consider additional evidence to determine whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. *State ex rel. Ohio Dept. of Transp. v. Indus. Comm.*, Franklin App. No. 08AP-303, 2009-Ohio-700.

In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46, the court expanded eligibility for temporary total disability compensation by expanding the definition of an involuntary abandonment of employment:

Neither [*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42] nor [*State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145] states that *any* abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. We find that a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

(Emphasis sic.)

In *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist.

No. 07AP-478, 2008-Ohio-2453, this court held that an injury-induced job abandonment under *Rockwell* can be supported by the claimant's hearing testimony:

We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury. * * *

Id. at ¶18.

Analysis begins with the observation that on December 11, 2000, the date relator executed his "Employee Notice of Intent to Retire," he also visited Dr. Panigutti. Dr. Panigutti found that relator was "unable to perform regular job duties," but that he "is

able to return to light or modified job duties" with specified restrictions. The restrictions were to last for a four-week period.

Undisputedly, there is no evidence in the record that Dr. Panigutti, or any other doctor, ever advised relator to retire or to abandon his job at Park Ohio. Nevertheless, Dr. Panigutti's December 11, 2000 office note is indeed medical evidence that relator's decision to retire could have been induced by the industrial injury.

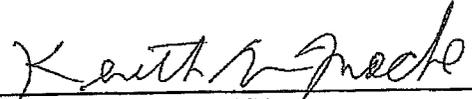
Given that Dr. Panigutti's December 11, 2000 office note is medical evidence upon which the commission could have relied in determining whether the job abandonment was injury induced, it is clearly inaccurate for the commission, through its SHO, to declare "[t]here is no medical evidence that it was induced by the industrial injury."

Moreover, when the SHO's order twice states there is no medical evidence that a physician advised relator to retire as a result of the allowed conditions, it is strongly suggested that the lack of such evidence was determinative, if not required, for relator to show that his job abandonment was injury induced. There is no such requirement.

Of course, the commission was not required to accept relator's hearing testimony at face value and, on that basis, conclude that the industrial injury motivated relator's decision to retire from his job at Park Ohio. But the commission cannot misconstrue the medical evidence of record nor seemingly set forth a requirement for relator to meet that is not in accordance with law.

Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the SHO's order of July 1, 2010 and, in a manner consistent with the magistrate's decision, enter a new

order that properly determines relator's eligibility for PTD compensation and, in the event relator is found to be eligible, adjudicates the PTD application on its merits.



KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

**IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO**

FILED
IN THE COURT OF APPEALS
2011 NOV -7 AM 8:53
CLERK OF COURTS

STATE OF OHIO, ex rel.	:	
BILLY G. BLACK	:	CASE NO. 10APD 12 1168
	:	
Relator,	:	
	:	
v.	:	Magistrate Macke
	:	
INDUSTRIAL COMMISSION OF OHIO:	:	
et al.	:	
	:	
Respondents.	:	

**RESPONDENT PARK OHIO INDUSTRIES, INC.'s OBJECTIONS TO
MAGISTRATE'S DECISION (REQUEST FOR ORAL ARGUMENT BEFORE
COURT OF APPEALS)**

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Park Ohio Industries, Inc.

OBJECTIONS TO DECISION OF MAGISTRATE

Respondent Park Ohio Industries, Inc. (hereinafter "Park Ohio") hereby objects to the Magistrate's Decision filed October 24, 2011, for the following reasons:

1. The Magistrate erred in failing to allow the Industrial Commission of Ohio discretion in making the factual determination whether Relator's retirement was voluntary or involuntary; and

2. The Magistrate erred in holding that the Industrial Commission of Ohio abused its discretion in determining that Relator's job abandonment at Park Ohio was not induced by the allowed conditions of the Industrial claim by failing to apply the correct standard to determine whether there was some evidence to support the Commission's order.

1. The Magistrate erred in failing to allow the Industrial Commission of Ohio discretion in making the factual determination whether claimant's retirement was voluntary or involuntary.

The voluntary nature of a claimant's abandonment of employment is a factual question that revolves around the claimant's intent at the time he/she retired. (See *State ex rel. Williams v. Coca-Cola ENT., Inc.*, Franklin App. No. 04AP-1270, 2005 Ohio 5085, at ¶ 9). The Supreme Court of Ohio has directed that the presence of such intent to retire is a factual question for the Commission to determine. (See *State ex rel. Diversitech Jen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St. 3d 381, 383, 544 NE 2d 677). The Tenth Appellate District Court has held that it is within the Commission's discretion to credit or discredit a claimant's testimony that his/her motivation for the departure from the job was based upon the allowed conditions, as the Commission is the sole evaluator of credibility. (See *State ex rel. Mid-Ohio Wood*

Products, Inc. v. Indus. Comm., Franklin App. No. 07AP-478, 2008 Ohio 2453, at ¶ 18). In *Mid-Ohio Wood Products* the Court stated that “the Commission must make a factual determination, based upon all the surrounding circumstances, whether the motivation for the claimant’s departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof.” (Id., at ¶ 18). Furthermore, the Tenth Appellate District Court stated that it gives high deference to the Commission in making credibility and factual determinations, as required by the standard of review. (See *Ford Motor Company, Relator v. Industrial Commission of Ohio and Veada R. Irby*, Franklin App. No. 08AP-218, 2008 Ohio 6517, at ¶ 6).

In the instant case, the Magistrate correctly lays out the two step analysis involved in the determination of whether a claimant had voluntarily removed himself from the workforce prior to becoming PTD, such that a PTD award is precluded. The first step requires the Commission to determine whether the retirement or job departure was voluntary or involuntary. If the job departure is determined to be voluntary by the Commission, the Commission must consider additional evidence to determine whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. (See Magistrate’s Decision on p. 10 quoting *State ex rel. Garrison v. Indus. Comm.*, Tenth App. No. 08AP-419, 2009-Ohio-2898, ¶ 54). However, the Magistrate failed to recognize that the Staff Hearing Officer (“SHO”) performed the required two step analysis. As the SHO’s order of July 1, 2010 explained, the Staff Hearing Officer found that the injured worker’s retirement was voluntary, thus completing step one of the analysis. The Staff Hearing Officer further explained that she considered the additional evidence presented to determine whether the job departure was an abandonment of the

workforce in addition to an abandonment of the job. Specifically, the Staff Hearing Officer pointed to the December 11, 2000 medical record of Dr. Panigutti, the December 11, 2000 document captioned "Employee Notice of Intent to Retire," and the claimant's own testimony at hearing. Thus, the step two of the analysis was completed by the Staff Hearing Officer.

In addition, the Magistrate abused his discretion by placing his own evaluation of the evidence ahead of the Commission. Credibility is the sole province of the Industrial Commission Hearing Officer. The SHO chose not to credit the Relator's testimony regarding the reason for his retirement. Additionally, the Magistrate noted that Dr. Panigutti's December 11, 2000 office note is medical evidence upon which the Commission could have relied upon in determining whether the job abandonment was injury induced. However, the SHO chose not to credit this evidence, which was within the purview of the SHO to determine. In doing so, the Magistrate supplanted his opinion over that of the Commission, committing reversible error.

In *Ford Motor Company, supra*, the Commission relied upon the claimant's testimony and office note from Dr. Jolson to determine that the claimant's retirement was involuntary. *Id.* at ¶ 4. Ford argued that the office note was not persuasive because Dr. Jolson never recommended that the claimant retire or suggested that she was unable to perform her duties. *Id.* The Court rejected Ford's argument and indicated that the Commission could have relied upon Dr. Jolson's office notes to support claimant's testimony. *Id.* at ¶ 6. Similarly, in the instant case, there was no evidence in the record that Dr. Panigutti, or any other doctor, ever advised relator to retire or abandon his job at

Park Ohio. While the SHO could have relied upon Dr. Panigutti's December 11, 2000 office note, she chose not to, which was in the discretion of the Commission.

The Magistrate's Decision accused the Commission of establishing a requirement that is contrary to the decision in *Mid-Ohio Wood Products*. In that decision, the Court held that there is nothing that requires there to be objective medical evidence corroborating a claimant's testimony regarding his/her motivation for abandonment of employment. *Supra* ¶ 18. By insinuating that he would have relied upon Dr. Panigutti's December 11, 2000 office note, the Magistrate again usurped the discretion of the Commission to interpret the evidence. The SHO's statement that there was no medical evidence that a physician advised relator to retire as a result of the allowed conditions was additional support for the conclusion that the Relator was not retiring due to his injuries but rather that the retirement was voluntary.

2. **The Magistrate erred in holding that the Industrial Commission of Ohio abused its discretion in determining that relator's job abandonment at Park Ohio was not induced by the allowed conditions of the Industrial claim by failing to apply the correct standard to determine whether there was some evidence to support the Commission's order.**

The determination of disputed factual situations is within the final jurisdiction of the Commission and subject to correction by mandamus upon a showing of an abuse of discretion. (See *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm.* (1956), 166 Ohio St. 47). There is no abuse of discretion, however, where the record contains some evidence to support the Commission's decision. (See *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St. 3d 18). Where the record contains some evidence to support the Commission's findings, there has been no abuse of discretion and mandamus is not appropriate. (*State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St. 3d

56). Furthermore, questions of credibility in the weight to be given evidence are clearly within the discretion of the Commission as fact finder. (*State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St. 2d 165).

The voluntary nature of any claimant's departure from the workforce or abandonment is a factual question which centers around the claimant's intent at the time of retirement. In *State ex rel. Diversitech Jen Plastic Film Division v. Indus. Comm.* (1989), 45 Ohio St. 3d 381, the Supreme Court of Ohio stated that consideration must be given to all relevant circumstances existing at the time of the alleged abandonment. Further, the Court stated that the termination of such intent is a factual question which must be determined by the Commission. *Id.* at p. 383.

In the instant case, the Relator was seen by Dr. Panigutti on December 11, 2000 and was released to return to work with restrictions on December 13, 2000. After receiving his slip to return to work, but before actually returning to work, the Relator submitted his Notice of Intent to Retire effective February 28, 2001. The Relator did in fact return to work on December 13, 2000 and worked until February 9, 2001. The Relator's Notice of Intent to Retire indicated that he was eligible to retire because he was at least fifty-five (55) years of age and had a minimum of fifteen (15) years of service. The notice did not include any reference to disability. The claimant's testimony at hearing, as well as the Notice of Intent to Retire, constituted some evidence upon which the Commission could conclude that the Relator's retirement was voluntary.

In *Ford Motor Company, supra*, the Commission relied upon claimant's testimony that she took early retirement because she was eligible and because the symptoms from her allowed conditions interfered with her ability to continue to work.

Supra at ¶ 31. Conversely, in this case, the Commission held that the Relator's retirement was voluntary and was not related to the allowed conditions in the claim. In *Ford*, the Court noted that the determination whether a claimant's retirement was sufficiently related to the allowed conditions was a factual determination that should not be reweighed in a mandamus action. *Supra* at ¶ 35. In the instant case, the Magistrate's reference to the hearing transcript and the claimant's testimony that his symptoms forced him to retire and precluded him from working indicates that the Magistrate was weighing a factual determination that was contrary to that of the trier of fact. By doing so, the Magistrate again committed reversible error.

The Relator was injured on October 17, 2000 and returned to work less than two (2) months later on December 13, 2000. Prior to returning to work, the claimant filed his Notice of Intent to Retire. The Relator was able to work from December 13, 2000 to February 9, 2001. During that time, the claimant's physical condition improved and his restrictions were modified to allow for increased lifting. Nevertheless, the Relator officially retired on February 28, 2001. Given the timing of the retirement, the written Notice of Intent to Retire and the Relator's testimony over nine (9) years later, the Commission had some evidence upon which to base its decision that the Relator's retirement was voluntary.

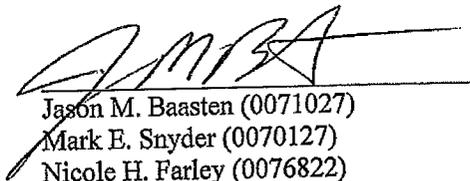
CONCLUSION

The Magistrate erred when he held that the Commission abused its discretion in determining that Relator's job abandonment at Park Ohio was not induced by the allowed conditions in the industrial claim. The Magistrate failed to give deference to the Commission's discretion to determine whether the Relator's retirement was voluntary or

involuntary. Further, the Magistrate erred by failing to acknowledge that some evidence existed for the Commission's decision to determine that the Relator's retirement was voluntary, thus precluding permanent total disability benefits.

Respondent Park Ohio Industries respectfully requests oral argument before the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Respondent's Objections to Magistrate's Decision (Request for Oral Argument before Court of Appeals)* was served upon the following by regular U.S. Mail service, this 4th day of November, 2011:

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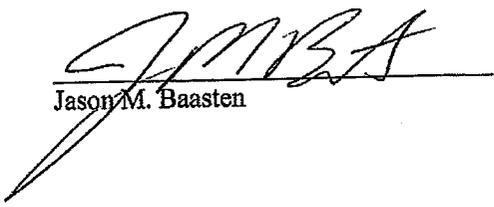
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ORIGINAL

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

STATE OF OHIO, ex rel.
BILLY G. BLACK

CASE NO. 10APD 12 1168

Relator,

v.

INDUSTRIAL COMMISSION OF OHIO
et al.

Respondents.

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RESPONDENT, INDUSTRIAL COMMISSION OF OHIO'S
OBJECTIONS TO THE MAGISTRATE'S DECISION

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Pursuant to Civ.R. 53(E)(3) and Loc.R. 12(M)(3), Respondent, Industrial Commission of Ohio ("commission"), objects to the October 24, 2011, decision of the Magistrate. The commission objects to the Magistrate's conclusion of law that fails to defer to the commission as fact finder and recommends issuing a writ of mandamus on a "possible" alternative reading of the treating physician's office note. A memorandum in support follows.

MEMORANDUM IN SUPPORT

Introduction

This is a workers' compensation case brought by Relator, Billy Black ("Black"), to challenge an order the commission which denied his request for permanent total disability ("PTD") compensation. The rationale for the final order denying PTD compensation was that Black had voluntarily retired and abandoned the work force, thereby barring his receipt of PTD compensation in his claim for the injury he sustained on October 17, 2000.

Black filed the instant mandamus action asking the court to reweigh and re-evaluate evidence concerning the circumstances that led to his retirement. After being released to light duty work on December 11, 2000, and before actually returning to work, Black filed a notice of intent to retire from Respondent, Park Ohio Industries, Inc. ("Park Ohio"), on February 28, 2001. Under the facts presented, the commission's decision denying PTD compensation is legally justified and is not subject to revocation by the issuance of an extraordinary writ.

Statement of Facts

Black sustained a back injury on October 17, 2000, while working for Park Ohio. His claim was allowed initially for lumbar strain, aggravation of pre-existing lumbar degenerative joint disease, and aggravation of pre-existing spondylolisthesis L5-S1. Stipulated Record at 32,

hereinafter "S. #." On May 7, 2008, his claim was additionally allowed for major depressive disorder, single episode. Id. On August 14, 2009, he applied for PTD compensation (S. 109).

On the day of his injury, Black received medical treatment from Elizabeth Mease, M.D. Supplemental Stipulation of Evidence at 111-113, hereinafter "SS. #." He was placed on several restrictions for his return to work: no repetitive lifting over 10 pounds, no pushing/pulling over 10 pounds of force, no squatting/kneeling, and alternate sitting/standing. Id. Black returned to work October 19, 2000, was assigned to clean restrooms, and returned to Dr. Mease in pain that day. Id. Dr. Mease prescribed no activity and scheduled a return visit for an evaluation (SS. 114). On November 10, 2000, Dr. Mease gave Black a restricted return to work (no bending, no repetitive lifting over 10 pounds, no pushing/pulling over 10 pounds of force, and sitting 75% of the time) and referred him to Mark Panigutti, M.D., an orthopedic surgeon (SS. 115-116).

On November 15, 2000, Dr. Panigutti saw Black and opined the claimant was "unable to return to light or modified job duties," indicating "dates of disability from 10/17/2000 to 12/12/2000 (Estimated)" with a "return to full duty work" on "12/13/2000 (Estimated)" (SS. 116). On December 11, 2000, Dr. Panigutti saw Black again and opined he was "unable to perform regular job duties," but could "return to light or *modified job duties with no lift > 20 lbs, no stand > 2hrs for 4 weeks then full duty*" (SS. 117). (Emphasis added.) Dr. Panigutti gave Black disability dates "from 10/17/2000 to 12/12/2000 (Actual)" and a "return to work date" of "12/13/2000 (Actual)" (SS. 117). (Emphasis added.)

On December 11, 2000, before his return to work, Black executed an "*EMPLOYEE NOTICE OF INTENT TO RETIRE*" giving 60 days notice of his intent to retire from Park Ohio on February 28, 2001 (S. 60). Black "returned to work with Park Ohio in December of 2000," "cleaning the bathrooms and pushing brooms and doing . . . whatever they could find for" him

(S. 71). Black went back to Dr. Panigutti on **January 22, 2001**, complaining of “back pain” and “groin pain in his testicle” (SS. 118). Dr. Panigutti told Black the groin pain was “unrelated to his back pain” and placed him on restrictions: “*no lifting greater than 50 pounds and no work greater than 8 hours for four weeks*” (SS. 118). (Emphasis added.) Black last worked **February 9, 2001**, and his official retirement from Park Ohio commenced on **February 28, 2001** (S. 60, 72-73).

After retiring, Black received Social Security Disability (“SSD”) in September, 2001 (S. 2 and 74). During the administrative hearing, Black failed to introduce corroborating evidence to support his assertion that he received SSD solely because of his back (S.74). Prior to applying for SSD, Black had “a long history of gastroesophageal reflux, elevated cholesterol, heart disease, and hypertension,” he had “had angioplasty in the late 1990s,” and he had “a remote history of a right knee medial meniscectomy . . . nose surgery and kidney stones” (S. 22 and 90-91). More recently, he “has been diagnosed with lung disease, chronic obstructive pulmonary disease, and emphysema.” Id.

A Staff Hearing Officer (“SHO”) of the commission heard Black’s PTD application on July 1, 2010 (S. 109). On direct examination, Black claimed he “took a retirement in February 2001” from Park Ohio because he “was in too much pain at the time, and . . . couldn’t maintain my job (S. 67). On cross-examination, Black admitted February 9, 2001, was the last day he worked and his retirement was effective February 28, 2001 (S. 72-73). He admitted he never sought temporary total disability (“TTD”) compensation from Park Ohio after he retired (S. 73), but he did apply for and receive SSD; moreover, he suffers from a number of medical conditions not involving his back (S. 74-75). He admitted that since his retirement in February, 2001, he has never sought vocational training, enrolled in a literacy program, or attempted to get a GED

(S. 75-76). Finally, he admitted he had neither looked for work nor worked anywhere since his retirement from Park Ohio (S.76-77).

The SHO denied Black's PTD application, concluding "the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force" (S. 109). In support of this conclusion of law, the SHO makes the following findings of fact (S. 109-110):

1. Black received TTD "until he returned to work on 12/13/00."
2. "On 12/11/00," he notified the employer "he intended to take retirement" based on his age and 38 years of experience with the company.
3. He "last worked on 2/9/01 and officially retired on 2/28/01."
4. No TTD "was paid after he stopped working."
5. No medical evidence indicates that the retirement "was induced by the industrial injury" or that "any of his treating physicians advised him to retire."
6. The January, 2001, restrictions from the treating orthopedist were "due to groin pain . . . unrelated to the Injured Worker's back condition."
7. Black started receiving SSD "benefits later in 2001" but did not document the basis for the award.
8. The "Injured Worker never looked for work after his retirement."

Black filed this mandamus case to challenge the denial of PTD compensation.

Objection to the Magistrate's Conclusion of Law

The commission objects to statements in the Magistrate's Conclusions of Law made on page 12 of the decision. The Magistrate erroneously concludes: "Dr. Panigutti's December 11, 2000 office note is indeed medical evidence that relator's decision to retire could have been induced by the industrial injury." (Magistrate's Decision, page 12.) Then the Magistrate

erroneously finds "the commission . . . misconstrue[d] the medical evidence of record . . ." Id. The Magistrate unnecessarily interprets the office note rather than applying a plain reading as the SHO did.

Magistrate notes in paragraph 7 of his Finding of Facts, the office note in question states:

Billy Black complained of back pain. Billy Black had the following objective physical findings of improved pain, motion and strength. Billy Black has a good prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

* * *

Billy Black is unable to perform regular job duties. Billy Black is able to return to light or modified job duties with no lift > 20 lbs. nos stand > 2 hrs for 4 weeks then full duty. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Actual). The return to work date is 12/13/2000 (Actual).

(Magistrate's Decision, page 4).

The commission did not misconstrue the medical evidence. The December 11, 2000, office note is some evidence indicating that Black's retirement was voluntary and not premised on his industrial injury. The commission's consideration of this office note complies with Ohio Adm.Code 4121-3-34(D)(1)(d), which requires the commission to "consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement." The Magistrate construes Dr. Panigutti's December 11, 2000, office note as evidence that Black's retirement "could have been induced by the industrial injury." In reviewing the entire note, Dr. Panigutti does not state that Black is prevented from returning to work, but finds he is improving and needs treatment.

The Magistrate's assessment of Dr. Panigutti's office note does not warrant a recommendation to issue a writ. The commission is the "exclusive evaluator of disability," and its decisions are deemed to be final. *State ex rel. Moss v. Indus. Comm.* (1996), 75 OhioSt.3d 414, 416. The "commission is the *exclusive evaluator of weight and credibility*" of the evidence

presented to it. (Emphasis added.) *State ex rel. Athey v. Indus. Comm.* (2000), 89 Ohio St.3d 473, 475. Where the record contains some evidence to support the commission's findings, no abuse of discretion has occurred and a writ of mandamus is inappropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56 As long as some evidence before the commission supports an order challenged in mandamus, courts will not overturn the decision. *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 170.

Conclusion

The Magistrate's Decision fails to defer to the commission as fact finder and substitutes a strained reading of an office note for the commission's common sense, plain reading. Accordingly, the Court should uphold the respondents' objections to the Magistrate's Decision and deny the relator's prayer for a writ of mandamus.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Objection was served upon the following by regular U.S. Mail service, this 10th day of November, 2011:

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State ex rel. Billy G. Black,	:	
Relator,	:	
v.	:	No. 10AP-1168
Industrial Commission of Ohio and Park Ohio Industries, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

DECISION

Rendered on June 12, 2012

Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Millisor & Nobil Co., L.P.A., Mark E. Snyder, and Nicole H. Farley, for respondent Park Ohio Industries, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Billy G. Black, brings this original action seeking a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation on eligibility grounds, and to enter an order granting the compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate, who has rendered a decision and recommendation that includes findings of fact and conclusions of law, which is appended to this decision.

{¶ 3} In his decision, the magistrate recommended that we grant a writ of mandamus ordering the commission to vacate the staff hearing officer's ("SHO") July 1, 2010 order and, in a manner consistent with the magistrate's decision, enter a new order that: (1) properly determines relator's eligibility for PTD compensation, and (2) if relator is found to be eligible, adjudicates the PTD application on its merits. Both the commission and relator's employer, Park Ohio Industries, Inc. ("Park Ohio") have filed objections to the magistrate's decision, and the matter is now before the court for our independent review. For the reasons that follow, we overrule all objections and adopt the magistrate's recommendation to grant a writ of mandamus.

{¶ 4} Park Ohio filed the following objections:

1. The Magistrate erred in failing to allow the Industrial Commission of Ohio discretion in making the factual determination whether [relator's] retirement was voluntary or involuntary.

2. The Magistrate erred in holding that the Industrial Commission of Ohio abused its discretion in determining that relator's job abandonment at Park Ohio was not induced by the allowed conditions of the Industrial claim by failing to apply the correct standard to determine whether there was some evidence to support the Commission's order.

{¶ 5} Additionally, the commission objected asserting that the magistrate erroneously concluded that:

[I.] Dr. Panigutti's December 11, 2000 office note is indeed medical evidence that relator's decision to retire could have been induced by the industrial injury.

[II.] [T]he commission[] misconstrued the medical evidence of record[].

{¶ 6} Because they are interrelated, we will address Park Ohio's and the commission's objections together.

(¶ 7) On October 17, 2000, relator injured his lower back while employed as a press operator for Park Ohio. That same day, Elizabeth W. Mease, M.D. ("Dr. Mease") treated relator and diagnosed him with lumbar strain, placing him on modified activity with the restrictions of no repetitive lifting over ten pounds, no pushing/pulling over ten pounds, and no squatting or kneeling with alternate sitting and standing. On October 19, 2000, relator returned to work for the modified duty of cleaning bathrooms. However, after a few hours, relator returned to Dr. Mease and she prescribed no activity and a follow-up visit. Further, Dr. Mease indicated that relator could return to work on November 10, 2000, with restrictions of no repetitive lifting over ten pounds, no pushing/pulling over ten pounds, and that relator should be sitting 75 percent of the time.

(¶ 8) At the referral of Dr. Mease, relator saw orthopedic surgeon Mark A. Panigutti, M.D. ("Dr. Panigutti"). On November 15, 2000, Dr. Panigutti wrote an office note stating:

Billy Black was seen in our office today for evaluation of his back pain and leg weakness. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 11/15/2000. His date of injury was 10/17/2000.

The current diagnoses are:

1. S47.2 Lumbar Sprain
2. 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc

Billy Black complained of back pain and leg weakness. Billy Black had the following objective physical findings of spondylolisthesis, decreased motion, leg weakness and aggravation of preexisting condition. Billy Black has a fair prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

We are recommending the following treatments:

1. Continue [physical therapy] at Concentra 2xweek for 4 weeks

Billy Black is unable to perform regular job duties. Billy Black is unable to return to light or modified job duties. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Estimated). The return to full duty work date is 12/13/2000 (Estimated).

On December 11, 2000, Dr. Panigutti wrote, in pertinent part, that:

Billy Black is unable to perform regular job duties. Billy Black is able to return to light or modified job duties with no lift > 20 lbs, nos [sic] stand > 2 hrs for 4 weeks then full duty. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Actual). The return to work date is 12/13/2000 (Actual).

{¶ 9} In addition, on December 11, 2000, relator signed a notice of intent to retire indicating that his retirement date would be February 28, 2001.

{¶ 10} On January 22, 2001, relator returned to Dr. Panigutti for another examination. Dr. Panigutti wrote:

He comes back today. He still has back pain. He is also getting some groin pain in his testicle.

On examination today there is some question of bulging into the groin.

Assessment and Plan: This is a gentleman with back pain with no significant leg pain. He does do heavy work and this [does] cause his symptoms to increase. We explained to him that his groin pain is unrelated to his back pain and he may have a hernia and should be checked by his primary care physician. At this time we will limit activities and no lifting greater [than] 50 pounds and no work greater than 8 hours for four weeks. We will see him back as needed.

{¶ 11} On August 14, 2009, relator filed an application for PTD compensation for claim No. 00-816839. Claim No. 00-816839 was allowed for the following conditions: (1) lumbar strain, (2) aggravation of degenerative joint disease lumbar, (3) aggravation of pre-existing spondylolisthesis L5-S1, and (4) major depressive disorder single episode.

{¶ 12} In a tentative order mailed on April 21, 2010, the SHO granted relator's PTD application. The SHO wrote:

This order is based specifically upon the reports of Dr. Krupkin (03/23/2010), Dr. Patel (06/10/2008) and Dr. Medling (06/14/2008) who found that the Injured Worker is prevented from returning to sustained, remunerative employment as a result of the allowed conditions in the claim. Permanent total disability compensation is hereby awarded from 06/10/2008 and to continue without suspension unless future facts or circumstances should warrant the stopping of the award * * *.

(¶ 13) Park Ohio objected to the tentative order and, on July 1, 2010, another SHO heard relator's PTD application. At the hearing, relator testified regarding the working conditions at Park Ohio and his subsequent retirement:

Q. Did they bring you back on light duty or what was goin' on?

A. Well, it was supposed to be under light duty. But the job they give me, they just - - they just kept harassing me. They didn't want me to stay on light duty so . . .

Q. Was this a sitting job on light duty in the office?

A. No, no, no, no. I had to get out and actually clean. Like sweep and clean - -

Q. What percentage of the - -

A. -- the bathrooms and stuff.

Q. What percentage of the work hour, just ballpark it, were you on your feet?

A. The biggest part of it; biggest part of it.

Q. Okay.

A. I struggled all day long. Sometimes I'd sneak off somewhere and try to hide and sit down. But if they caught me doin' that, then I was in trouble so . . .

Q. And it looks like you took a retirement in February 2001. Why was that? You were only 56 years old.

A. Well, I was just in too much pain at the time, and I couldn't maintain my job that they expected me to there.

(Tr. 6-7.)

{¶ 14} In an order mailed on July 21, 2010, the SHO denied relator's PTD application, stating, in relevant part:

It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.

The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing Officer finds that the Injured Worker's retirement was voluntary. *There is no medical evidence that it was induced by the industrial injury.* There is no evidence that any of his treating physicians advised him to retire and no temporary total disability was paid after he stopped working. *** Since the Injured Worker never looked for work after his retirement he abandoned the work force. In this situation he is ineligible to receive permanent total disability compensation.

(Emphasis added.)

{¶ 15} In his decision, the magistrate concluded that the commission abused its discretion in misconstruing the medical evidence of record and seemingly setting forth a requirement for relator to meet that is not in accordance with the law.

{¶ 16} First, in addressing Park Ohio's objections, we find that the magistrate's decision does not prevent the commission from making a factual determination regarding whether relator's retirement was voluntary or involuntary, nor does it use an incorrect standard of review. The magistrate's decision simply directs the commission to make its factual determination regarding the voluntariness of relator's retirement in accordance with the law. Pursuant to Ohio Adm.Code 4121-3-34(D)(1)(d):

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is

brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

Further, in *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994), paragraph two syllabus, the Supreme Court of Ohio stated that "[a]n employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market."

{¶ 17} Here, because relator retired on February 28, 2001, prior to applying for PTD compensation on August 14, 2009, he can only be precluded from an award of PTD compensation if his retirement was voluntary and constituted an abandonment of the entire job market. Further, because the question of whether relator's retirement was voluntary or involuntary came into issue, the SHO was required to consider evidence of relator's medical condition at or near the time of his removal/retirement. See Ohio Adm.Code 4121-3-34(D)(1)(d).

{¶ 18} In an order mailed on July 21, 2010, the SHO found that: (1) there is no medical evidence that relator's retirement was induced by the industrial injury, and (2) there is no evidence that any of relator's treating physicians advised him to retire. We conclude that the above findings can be interpreted to mean that the SHO did not consider or review evidence of relator's medical condition at or near the time of his retirement. Further, because voluntary job abandonment is an affirmative defense, the burden of proof with respect to demonstrating voluntary abandonment/job departure falls upon the employer or the administrator. *State ex rel. Kelsey Hayes Co. v. Grashel*, 10th Dist. No. 10AP-386, 2011-Ohio-6169, ¶ 16. However, because the SHO's order doubly addresses the issue of there being no evidence that any of relator's physicians advised him to retire, it appears that the SHO erroneously believed that relator was, in fact, required to submit this evidence, thus wrongly shifting the burden of proof from Park Ohio to relator.

{¶ 19} Therefore, because the July 21, 2010 order suggests that the SHO did not consider relator's medical evidence in order to properly determine whether relator's retirement was voluntary, and because the July 21, 2010 order is based upon a mistaken

belief that relator had to submit evidence that his treating physician(s) advised him to retire, we find Park Ohio's objections not well-taken.

{¶ 20} Second, in addressing the commission's objections to the magistrate's conclusions of law, we find no error in the magistrate's conclusion that Dr. Panigutti's December 11, 2000 office note constitutes some medical evidence that relator's retirement was induced by his industrial injury and, therefore, may not be voluntary. Dr. Panigutti's December 11, 2000 office note clearly states that relator was complaining of back pain and unable to perform regular job duties. Further, Dr. Panigutti's December 11, 2000 office note states that relator can return to light or modified job duties with certain restrictions. Dr. Panigutti's office note, in conjunction with relator's testimony regarding the fact that he retired because he was in too much pain and unable to perform his job duties, could, if considered by the commission, constitute some evidence that relator did not voluntarily retire from Park Ohio on February 28, 2001.

{¶ 21} Further, for the reasons stated above, we find no error in the magistrate's conclusion that the commission misconstrued (or possibly ignored) medical evidence of record contemporaneous with relator's retirement.

{¶ 22} Therefore, the commission's objections are also not well-taken.

{¶ 23} Upon independent review of the magistrate's decision and the objections presented by the parties, we overrule all objections, adopt the magistrate's decision as our own, and issue a limited writ of mandamus ordering the commission to vacate the SHO's order mailed July 21, 2010, and enter a new order that properly determines relator's eligibility for PTD compensation in accordance with this decision and the law.

*Objections overruled;
limited writ of
mandamus granted.*

BROWN, P.J., and BRYANT, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Billy G. Black,	:	
Relator,	:	
v.	:	No. 10AP-1168
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Park Ohio Industries, Inc.,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on October 24, 2011

Plevin & Gallucci, Frank Gallucci, III, and Bradley E. Elzeer, II; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for relator.

Michael DeWine, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Millisor & Nobil Co., L.P.A., Mark E. Snyder, and Nicole H. Farley, for respondent Park Ohio Industries, Inc.

IN MANDAMUS

{¶ 24} In this original action, relator, Billy G. Black, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order

denying him permanent total disability ("PTD") compensation on eligibility grounds, and to enter an order granting the compensation.

Findings of Fact:

{¶ 25} 1. On October 17, 2000, relator injured his lower back while employed as a press operator for respondent Park Ohio Industries, Inc. ("Park Ohio"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 26} 2. The industrial claim (No. 00-816839) is allowed for "lumbar strain; aggravation of degenerative joint disease lumbar; aggravation of pre-existing spondylolisthesis L5-S1; major depressive disorder single episode."

{¶ 27} 3. On the date of injury, relator was treated at Concentra Medical Centers by Elizabeth W. Mease, M.D. Dr. Mease diagnosed a "[]umbar [s]train" and placed relator on "[m]odified activity." The restrictions were no repetitive lifting over ten pounds, no pushing/pulling over ten pounds, no squatting or kneeling with alternate sitting and standing.

{¶ 28} 4. On October 19, 2000, relator returned to modified duty at Park Ohio cleaning bathrooms. After a few hours of this modified duty, relator returned to Concentra Medical Centers and saw Dr. Mease again. On October 19, 2000, Dr. Mease prescribed "[n]o activity" and a return follow-up visit.

{¶ 29} 5. On November 10, 2000, Dr. Mease indicated that relator could return to work but with restrictions of no repetitive lifting over ten pounds and no pushing/pulling over ten pounds. Relator should be sitting 75 percent of the time.

{¶ 30} 6. On November 15, 2000, relator saw orthopedic surgeon Mark A. Panigutti, M.D., at the referral of Dr. Mease. On November 15, 2000, Dr. Panigutti wrote:

Billy Black was seen in our office today for evaluation of his back pain and leg weakness. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 11/15/2000. His date of injury was 10/17/2000.

The current diagnoses are:

[One] 847.2 Lumbar Sprain

[Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc.

Billy Black complained of back pain and leg weakness. Billy Black had the following objective physical findings of spondylolisthesis, decreased motion, leg weakness and aggravation of preexisting condition. Billy Black has a fair prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

We are recommending the following treatments:
[One] Continue [physical therapy] at Concentra 2xweek for 4 weeks

Billy Black is unable to perform regular job duties. Billy Black is unable to return to light or modified job duties. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Estimated). The return to full duty work date is 12/13/2000 (Estimated).

¶ 31} 7. On December 11, 2000, relator returned to see Dr. Panigutti. On that date, Dr. Panigutti wrote:

Billy Black was seen in our office today for evaluation of his back pain. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 12/11/2000. His date of injury was 10/17/2000.

The current diagnoses are:

[One] 847.2 Lumbar Sprain
[Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc

Billy Black complained of back pain. Billy Black had the following objective physical findings of improved pain, motion and strength. Billy Black has a good prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.

Billy Black is unable to perform regular job duties. Billy Black is able to return to light or modified job duties with no lift > 20 lbs. nos stand > 2 hrs for 4 weeks then full duty. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Actual). The return to work date is 12/13/2000 (Actual).

{¶ 32} 8. Also on December 11, 2000, relator signed a document captioned "Employee Notice of Intent to Retire." The document lists February 9, 2001 as the "[l]ast [d]ay [w]orked" and February 28, 2001 as the "[r]etirement [d]ate." The document also lists "55" as the "[r]etirement [a]ge," based upon relator's February 10, 1946 date of birth. The document states:

Pursuant to Article 25D (under Retiree Health Care) of the Labor Agreement, I, Billy S. Black, an hourly employee of Park Drop Forge, do hereby give 60 (sixty) days notice of my intent to retire. I understand to be eligible I must be 55 (fifty-five) years of age and have a minimum of 15 (fifteen) years of service.

{¶ 33} 9. Apparently, on December 13, 2000, relator returned to modified duty at Park Ohio. According to relator's testimony, the modified duty included cleaning bathrooms and pushing brooms.

{¶ 34} 10. On January 22, 2001, relator returned to see Dr. Panigutti. On that date, Dr. Panigutti wrote:

He comes back today. He still has back pain. He is also getting some groin pain in his testicle.

On examination today there is some question of bulging into the groin.

Assessment and Plan: This is a gentleman with back pain with no significant leg pain. He does do heavy work and this dose [sic] cause his symptoms to increase. We explained to him that his groin pain is unrelated to his back pain and he may have a hernia and should be checked by his primary care physician. At this time we will limit activities and no lifting greater than [sic] 50 pounds and no work greater than 8 hours for four weeks. We will see him back as needed. * * *

{¶ 35} 11. On June 6, 2008, at relator's request, he was examined by M.P. Patel, M.D. In his two-page narrative report dated June 10, 2008, Dr. Patel concludes:

After reviewing history of accident, clinical course, diagnostic studies, subjective and objective findings, in my opinion, Mr. Black with regards to claim number: 00-816839 SI, sprain lumbar region, lumbosacral spondylosis, ACQ spondylolisthesis, major depressive disorder, single episode, has significant physical limitations and is permanently and totally disabled from engaging into any gainful employment.

{¶ 36} 12. On June 14, 2008, at relator's request, he was examined by psychologist James M. Medling, Ph.D. In his five-page narrative report, Dr. Medling concludes:

Based upon AMA Guidelines as to the Evaluation of Permanent Impairment, 5th Edition, it is this examiner's opinion that his current complaints of Major Depressive Disorder, Single Episode renders him permanently and totally disabled from all forms of gainful employment. He can manage any monies awarded.

{¶ 37} 13. On August 14, 2009, relator filed an application for PTD compensation. On the application, relator indicated that he had been receiving Social Security Disability Benefits since September 2001.

{¶ 38} 14. On March 23, 2010, at the commission's request, relator was examined by R. Scott Krupkin, M.D. Dr. Krupkin conducted a physical examination. In his four-page narrative report, Dr. Krupkin opines that relator has a "20% whole person impairment" based upon the allowed physical conditions of the claim.

{¶ 39} 15. On March 23, 2010, Dr. Krupkin completed a physical strength rating form on which he indicated by his mark that "[t]his Injured Worker is incapable of work."

{¶ 40} 16. On April 21, 2010, pursuant to Ohio Adm.Code 4121-3-34(C)(6), a staff hearing officer ("SHO") issued a tentative order awarding PTD compensation beginning June 10, 2008:

* * * [T]he Application for Permanent and Total Disability filed on 08/14/2009 be GRANTED. This order is based specifically upon the reports of Dr. Krupkin (03/23/2010), Dr. Patel (06/10/2008) and Dr. Medling (06/14/2008) who found that the Injured Worker is prevented from returning to sustained, remunerative employment as a result of the allowed conditions in the claim. Permanent total disability

compensation is hereby awarded from 06/10/2008 and to continue without suspension unless future facts or circumstances should warrant the stopping of the award.

(Emphasis sic.)

{¶ 41} 17. Park Ohio filed a timely objection to the tentative order.

{¶ 42} 18. On July 1, 2010, another SHO heard relator's PTD application. The hearing was recorded and transcribed for the record.

{¶ 43} 19. On direct examination of relator by his counsel, the following exchange occurred:

Q. What percentage of the work hour, just ballpark it, were you on your feet?

A. The biggest part of it; biggest part of it.

Q. Okay.

A. I struggled all day long. Sometimes I'd sneak off somewhere and try to hide and sit down. But if they caught me doin' that, then I was in trouble so . . .

Q. And it looks like you took a retirement in February 2001. Why was that? You were only 56 years old.

A. Well, I was just in too much pain at the time, and I couldn't maintain my job that they expected me to there.

Q. After they found that out, at any time did they offer you a sitting job in the office?

A. No. There was never no sit-down jobs.

Q. The company just doesn't have it, I would imagine?

(Tr. 6-7.)

{¶ 44} 20. On cross-examination of relator by Park Ohio's counsel, the following exchange occurred:

Q. After your retirement, did you apply for Social Security benefits?

A. Yes, I did.

Q. And when was that?

A. Oh, it was a while after I was off work that I applied for it. I don't recall exactly how long it was.

Q. What were the reasons you sought the Social Security?

A. Well, because of the - - my condition, my back condition. I wasn't able to, you know, perform things around the house or do things that I needed to do. And someone suggested to me I go to Social Security. So I went to Social Security and they approved me, you know.

Q. Was your back the sole reason that you were awarded Social Security disability? Were there any other conditions?

A. I think they might have considered my background in not being able to read and write and different things like that, you know.

Q. And after your retirement in February of 2001, did you ever seek any vocational training?

A. No, no.

Q. Have you ever enrolled in a literacy program?

A. No.

Q. Have you ever attempted - - I understand you haven't obtained your GED, but have you ever attempted?

A. I'm not hearing with them talking.

Q. I'm sorry. I understand that you do not have a GED, but did you ever attempt to get a GED?

A. No. I never thought I was able to do anything like that, you know.

Q. Would you be interested in vocational training?

A. I don't think it would do me any good. I - - you know, when I went to school, I mean, I doubled up on the years that I went there. And I wasn't able to learn, so I don't go - - I don't figure after all these years I'm going to be able to learn anything either. So along those lines . . .

[Park Ohio's counsel] I have no further questions.

HEARING OFFICER: I have just a couple. Mr. Black, did you work anywhere after you left Park Drop Forge?

[Relator] No, ma'am.

HEARING OFFICER: Did you look for work anywhere?

[Relator] No, ma'am.

(Tr. 14-17.)

[¶ 45] 21. Following the July 1, 2010 hearing, the SHO issued an order denying the PTD application on eligibility grounds. The SHO's order of July 1, 2010 explains:

It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.

The Injured Worker sustained the instant injury on 10/17/00. Following the injury he received temporary total disability compensation until he returned to work on 12/13/00. When he returned to work he had a restriction of no lifting over twenty pounds. On 12/11/00 the Injured Worker notified the Employer that he intended to take retirement based on his years of service with the company. At the time the Injured Worker was fifty-six years old and [had] been with the Employer thirty-eight years. There is no medical evidence that any physician advised the Injured Worker to retire as a result of the allowed injuries. The Injured Worker saw his treating orthopedist in January 2001. At that time the lifting restriction was increased to fifty pounds due to groin pain which the doctor stated was unrelated to the Injured Worker's back condition.

The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing

Officer finds that the Injured Worker's retirement was voluntary. There is no medical evidence that it was induced by the industrial injury. There is no evidence that any of his treating physicians advised him to retire and no temporary total disability was paid after he stopped working. The permanent total disability application indicates that the Injured Worker began receiving Social Security Disability benefits later in 2001, but the file is silent as to the basis for those benefits. Since the Injured Worker never looked for work after his retirement he abandoned the work force. In this situation he is ineligible to receive permanent total disability compensation. The application is denied.

{¶ 46} 22. On December 20, 2010, relator, Billy G. Black, filed this mandamus action.

Conclusions of Law:

{¶ 47} The main issue is whether the commission abused its discretion in determining that relator's job abandonment at Park Ohio was not induced by the allowed conditions of the industrial claim.

{¶ 48} Finding an abuse of discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 49} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(d) states:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

{¶ 50} Paragraph two of the syllabus of *State ex rel. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, states:

An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market. * * *

{¶ 51} In *State ex rel. Garrison v. Indus. Comm.*, 10th Dist. No. 08AP-419, 2009-Ohio-2898, ¶54, this court, speaking through its magistrate, states:

The case law indicates that a two-step analysis is involved in the determination of whether a claimant has voluntarily removed himself from the workforce prior to becoming PTD such that a PTD award is precluded. The first step requires the commission to determine whether the retirement or job departure was voluntary or involuntary. If the commission determines that the job departure was involuntary, the inquiry ends. If, however, the job departure is determined to be voluntary, the commission must consider additional evidence to determine whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. *State ex rel. Ohio Dept. of Transp. v. Indus. Comm.*, Franklin App. No. 08AP-303, 2009-Ohio-700.

{¶ 52} In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46, the court expanded eligibility for temporary total disability compensation by expanding the definition of an involuntary abandonment of employment:

Neither [*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42] nor [*State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145] states that any abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. We find that a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

(Emphasis sic.)

{¶ 53} In *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, this court held that an injury-induced job abandonment under *Rockwell* can be supported by the claimant's hearing testimony:

We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury. * * *

Id. at ¶18.

¶54) Analysis begins with the observation that on December 11, 2000, the date relator executed his "Employee Notice of Intent to Retire," he also visited Dr. Panigutti. Dr. Panigutti found that relator was "unable to perform regular job duties," but that he "is able to return to light or modified job duties" with specified restrictions. The restrictions were to last for a four-week period.

¶55) Undisputedly, there is no evidence in the record that Dr. Panigutti, or any other doctor, ever advised relator to retire or to abandon his job at Park Ohio. Nevertheless, Dr. Panigutti's December 11, 2000 office note is indeed medical evidence that relator's decision to retire could have been induced by the industrial injury.

¶56) Given that Dr. Panigutti's December 11, 2000 office note is medical evidence upon which the commission could have relied in determining whether the job abandonment was injury induced, it is clearly inaccurate for the commission, through its SHO, to declare "[t]here is no medical evidence that it was induced by the industrial injury."

¶57) Moreover, when the SHO's order twice states there is no medical evidence that a physician advised relator to retire as a result of the allowed conditions, it is strongly suggested that the lack of such evidence was determinative, if not required, for relator to show that his job abandonment was injury induced. There is no such requirement.

{¶ 58} Of course, the commission was not required to accept relator's hearing testimony at face value and, on that basis, conclude that the industrial injury motivated relator's decision to retire from his job at Park Ohio. But the commission cannot misconstrue the medical evidence of record nor seemingly set forth a requirement for relator to meet that is not in accordance with law.

{¶ 59} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the SHO's order of July 1, 2010 and, in a manner consistent with the magistrate's decision, enter a new order that properly determines relator's eligibility for PTD compensation and, in the event relator is found to be eligible, adjudicates the PTD application on its merits.

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

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
TENTH APPELLATE DISTRICT

2012 JUN 19 PM 12:39

CLERK OF COURTS

State ex rel. Billy G. Black,

Relator,

v.

Industrial Commission of Ohio and
Park Ohio Industries, Inc.,

Respondents.

No. 10AP-1168

(REGULAR CALENDAR)

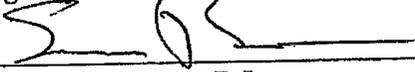
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 12, 2012, we overrule all objections, adopt the magistrate's decision as our own, and issue a limited writ of mandamus ordering the commission to vacate the SHO's order mailed July 21, 2010, and enter a new order that properly determines relator's eligibility for PTD compensation in accordance with this decision and the law.

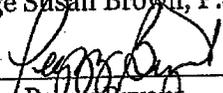
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge John A. Connor



Judge Susan Brown, P.J.



Judge Peggy Bryant



ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. BILLY G. BLACK,

Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO,

-and-

PARK OHIO INDUSTRIES, INC.,

Appellants,

CASE NO. 12-1163

On appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals (Original Action) Case No. 10AP-1168

NOTICE OF APPEAL OF APPELLANT PARK OHIO INDUSTRIES, INC.

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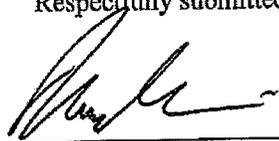
FILED
JUL 11 2012
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT PARK OHIO INDUSTRIES, INC.

Appellant Park Ohio Industries, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment Entry of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 10AP-1168 on June 19, 2012. A true date-stamped copy of the Judgment Entry is attached hereto and incorporated herein by reference.

This case originated in the Franklin County Court of Appeals, Tenth Appellate District, and therefore, is an appeal of right.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail this 11th

day of July to:

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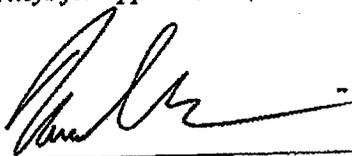
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OHIO ADMINISTRATIVE CODE
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*** This document is current through the Ohio Register for the week of September 17, 2012 through September 21, 2012 ***

4121 Industrial Commission
Chapter 4121-3 Claims Procedures

OAC Ann. 4121-3-34 (2012)

4121-3-34. Permanent total disability.

(A) Purpose

The purpose of this rule is to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner. This rule applies to the adjudication of all applications for compensation for permanent and total disability filed on or after the effective date of this rule.

(B) Definitions

The following definitions shall apply to the adjudication of all applications for permanent and total disability:

(1) "Permanent total disability" means the inability to perform sustained remunerative employment due to the allowed conditions in the claim.

The purpose of permanent and total disability benefits is to compensate an injured worker for impairment of earning capacity.

The term "permanent" as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the injured worker but that it will, within reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.

(2) Classification of physical demands of work:

(a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

(c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

(d) "Heavy work" means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

(e) "Very heavy work" means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

(3) Vocational factors:

(a) "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.

(b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

(i) "Illiteracy" is the inability to read or write. An injured worker is considered illiterate if the injured worker can not read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.

(ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.

(iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow a an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

(iv) "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.

(c) "Work experience":

(i) "Unskilled work" is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.

(ii) "Semi-skilled work" is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

(iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

(iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the an injured worker. Skills

which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

(4) "Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

(5) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

(C) Processing of applications for permanent total disability

The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.

(1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation. The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s). Medical evidence which provides an opinion addressing such limitations, but which also contains a conclusion as to whether an injured worker is permanently and totally disabled, may be considered by a hearing officer. A vocational expert's opinion, by itself, is insufficient to support an application for permanent total disability compensation. If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.

(2) At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

(3) A claims examiner shall initially review the application for permanent and total disability. (a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the injured worker, the employer, and the administrator in claims involving state fund employers, the application shall be adjudicated, and an order issued, without a hearing.

(b) If it is determined that the injured worker is requesting a finding of permanent total disability compensation under division (C) of *section 4123.58 of the Revised Code* (statutory permanent and total disability), the application shall be adjudicated in accordance with paragraph (E) of this rule.

(c) If a motion requesting recognition of additional conditions is filed on or prior to the date of filing for permanent total disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

(4) (a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.

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(b) The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgment letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

(c) If the injured worker or the employer has made a good faith effort to obtain medical evidence described in paragraph (C)(4)(a) or (C)(4)(b) of this rule and has been unable to obtain such evidence, the injured worker or the employer may request that the hearing administrator issue a subpoena to obtain such evidence. Prior to the issuance of a subpoena, the hearing administrator shall review the evidence submitted by the injured worker or the employer that demonstrates the good faith effort to obtain medical evidence. Should a subpoena be issued, it shall be served by the party requesting the issuance of a subpoena.

(d) Upon the request of either the injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, to obtain the medical evidence described in paragraphs (C)(4)(a) and (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible other than additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule.

(5) (a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

(i) Obtain all the claim files identified by the [injured worker] on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.

(ii) Copy all relevant documents as deemed pertinent to the by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

(6) (a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the commission in writing of the objection to the tentative order within fourteen days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(ii) In the event a party makes written notification to the industrial commission of an objection within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(b) If the hearing administrator determines that the case should not be referred for consideration of issuance of a tentative order by an adjudicator, the hearing administrator shall notify the parties to the claim that a party has fourteen days from the date that copies of reports of the commission medical examinations are submitted to the parties within which to make written notification to the commission of a party's intent to submit additional vocational infor-

mation to the commission that is relevant to the adjudication of the application for permanent total disability compensation.

(i) Unless a party notifies the commission within the aforementioned fourteen-day period of the party's intent to submit additional vocational information to the commission, a party will be deemed to have waived its ability to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability.

(ii) Should a party provide timely notification to the commission of its intent to submit additional vocational information, the additional vocational information shall be submitted to the commission within forty-five days from the date the copies of the reports of commission medical examinations are submitted to the parties. Upon expiration of the forty-five day period no further vocational information will be accepted without prior approval from the hearing administrator.

(7) If the employer or the injured worker request, for good cause shown, that a pre-hearing conference be scheduled, a pre-hearing conference shall be set. The request for a pre-hearing conference shall include the identification of the issues that the requesting party desires to be considered at the pre-hearing conference. The hearing administrator may also schedule a pre-hearing conference when deemed necessary on any matter concerning the processing of an application for permanent and total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent and total disability.

Notice of a pre-hearing conference is to be provided to the parties and their representatives no less than fourteen days prior to the pre-hearing conference. The pre-hearing conference may be by telephone conference call, or in-person at the discretion of the hearing administrator and is to be conducted by a hearing administrator.

The failure of a party to request a pre-hearing conference or to raise an issue at a pre-hearing conference held under paragraph (C)(8) of this rule, does not act to waive any assertion, argument, or defense that may be raised at a hearing held under paragraphs (D) and (E) of this rule.

(8) Should a pre-hearing conference be held, the hearing administrator is not limited to the consideration of the issues set forth in paragraphs (C)(8)(a) through (C)(8)(i) of this rule, but may also address any other matter concerning the processing of an application for permanent total disability. At a pre-hearing conference the parties should be prepared to discuss the following issues:

- (a) Evidence of retirement issues.
- (b) Evidence of refusal to work or evidence of refusal or failure to respond to written job offers of sustained remunerative employment.
- (c) Evidence of job description.
- (d) Evidence of rehabilitation efforts.
- (e) Exchange of accurate medical history, including surgical history.
- (f) Agreement as to allowed condition(s) in the claim.
- (g) Scheduling of additional medical examinations, if necessary.
- (h) Ensure that deposition requests that have been granted pursuant to industrial commission rules are completed and transcripts submitted.
- (i) Settlement status.

(9) At the conclusion of the pre-hearing conference, a date for hearing before a staff hearing officer shall be scheduled no earlier than fourteen days subsequent to the date of a pre-hearing conference. After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent and total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

(10) The time frames established herein in paragraph (C) of this rule can be waived by mutual agreement of the parties by motion to a hearing administrator, except where otherwise specified.

(11) The applicant may dismiss the application for permanent and total disability any time up to the determination of the hearing on the merits of the application. Should a party dismiss an application prior to its adjudication, the commission's medical evidence obtained will be valid twenty-four months from the date of dismissal.

(D) Guidelines for adjudication of applications for permanent total disability

The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation:

(1) (a) If the adjudicator finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of *section 4123.58 of the Revised Code*, due to the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the injured worker shall be found permanently and totally disabled, and a tentative order shall be issued.

Should an objection be filed from a tentative order, a hearing shall be scheduled. (Reference paragraph (E) of this rule).

(b) If, after hearing, the adjudicator finds that the injured worker is engaged in sustained remunerative employment, the injured worker's application for permanent and total disability shall be denied, unless an injured worker qualifies for an award under division (C) of *section 4123.58 of the Revised Code*.

(c) If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

(d) If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

(e) If, after hearing, the adjudicator finds that the injured worker is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker, the injured worker shall be found not to be permanently and totally disabled.

(f) If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. In claims involving self-insured employers, the self-insured employer shall be notified to consider the question of the injured worker's entitlement to temporary total disability compensation.

(g) If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

(h) If, after hearing, the adjudicator finds that the allowed condition(s) is the proximate cause of the injured worker's inability to perform sustained remunerative employment, the adjudicator is to proceed in the sequential evaluation of the application for permanent and total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that non-allowed conditions are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(i) If, after hearing, the adjudicator finds that injured worker's inability to perform sustained remunerative employment is the result of a pre-existing condition(s) allowed by aggravation, the adjudicator is to continue in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that the non-allowed pre-existing condition(s) are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(2) (a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

(3) Factors considered in the adjudication of all applications for permanent and total disability:

(a) The burden of proof shall be on the injured worker to establish a case of permanent and total disability. The burden of proof is by preponderance of the evidence. The injured worker must establish that the disability is permanent and that the inability to work is causally related to the allowed conditions.

(b) In adjudicating an application for permanent and total disability, the adjudicator must determine that the disability is permanent, the inability to work is due to the allowed conditions in the claim, and the injured worker is not capable of sustained remunerative employment.

(c) The industrial commission has the exclusive authority to determine disputed facts, the weight of the evidence, and credibility.

(d) All medical evidence of impairment shall be based on objective findings reasonably demonstrable and medical reports that are submitted shall be in conformity with the industrial commission medical examination manual.

(e) If the adjudicator concludes from evidence that there is no proximate causal relationship between the industrial injury and the inability to work, the order shall clearly explain the reasoning and basis for the decision.

(f) The adjudicator shall not consider the injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent and total disability.

(g) The adjudicator is to review all relevant factors in the record that may affect the injured worker's ability to work.

(h) The adjudicator shall prepare orders on a case by case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule the adjudicator is to specifically list the non-medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.

(i) In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

(E) Statutory permanent total disability

Division (C) of section 4123.58 of the Revised Code provides that the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

(1) In all claims where the evidence on file clearly demonstrates actual physical loss, or the permanent and total loss of use occurring at the time of injury secondary to a traumatic spinal cord injury or head injury, of both hands or

both arms, or both feet or both legs, or both eyes, or any two thereof, the claim shall be referred to be reviewed by a staff hearing officer of the commission. Subsequent to review, the staff hearing officer shall, without hearing, enter a tentative order finding the injured worker to be entitled to compensation for permanent and total disability under division (C) of *section 4123.58 of the Revised Code*. If an objection is made, the claim shall be scheduled for hearing.

(a) Within thirty days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the industrial commission in writing of the objection to the tentative order within thirty days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(b) In the event a party makes written notification to the industrial commission of an objection within thirty days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(2) In all other cases filed under division (C) of *section 4123.58 of the Revised Code*, if the staff hearing officer finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of *section 4123.58 of the Revised Code*, due to the loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the staff hearing officer, without a hearing, is to issue a tentative order finding the injured worker to be permanently and totally disabled under division (C) of *section 4123.58 of the Revised Code*. An objection to the tentative order may be made pursuant to paragraphs (E)(1)(a) and (E)(1)(b) of this rule.

History:Effective: 06/01/2008.

R.C. 119.032 review dates: 02/11/2008 and 02/01/2012.

Promulgated Under: 119.03.

Statutory Authority: 4121.30, 4123.58, 4121.32.

Rule Amplifies: 4121.35, 4123.36.

Prior Effective Dates: 6/1/95, 9/15/95, 1/1/97, 4/1/04.

NOTES:

Editor's Note:

The bracketed language in subsection (C)(5)(a)(i) was added by the publisher for purposes of clarity.

Case Notes And OAG

(2001) PTD granted: *State ex rel. Turbine Engine Components Textron, Inc. v. Indus. Comm.*, 93 OS3d 156, 2001 Ohio 1296, 753 NE2d 189, 2001 Ohio LEXIS 2185.



Caution
As of: Oct 26, 2012

[State ex rel.] Mid-Ohio Wood Products, Inc., Relator, v. The Industrial Commission of Ohio and David L. Franks, Respondents.

No. 07AP-478

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 2453; 2008 Ohio App. LEXIS 2086

May 22, 2008, Rendered

SUBSEQUENT HISTORY: Later proceeding at *State ex rel. Mid-Ohio Wood Prods. v. Indus. Comm.*, 118 Ohio St. 3d 1528, 2008 Ohio 3602, 890 N.E.2d 918, 2008 Ohio LEXIS 1962 (2008)
Cause dismissed by *State ex rel. Mid-Ohio Wood Prods. v. Indus. Comm.*, 2010 Ohio 100, 2010 Ohio LEXIS 32 (Ohio, Jan. 19, 2010)

DISPOSITION: [**1] Objections sustained in part and overruled in part; writ of mandamus denied.

COUNSEL: Garvin & Hickey, LLC, Michael J. Hickey, Daniel M. Hall, and Matthew D. Shufeldt, for relator.

Thomas R. Winters, Acting Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Bevan & Associates, L.P.A., and Christopher J. Stefancik, for respondent David L. Franks.

JUDGES: SADLER, J. KLATT and FRENCH, JJ., concur.

OPINION BY: SADLER

OPINION

(REGULAR CALENDAR)

DECISION

IN MANDAMUS

ON OBJECTIONS TO MAGISTRATE'S DECISION

SADLER, J.

[*P1] Relator, Mid-Ohio Wood Products, Inc. ("relator"), commenced this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding respondent David L. Franks ("claimant") temporary total disability ("TTD") compensation beginning February 21, 2006, and to enter an order finding that the claimant voluntarily abandoned his employment.

[*P2] Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law. (Attached as Appendix A.) Therein, the magistrate concluded that the commission [**2] abused its discretion and recommended that this court issue a writ of mandamus ordering the commission to vacate its order finding that the claimant's job departure was injury-induced, and to issue a new order adjudicating whether the claimant's job departure was injury-induced. The commission filed objections to the magistrate's decision, and relator filed a memorandum op-

posing the objections. This cause is now before the court for a full review.

[*P3] Recapitulated, the facts relevant to our determination are as follows. On April 21, 2005, the claimant was injured in the course and scope of his employment with relator. The claim was initially allowed for lumbosacral strain. On the date of injury, the claimant presented to a local hospital emergency room, where he was prescribed Flexeril and Vicodin and was excused from work until April 23, 2005. However, he has never returned to work. The next evidence of medical treatment in the stipulated record are the records of the claimant's treatment with chiropractor Craig Dyer on July 16, 2005. Dr. Dyer's July 20, 2005 report states that the claimant reported having experienced persistent and severe back pain and leg numbness for the preceding [*3] three months. Dr. Dyer established a treatment plan.

[*P4] On November 22, 2005, Garth Bennington, M.D., examined the claimant and ordered an MRI of the lumbar spine, which took place on November 30, 2005. The MRI revealed an L5-S1 broad-based central disc extrusion. Dr. Bennington treated the claimant with muscle relaxants and pain medications. On February 21, 2006, chiropractor Matthew Ellis examined the claimant, and his report indicates that the claimant's symptoms continued unabated, for which Dr. Ellis prepared a treatment plan. On March 3, 2006, Dr. Ellis completed a C-84 certifying a period of TTD from July 16, 2005 (the date of Dr. Dyer's examination) to an estimated return-to-work date of June 5, 2006. Dr. Ellis stated that the last date of examination was February 28, 2006. On May 11, 2006, the claimant moved for the allowance of the additional conditions of broad-based central disc extrusion L5-S1 and radicular syndrome of the lower limbs. On May 26, 2006, Dr. Ellis completed a second C-84 in which he certified a period of TTD from July 16, 2005 to an estimated return-to-work date of September 4, 2006, based on the conditions of lumbosacral sprain, broad-based central disc extrusion [**4] L5-S1, and radicular syndrome of the lower limbs.

[*P5] Following a district hearing officer's consideration of the C-84s and the C86, a staff hearing officer ("SHO") heard the matter on September 14, 2006. The SHO allowed the claim for broad-based central disc extrusion L5-S1, and stated that the claim was neither allowed nor disallowed for radicular syndrome of the lower limbs because there had not yet been a confirmatory EMG. The SHO granted TTD from February 21, 2006 (the date that Dr. Ellis first treated the claimant), to September 4, 2006, and continuing upon submission of medical proof. The SHO stated that the decision as to TTD was based upon Dr. Ellis' C-84s. The SHO rejected relator's argument that the claimant had voluntarily abandoned his employment, citing the claimant's hearing

testimony that his work-related injury prevented him from returning to work after the date of injury.

[*P6] Relator instituted this original action, arguing that it is entitled to a writ of mandamus vacating the commission's order because the commission abused its discretion in refusing to find that the claimant voluntarily abandoned his employment. In his decision, the magistrate concluded that the commission [**5] abused its discretion in relying solely on the claimant's testimony as to the reason that he did not return to work. Citing voluntary retirement cases in which the Supreme Court of Ohio noted the presence or absence of corroborative medical evidence, the magistrate reasoned that, although the commission may rely on the claimant's testimony as to why he did not return to work, it may not rely on that evidence alone; rather, it must point to some medical evidence that corroborates the testimony. The magistrate found further support for his conclusion in *Ohio Adm.Code 4121-3-34(D)(1)(d)*, which concerns adjudication of applications for permanent total disability ("PTD") compensation. The magistrate recommended that this court grant a writ of mandamus ordering vacation of the commission's order, and readjudication because, in the magistrate's view, the record contains medical evidence upon which the commission could rely as corroborative of the claimant's testimony.

[*P7] The commission filed several objections, which we will discuss in turn. First, the commission objects to the magistrate finding that, "[f]ollowing his April 21, 2005 hospital discharge, claimant did not seek medical treatment [**6] until July 16, 2005 * * *." P25, *infra*. The commission argues that the finding should be that the stipulated evidence is silent as to whether the claimant sought treatment for his back between the date of injury and July 16, 2005. The commission's request finds support in the record; therefore, we sustain this objection and we will modify the magistrate's finding of fact accordingly.

[*P8] Next, the commission objects to the magistrate's description of Dr. Ellis' C-84s, and argues that the description of these forms "should indicate that [the claimant] was incapable of returning to his former position of employment and of attending vocational rehabilitation" because this demonstrates the severity of the claimant's injury and corroborates that it was his industrial injury that rendered him unable to return to work. (Commission Objections, at 4.) Specifically, the commission points out that both C-84s indicate that the claimant was not a candidate for vocational rehabilitation due to the severity of his condition; and the second C-84 supports the motion to add the conditions of L5-S1 extruded disc and radicular syndrome to the claim, one of which was subsequently allowed, and the other of [**7]

which the commission gave the claimant the opportunity to refile after obtaining a confirmatory EMG.

[*P9] Upon review, we agree that Dr. Ellis states in both of the C-84s that the claimant is, as of that time, not a candidate for vocational rehabilitation "due to severity of condition * * *." Therefore, we will modify the magistrate's findings of fact to reflect that, on the dates of the C-84s, Dr. Ellis opined that the claimant was not a candidate for vocational rehabilitation. However, we need not modify the magistrate's findings to note that the C-84s state that the claimant could not return to his former position, because the magistrate has already included the fact that in each C-84 Dr. Ellis certified a period of TTD. Accordingly, we will sustain the commission's second objection in part and overrule it in part.

[*P10] Next, the commission argues that the findings of fact should include a finding that, because the SHO neither allowed nor disallowed the additional condition of radicular syndrome of the lower limbs, the claimant is free to reapply for the condition with additional medical evidence. We decline the commission's invitation to reach a legal conclusion not germane to the issues [**8] presented in relator's complaint. Accordingly, we overrule the commission's third objection.

[*P11] Next, the commission lodges several objections to the magistrate's conclusions of law, which we will discuss out of order, and several of which we will combine, for ease of analysis. First, the commission objects to the magistrate's reliance upon *Ohio Adm.Code 4121-3-34(D)(1)(d)*, which concerns adjudication of applications for PTD. We agree that there is no authority for the proposition that the foregoing administrative code provision is applicable to adjudications of requests for TTD. Accordingly, this objection is sustained.

[*P12] Next, the commission argues that this case should have been dismissed for failure to bring the action in the name of the state. However, the commission failed to raise this issue in its answer, brief, or at any other time. We decline to address it now, particularly because the commission has been on notice as to the nature of this action since it was served with the "Complaint for Writ of Mandamus," and it has suffered no prejudice from relator's failure to properly caption its complaint. For these reasons, we overrule this objection.

[*P13] Finally, the commission objects to [**9] the magistrate's conclusion that its order is unsupported by "some evidence" because the SHO relied upon the claimant's testimony to conclude that his motivation for abandoning his job was related to his industrial injury, and that his departure was, therefore, involuntary. The commission maintains that there is no support in the law for this conclusion. The commission also argues that the medical evidence, including the presence of the disc ex-

trusion now recognized in the claim, and reports of consistent severe pain, corroborate the claimant's testimony by revealing that his injury was clearly more severe than it appeared to be on the date of injury. The commission argues that there is no requirement that the SHO mention the corroborative aspects of the medical evidence, when the SHO specifically states that he relied upon the C-84s and the claimant's testimony. We agree and sustain the remaining objections on that basis.

[*P14] "[T]emporary total disability is defined as a disability which prevents a worker from returning to his former position of employment." *State ex rel. Ramirez v. Indus. Comm. (1982)*, 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586, syllabus. "A worker is prevented [**10] 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." *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm. (1985)*, 29 Ohio App.3d 145, 29 OBR 162, 504 N.E.2d 451, syllabus.

[*P15] Thus, "[a] claimant's separation from employment is classified as either voluntary or involuntary. * * * The latter includes an injury-induced departure and does not affect TT[D] eligibility." *State ex rel. Wiley v. Whirlpool Corp.*, 100 Ohio St.3d 110, 2003 Ohio 5100, 796 N.E.2d 925, P14. However, "a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. * * * This broader focus takes into consideration a claimant's physical condition. [**11] It recognizes the inevitability that some claimants will never be medically able to return to their former positions of employment, and thus dispenses with the necessity of a claimant's remaining on the company roster in order to maintain temporary total benefit eligibility." *State ex rel. Rockwell Internatl. v. Indus. Comm. (1988)*, 40 Ohio St.3d 44, 46, 531 N.E.2d 678.

[*P16] Moreover, "[t]he voluntary nature of [the claimant's] abandonment is a factual question which revolves around [the claimant's] intent at the time he retired. The Supreme Court of Ohio has directed: 'All relevant circumstances existing at the time of the alleged abandonment should be considered. * * * The presence of such intent, being a factual question, is a determination for the commission.'" *State ex rel. Williams v. Coca-Cola Ent., Franklin App. No. 04AP-270, 2005 Ohio 5085*, P9, quoting *State ex rel. Diversitech Gen. Plastic*

Film Div. v. Indus. Comm. (1989), 45 Ohio St.3d 381, 383, 544 N.E.2d 677.

[*P17] Additionally, it is well-settled that the claimant does not have a burden of disproving a voluntary abandonment of the former position of employment in order to show entitlement to TTD compensation. *State ex rel. College of Wooster v. Gee*, Franklin App. No. 03AP-389, 2004 Ohio 1898, P38, [*12] citing *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 78 Ohio St.3d 409, 1997 Ohio 9, 678 N.E.2d 565. "The burden of proof with respect to voluntary abandonment falls upon the employer * * *. The claimant's burden is to persuade the commission that there is a proximate causal relationship between his or her work-connected injuries and disability, and to produce medical evidence to this effect. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83, 1997 Ohio 71, 679 N.E.2d 706. * * * Where a claimant establishes a prima facie causal connection based upon medical evidence, the burden should then properly fall upon the employer to raise and produce evidence on its claim that other circumstances independent of the claimant's allowed conditions caused him to abandon the job market. Id."

[*P18] We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission [*13] must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury. The commission is the exclusive evaluator of weight and credibility of the evidence. *State ex rel. LTV Steel Co. v. Indus. Comm.*, 88 Ohio St.3d 284, 2000 Ohio 328, 725 N.E.2d 639. For these reasons, we sustain the commission's objections insofar as they challenge the magistrate's conclusion that the commission abused its discretion.

[*P19] Having undertaken a review of the commission's objections and relator's memorandum in opposition thereto, considered the arguments of all of the parties, and independently appraised the evidence, we sustain in part and overrule in part the commission's objections, we adopt the magistrate's findings of fact with modifications [*14] as indicated herein, we reject the magistrate's conclusions of law and substitute them with our own, and we deny the requested writ of mandamus.

Objections sustained in part and overruled in part; writ of mandamus denied.

KLATT and FRENCH, JJ., concur.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

[State ex rel.] Mid-Ohio Wood Products, Inc., Relator, v. The Industrial Commission of Ohio and David L. Franks, Respondents.

No. 07AP-478

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on January 31, 2008

Garvin & Hickey, LLC, Michael J. Hickey, Daniel M. Hall and Matthew D. Shufeldt, for relator.

Marc Dann, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Bevan & Associates, L.P.A., and *Christopher Stefancik*, for respondent David L. Franks.

IN MANDAMUS

[*P20] In this original action, relator, Mid-Ohio Wood Products, Inc. ("relator" or "Mid-Ohio"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent David L. Franks ("claimant") temporary total disability ("TTD") compensation beginning February 21, 2006, and to enter an order finding that claimant voluntarily abandoned [*15] his employment.

Findings of Fact:

[*P21] 1. On April 21, 2005, claimant sustained an industrial injury while employed as a laborer for relator, a state-fund employer. The industrial claim was initially allowed for "lumbosacral strain" and was assigned claim number 05-335727.

[*P22] 2. On the date of injury, claimant presented to a hospital emergency department. Following a medical evaluation, claimant was discharged that same day. Hospital records indicate that he was excused from

work "to 4/23/2005." He received a prescription for "Flexeril 10 mg." to be taken for muscle spasms. According to hospital records, he also received a prescription for "Vicodin" to relieve pain.

[*P23] 3. Prior to April 21, 2005, claimant had sustained an earlier industrial injury while employed with Mid-Ohio. Apparently, in that claim, claimant underwent carpal tunnel surgery prior to the April 21, 2005 industrial injury at issue here.

[*P24] 4. Claimant did not return to work at Mid-Ohio following his April 21, 2005 industrial injury.

[*P25] 5. Following his April 21, 2005 hospital discharge, claimant did not seek medical treatment until July 16, 2005, when he was initially examined by chiropractor Craig A. Dyer, D.C., who was an employee [**16] of the Mantonya Chiropractic Center. Following the July 16, 2005 examination, Dr. Dyer prepared a report, dated July 20, 2005, stating:

Mr. Franks indicated his major complaints developed as a result of a job related injury on 04/21/2005 and have persisted for 3 months. Mr. Franks is experiencing severe low back pain and radiating leg numbness. The symptoms are constant. Activities that aggravate the symptoms are bending, getting up [and] down, increased activity in general and lifting. Mr. Franks injured himself on 4/21/2005 while at work. He was moving a steel cart loaded with lumber. He was to move it by himself by leaning backwards into the cart and pushing off on the ground to get it moving. The cart weighed at least several hundred pounds to a thousand pounds when loaded. This activity was performed on a daily basis and was one of the normal duties of Mr. Franks once the cart was loaded fully. On 4/21/2005, Mr.[.] Franks was attempting to move the loaded cart when he felt a sharp pain in his lower back. He had pushed his tailbone/low back onto the cart and was pushing with his legs to move the cart when the pain began. This mechanism of injury caused a sprain/strain injury to occur [**17] because of the extreme weight and poor technique for moving the fully loaded carts. Mr. Franks indicates that this was the only way to move the fully loaded carts since this was to be done individually.

Mr. Franks left work to go to Licking Memorial Hospital for treatment of his injury. He was treated and examined at the ER at Licking Memorial Hospital. Pain medication was given to Mr. Franks for his injury. He was told to follow up with his family doctor. Later that night visible bruising appeared on his lower back where the cart made contact with his body. Mr. Franks has only been given pain medication for his condition. Temporary relief has been apparent, but the symptoms are worsening with time. No other treatment has been given or sought prior to presentation at this office. Radiating leg numbness has also become apparent in the days since his injury as well as: loss of balance, depression, and sleeping trouble. Mr. Franks sleeps only 1-2 hours at a time due to his worsening pain.

* * *

TREATMENT PLAN

Symptoms: low back pain, radiating leg numbness (diagnosis: 846.0 sprain/strain, lumbosacral)[.] During the relief care phase (acute), which will begin 7/16/2005 and last for approximately [**18] 4 weeks, the patient should be treated 12 times. Each visit will include the following treatment: spinal manipulation, ems, cryotherapy. The goals during this phase of care are to: decrease pain, decrease swelling/inflammation, decrease muscle spasm, increase range of motion, increase ability to perform activities of daily living, increase function, increase strength, increase flexibility, improve alignment. An active care program is to be implemented as soon as the swelling has reduced. Stretching exercises are to be given and performed at home to Mr. Franks in addition to the strengthening exercises. The strengthening exercises are to be performed beginning the second week of care and to be performed at this office 3X/week for two weeks beginning on the 7th treatment visit.

* * *

FINAL COMMENTS

The current prognosis for this patient is very good. In my professional opinion, the symptoms presented by Mr. Franks on

7/16/2005 are a direct result of the accident chronicled in this report.

[*P26] 6. Although claimant was treated by Dr. Dyer on several occasions after July 16, 2005, Dr. Dyer never provided a work excuse nor did he ever opine that claimant was unable to return to work.

[*P27] 7. On November [**19] 22, 2005, claimant was initially examined by Garth Bennington, M.D., for treatment purposes.

[*P28] 8. On November 30, 2005, at Dr. Bennington's request, claimant underwent an MRI of the lumbar spine. The radiologist's report of the MRI states:

L5-S1 demonstrates a broad-based central disc extrusion with some slight caudad subligamentous extension. Some generalized annulus bulging is also seen and is slightly asymmetrical with some narrowing of the neural foramen on the right compared to the left. Some lateral recess stenosis is seen however exiting nerve roots at L5-S1 show no encroachment.

[*P29] 9. On January 9, 2006, following another office visit, Dr. Bennington wrote:

* * * [Patient] has 3-4 months of low back pain. Seems to bother his hip and legs at times. Only recent injuries are [sic] include falling down steps and heavy lifting. Only specific incident was in [A]pril moving a steel cart -- 2000 lbs and went to hospital after pulling back. Sent home with muscle relaxants and pain meds. * *

[*P30] 10. On February 21, 2006, claimant returned to the Mantonya Chiropractic Center. Because Dr. Dyer was no longer employed there, claimant saw chiropractor Matthew F. Ellis, D.C. Following the February [**20] 21, 2006 examination, Dr. Ellis wrote:

TREATMENT PLAN

Symptoms: low back pain, radiating leg numbness (diagnosis: 846.0 sprain/strain, lumbosacral)[.] During the sub-acute care phase, which will begin

02/21/2006 and last for approximately 4 weeks, the patient should be treated 12 times. Each visit will include the following treatment: spinal manipulation, ems, cryotherapy. The goals during this phase of care are to: decrease pain, decrease swelling/inflammation, decrease muscle spasm, increase range of motion, increase ability to perform activities of daily living, increase function, increase strength, increase flexibility, improve alignment. Request 12 visits of physical therapy in our office to increase range of motion, decrease muscle tightness [sic] and increase endurance, at 3 times a week for 4 weeks.

[*P31] 11. On March 3, 2006, Dr. Ellis completed a C-84. The C-84 form presents the following query: "List ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response to the query, Dr. Ellis wrote: "846.0 Sprain Lumbosacral." On the C-84, Dr. Ellis certified a period of TTD beginning July 16, 2005 (the date of Dr. Dyer's initial [**21] examination) to an estimated return-to-work date of June 5, 2006. In response to the form's further query, Dr. Ellis indicated that February 28, 2006 was the date of last examination.

[*P32] 12. On May 11, 2006, claimant moved for the allowance of additional conditions in the claim.

[*P33] 13. On May 26, 2006, Dr. Ellis completed another C-84 on which he certified TTD from July 16, 2005 to an estimated return-to-work date of September 4, 2006. In response to the form's query asking for a list of the allowed conditions being treated which prevent a return to work, Dr. Ellis wrote: "846.0 Lumbosacral sprain/strain[,] 722.2 Broad-based central disc extrusion L5-S1 [.] 724.4 Radicular Syndrome of lower limbs."

[*P34] 14. On July 20, 2006, a district hearing officer ("DHO") heard claimant's motion for the allowance of additional conditions and request for TTD compensation. Following the hearing, the DHO issued separate orders. One of the orders denied the motion for the allowance of additional conditions. The other order denied the request for TTD compensation.

[*P35] 15. Claimant administratively appealed the July 20, 2006 orders of the DHO.

[*P36] 16. On September 14, 2006, a staff hearing officer ("SHO") heard the appeals [**22] from the DHO's orders of July 20, 2006. Following the hearing, the SHO issued separate orders.

[*P37] One of the orders vacated the DHO's denial of the additional claim allowance and additionally allowed the claim for "broad-based central disc extrusion L5-S1." The order further states: "The denial of the condition "RADICULAR SYNDROME LOWER LIMBS is vacated. This condition is neither granted or denied at this time but is dismissed due to the lack of EMG testing to confirm or rule out the diagnosis." (Emphasis sic.)

[*P38] The other SHO's order vacated the DHO's denial of TTD compensation. That SHO's order states:

Temporary total compensation is granted from 02/21/2006 (the date of the first treatment by Dr. Ellis) to 09/04/2006, and to continue upon submission of medical proof. Disability is based on the C-84's from Dr. Ellis (03/03/2006 and 05/26/2006) and the additional condition granted by Staff Hearing order of 09/14/2006.

Temporary total disability compensation is denied from 07/16/2005 through 02/20/2006 based on a lack of persuasive medical evidence. Dr. Ellis did not see the injured worker until 02/21/2006. Dr. Dyer saw the injured worker from 07/16/2005 through 07/30/2005 but makes no mention [**23] in his office notes or 07/20/2005 report of disability. The injured worker then saw Dr. Bennington from 11/22/2005 through 03/09/2006, yet nowhere does Dr. Bennington state the injured worker is unable to work due to the allowed injuries. In light of this history and evidence, Dr. Ellis' opinion of disability from 07/16/2005 through 02/20/2006 is not found persuasive.

The employer's argument of a voluntary abandonment is not found persuasive. The injured worker testified that he never returned to work after 04/21/2005 because he was unable to due to his injury. Leaving or quitting work due to an allowed injury is not a voluntary abandonment but an involuntary departure akin to a retirement due to an allowed injury. Further, the employer has submitted no written proof of a termination, the reasons for such a termination, or a written policy to show the employee was put on notice of the violation claimed and was aware it would lead to termination, as required by the *[State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St.3d*

401, 1995 Ohio 153, 650 N.E.2d 469] case.

[*P39] 17. The SHO's order of September 14, 2006, indicates that "Parkinson" appeared as a witness for the employer at the hearing.

[*P40] 18. The record [**24] contains a hand-written memorandum dated June 1, 2005, on Mid-Ohio stationery. The memorandum, signed by "Deanna Parkinson," states:

After being off work for 11 weeks for carpal tunnel surgery on both wrists, David Franks returned to work on 3-29-05. The 1st week he worked 32 hrs. 2nd week 8 hrs. 3rd week 14 1/2 hrs and 4th week 12 hrs.

His girlfriend came in and handed Nancy a paper from Licking Memorial Hospital stating that he had hurt his back. (Which he did not hurt here).

David's last day of work was 4-21-05. His girlfriend came in for his check. I asked what was up with David and she said "Uh - - - I think he done quit."

(Emphasis sic.)

[*P41] 19. At oral argument, this magistrate was informed by relator's counsel that the "Parkinson" who appeared as a witness at the SHO hearing was Jay Parkinson who is the brother of Deanna Parkinson.

[*P42] 20. Relator administratively appealed both SHO's orders of September 14, 2006.

[*P43] 21. On October 12, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 14, 2006, that granted the additional claim allowance.

[*P44] 22. On March 22, 2007, another SHO mailed an order refusing relator's administrative appeal from [**25] the SHO's order of September 14, 2006, that awarded TTD compensation.

[*P45] 23. Earlier, in December 2006, pursuant to R.C. 4123.512, relator appealed the SHO's refusal order of October 12, 2006 to the Licking County Court of Common Pleas. That action remains pending.

[*P46] 24. On June 7, 2007, relator, Mid-Ohio Wood Products, Inc., filed this original action.

Conclusions of Law:

[*P47] The main issue is whether the commission can exclusively rely upon claimant's testimony in determining that his post-injury failure to return to work at Mid-Ohio was injury-induced and thus involuntary under the standard set forth in *State ex rel. Rockwell Internatl. v. Indus. Comm. (1988)*, 40 Ohio St.3d 44, 531 N.E.2d 678, and its progeny.

[*P48] Finding that the claimant's testimony alone fails to constitute the some evidence needed to support the commission's determination of an injury-induced departure from employment, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

[*P49] Analysis begins with a brief review of three decisions of the Supreme Court of Ohio addressing the question of whether a claimant's retirement from his employment was voluntary or involuntary. Obviously, in the instant [**26] case, there was no retirement in the usual sense of the word. However, it is undisputed that the instant claimant quit his job by simply failing to return to his job. Clearly, the retirement cases to be addressed below set forth the standard applicable to this case.

[*P50] Before addressing the three decisions of the Supreme Court of Ohio involving retirement, the magistrate notes that there is no evidence that claimant was fired for violation of a written work rule and, thus, contrary to what might be suggested in the SHO's order of September 14, 2006, *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995)*, 72 Ohio St.3d 401, 1995 Ohio 153, 650 N.E.2d 469, and its progeny are not germane to this action.

[*P51] Specifically, what is at issue is the following portion of the SHO's order:

The employer's argument of a voluntary abandonment is not found persuasive. The injured worker testified that he never returned to work after 04/21/2005 because he was unable to due to his injury. Leaving or quitting work due to an allowed injury is not a voluntary abandonment but an involuntary departure akin to a retirement due to an allowed injury. * * *

[*P52] In *Rockwell*, the court pronounced:

Neither [*State ex rel. Ashcraft v. Indus. Comm. (1987)*, 34 Ohio St.3d 42, 517 N.E.2d 533] [**27] nor [*State ex rel.*

Jones & Laughlin Steel Corp. v. Indus. Comm. (1985), 29 Ohio App.3d 145, 29 Ohio B. 162, 504 N.E.2d 451] states that any abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. We find that a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

Id. at 46. (Emphasis sic.)

[*P53] In *Rockwell*, the claimant sustained a low back injury within the course of his employment with Rockwell International. Following receipt of TTD compensation, his attending physician, Dr. Salinas, released him to return to light duty work. Evidence from the employer as to the physical requirements of the claimant's job indicated that the claimant could not return to that job under Dr. Salinas' restrictions. [**28] When the claimant moved to reactivate his claim requesting TTD compensation, the commission awarded TTD compensation and also determined that the claimant's retirement was due to his industrial injury.

[*P54] Upholding the commission's decision on the job abandonment issue, the *Rockwell* court explained:

The determination of disputed factual situations is within the final jurisdiction of the commission, subject to correction by mandamus only upon a showing of an abuse of discretion. *State ex rel. Allied Wheel Products, Inc. v. Indus. Comm. (1956)*, 166 Ohio St. 47, 139 N.E.2d 41[.] * * * There has been no abuse of discretion, however, where the record contains some evidence to support the commission's decision. *State ex rel. Burley v. Coil Packing, Inc. (1987)*, 31 Ohio St. 3d 18, 31 Ohio B. 70, 508 N.E.2d 936[.] * * * Having defined "voluntary" retirement, we must now determine whether there is "some evidence" to support the commis-

sion's determination that appellant did not voluntarily retire.

The commission relied primarily on three pieces of evidence: (1) the statement of the plant personnel officer indicating that appellant tried to return to a job with lighter duties, but none was available; (2) appellant's ability to continue to [**29] work, following a heart-bypass operation, until his industrial injury; and (3) the May 16, 1984 report of commission specialist Dr. Rogelio Sanchez, who found it highly improbable that appellant would ever return to substantially remunerative employment. We hold the above constitutes "some evidence" supporting the commission's determination that appellant's retirement was causally related to his industrial injury and thus was not "voluntary."

Id. at 46.

[*P55] On the same day that *Rockwell* was decided, the Supreme Court of Ohio also decided *State ex rel. Scott v. Indus. Comm. (1988)*, 40 Ohio St.3d 47, 531 N.E.2d 704, a case that applied the *Rockwell* standard. In *Scott*, after noting that the determination of disputed factual situations is within the final jurisdiction of the commission, the court stated that the question before it is whether there was some evidence supporting the commission's determination that the claimant voluntarily retired.

[*P56] In *Scott*, the commission had denied TTD compensation to the claimant on grounds that he had voluntarily retired. The claimant then filed for a writ of mandamus in this court. After this court denied the writ, the claimant appealed as of right to the Supreme Court of [**30] Ohio. In affirming this court's judgment, the Supreme Court of Ohio stated:

In affirming the commission's findings herein, the appellate court emphasized three factors: (1) an apparent absence of medical treatment for appellant for eighteen months, (2) appellant's receipt of unemployment compensation benefits from June 23, 1984 through March 23, 1985, and, (3) appellant's receipt of Social Security retirement benefits. The court stated that "taken together, * * * these factors collectively constituted some evidence supporting a finding by the Industrial Commission of a voluntary retirement by relator." We agree.

Id. at 48.

[*P57] In *State ex rel. White Consolidated Industries v. Indus. Comm. (1990)*, 48 Ohio St.3d 17, 548 N.E.2d 926, the claimant sustained an industrial injury and began receiving TTD compensation. In April 1986, while still receiving TTD compensation, the claimant retired. He then asked the commission to determine whether he should receive TTD compensation subsequent to his retirement. Citing the claimant's affidavit and a report from Dr. Boumphrey, the commission ordered compensation to continue. Thereafter, the self-insured employer filed for a writ of mandamus in this court. After this court [**31] denied the writ, the employer appealed as of right to the Supreme Court of Ohio.

[*P58] In reversing this court's judgment, the Supreme Court of Ohio, in *White*, explained:

The voluntary nature of retirement is a factual question within the commission's final jurisdiction. *State ex rel. Haines v. Indus. Comm. (1972)*, 29 Ohio St. 2d 15, 278 N.E.2d 24[.] * * * So long as the commission's decision is supported by "some evidence," there has been no abuse of discretion and mandamus will not lie. *State, ex rel. Burley, v. Coil Packing, Inc. (1987)*, 31 Ohio St.3d 18, 31 Ohio B. 70, 508 N.E.2d 936[.] * * * Upon review, we find that Dr. Boumphrey's February 22, 1985 report and the claimant's affidavit are "some evidence" supporting the commission's determination that claimant's retirement was not voluntary.

Id. at 18.

[*P59] Clearly, *Rockwell*, *Scott* and *White* do not foreclose the proposition being advanced here. Moreover, in all three cases, medical evidence was viewed by the commission and the Supreme Court of Ohio as critical to the determination of whether a retirement was injury-induced.

[*P60] While TTD compensation is the issue in the instant case, the magistrate finds instructive one of the commission's guidelines for the adjudication of applications [**32] for permanent total disability ("PTD") compensation. *Ohio Adm.Code 4121-3-34(D)(1)(d)* states:

If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

[*P61] If medical evidence is essential to the consideration of whether an injured worker has voluntarily removed himself from the workforce in a PTD adjudication, it follows that medical evidence is essential to the consideration of whether a job departure is injury-induced in a TTD adjudication. See, generally, *State ex rel. Bozeman v. Unisource Corp.*, *Franklin App. No. 01AP-1484*, 2003 Ohio 747 (the commission misconstrued the PTD applicant's treatment record in determining that his retirement was voluntary).

[*P62] The question of whether a retirement or job departure is injury-induced must focus upon the claimant's motivation for leaving his job. Given the above authorities, it is clear to this magistrate [*33] that the claimant's motivation for leaving his job must be supported by medical evidence relevant to his decision to abandon the employment. It follows then that the commission must find support in the medical evidence of record if it is to rely upon the claimant's testimony that it was the industrial injury that motivated his decision to retire or to abandon his job. Under *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, 567 N.E.2d 245, the commission must also specify what medical evidence has been relied upon to support the claimant's testimony along with a brief explanation of its reasoning.

[*P63] This magistrate disagrees with relator's contention that the commission cannot find claimant's job departure to be injury-induced in the absence of a medical opinion that he was unable to return to his former position of employment after his work excuse expired on April 22, 2005. Relator's reliance upon *State ex rel. Earls v. Indus. Comm.*, 97 Ohio St.3d 264, 2002 Ohio 6320, 779 N.E.2d 212, is misplaced.

[*P64] In *Earls*, the court reiterated well-established law when it stated that a key requirement of TTD eligibility is "the presence of medical evidence substantiating a causal relationship between the allowed conditions [*34] and the alleged inability to return to the relevant position of employment." *Id.* at P8.

[*P65] Citing the above-quoted pronouncement by the *Earls* court, relator asserts that "[t]he same stand-

ard should apply to the question of whether Franks voluntarily abandoned his employment." (Reply brief at 4.) The magistrate disagrees with relator's assertion.

[*P66] A distinction needs to be made between those cases that have decided what constitutes some evidence to support a finding that a claimant is totally disabled by an allowed condition and those cases that have decided what constitutes some evidence to support a determination of whether a retirement or job departure is injury-induced.

[*P67] As previously noted, on the issue of job abandonment, the focus is upon the claimant's motivation for his job departure. It is certainly conceivable that a claimant's job departure might not immediately generate a doctor's opinion of disability yet the claimant is induced by the injury to depart from his employment. That is, an injury-induced job departure is not necessarily equatable to an inability to perform the job at the time of the departure.

[*P68] Here, the record shows that in April 2005, claimant was told at the time [*35] of his hospital evaluation that he had sustained a lumbosacral sprain that would be expected to heal within a brief period of time. Yet, according to Dr. Dyer's report, claimant's back pain persisted to such an extent that he sought additional medical treatment from Dr. Dyer on July 16, 2005, some three months after the date of injury. Not until the results of the November 30, 2005 MRI were reported was it clear that claimant had sustained a much more serious injury than originally believed.

[*P69] The point of this brief analysis of the medical evidence is to indicate that, contrary to relator's assertion, the record does contain medical evidence that the commission could conceivably rely upon to support claimant's testimony. That the commission abused its discretion does not compel a full writ of mandamus ordering the commission to enter a finding of a voluntary abandonment of employment as relator claims here.

[*P70] Citing *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 1998 Ohio 366, 694 N.E.2d 459, the commission claims that this mandamus action is not ripe for judicial review because relator is pursuing an *R.C. 4123.512* appeal to a common pleas court. The commission's reliance upon *Elyria Foundry* [*36] is misplaced.

[*P71] In *Elyria Foundry*, the employer, pursuant to *R.C. 4123.512*, appealed the allowance of the claim to the Lorain County Court of Common Pleas. The claim had been only allowed by the commission for silicosis and it was this claim allowance that the employer challenged in the common pleas court. During the pendency of the common pleas court action, the employer initiated

a mandamus action challenging the commission's award of TTD compensation. Noting that the allowance of the entire claim was in dispute in the common pleas court, the *Elyria Foundry* court held that the mandamus action was not ripe for review.

[*P72] Here, the claim was initially allowed for "lumbosacral strain" and then subsequently allowed for "broad-based central disc extrusion L5-S1." Relator's *R.C. 4123.512* action in the common pleas court does not challenge the "lumbosacral strain" which is the sole basis for Dr. Ellis' certification of TTD in his March 3, 2006 C-84. The SHO, in his September 14, 2006 order, awarded TTD compensation beginning February 21, 2006 based upon two C-84s from Dr. Ellis dated March 3 and May 26, 2006. Thus, even if relator were to succeed in its common pleas court action, Dr. Ellis' [*37] March 3, 2006 certification of TTD based solely upon the lumbosacral strain would not be eliminated from evidentiary consideration. While Dr. Ellis' May 26, 2006 C-84 would be eliminated from evidentiary consideration if the subsequent claim allowance were successfully challenged in the common pleas court, that would not undermine the TTD award based upon Dr. Ellis' March 3, 2006 C-84.

[*P73] Given the above analysis explaining the critical difference between *Elyria Foundry* and the instant case, it is clear that this mandamus action is not barred by the ripeness doctrine set forth in *Elyria Foundry*.

[*P74] Citing *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 1997 Ohio 71, 679 N.E.2d 706, the commission claims here that relator failed to raise administratively the defense of a voluntary abandonment of employment. The commission's claim lacks merit. The SHO's order of September 14, 2006 addresses "[t]he employer's argument of a voluntary abandonment" even though that argument is not specifi-

cally set forth in the order. Thus, the SHO's order itself contradicts the commission's position here.

[*P75] The magistrate also disagrees with the commission's suggestion that its abuse of discretion, as explained above, does [*38] not require a writ of mandamus because allegedly relator failed to administratively present a prima facie case for a voluntary abandonment. Contrary to the commission's suggestion, relator's claim of a voluntary abandonment does not rest solely upon the reported remarks of his girlfriend as indicated in the June 1, 2005 handwritten memorandum.

[*P76] Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order finding that claimant's job departure was injury-induced and, in a manner consistent with this magistrate's decision, enter a new order determining whether the job departure was injury-induced.

/s/ KENNETH W. MACKE

KENNETH W. MACKE

MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Civ.R. 53(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Civ.R. 53(D)(3)(b)*.