[Cite as *State ex rel. Garrison v. Indus. Comm.*, 2009-Ohio-2898.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Robert J. Garrison, | : | |
| Relator, | : | |
| v. | : | No. 08AP-419 |
| The Industrial Commission of Ohio and Coit Services of Ohio, Inc., | : | (REGULAR CALENDAR) |
| | : | |
| Respondents. | : | |

D E C I S I O N

Rendered on June 18, 2009

*Shapiro, Marnecheck & Reimer*, *Philip A. Marnecheck*, and *Matthew Palnik*, for relator.

*Richard Cordray*, Attorney General, *Rema A. Ina*, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

**{¶1}** Relator, Robert J. Garrison, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his application for permanent total disability ("PTD") compensation on the grounds that he voluntarily removed himself from the work force, and to enter a new order granting said application.

**{¶2}** This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, recommending that this court issue a writ of mandamus ordering the commission to vacate its order and to enter a new order that adjudicates the application.

**{¶3}** The commission has filed objections to the magistrate's decision. In its objections, the commission argues that there is some evidence to support the finding of its staff hearing officer ("SHO") that relator voluntarily abandoned his employment with respondent Coit Services of Ohio, Inc. ("Coit"). The commission argues relator's own actions led to his job termination with Coit, and that there is no causal connection between relator's industrial injuries and his subsequent departure from the work force.

**{¶4}** The magistrate addressed the issue of causal connection, relying in part upon *State ex rel. B.O.C. Group v. Indus. Comm.* (1991), 58 Ohio St.3d 199, in which the employer asserted that the award of temporary total disability compensation would be improper because the claimant's departure was not injury related. The Supreme Court of Ohio rejected this argument, holding that "[a]n employer-initiated departure is still considered involuntary as a general rule," and that "lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant." Id. at 202.

**{¶5}** While the commission cites the fact that relator in the instant case was not laid off, we view the magistrate's reliance upon *B.O.C. Group* as directed to the broader issue of whether there existed facts and circumstances which may have rendered involuntary relator's departure from his position with Coit. In this respect, the magistrate

found conflicting language in the SHO's order as to whether relator's departure was a result of him being unable, or merely unwilling, to pay one-half of the insurance premiums requested by the employer. The magistrate further expressed concern that the order of the SHO was based upon an interpretation of Ohio law that narrowed the definition of involuntary job departure in contravention of the holding in *B.O.C. Group.* Upon review, we find no error with the magistrate's analysis and reliance upon *B.O.C. Group.*

**{¶6}** The commission argues that the facts of the instant case are more similar to those in *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648, 1996-Ohio-297, in which a claimant chose early retirement, began drawing pension and Social Security retirement benefits, and did not seek other employment following his departure from his former employer. In *McAtee,* however, which was cited in the magistrate's decision, the court found evidence that relator had voluntarily retired because he had rejected PTD retirement benefits. Having found evidence that the claimant's job departure was voluntary, the court in *McAtee* then addressed the further issue of whether the claimant voluntarily removed himself from the entire labor market.

**{¶7}** As noted, in the instant case the magistrate found that contradictory and/or inconsistent language in the SHO's order precluded a determination whether relator's departure from his former position was voluntary or involuntary. Upon review, we agree with the magistrate that the SHO's summary of relator's testimony raises a factual question about the voluntariness of his job departure with Coit, and that this matter should be returned to the commission for further consideration and an amended order.

**{¶8}** Following an examination of the magistrate's decision, as well as an independent review of the record, we overrule the commission's objections to the

magistrate's decision. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and grant relator's request for a writ of mandamus to the extent the commission is ordered to vacate the SHO's order of January 24, 2008, and to issue a new order adjudicating the application.

*Objections overruled;*
*writ of mandamus granted with instructions.*

KLATT and CONNOR, JJ., concur.

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# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio ex rel. Robert J. Garrison, | : | |
| Relator, | : | |
| v. | : | No. 08AP-419 |
| The Industrial Commission of Ohio and Coit Services of Ohio, Inc., | : | (REGULAR CALENDAR) |
| | : | |
| Respondents. | : | |

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

Rendered on February 25, 2009

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*Shapiro, Marnecheck & Reimer*, *Philip A. Marnecheck* and *Matthew Palnik*, for relator.

*Richard Cordray*, Attorney General, *Rema A. Ina* and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS

**{¶9}** In this original action, relator, Robert J. Garrison, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for permanent total disability ("PTD") compensation on

grounds that he voluntarily removed himself from the workforce, and to enter an order granting his application.

Findings of Fact:

**{¶10}** 1. Relator has three industrial claims arising from his employment with respondent Coit Services of Ohio, Inc. ("Coit Services"), a state-fund employer.

**{¶11}** 2. The oldest claim (No. 99-310622) is allowed for "toxic effect gas/vapors." This January 1999 injury resulted from a fire inside a factory where relator worked as a supervisor of employees involved in the cleaning of oriental and other types of rugs.

**{¶12}** 3. Relator's August 4, 1999 injury (claim No. 99-478531) is allowed for:

> Sprain lumbosacral; left paracentral disc extrusion seen at the L3-4 level and the focal left foraminal disc protrusion seen at the L4-5 level with radiculopathy; aggravation of pre-existing degenerative disc disease at L2-5; spondylosis L3-S1; spinal stenosis L2-5; disc bulge L2-3.

The August 4, 1999 injury occurred while relator was lifting a heavy rug with another employee.

**{¶13}** 4. Relator's March 5, 2002 injury (claim No. 02-329949) is allowed for "right biceps tendon rupture." This injury also occurred while relator was carrying a heavy rug with another employee.

**{¶14}** 5. On May 23, 2006, at relator's own request, he was examined by orthopedist Ralph Kovach, M.D., who issued a two-page narrative report. In his report, Dr. Kovach discusses the August 4, 1999 injury to the lower back and the March 5, 2002 injury to the right biceps. There is no mention of the January 1999 injury allowed for "toxic effect gas/vapors," nor is claim No. 99-310622 even listed among the claims

identified in the report. In his paragraph describing the examination, there is no indication that the lungs or airways were examined.

In his concluding paragraph, Dr. Kovach opines:

> * * * Robert Garrison is permanently and totally disabled. Outside of an appropriate medication regimen, there is nothing that can be offered him from a surgical standpoint for the reasons explained. He has significant limitations with standing, sitting, lifting, reaching and ambulating. His limitations are consistent with the claim conditions and his exam. He is not capable of engaging in sustained, gainful employment and his disabled status, in my medical opinion, does relate directly to allowed claim conditions.

**{¶15}** 6. On October 6, 2006, relator filed an application for PTD compensation. In support, relator submitted the report of Dr. Kovach.

**{¶16}** 7. The PTD application form asks the applicant to list all claims. Relator failed to list claim No. 99-310622 or to indicate in any way that a third claim existed.

**{¶17}** The PTD application form asks the applicant to provide information regarding his medical history. Relator provided information regarding his back injuries. However, relator made no mention of any injury related to "toxic effect gas/vapors."

**{¶18}** 8. On May 18, 2007, at the commission's request, relator was examined by Gordon C. Steinagle, D.O. Dr. Steinagle issued a nine-page narrative report in which he accepted all three industrial claims including the January 1999 injury.

In the "History" portion of his report, Dr. Steinagle wrote:

> Mr. Garrison also sustained a toxic gas/vapor inhalation when he was working inside of a factory and a fire occurred. * * * He was subsequently treated at Metro Health Hospital for smoke inhalation and then released. There is no documented follow-up care for this incident. According to the claimant, there was some asbestos exposure during this fire.

> The claimant relocated to Buffalo, NY in June of 2006 after being employed in Ohio from 1999 to 2003. The claimant has not worked since 2003 and has supported himself on Social Security benefits and Workers' Compensation insurance. He also has US service related disabilities related to peripheral neuropathy.
>
> He presently receives regular primary care (medical) services at the Buffalo VAMC, but is not receiving care for his low back issues.
>
> Under "Present Complaints," Dr. Steinagle wrote in part:
>
> Mr. Garrison also complains of chronic exertional shortness of breath with moderate exertion, and frequent cough. Reportedly, there was asbestos exposure at the fire in the plant. He denies chest pain, exertional chest pain or palpitations.
>
> Under "Past Medical History," Dr. Steinagle wrote:
>
> Significant for diabetes mellitus type 2, hypertension, COPD, low back pain (as described above), right bicep tendon rupture, sleep apnea syndrome, neuropathy of the upper and lower extremities (due to diabetes and US service related exposures), and carpal tunnel syndrome of the right upper extremity. He also had a toxic inhalation case which is described above.

**{¶19}** Under "Social History," Dr. Steinagle wrote: "He has at least a 75-pack-year history of smoking."

**{¶20}** Under "Physical Examination," Dr. Steinagle wrote: "Lungs were clear to auscultation with mildly decreased breath sounds."

**{¶21}** Under "Medical Records Reviewed," Dr. Steinagle wrote: "The last PFT done was on 8/24/04 at Occucenters Inc. and showed a FVC of 3/26 liters (76.3% of predicted), FEV1 of 2.13 liters (65.8% of predicted) and FEV1/FVC of 65.3% of predicted."

**{¶22}** Under "Diagnoses," Dr. Steinagle listed 12 diagnoses. Among the 12 listed are: "2. Toxic inhalation of gas/vapors," and "8. COPD by history due to smoking."

**{¶23}** Under "Degree of Functional Impairment and/or Disability," Dr. Steinagle wrote:

> 2. Toxic Inhalation
>
> Page 90 5th edition of the Guides, section 5.3b. See also page 98, table 5-12, and pages 95 and 97, tables 5.2a 5.4a[.]
>
> PFT done on 8/24/04 showed a FVC of 3.26 L (76.3% of predicted), FEV1 of 2.13> (65.8% of predicted) and FEEV1/FVC of 65.3% (restrictive lung disease). He falls in to Class 2[.]
>
> FEV1 was measured at 2.13L: the predicted value is 3.23L and the lower limit of normal FEV1 is 2.408 L. 2.13L/3.25 (100) = FEV1 65.6% of predicted.
>
> 20% whole person impairment[.]
>
> * * *
>
> Total Impairment
>
> Page 604, combined values chart.
>
> 25% (L spine) + 20% (toxic inhalation) + 5% (R bicep tendon rupture)
>
> 25% + 20% = 40%
>
> 40% + 5% = 43% whole person Impairment
>
> SUMMARY 43% Whole Person Impairment

**{¶24}** 9. On May 18, 2007, Dr. Steinagle completed a physical strength rating form. On the form, Dr. Steinagle indicated by his mark "[t]his injured worker is incapable of work."

**{¶25}** 10. The record contains a one-page interoffice memorandum to the "Staff Hearing Officers, Columbus Regional Office," from "Ellen A. Dickhaut, Manager, Columbus Regional Office."

"PTD Tentative Order Processing" is the subject matter of the memorandum dated October 30, 1996.

The typewritten memorandum instructs:

> All claims that are referred to you for PTD tentative orders or statutory PTD orders should be returned to the Columbus Hearing Administrator's Office[.] * * *
>
> * * *
>
> If you decide not to issue a tentative order, the claim will be returned to the normal PTD process.
>
> If you do issue a tentative order, granting or denying PTD, the Hearing Administrator's office will update issue resolution and forward the claim for typing.

**{¶26}** On a copy of the interoffice memorandum, staff hearing officer ("SHO") M.L. Finnegan wrote in his own hand:

> 06/19/2007 File reviewed. Please prepare and set for regular SHO PTD hearing. Dr. Steinagle offered no guidance on how to apportion PTD between 3 claims. That can be figured out at hearing[.]

**{¶27}** 11. A tentative order pursuant to Ohio Adm.Code 4121-3-34(C)(6) was never issued.

**{¶28}** 12. On January 5, 2008, the commission issued to the parties and their respective representatives notice of a January 24, 2008 hearing before an SHO. The notice states: "ISSUES TO BE HEARD: 1) Permanent Total Disability."

**{¶29}** 13. On January 24, 2008, the SHO heard relator's PTD application. The hearing was not recorded. Following the hearing, the SHO issued an order denying the PTD application. The SHO's order explains:

> Claimant filed an IC-2 application on 10/06/2006, alleging that, due to impairments arising from occupational claims 02-329949, 99-310622 and 99-478531, he is prevented from returning to any type of sustained, remunerative employment. On claimant's IC-2 application, claimant stated that his last date of work was 10/30/2003. At hearing, claimant was questioned as to the accuracy of this last date of employment and his reason for stopping work on that date. Claimant responded that he quit work, on or about 10/30/2003, due to his inability or unwillingness to financially assume one-half of the cost of vehicle insurance coverage insisted upon by his employer at the time. Claimant had had three work-related motor vehicle accidents within a month or two and his employer, as a result of an apparent or threatened increase in premiums, informed claimant that he would have to assume responsibility for payment of one half of the amount due in order to maintain coverage and, hence, his job, as his job entailed regular travel on a route in a company vehicle. Claimant stated that he declined to pay the portion of the insurance premium demanded of him by his employer and, thereupon, quit his employment. Claimant did not assert, at today's hearing (01/24/2008), that he stopped work on or about 10/30/2003 due to any physical impairment arising from his occupational injury claims.
>
> A review of the three claim files under consideration fails to reveal any medical documentation, contemporaneous with claimant's last day worked of 10/30/2003, to establish that claimant's removal from the workforce at that time was related to impairment arising from his recognized occupational injury claims. To the contrary, what little mention is made of his removal from the workforce is characterized as a 'lay-off' (Dr. Ortega office notes of 07/13/2004 and 08/03/2004; TheraCare physical therapy note of 7/19/2004; Dr. Mascarenhas report of 03/15/2005). Claimant has not worked since 10/30/2003 and is currently receiving benefits from Veterans Administration for an unrelated service-connected disability, along with benefits from the Social Security Administration. It is apparent, therefore, that claimant has not only removed himself from

> his former position of employment with Coit Services of Ohio, but also from the workforce in general. His removal from the workforce, on or about 10/30/2003, was for reasons unrelated to any impairment arising from the injury claims cited above.
>
> The Staff Hearing Officer, in considering claimant's IC-2 application and the express assertion that he is unable to return to the workforce in any sustained capacity as a direct result of his occupational injuries, must, as a rudimentary inquiry, question claimant as to the circumstances that led to his removal from employment. Upon learning the answer to this question, the Staff Hearing Officer is not free to ignore it or its implications (see, OAC 4121-3-34(D)(d)). In the present case, claimant Garrison clearly and unequivocally stated that he quit his job with Coit Services of Ohio, on or about 10/30/2003, due to his unwillingness to pay a portion of the insurance premium demanded of him by his employer. He has not worked since.
>
> For the above reasons, the Staff Hearing Officer finds that claimant's removal from the workforce was due to factors unrelated to impairments arising from the occupational injury claims under consideration. The IC-2 of 10/06/2006 is, therefore, denied.

**{¶30}** 14. On March 19, 2008, the three-member commission, one member dissenting, mailed an order denying relator's motion for reconsideration.

**{¶31}** 15. On May 19, 2008, relator, Robert J. Garrison, filed this mandamus action.

Conclusions of Law:

**{¶32}** Several issues are presented: (1) whether SHO Finnegan's June 19, 2007 notation regarding apportionment among the three industrial claims deprived relator of notice of the subject matter actually adjudicated at the January 24, 2008 hearing; (2) whether the commission improperly placed a burden on relator to raise and then disprove the defense of voluntary abandonment of the workforce; and (3) whether the commission

used an incorrect standard of law in determining that relator voluntarily removed himself from the workforce and thus is ineligible for PTD compensation.

**{¶33}** The magistrate finds: (1) SHO Finnegan's June 19, 2007 notation regarding apportionment among the three industrial claims did not deprive relator of notice of the subject matter actually adjudicated at the January 24, 2008 hearing; (2) the commission did not improperly place a burden on relator to raise and then disprove the defense of voluntary abandonment of the workforce; and (3) the commission did use an incorrect standard of law in determining that relator voluntarily removed himself from the workforce.

**{¶34}** Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

**{¶35}** Turning to the first issue, the processing of tentative PTD orders is the subject matter of the October 30, 1996 interoffice memorandum on which SHO Finnegan made his June 19, 2007 notation. In that regard, Ohio Adm.Code 4121-3-34(C) provides rules for the processing of PTD applications. Ohio Adm.Code 4121-3-34(C)(6)(a) provides:

> 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.

**{¶36}** Undisputedly, no tentative order issued following the issuance of Dr. Steinagle's report. Apparently, as indicated by the June 19, 2007 notation, SHO Finnegan decided not to issue a tentative order after reviewing the file.

**{¶37}** On January 5, 2008, some six and one-half months after SHO Finnegan's notation, the commission mailed notice of the January 24, 2008 hearing. The notice indicates that "Permanent Total Disability" is the issue to be heard.

**{¶38}** Here, relator claims that he was only on notice that the subject matter of the January 24, 2008 hearing would be the apportionment of a PTD award among the three industrial claims and, thus, he lacked notice that a retirement issue would be the subject of the January 24, 2008 hearing. Relator's claim or argument lacks merit.

**{¶39}** It is important to note at the outset that the notice of the January 24, 2008 hearing was submitted to the record before this court at the magistrate's request following oral argument. Clearly, the sufficiency of the hearing notice itself is not at issue in this action. Relator never challenged the sufficiency of the hearing notice. In fact, relator's argument is made as if the hearing notice is irrelevant or even nonexistent.

**{¶40}** R.C. 4121.36(A) requires the commission and its hearing officers to serve notice of hearing to all parties and their representatives. See, also, Ohio Adm.Code 4121-3-09(C).

**{¶41}** Relator does not claim that SHO Finnegan's June 19, 2007 notation was an R.C. 4121.36(A) hearing notice or intended as such, nor can such a claim be seriously advanced. Accordingly, relator's argument suggests that he or his counsel had a right to rely upon the alleged import of the notation and to disregard the actual notice of hearing as well as the fact that a tentative order never issued.

**{¶42}** Even if it can be argued that SHO Finnegan's notation suggests that a PTD award might be forthcoming and that apportionment is the only remaining issue, neither relator nor his counsel had a right under statute or rule to rely upon anything that might be suggested in SHO Finnegan's notation. Moreover, it would not be reasonable under the circumstances to assume that a PTD award was a given and only a formality to be rendered at the hearing.

**{¶43}** Turning to the second issue, in *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71, the court had occasion to set forth law pertinent to the instant issue. In the *Quarto Mining* case, the employer challenged the commission's award of PTD compensation to respondent Glen Foreman.

**{¶44}** In the administrative proceedings before the commission, the employer had failed to raise the issue of whether Foreman's retirement precluded his eligibility for PTD compensation. In awarding PTD compensation, the commission did not address the retirement issue even though the record before the commission indicated that a retirement issue was there. The court held that the commission did not abuse its discretion by not addressing the retirement issue. The *Quarto Mining* court explained:

> * * * The claimant's burden is to persuade the commission that there is a proximate causal relationship between his work-connected injuries and disability, and to produce medical evidence to this effect. * * * The claimant's burden in this regard does not extend so far as to require him to raise, and then eliminate, other possible causes of his disability. * * * Here, the claimant has produced direct medical evidence linking his disability with the injuries allowed in the claim. This evidence is sufficient to establish a prima facie causal connection. 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. at 83-84.

**{¶45}** Here, citing *Quarto Mining*, relator points out that the SHO sua sponte addressed the retirement issue notwithstanding that neither the employer nor the administrator raised the issue. According to relator, this scenario, in effect, improperly "required [r]elator to raise and then eliminate the issue of voluntary retirement despite the

employer having such burden." (Relator's brief, at 9.) The magistrate disagrees with relator's argument.

**{¶46}** Nothing in the *Quarto Mining* case prohibits the commission from sua sponte raising the defense of voluntary abandonment or removal from the workforce. Nothing in the *Quarto Mining* case prohibited the SHO from questioning relator regarding the circumstances of his October 30, 2003 job departure and on that basis entering a determination on the issue.

**{¶47}** While the *Quarto Mining* court placed the burden on the employer to raise and produce evidence on the retirement issue, it did not prohibit the commission itself from undertaking the burden of raising the issue and producing evidence by questioning the PTD claimant. Accordingly, contrary to relator's argument, the commission did not improperly place a burden on relator.

**{¶48}** Turning to the third issue, 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.

**{¶49}** 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. * * *

**{¶50}** In *State ex rel. Kinnear Div., Harsco Corp. v. Indus. Comm*. (1997), 77 Ohio St.3d 258, 264, the court states:

> * * * In order for retirement to preclude PTD compensation, the retirement must be taken before the claimant became permanently and totally disabled, it must have been voluntary, and it must have constituted an abandonment of the entire job market. * * *

**{¶51}** In *State ex rel. McAtee v. Indus. Comm*. (1996), 76 Ohio St.3d 648, the court, applying *Baker*, upheld the commission's decision to deny a PTD award on grounds that the claimant's retirement in August 1989 was voluntary. The commission's decision pointed to the claimant's age of 62 years at the time he quit work and that he took a regular retirement rather than a disability retirement from his employer. He also chose to receive Social Security retirement benefits rather than Social Security Disability.

The *McAtee* court states:

> As for the question of whether McAtee abandoned the entire labor force, the commission's order does not explicitly address that issue. However, the commission relied on all of the evidence in the file and adduced at the hearing, and that evidence can only lead to the conclusion that McAtee abandoned the work force. His early retirement and receipt of Social Security benefits, his application for pension benefits, and his failure to seek other employment following his departure from Chrysler, all demonstrate his intent to leave the labor force. Accordingly, we find that the disposition of the abandonment issue was implicit in the commission's order. * * *

Id. at 651.

**{¶52}** 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.

**{¶53}** In *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, 202, the court clarified its holding in *Rockwell.* The court explains:

> Relying on *Rockwell*, B.O.C. asserts that temporary total disability compensation is improper since claimant's departure was not injury-related. This is incorrect. An employer-initiated departure is still considered involuntary as a general rule. *Rockwell* did not narrow the definition of "involuntary," it expanded it. While certain language in *Rockwell* may be unclear, its holding is not. The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant.

**{¶54}** 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.

**{¶55}** Here, the SHO's order of January 24, 2008, indicates that *Rockwell* was incorrectly viewed as narrowing the definition of an involuntary job departure in violation of the *B.O.C. Group* court's clarification of *Rockwell.*

**{¶56}** In the first paragraph of the SHO's order quoted above, the SHO points out that relator did not assert at the hearing that he stopped work on October 30, 2003, "due to any physical impairment arising from his occupational injury claims."

**{¶57}** In the next paragraph, the SHO analyzes the medical evidence to show that relator's "removal from the workforce" was not injury-induced. The concluding sentence of the paragraph states: "His removal from the workforce, on or about 10/30/2003, was for reasons unrelated to any impairment arising from the injury claims cited above."

**{¶58}** In the concluding paragraph of the order, the SHO renders his ultimate conclusion: "For the above reasons, the Staff Hearing Officer finds that claimant's removal from the workforce was due to factors unrelated to impairments arising from the occupational injury claims under consideration. The IC-2 of 10/06/2006 is, therefore, denied."

**{¶59}** In the magistrate's view, the SHO's order strongly suggests that *Rockwell* was incorrectly viewed as narrowing the definition of an involuntary job departure. But, as the *B.O.C. Group* court clarified, it does not follow solely from the absence of an injury-induced job departure that the claimant voluntarily removed himself from the workforce.

**{¶60}** A careful reading of the SHO's order fails to show that the SHO actually rendered a finding that the October 30, 2003 job departure was involuntary based upon analysis of relator's testimony regarding the circumstances of the job departure. In fact, the SHO's description or summary of relator's testimony, which was unrecorded, is inconsistent, if not contradictory.

**{¶61}** In the first paragraph of the order, the SHO states that relator responded that he quit work at Coit Services "due to his inability or unwillingness to financially

assume one-half of the cost of vehicle insurance coverage." In the second to the last paragraph of the order, the SHO states that relator "unequivocally stated that he quit his job with Coit Services * * * due to his unwillingness to pay a portion of the insurance premium demanded of him by his employer."

**{¶62}** Obviously, there is a distinction between an "inability" and an "unwillingness" to pay one-half of the premium. If relator was unable to make the payment, then the resignation would seem to be involuntary. On the other hand, if relator was able to pay on the premium, but was unwilling to do so, the resignation might be voluntary depending on other factors that the SHO does not discuss in the order.

**{¶63}** Based upon the above analysis, the magistrate concludes that the commission's determination that relator voluntarily removed himself from the workforce was an abuse of discretion.

**{¶64}** Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of January 24, 2008 that denies relator's application for PTD compensation and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates the application.

*/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).