**[Cite as *State ex rel. Lackey v. Indus. Comm.*, 2009-Ohio-4208.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Juan L. Lackey, | : | |
| Relator, | : | |
| v. | : | No. 08AP-262 |
| Industrial Commission of Ohio and Penske Truck Leasing Co. LLP, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

D E C I S I O N

Rendered on August 20, 2009

*Thomas W. Condit*, for relator.

*Richard Cordray*, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

*Schottenstein, Zox & Dunn, Robert M. Robenalt* and *William J. McDonald*, for respondent Penske Truck Leasing Co., LLP.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

**{¶1}** Relator, Juan L. Lackey, commenced this original action requesting a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to

vacate its order denying his motion for temporary total disability ("TTD") compensation, and to enter an order granting the motion.

**{¶2}** This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate has rendered a decision, including findings of fact and conclusions of law, which is appended to this decision. In the decision, the magistrate recommended that this court deny relator's request for a writ.

**{¶3}** Relator has filed timely objections to the magistrate's decision. Respondent, Penske Truck Leasing Co., LLP ("employer"), and the commission filed memoranda supporting the magistrate's decision.

**{¶4}** In his objections, relator essentially presents the same arguments previously raised before and addressed by the magistrate. Specifically, relator argues that the record does not support a finding of a voluntary and permanent retirement. Further, relator argues that a claimant should not be required to ensure that there is contemporaneous medical evidence documenting the causal relationship between an injury and a retirement.

**{¶5}** Regarding these arguments, the magistrate held that the commission properly considered the retirement document, the absence of contemporaneous medical evidence documenting the causal relationship between relator's injury and his retirement, the admitted absence of a post-retirement job search, and relator's testimony during the proceedings. See *State ex rel. Ashcraft v. Indus. Comm*. (1987), 34 Ohio St.3d 42; *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44; *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381; *State ex*

*rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. After considering these factors, the magistrate held that there was some evidence in the record supporting the factual findings of the district hearing officer and staff hearing officer. As a result, the magistrate held that the commission acted within its discretion when it determined relator's intent to leave his position and the workforce. Accordingly, the magistrate recommended we deny relator's request for a writ.

**{¶6}** After an examination of the magistrate's decision, as well as an independent review of the record, we find that the magistrate sufficiently discussed and determined the issues raised by relator. We therefore overrule relator's objections to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. As a result, we deny relator's request for a writ of mandamus.

*Objections overruled; writ denied.*

FRENCH, P.J., and SADLER, J., concur.

# A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Juan L. Lackey, | : | |
| Relator, | : | |
| v. | : | No. 08AP-262 |
| Industrial Commission of Ohio and Penske Truck Leasing Co. LLP, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

---

M A G I S T R A T E ' S D E C I S I O N

Rendered February 23, 2009

---

*Thomas W. Condit*, for relator.

*Richard Cordray*, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

*Schottenstein, Zox & Dunn, Robert M. Robenalt* and *William J. McDonald*, for respondent Penske Truck Leasing Co., LLP.

---

IN MANDAMUS

**{¶7}** In this original action, relator, Juan L. Lackey, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his motion for temporary total disability ("TTD") compensation beginning

November 16, 2005 on grounds that he voluntarily abandoned his employment, and to enter an order granting the motion.

Findings of Fact:

**{¶8}** 1. On June 5, 2001, relator injured his left knee while employed as a truck driver for respondent Penske Truck Leasing Co., LLP ("Penske"), a self-insured employer under Ohio's workers' compensation laws. On that date, relator twisted his left knee while climbing down from a truck. Penske initially certified the claim (No. 01-828193) for "left knee strain."

**{¶9}** 2. On March 3, 2003, relator moved for additional allowances in the claim. Following an April 30, 2003 hearing, a district hearing officer ("DHO") issued an order additionally allowing the claim for "medial meniscus tear, left knee [and] patellofemoral syndrome, left knee." Apparently, the DHO's order of April 30, 2003 was not administratively appealed.

**{¶10}** 3. On June 25, 2003, relator underwent left knee surgery. The procedure is described in the June 25, 2003 operative report of James T. Bilbo, M.D.:

> * * * EUA, arthroscopy, partial medial meniscectomy with chondroplasty medial femoral condylar articular surface left knee.
>
> * * * Partial lateral meniscectomy left knee.
>
> * * * Chondroplasty patellar articular surface left knee. * * *

**{¶11}** 4. On July 21, 2004, Dr. Bilbo wrote:

> I do feel that Mr. Lackey had degenerative changes and chondromalacia of his knee that preexisted the 6/5/01 industrial injury; however, based on his history of no problems or symptoms prior to the industrial injury, it is my opinion within reasonable certainty that these conditions were dormant and nondisabiling until aroused by the 6/5/01

> injury. Since there is a possibility that these conditions could progress as a result of the knee injury and subsequent surgery, I recommend proceeding with getting his claim amended to include these conditions.

**{¶12}** 5. On July 27, 2004, citing Dr. Bilbo's July 21, 2004 report, relator, through counsel, moved for additional claim allowances.

**{¶13}** 6. On July 27, 2004, relator signed a document captioned "Western Conference of Teamsters Pension Trust[,] Certification of Complete Severance and Termination of Employment" ("Teamsters Pension Certification"). On the form, relator listed October 31, 2004 as his last day of work and the actual termination date for his employment with Penske.

**{¶14}** Immediately above relator's signature, the pre-printed form states:

> I DO HEREBY CERTIFY UNDER PENALTY OF PERJURY THAT BEFORE MY PENSION EFFECTIVE DATE:
>
> - I have or will have stopped all work (whether or not as a Teamster) with the employer listed above; and
> - I have or will have completely severed and terminated my employment relationship with the employer listed above; and
> - I do not currently intend to return to work for the employer listed above in any capacity.

(Emphasis sic.)

**{¶15}** The form required that Penske complete the bottom portion. A Penske representative signed the form on July 28, 2004. Penske also listed October 31, 2004 as the employment termination date.

**{¶16}** 7. By letter dated August 31, 2004, relator's counsel informed Penske's third-party administrator ("TPA") Gallagher Bassett Services, Inc. ("Gallagher Bassett"):

> After having a long discussion with Mr. Lackey this weekend, I am writing to address an important issue that may govern

> future benefits in this claim. Specifically, Mr. Lackey has applied for retirement, to be effective October 31, 2004, based upon his 27 years with the Teamsters Union. Mr. Lackey's decision to retire at this time is driven primarily by the increasing severity of his left knee pain. Mr. Lackey specifically stated to me that in the absence of this knee injury he would likely continue driving until he reached a 30 year retirement.
>
> Mr. Lackey is likely to seek some form of light duty employment after his retirement from the Teamsters Union consistent with his physical limitations. Mr. Lackey does not want his premature retirement to be construed as a "voluntary" exit from the work force at age 59.

**{¶17}** 8. Following a December 14, 2004 hearing, a staff hearing officer ("SHO") granted relator's July 27, 2004 motion to the extent that the claim was additionally allowed for "aggravation of pre-existing degenerative changes of the left knee and aggravation of pre-existing grade III chondromalacia of the left knee."

**{¶18}** 9. On October 18, 2005, Dr. Bilbo completed a C-9 requesting authorization for further left knee surgery. On October 21, 2005, Penske's TPA, Gallagher Bassett, approved the C-9 request.

**{¶19}** 10. On November 16, 2005, relator underwent left knee surgery performed by Forest T. Heis, M.D. According to the November 16, 2005 operative report of Dr. Heis, the following procedure was performed:

> * * * Left knee arthroscopic partial medial and lateral menis-cectomies.
>
> * * * Left knee arthroscopic debridement and chondroplasty of the patella and 5 x 5 mm loose body removal from the suprapatellar pouch (separate compartment).

**{¶20}** 11. On December 27, 2005, Dr. Heis completed a C-84 certifying TTD from November 16, 2005 to an estimated return-to-work date of March 27, 2006.

**{¶21}** 12. On December 28, 2005, citing the operative report and C-84 from Dr. Heis, relator, through counsel, moved for TTD compensation beginning November 16, 2005.

**{¶22}** 13. Genex Services, Inc. ("Genex") is the medical care organization involving relator's industrial claim. In a report dated January 19, 2006 to Gallagher Bassett, a Genex case manager wrote that, as of January 11, 2006, "claimant wants to return to work." It is further written that on January 13, 2006:

> Met with the claimant and his wife prior to the appointment with Dr. Heist [sic]. I then attended the visit with Dr. Heist [sic]. Dr. Heist [sic] stated the claimant was not yet at [maximum medical improvement]. The claimant stated that he is not pleased with the surgical results. He expected better pain relief. He brought up the possibility of a total knee replacement. He states he wants to return to work, he wants to be pain free and have the strength and range of motion to return to work. Dr. Heist [sic] and I explained that he may not be able to do that and because he is retired, Penske is not responsible for returning him to work. Dr. Heist [sic] suggested a rest from physical therapy and the introduction of a Neoprene knee sleeve. The claimant is scheduled to return to Dr. Heist [sic] on 02/10/2006.

**{¶23}** 14. On February 10, 2006, a DHO heard relator's December 28, 2005 motion for TTD compensation. Following the hearing, which was not recorded, the DHO issued an order denying the motion:

> The injured worker's motion requesting Temporary Total Disability Compensation for the period of 11/16/2005 to the present and continuing is denied.
>
> The District Hearing Officer finds that the injured worker voluntarily retired from his former position of employment on 10/31/2004 based on the retirement form signed by the injured worker on file.
>
> The District Hearing Officer further finds that this retirement constitutes a voluntary abandonment of employment.

> The District Hearing Officer finds that the injured worker took a full retirement and not a disability retirement. Further, the District Hearing Officer finds that there is no medical evidence indicating that the injured worker's retirement was in anyway related to the industrial accident of 06/05/2001.
> All evidence on file was reviewed.
>
> This order is based on the injured worker's retirement form dated 07/27/2004.

**{¶24}** 15. Relator administratively appealed the DHO's order of February 10, 2006.

**{¶25}** 16. Following a March 13, 2006 hearing, an SHO issued an order affirming the DHO's order. The SHO's order explains:

> The Staff Hearing Officer finds that the injured worker applied for retirement through his union based on 27 years of employment effective 10/31/2004. The injured worker testified at hearing that he has not sought employment since his retirement and would be penalized financially should he become re-employed through a reduction of retirement benefits.
>
> The Staff Hearing Officer finds that the injured worker's retirement effective 10/31/2004 was a voluntary retirement and the injured worker has no intention of returning to employment based on his retirement. The Staff Hearing Officer finds that such voluntary retirement makes the injured worker ineligible to receive the payment of temporary total disability compensation in this claim. Accordingly, the injured worker's request for the payment of temporary total disability compensation from 11/16/2005 through the present time and continuing is denied.
>
> This order is based on the retirement paperwork contained in the claim file and the injured worker's testimony at hearing.

**{¶26}** 17. Relator filed an administrative appeal from the SHO's order of March 13, 2006. In support of his appeal, relator submitted his affidavit executed April 3, 2006:

* * * I am the injured worker in Ohio BWC Claim No. 01-828193 based upon an injury that I sustained on June 5, 2001 while I was employed by Penske Truck Leasing ("Penske"). I am providing this affidavit in support of my motion for payment of temporary total disability (TTD), and specifically to rebut the previous findings by Commission hearing officers that I had voluntarily retired from my position with Penske and the Teamsters Union in 2004.

* * * I was a full-time member of the Teamsters Union from 1979 until my retirement in 2004. I was employed by Penske, or a company later purchased by Penske, from approximately 1991 until my retirement in 2004.

* * * My left knee was healthy prior to my June 5, 2001 injury. In fact, in November 2000 I passed a physical exam that was conducted at the Ohio Military Induction Center as a requirement to my application to transfer to the Army Reserves. I had served in the Naval Reserves since 1978.

* * * My industrial claim was originally recognized only for a left knee strain. However, my knee did not heal over time and in fact became progressively worse. After I retained an attorney to represent me, I managed to win a hearing on April 30, 2003 that amended this claim to include "medial meniscus tear" and "patellofemoral syndrome."

* * * I had surgery for the newly allowed conditions on June 24, 2003 and was off work until August 2003.

* * * I returned to work and continued driving into the year 2004 but my left knee continued to be a problem. I had difficulty getting in and out of my truck and difficulty operating the clutch. In fact, when I was stopped in traffic I would often shift into neutral gear to relieve my left knee from the stress of holding the clutch down. When my terminal manager learned of this practice, he told me that it was possibly a safety hazard.

* * * Additional conditions were diagnosed in my left knee but they were again contested by Penske. My doctor suggested that another surgery may be necessary but I had no way of knowing when that might be approved. I filed a motion to amend this claim again on July 27, 2004, this time to include conditions diagnosed as "degenerative conditions" and

"Grade III Chondromalacia" of the left knee. Penske opposed the amendment.

* * * Meanwhile, it had been frustrating all along that there was poor communication between my doctor's office (Dr. Bilbo & Dr. Heis) and Penske's representative (Gallagher Bassett). Dr. Bilbo's office often would tell me that Penske was not responding to requests for authorization of care, while Gallagher Bassett (according to my attorney) would deny having received such requests. I cannot say who was to blame for that problem, but there seemed to be long periods of time when nothing was accomplished.

* * * During the summer of 2004, I made the decision to retire early (effective October 31, 2004) rather than to continue functioning in such pain and operating my truck in an unsafe manner. However, my attorney informed me that there were important legal ramification[s] to taking an early retirement and I confirmed to him that I was retiring early only because of my knee injury and that I would have kept working toward a 30-year retirement were it not for my knee injury. My attorney informed me that he would write a letter to Penske's representative confirming that I was retiring early only because of me knee injury.

* * * My retirement took effect on October 31, 2004, while the motion to amend my claim was still pending.

* * * On 11/4/04 and 12/14/04, respectively, a Commission District Hearing Officer and a Commission Staff Hearing Officer granted the motion to amend my claim to include "aggravation of pre-existing degenerative changes of the left knee and aggravation of pre-existing Grade III Chondromalacia of the left knee."

* * * For reasons not clear to me, it again took a long time for surgery to be approved. I finally had surgery on November 16, 2005, and my claim for TTD begins from that date forward. In spite of my diligent efforts, my post-surgery rehabilitation has not gone well. Dr. Heis is now requesting a total knee replacement. Penske has put that request on hold pending additional medical review. I have no idea when that issue will be resolved.

* * * During the 12+ months from my 10/31/04 retirement date until my 11/16/05 surgery, I did not seek employment

> because my knee pain was getting worse and I saw no point is [sic] seeking employment with that disability and when I might be approved for surgery at any time.
>
> * * * The Staff Hearing Officer's (SHO) decision from the 3/13/06 hearing ignored or mischaracterized important evidence relating to why I retired:
>
> a. Attached hereto as Exhibit A and incorporated herein fully by reference is a copy of my attorney's August 31, 2004 letter to Gallager Bassett giving advance notice to Penske and the BWC of the reasons for my early retirement. This letter was presented and argued to the SHO at the March 13, 2006 hearing, yet it was not even mentioned as a factor in the SHO decision.
>
> b. The SHO also ignored the evidence that I still want to return to work in some capacity. For example, my desire to work is specifically referenced in multiple Medical Case Management (MCM) reports filed by Genex, whose vocational rehabilitation specialist has been intimately involved in my post-surgery rehabilitation. A copy of the initial MCM report (one day post-surgery) is attached hereto as Exhibit B and incorporated herein fully by reference, and accurately notes (bottom p. 3) that "he would like to return to gainful employment." Subsequent MCM reports also record my desire to return to work in some capacity.
>
> c. The SHO comments about the reduction of my retirement benefits is misleading because my benefits would only be affected if I accept a Teamster related position. My retirement benefits will not be affected, however, if I can obtain other kinds of work, which I still hope to do if my knee injury allows it. Having been forced into an early retirement by my injury, I have no intention of violating my retirement plan.

**{¶27}** 18. On April 11, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of March 13, 2006.

**{¶28}** 19. On April 11, 2007, relator, through counsel, moved that the commission exercise R.C. 4123.52 continuing jurisdiction over its SHO's order of March 13, 2006.

Relator asserted that the commission had reached "the factually and legally erroneous conclusion that [injured worker] had 'voluntarily retired.' "

**{¶29}** 20. In support of his April 11, 2007 motion, relator submitted a May 15, 2006 operative report from Dr. Heis describing a "[l]eft total knee arthroplasty" performed on May 15, 2006.

**{¶30}** 21. In further support of his April 11, 2007 motion for the exercise of continuing jurisdiction, relator submitted C-84s from Dr. Heis dated March 20 and June 6, 2006 and January 29, 2007. Together, the C-84s certify TTD from November 16, 2005 to an estimated return-to-work date of May 7, 2007.

**{¶31}** 22. In further support of his April 11, 2007 motion, relator submitted a series of office notes from Dr. Heis beginning May 25 through December 15, 2006. The office note dated May 25, 2006 reads:

> * * * He returns today for his first postoperative visit after his total knee arthroplasty. He is doing very well and has no complaints. He notes that all of the pain that he was having preoperatively is completely gone. * * *

The office note of December 15, 2006 reads:

> * * * He is doing well, his examination is unchanged. The FCE [functional capacities evaluation] put a lifting limit on him for 50 pounds and that seems about appropriate where he is now. He still has about another five or six months until he is a year out. I am going to follow the recommendations of the FCE, have him continue with an independent exercise program. I will allow him to return to work, with some restrictions[.] * * *

**{¶32}** 23. In his April 11, 2007 motion for the exercise of continuing jurisdiction, relator also requested that the commission "alternatively" pay TTD compensation beginning May 15, 2006, the date of the total knee replacement.

**{¶33}** 24. Following a May 21, 2007 hearing, an SHO issued an order denying relator's April 11, 2007 motion:

> The injured worker's motion requests that the Industrial Commission exercise its continuing jurisdiction to correct an alleged mistake of fact in the Industrial Commission order dated 03/13/2006. The alleged mistake of fact is that the order indicates that the injured worker voluntarily retired from employment. Because of this finding, the injured worker has subsequently been denied temporary total disability compensation.
>
> The Staff Hearing Officer finds those situations in which it is appropriate to exercise continuing jurisdiction are few. The Staff Hearing Officer finds that it is appropriate to exercise continuing jurisdiction to correct an obvious mistake of law or fact, in the presence of fraud or in the presence of newly discovered evidence which could not have been discovered previously with the exercise of due diligence.
>
> The Staff Hearing Officer finds that none of the circumstances exist. The injured worker argues that there is a mistake of fact. The Staff Hearing Officer finds that the appropriate manner for challenging the mistake in question is through appeals in the administrative process, or if necessary, in the courts.

**{¶34}** 25. On August 3, 2007, the three-member commission, one member dissenting, denied relator's request for reconsideration of the SHO's order of May 21, 2007.

**{¶35}** 26. On April 1, 2008, relator, Juan L. Lackey, filed this mandamus action.

Conclusions of Law:

**{¶36}** Two issues are presented: (1) did the commission abuse its discretion in determining that relator voluntarily abandoned his employment with Penske, and (2) did the commission abuse its discretion in denying relator's motion for the exercise of continuing jurisdiction?

**{¶37}** The magistrate finds: (1) the commission did not abuse its discretion in determining that relator had voluntarily abandoned his employment with Penske, and (2) the commission did not abuse its discretion in denying relator's motion for the exercise of continuing jurisdiction.

**{¶38}** Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

**{¶39}** Analysis begins with the observation that the SHO's order of March 13, 2006 affirms the DHO's order of February 10, 2006.

**{¶40}** The DHO's order concludes that the retirement constitutes a voluntary abandonment of employment. To support the conclusion, the DHO identified two findings: (1) that relator took a "full retirement and not a disability retirement," and (2) there is "no medical evidence" indicating that the retirement was related to the industrial injury.

**{¶41}** In affirming the DHO's order, the SHO states reliance on relator's hearing testimony which the SHO summarizes in the order. According to the SHO, relator testified that he has not sought employment since his retirement and that his retirement benefits would be reduced should he become reemployed. Based upon the summarized hearing testimony, the SHO concludes that relator has no intention of returning to employment.

**{¶42}** The record before this court supports all the factual findings of the DHO and the SHO. That is, there is some evidence to support the factual findings. Moreover, together, the factual findings support the ultimate conclusion of the SHO that the

retirement constitutes a voluntary abandonment of employment that renders relator ineligible for TTD compensation.

**{¶43}** Historically, this court first held that, 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 TTD benefits since it is his own action, rather than the industrial injury, which prevents his returning to his former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. The *Jones & Laughlin* rationale was adopted by the Supreme Court of Ohio in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, wherein the court recognized a "two-part test" to determine whether an injury qualified for TTD compensation. *Ashcraft* at 44. The first part of the test focuses upon the disabling aspects of the injury whereas the latter part determines if there are any other factors, other than the injury, which prevent the claimant from returning to his former position of employment. Id.

**{¶44}** In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary.

**{¶45}** In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, the court held that a claimant's acceptance of a light-duty job did not constitute an abandonment of his former position of employment. The *Diversitech Gen.* court stated, at 383:

> * * * The question of abandonment is "primarily * * * [one] of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts. * * * All relevant circum-

> stances existing at the time of the alleged abandonment should be considered." * * *

**{¶46}** An injured worker who has voluntarily abandoned his employment may thereafter reinstate his TTD entitlement. *State ex rel. McCoy v. Dedicated Transport, Inc*., 97 Ohio St.3d 25, 2002-Ohio-5305. The syllabus of *McCoy* states:

> A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

**{¶47}** In *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, the court clarified its holding in *McCoy*. In *Jennings*, the court reemphasized that a claimant who has abandoned his or her former job does not reestablish TTD eligibility unless the claimant secures another job and was removed from subsequent employment by the industrial injury.

**{¶48}** Recently, the Supreme Court of Ohio decided *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, a case that is instructive here.

**{¶49}** Richard Pierron was seriously injured in 1973 while working as a telephone lineman for Sprint/United Telephone Company ("Sprint/United"). Thereafter, Sprint/United offered him a light-duty warehouse job consistent with his medical restrictions, and he continued to work in that position for the next 23 years.

**{¶50}** In 1997, Sprint/United informed Pierron that his light-duty position was being eliminated. Sprint/United did not offer him an alternative position, but gave him the option to retire or be laid off. Pierron chose retirement.

**{¶51}** In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, he moved for TTD compensation beginning June 2001. The commission denied the motion finding that Pierron had voluntarily abandoned his former position of employment. In its decision, the commission wrote:

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

Industrial Commission decision, quoted in *Pierron*, at ¶6.

**{¶52}** Holding that the commission did not abuse its discretion in denying Pierron TTD compensation, the *Pierron* court explains:

> We are confronted with this situation in the case before us. The commission found that after Pierron's separation from Sprint/United, his actions-or more accurately inaction-in the months and years that followed evinced an intent to leave the work force. This determination was within the commission's discretion. Abandonment of employment is largely a question "of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts." *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383, 544 N.E.2d 677, quoting *State ex rel. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 414 N.E.2d 1044. In this case, the lack of evidence of a search for employment in the years following Pierron's departure from Sprint/United supports the commission's decision.

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

Id. at ¶10-11.

**{¶53}** As previously noted, the DHO's order of February 10, 2006 presents two findings: (1) that relator took a "full retirement and not a disability retirement," and (2) that there is "no medical evidence" indicating that the retirement was related to the industrial injury.

**{¶54}** Given that the issue before the commission was whether the retirement was injury-induced under *Rockwell Internatl.*, medical evidence contemporaneous with the decision to retire would be highly relevant to the commission's determination. See, also, *State ex rel. Scott v. Indus. Comm.* (1988), 40 Ohio St.3d 47 (an absence of medical treatment for an 18-month period was relevant); *State ex rel. White Consolidated Industries v. Indus. Comm.* (1990), 48 Ohio St.3d 17 (a report from a Dr. Boumphrey was some evidence supporting an involuntary retirement).

**{¶55}** As Penske correctly points out here, there is a lack of medical evidence contemporaneous with the retirement to show that the retirement was injury-induced.

There are no C-84s or other medical records showing that relator became disabled while employed with Penske, or that he was having difficulty working. Moreover, relator's request for knee surgery was submitted October 18, 2005, over one year after the effective date of his retirement. (Penske's brief, at 8.)

**{¶56}** Dr. Bilbo's July 21, 2004 report pre-dates relator's signing of the Teamsters Pension Certification by six days. While Dr. Bilbo's July 21, 2004 report is contemporaneous with relator's decision to retire, it contains no medical evidence indicating that the knee injury is causing relator any problems at work. The report simply states that the degenerative changes and chondromalacia of the knee "could progress" and that the claim should be amended to include those conditions. Clearly, the commission was not required to read into Dr. Bilbo's July 21, 2004 report something that is not there.

**{¶57}** Relator seems to suggest that counsel's August 31, 2004 letter to Gallagher Bassett must be viewed as medical evidence showing that the retirement was injury-induced. Clearly, statements of counsel are not medical evidence. Moreover, counsel's reporting of what relator stated to counsel to be the situation with his knee is not medical evidence supporting an injury-induced retirement. Even if relator's statement to his counsel that his decision to retire was "driven primarily by the increasing severity of his left knee pain" can be viewed as evidence, it is clearly not evidence from a medical expert as to relator's condition at or near the time of the decision to retire. Thus, it can be said that counsel's August 31, 2004 letter is not medical evidence supporting an injury-induced retirement.

**{¶58}** Given the above analysis, it is clear that the finding in the DHO's order of February 10, 2006, that "there is no medical evidence indicating that the injured worker's retirement was in anyway related to the industrial accident" accurately describes the record before this court. This finding alone could have been dispositive of the commission's determination that the retirement was not injury-induced. The finding of no medical evidence indicating that the retirement was injury-induced is clearly some evidence that the retirement was voluntary.

**{¶59}** As previously noted, the DHO's order of February 10, 2006 finds that relator took a "full retirement and not a disability retirement." Referring to the Teamsters Pension Certification executed by relator on July 27, 2004, relator argues that, "there is no factual basis for construing that document as evidence that Mr. Lackey intended to permanently retiring [sic] from the workforce." (Relator's brief, at 8.)

**{¶60}** Clearly, the type of retirement taken can be considered by the commission in reaching a decision as to whether the retirement is voluntary. See *State ex rel. McAtee v. Indus. Comm*. (1996), 76 Ohio St.3d 648; *State ex rel. Kinnear Div., Harsco Corp. v. Indus. Comm.* (1997), 77 Ohio St.3d 258, 264.

**{¶61}** There is no real dispute here that relator did not take a disability retirement through the Teamsters Pension Trust. However, we do not know whether a disability retirement was even an option under the Teamsters plan. The record is silent on that. Therefore, the document alone cannot be dispositive of the question of whether the retirement was injury-induced. See *Kinnear Div.* However, the document need not be dispositive for the commission to state reliance upon it for support of its decision. *State*

*ex rel. Wiley v. Whirlpool Corp*., Franklin App. No. 02AP-340, 2002-Ohio-6558, at ¶10, affirmed 100 Ohio St.3d 110, 2003-Ohio-5100.

**{¶62}** Given the above analysis, the DHO's order of February 10, 2006, as administratively affirmed, presents a valid reason supported by some evidence to support the commission's ultimate determination that the retirement was voluntary. Nevertheless, the magistrate will next analyze the SHO's order of March 13, 2006.

**{¶63}** As previously noted, the SHO's order of March 13, 2006 states reliance on relator's hearing testimony which the SHO summarizes. According to the SHO, relator testified that he has not sought employment since his retirement and that his retirement benefits would be reduced should he become reemployed. The SHO concluded that relator has no intention of returning to employment.

**{¶64}** According to relator, what he "did *after* his retirement is quite irrelevant to the analysis of **why** he retired." (Emphases sic; relator's brief, at 7.) Relator is incorrect to suggest that his failure to seek other employment following his retirement was irrelevant to the commission's inquiry. *Pierron*. What relator did or did not do after departing employment at Penske in October 2004 was, indeed, highly relevant to the commission's inquiry as to whether the retirement was voluntary or involuntary. Id.

**{¶65}** The commission's reliance upon relator's testimony that he had not sought employment since his retirement was not an abuse of discretion. Moreover, the testimony further supports the decision of the DHO which was administratively affirmed.

**{¶66}** Here, relator relies heavily upon his affidavit executed after the issuance of the SHO's order of March 13, 2006. As previously noted, the commission, through its SHO's order of April 11, 2006, refused to accept relator's administrative appeal from the

SHO's order of March 13, 2006. Thus, relator's affidavit was not timely submitted as evidence to be considered by either the DHO or SHO. Moreover, it was entirely within the commission's discretion to refuse the appeal.

**{¶67}** Because the hearings before the DHO and SHO were not recorded, we have no way of knowing whether relator's affidavit accurately reflects his testimony at the hearings. But, even if the affidavit is an accurate presentation of relator's testimony, it does not support a finding in mandamus that the commission abused its discretion in determining that the retirement was voluntary.

**{¶68}** According to relator, "it is unrebutted that Mr. Lackey retired for two closely related reasons: (i) continuing knee pain; and (ii) the related safety issue as he drove his truck." (Relator's brief, at 6-7.)

**{¶69}** Relator is incorrect to suggest that the commission was required to accept the averments in his affidavit as true, or to accept his hearing testimony, if in fact it conformed to the averments of the affidavit. It was clearly within the commission's fact-finding discretion to place greater reliance on the absence of contemporaneous medical evidence than relator's statements that it was his knee that caused him to retire.

**{¶70}** In the order of March 13, 2006, the SHO states that relator testified that he "would be penalized financially should he become re-employed through a reduction of retirement benefits." Relator describes the SHO's description of his testimony as "misleading" because the affidavit avers that retirement benefits would not be affected if relator finds work that is not Teamster related. (Relator's brief, at 7.)

**{¶71}** Again, because the proceedings were not recorded, we have no way of knowing for sure whether relator actually testified as he avers in his affidavit. But even if

he did so testify, and even if the SHO's statement of the testimony is appropriately clarified by the affidavit, clarification of the circumstances of the financial penalty does not render the SHO's order an abuse of discretion.

**{¶72}** It is undisputed that, as of the March 13, 2006 hearing, relator had not sought employment since his October 2004 retirement. Thus, relator did not even seek non-Teamster-related employment that, if obtained, would not reduce his pension. Moreover, that relator eliminated certain jobs from his consideration because of the terms of the retirement that he accepted does not advance his claim that the retirement was involuntary.

**{¶73}** Based upon the above analysis, it must be concluded that the commission did not abuse its discretion in determining that the retirement was voluntary and that relator is thus ineligible for TTD compensation until he returns to the workforce.

**{¶74}** As previously noted, the second issue is whether the commission abused its discretion in denying relator's motion for the exercise of continuing jurisdiction. This issue is easily answered given that the above analysis conclusively shows that the SHO's order of March 13, 2006 is not an abuse of discretion.

**{¶75}** The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. B & C Machine Co. v. Indus. Comm.* (1992), 65 Ohio St.3d 538, 541-542.

**{¶76}** Relator alleges here that the commission's determination that he voluntarily retired contains a clear mistake of fact and a clear mistake of law. Or, as relator puts it in

his April 11, 2007 motion, the commission denied TTD compensation on the "factually and legally erroneous conclusion that [injured worker] had 'voluntarily retired.' "

**{¶77}** Here, relator argues:

> * * * Simply put, if this Court concludes that the Commission abused its discretion by denying Mr. Lackey's first motion for TTD on the "voluntary retirement" theory, then it was a related abuse of discretion for the Commission to fail to correct that order when asked to do so when Mr. Lackey re-applied for TTD for the period following his total knee replacement.

(Relator's brief, at 9.)

**{¶78}** Given that relator has failed to show any cause for the issuance of a writ of mandamus with respect to the SHO's order of March 13, 2006 which is a final commission order determining that the retirement was voluntary, there can be no grounds for the issuance of a writ of mandamus for the commission's refusal to exercise continuing jurisdiction over the SHO's order of March 13, 2006. Simply put, there were no grounds for the commission's exercise of continuing jurisdiction and, thus, the commission appropriately denied relator's motion for the exercise thereof.

**{¶79}** It should be further noted that relator's April 11, 2007 motion mixes a request for the exercise of continuing jurisdiction with a request for a new period of TTD compensation to begin May 15, 2006. Given that relator lost his eligibility for TTD compensation, it was appropriate that the commission deny relator's request for TTD compensation beginning May 15, 2006.

**{¶80}** Accordingly, for all the above reasons, it is the magistrate's decision that

this court deny relator's request for a writ of mandamus.

/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).