[Cite as *State ex rel. Rockey v. Sauder Woodworking Co.*, 2011-Ohio-1590.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gary A. Rockey,	:	
Relator,	:	
v.	:	No. 09AP-888
Sauder Woodworking Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 31, 2011

Gallon, Takacs, Boissoneault & Shaffer Co. *L.P.A*., and *Theodore A. Bowman*, for relator.

Marshall & Melhorn, LLC, and *Michael S. Scalzo*, for respondent Sauder Woodworking Company.

Michael DeWine, Attorney General, *Charissa D. Payer*, and *Rachel L. Lawless*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶1} Relator, Gary A. Rockey, filed an original action in mandamus, asking this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator's October 10, 2008 motion for temporary total disability ("TTD") compensation on eligibility grounds, and to enter an order (1) determining that he is eligible for that compensation and (2) adjudicating his motion on the basis of the medical evidence submitted.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court issue a writ of mandamus ordering the commission to vacate the January 22, 2009 order of the staff hearing officer ("SHO") and to enter a new order that adjudicates relator's October 10, 2008 motion for TTD compensation.

{¶3} None of the parties filed objections to the magistrate's findings of fact, and we adopt them as our own. As detailed in the magistrate's decision, relator suffered a work-related injury in 2004, while employed by respondent Sauder Woodworking Co. ("Sauder"). On June 6, 2008, Jason P. Row, M.D., completed a C-84 on which he certified a period of TTD beginning May 22, 2008 to an estimated return-to-work date of June 20, 2008.

{¶4} Prior to returning to work, however, on June 23, 2008, relator signed a "Voluntary Severance Candidacy Acknowledgement." That document included the following statements: "I hereby volunteer to accept the voluntary severance offering. I

understand should I be selected that my position will be eliminated and my last day of employment will be Friday, June 27th [2008]." Relator also hand-wrote the following: "Severence [sic] has nothing to do with my worker's [sic] comp claim."

{¶5} On July 17, 2008, relator moved for TTD compensation beginning on May 22, 2008. Relator cited Dr. Row's June 6, 2008 C-84 in support.

{¶6} Following a hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation from May 22 to June 23, 2008. The order was not appealed and became final.

{¶7} On September 2, 2008, Patrick W. Frank, D.C., completed a C-84 on which he certified a period of TTD compensation beginning September 2, 2008 to an estimated return-to-work date of December 2, 2008. Dr. Frank responded in the negative to the following question: "Is the [i]njured worker able to return to other employment including light duty, alternative work, modified work or transitional work?" On October 10, 2008, relator moved for TTD compensation beginning September 2, 2008.

{¶8} Following a hearing, a DHO issued an order denying relator's motion. The DHO found that relator "voluntarily abandoned his job due to the signing of a voluntary severance candidacy acknowledgement in which he stated 'severance has nothing to do with my Workers' Comp claim' on 06/23/2008 and he has not worked since."

{¶9} Following a hearing, the SHO issued an order that vacated the DHO's order. The SHO denied relator's motion for TTD compensation. The SHO found that "the weight of the evidence supports that [relator] abandoned the work force when he

signed a voluntary severance candidacy acknowledgement wherein he stated * * * 'the severance has nothing to do with my workers['] comp claim,' on 06/23/2008." Relator had "not attempted to work since the resignation. Therefore, the request for [TTD] benefits is not supported by the weight of the evidence."

{¶10} As part of the evidence before the SHO, Sauder submitted the statements of its workers' compensation manager, Donna Sadelson. Sadelson relayed conversations she had with relator in May 2008. According to Sadelson, relator was performing a job within his physical limitations until he requested a change to another position, which he then said caused him back pain. He had also been told that his job would be eliminated toward the end of the year.

{¶11} Relator appealed the SHO's order to the three-member commission. Relator submitted an affidavit in which he relayed his work history. Per Dr. Row's order, relator was off work until June 23, 2008. On June 20, 2008, according to relator, his supervisor contacted him and told him not to return to work on June 23, as there was no work available within his restrictions. A week later, he received a notice concerning severance packages. He accepted the severance package because he "had no income, and no job to return to at Sauder." He stated that he intended his handwritten note (that the severance had "nothing to do" with his workers' compensation claim) to ensure that his claim would remain open. He said that he did not intend to abandon his position or employment with Sauder, and only accepted severance because he had been advised that he would not have a job to return to.

{¶12} The SHO issued an order denying his appeal. The three-member commission granted reconsideration, but, following a hearing, concluded that it had no grounds to exercise continuing jurisdiction. It reinstated the SHO's January 22, 2009 order.

{¶13} Relator thereafter filed this mandamus action. As noted, the magistrate concluded that this court should grant a writ ordering the commission to vacate the January 22, 2009 order and to enter a new order that adjudicates relator's October 10, 2008 motion for TTD compensation. In reaching this recommendation, the magistrate concluded the following: (1) it was an abuse of discretion for the SHO to hold relator accountable for failing to search for work during a period of claimed disability, i.e., after September 2, 2008; (2) the time period between the date of relator's resignation to the date of the claimed disability is insufficient to support a finding of work force abandonment; (3) the SHO found only that relator had abandoned the work force, not that he had abandoned his job at Sauder; (4) Sauder did not pursue a claim of job abandonment and did not challenge the lack of a job-abandonment finding; and (5) the commission had not yet weighed the medical evidence regarding relator's motion.

{¶14} All parties—the commission, relator, and Sauder—filed objections to the magistrate's decision. We begin with relator's objections. Relator contends that he was disabled at the time of his separation; therefore, his departure was not voluntary. He cites *State ex rel. Pretty Products, Inc. v. Indus. Comm.,* 77 Ohio St.3d 5, 1996-Ohio-132, in support and argues that the magistrate erred by applying *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. In *Pretty Products*, the Supreme

Court of Ohio expressed the rule that a claimant can abandon a position " 'only if he or she has the physical capacity for employment at the time of the abandonment or removal.' " Id. at 7, quoting *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48, 1993-Ohio-141. Because he was disabled on June 23, 2008, relator argues *Pretty Products* applies to preclude a finding that he abandoned his position at Sauder. We agree with the magistrate, however, that *Pierron* applies here.

{¶15} The purpose of TTD compensation is to compensate an injured worker for the loss of earnings incurred while the industrial injury heals. *Pierron* at ¶9, citing *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44. There can be no lost earnings, or even a potential for lost earnings, however, if the claimant leaves the active work force voluntarily. Id. A claimant who voluntarily leaves the entire labor market "no longer incurs a loss of earnings because he is no longer in a position to return to work." Id. Under these circumstances, there simply is no causal relationship between the industrial injury and the voluntary decision to leave the entire work force. Consequently, when a claimant's reason for leaving the work force is unrelated to the industrial injury, TTD compensation is unavailable. *Pierron* at ¶9, citing *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. This principle applies even when the claimant's separation from a specific employer is deemed involuntary. *Pierron* at ¶11.

{¶16} Here, the question is not whether, applying *Pretty Products*, relator was disabled when he signed the severance agreement or thereafter. The question is whether, applying *Pierron*, there is some evidence to support the commission's decision that relator abandoned the entire work force. We overrule relator's objections.

{¶17} In their objections, both Sauder and the commission contend that the magistrate erred by concluding that the time period at issue was insufficient to show that relator had abandoned the work force entirely. The magistrate reached this conclusion for two reasons. First, the magistrate concluded that relator could not be expected to search for work during a period of claimed disability, that is, the period beginning on September 2, 2008. Second, the magistrate concluded that a period of 40 days—the period from relator's date of resignation to the date of claimed disability—was insufficient under *Pierron* to show work force abandonment. We note, first, that this is actually 67 days, i.e., June 27 to September 2, 2008. But more importantly, we conclude that the commission has discretion to consider all of the evidence before it to determine a claimant's intent at the time of separation, including the weight and credibility of that evidence. We will not impose our judgment as to specific circumstances or time periods that may be necessary. Therefore, we sustain the commission's objection and Sauder's fifth and sixth objections.

{¶18} In its eighth objection, Sauder contends that the magistrate erred by granting a writ of mandamus because there is some evidence to support the commission's conclusion that relator abandoned his job at Sauder voluntarily and did not intend or try to re-enter the work force. We agree.

{¶19} Relator argued before the commission that he accepted severance because Sauder no longer had work available within his restrictions, not because he wanted to leave the work force. According to relator, his supervisor advised him that no positions were available on his return-to-work date, June 23, 2008. The agreement

itself provided only short-term income. Relator received a total of $6,980, and the payments ended in October 2008. This evidence could have supported a commission decision that relator did not intend to abandon the work force.

{¶20} There is evidence to the contrary, however. Sauder's principal evidence is the *voluntary* severance agreement, which relator signed, and relator's handwritten note, which stated that the severance has "nothing to do" with his workers' compensation claim. Sauder offered the statements of Sadelson to show that there was work available for relator within his restrictions—statements that countered relator's contention that he had no choice but to sign the agreement because no other work was available. Sauder also pointed to the lack of evidence that relator had made any attempt to find or perform work after he left Sauder. Finally, the report of Sushil M. Sethi, M.D., indicates that relator took "the buyout" from Sauder because of personal medical conditions. His receipt of social security benefits shortly thereafter may also indicate that he intended to retire completely all along. All of this evidence supports the commission's finding that relator abandoned the work force.

{¶21} All parties agree that the question of abandonment is primarily a question of intent that " 'may be inferred from words spoken, acts done, and other objective facts. * * * All relevant circumstances existing at the time of the alleged abandonment should be considered.' " *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383, quoting *State ex rel. Freeman v. Indus. Comm.* (1980), 64 Ohio St.2d 291, 297. Here, while the SHO's order could have explained its reasoning in more detail, and the evidence could have supported a contrary

determination, the commission considered all of the relevant circumstances and found that relator intended to abandon the work force. The commission had the discretion to do so. *Pierron* at ¶10. Accordingly, we sustain Sauder's eighth objection and, by doing so, render its remaining objections moot.

{¶22} Based on our thorough and independent review, we overrule relator's objections, sustain the commission's objection, sustain Sauder's fifth, sixth, and eighth objections, and overrule Sauder's remaining objections as moot. We adopt the magistrate's findings of fact as our own, but decline to adopt the magistrate's conclusions of law. In accordance with the foregoing decision, we deny the requested writ of mandamus.

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

CONNOR, J., concurs.
BRYANT, P.J., dissents.

BRYANT, P.J., dissenting.

{¶23} Unlike the majority, I conclude the two reasons specified in the staff hearing officer's decision do not support the conclusion that relator abandoned the work force.

{¶24} Initially, although the comment that the "[s]ever[a]nce has nothing to do with my worker[s'] comp claim" is ambiguous, relator would have no interest in inserting the comment, on which the staff hearing officer relied, other than to preserve his workers' compensation claim. To conclude otherwise suggests relator acted to his own detriment, an unreasonable inference when his silence would have accomplished the

purpose the staff hearing officer attributed to the comment. Secondly, the 67 days relator was absent from the work force, unlike the years at issue in *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245 are insufficient to establish that relator voluntarily abandoned the work force.

{¶25} As a result, I would adopt the magistrate's decision and grant the requested writ.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gary A. Rockey,	:	
Relator,	:	
v.	:	No. 09AP-888
Sauder Woodworking Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 22, 2010

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Marshall & Melhorn, LLC, and *Michael S. Scalzo*, for respondent Sauder Woodworking Co.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶26} In this original action, relator, Gary A. Rockey, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his October 10, 2008 motion for temporary total disability

("TTD") compensation beginning September 2, 2008 on eligibility grounds, and to enter an order determining that he is eligible for the compensation and adjudicating his motion on the basis of the medical evidence submitted.

Findings of Fact:

{¶27} 1. On February 24, 2004, relator injured his lower back while employed as a "packer" for respondent Sauder Woodworking Co. ("Sauder"), a self-insured employer under Ohio's workers' compensation laws. The industrial claim (No. 04-811103) was initially allowed for "lumbosacral sprain." The record contains a letter dated June 10, 2004 from Sauder's third-party administrator stating that the claim has been allowed for "herniation of inverterbral disc at L4-L5 and L5-S1."

{¶28} 2. On May 22, 2008, relator was examined by attending physician Jason P. Row, M.D., during an office visit. Dr. Row wrote:

> SUBJECTIVE: Presents today because of his February 24th, 2004 work injury at Sauder Woodworking. That injury involved a lumbosacral herniated nucleus pulposus with radiculopathy, for which he underwent surgery in 2004. The last time I saw him for this was approximately 2 years ago, May 26, 2006. Since last November, he has been working an "auxiliary" position which involves cleaning restrooms and the lunch room. He had been doing well at that position although did note some difficulty with mopping. For at least 2 months, perhaps several months, he has had 2-3/10 intensity pain in the left low back and radiating down through the buttock, into the leg and down into the foot with a stinging or burning sensation in the top of the left foot. This has been going on at least since February because he approached his boss about it at that time, and his boss recommended avoiding the mopping as much as possible at that point, which he tried. He has to do more mopping on Mondays, Tuesdays and Thursdays and over the past 2 weeks has had a pain exacerbation such that his pain is continuous at 6-7/10 in intensity and Monday evening was

> far worse, to the point that he had to put his back brace back on after work. Pain is exacerbated by twisting, mopping, and by going down stairs. As a result of this pain he took off work Monday and Tuesday of this week and although he tried to work yesterday, it did not go well and his pain level increased markedly. He has been using 2 or 3 Naprosyn over-the-counter tablets a day in an effort to try to get the pain under control.
>
> * * *
>
> ASSESSMENT: Recurrent pain due to the herniated disc at L3-4 and the scar at L4-5 and L5-S1 (722.10) with resulting neuroforaminal and spinal stenosis (946[.]0) which is associated with his February 24, 2004 work injury.
>
> PLAN: * * * Will try to avoid reoperation by keeping him off from May 22 to June 2, and return with restrictions June 2 through June 20 as noted on the physicians report of work ability. Will start physical therapy and increase his Naprosyn to prescription strength 500 mg b.i.d. * * *

{¶29} 3. On June 6, 2008, Dr. Row completed a C-84 on which he certified a period of TTD beginning May 22, 2008 to an estimated return-to-work date of June 20, 2008.

{¶30} 4. On June 29, 2008, relator was again examined by Dr. Row during an office visit. Dr. Row wrote:

> SUBJECTIVE: Gary Rockey is seen today in follow from his February 24, 2004 work injury at Sauder Woodworking. Since I last saw him he has been off work for my order. He has had some improvement in the pain in the left buttock and hip area. He still has occasional lancinating pain that shoots down the left lower extremity from the back to the foot with an intense burning pain, 8/10 in intensity, on the dorsum of the left foot. That pain has been present on an intermittent basis since his surgery. Tends to last a minute or less and is quite intense and debilitating when it occurs. It may occur was [sic] standing, sitting or walking and is not necessarily positional. However there is no doubt that since he has

> ceased to twisting and repetitive bending activities, overall his pain has improved. He has also been taking naproxen 500 mg b.i.d. No adverse effects in the medications.
>
> * * *
>
> ASSESSMENT: Current pain in the low back and left lower extremity due to herniated disc at L3-4 and scar at L4-L5, L5-S1 (722.10) with resulting neuroforaminal and spinal stenosis (846.0) which is due to his February 24, 2004 work injury. I am confident that the only reason he is doing somewhat better today is because he has been off work 4 [sic] and on anti-inflammatories. * * *
>
> PLAN: We will make an attempt to return him to work with restrictions at this point since the pain is improved but I am afraid that returning him without restriction would exacerbate things once again. Will restrict him from June 23rd to July 9th to continuous lifting or carrying up to 10 pounds, only occasional 11 to 20 and nothing [above] 20 pounds. He may not bend, twist or turn or reach below the knee. He may push or pull occasionally, squat or kneel occasionally, and stand, walk or sit frequently but may not climb. He may not operate foot pedals with the left, but may frequently operate foot pedals with the right foot. He will be off until the 23rd. I will see him back on July 8th. * * *

{¶31} 5. On June 23, 2008, relator signed a Sauder prepared document captioned "Voluntary Severance Candidacy Acknowledgement." The pre-printed portion of the document provides:

> If you wish to be considered for the voluntary severance offering, this signed acknowledgement must be returned to the Human Resources / Personnel lobby **before 4:00 pm on Monday, June 23rd.**
>
> Individuals selected will be notified on Tuesday, June 24th through their supervisor via an official notification letter and severance document.
>
> Last day of employment for selected individuals will be Friday, June 27th. The company may request certain

> employee(s) work beyond this date based on specific business needs.
>
> **Voluntary Severance Candidacy Acknowledgement**
>
> I hereby volunteer to accept the voluntary severance offering. I understand should I be selected that my position will be eliminated and my last day of employment will be Friday, June 27th. The company may request certain employee(s) work beyond this date based on specific business needs.

(Emphases sic.)

{¶32} Immediately above his signature and immediately below the pre-printed provisions, relator wrote in his own hand: "Severence [sic] has nothing to do with my worker's comp claim."

{¶33} 6. On July 17, 2008, relator moved for TTD compensation beginning May 22, 2008 based upon Dr. Row's June 6, 2008 C-84.

{¶34} 7. Following a September 9, 2008 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation from May 22 to June 23, 2008. The DHO's order explains:

> GRANT Temporary Total Disability from 05/22/2008 to 06/23/2008; Injured Worker was released to return to work on 06/24/2008.
>
> The Injured Worker was working light-duty through 05/21/2008, with which his employer attempted to accommodate him. However, he sustained an exacerbation of his condition and was unable to perform the light-duty work available.
>
> * * *
>
> This order is based upon the reports of Dr. Row, dated 06/19/2008, 06/05/2008 [sic], and 05/22/2008.

(Emphasis sic.)

{¶35} 8. The DHO's order of September 9, 2008 was not administratively appealed. It therefore became a final commission order.

{¶36} 9. Earlier, on September 2, 2008, relator was examined by attending chiropractor Patrick W. Frank, D.C., who wrote:

> * * * Patient presents today with continued lumbar pain and left lumbar radicular pain that is directly and causally related to the work injury dated 2/24/2004[.] This claim is also allowed for the lumbar disc herniation and lumbar radiculopathy per [independent medical examination] on 4/14/2004[.] Gary is still, obviously, having L sciatic pain and lumbar radiculopathy that persist despite surgical intervention[.] Continued work activities have proven recently to aggravate this condition to the point that he was taken off of work[.] He has not received any substantive treatment other than Naproxen as prescribed by the [physician of record] since taken off of work[.] He has failed to see any improvement in these symptoms since being off of work[.] * * *

{¶37} 10. On a C-84 dated September 2, 2008, Dr. Frank certified a period of TTD beginning September 2, 2008 to an estimated return-to-work date of December 2, 2008. The C-84 form asks the attending physician: "Is the injured worker able to return to other employment including light duty, alternative work, modified work or transitional work?" In response, Dr. Frank marked the "No" box.

{¶38} 11. On October 10, 2008, relator moved for TTD compensation beginning September 2, 2008.

{¶39} 12. On November 19, 2008, at Sauder's request, relator was examined by Susan Rice, M.D. In her five page narrative report, Dr. Rice concludes:

> HISTORY ACCORDING TO THE INJURED WORKER
>
> He states, "I was working in packing at Sauder. They had a pallet dispenser and one pallet jammed and I picked up a long piece of wood trying to push a pallet and when I did I felt something pop in my back. The next day I could hardly get out of bed.["] * * *
>
> * * *
>
> * * * This injured worker has had increased symptomatology since May 2008 and reports that the employer was unable to accommodate his restrictions, and therefore a period of temporary total disability was appropriate due to the allowed conditions in this claim[.]

{¶40} 13. Following a December 3, 2008 hearing, a DHO issued an order denying relator's motion for TTD compensation. The DHO's order explained:

> Temporary Total Disability Compensation is denied from 09/02/2008 through 12/03/2008. Injured Worker voluntarily abandoned his job due to the signing of a voluntary severance candidacy acknowledgement in which he stated "severance has nothing to do with my Workers' Comp claim" on 06/23/2008 and he has not worked since.

{¶41} 14. Relator administratively appealed the DHO's order of December 3, 2008.

{¶42} 15. Sauder submitted a "Position Statement" to the staff hearing officer ("SHO") who heard the appeal. In support of its position, Sauder submitted the May 14, and 15, 2008 statements of Donna Sadelson, Sauder's workers' compensation manager:

> 5/14/08
> Gary Rockey
>
> Gary Rockey presented to my office complaining about the mopping he does in Auxiliary dept causing him back pain.

Gary and two co-workers were informed last week that their 2nd shift jobs would be eliminated towards the end of the year. Gary has a 2004 [workers' compensation] claim for his back; he had surgery, [physical therapy,] etc and when he went back to work as a hyster driver he did fine until he was required to work in Packing which he said he was unable to do. [Sauder] had a [functional capacities evaluation] done on him which did give him restrictions and at that point he applied for and got a new position as a Tug Driver/UPS which he started 11/1/06. I thought he was still in that job but evidently he had some issues with his duties and manger and chose to move to the Auxiliary dept 11/07. I asked him why he changed jobs when he was clearly in a position that he was able to do and he said he thought he could do it. He is now stating that he can't do his current job and he is wondering about a settlement or severance. I informed Gary that we had work for him within his restrictions and so that was not an option. He said his chiropractor Dr. Frank told him that everyone who has a [workers compensation] claim is entitled to a settlement. I asked him if he might be referring to a percentage award; which I had given him paperwork for in 06. He said he thought that might be it but the company never gave him any monies and I addressed the issue that you have to apply for it and fill out the paperwork (that is why I gave it to him). We discussed that right now he feels he can finish out the week but then if he feels he can't perform his current job he needs to see a doctor and bring in a restriction slip if he is given one. I told Gary I would review his file and get back with him.

5/15/08
I phoned Gary Rockey to let him know that the duties he was doing were his choice and that he would need a Dr.'s slip if he had restrictions pertaining to his current position. He asked what would happen if the restrictions couldn't be accommodated; I told him he would be placed on Short Term Disability for 6 months. He questioned a severance and I said "there would be no severance unless his job was eliminated". He then asked how much pay [short term disability] was and I told him 50%; he sort of gasped and said "well this is [workers' compensation]" from my 04 injury to which I replied "the company had you in a position that you were able to do with no complaints from 11/1/06 until you chose to change jobs due to personal conflicts 11/07". I

> then addressed that we aren't sure what is going on with his back as he has degenerative joint disease, spurring and stenosis as indicated in x-rays from 2/25/04. He told me he was going to get an appointment with Dr. Row his [physician of record].

{¶43} 16. In Sauder's "Position Statement," counsel argued that relator abandoned the workforce when he chose to take Sauder's severance offer and then failed to search for new employment thereafter. Sauder argued that the matter was controlled by *State ex rel. Pierron v. Indus. Comm*., 120 Ohio St.3d 40, 2008-Ohio-5245, and that this case is factually similar to *Pierron*. Sauder's "Position Statement" concluded:

> The [*Pierron*] court ended by saying that, although Pierron did not choose to leave his employer, once that separation occurred he had a choice either to seek other employment or to work no further. He chose the latter. "He cannot, therefore, credibly allege that his lack of income from 2001 and beyond is due to his industrial injury. Accordingly, he is ineligible for temporary total disability compensation." *Id.*
>
> The same is true here, even if it is believed that Rockey felt he had no choice but to accept the voluntary severance, his lack of efforts to look for and secure employment since that time render him ineligible to receive [temporary total disability compensation].

{¶44} 17. Following a January 22, 2009 hearing, an SHO issued an order that vacated the DHO's order of December 3, 2008. The SHO denied relator's motion for TTD compensation, explaining:

> The Hearing Officer finds the weight of the evidence supports that Injured Worker abandoned the workforce when he signed a voluntary severance candidacy acknowledgement wherein he stated the [sic], "the severance has nothing to do with my workers' comp claim", on 06/23/2008. The Injured Worker has not attempted to

> work since the resignation. Therefore, the request for Temporary Total Disability benefits is not supported by the weight of the evidence.

{¶45} 18. Relator administratively appealed the January 22, 2009 SHO's order to the three-member commission. In support of his appeal, relator submitted his affidavit executed February 6, 2009:

> [Two] On or about February 24, 2004[,] I was injured in the course of and arising out of my employment with Sauder Woodworking Company;
>
> [Three] My industrial injury claim is allowed for herniated disc at L4-5 and L5-S1;
>
> [Four] At my recent Staff Hearing, I testified as to the following facts pertaining to my work status at Sauder:
>
> > a. Subsequent to my surgery in April 2004, I was placed on transitional work performing my regular job for part of the day and alternative work the other part;
> >
> > b. I eventually performed my regular job as "packer" but after approximately 5 months, my low back pain increased; thus, I had an [functional capacities evaluation] that determined that I was physically unable to perform the work as a packer;
> >
> > c. I switched jobs and started working as "hyster driver" that was consistent with my restrictions but this job was eliminated after approximately one year and a half;
> >
> > d. I thereafter commenced working as "tug driver/UPS" where I was to mainly to drive the tug and help with UPS portion of the job; the UPS portion involved seeking matches for damaged boards, pack them and send them out. The UPS job is very similar to my former job as "packer."
> >
> > e. Over the course of time, I was being assigned more and more of the UPS portion of the job. This

increasing irritated my low back condition because it involved lifting and packing boards weighing anywhere from several ounces to 30 pounds;

f. Because of my increasing low back pain, I bid to a job called "auxiliary", a janitorial position, which I was able to do for several months; unfortunately, the auxiliary position stressed my low back as well, thus I sought medical treatment from my attending physician, Dr. Rowe [sic], who took me off work completely from May 24, 2008 to June 23, 2008.

g. Dr. Rowe [sic] recommended that I return to work on June 23, 2008 with the following restrictions: no lifting over 20 pounds, no bending, twisting/turning, reaching below the knee, climbing or operating foot controls; occasional pushing/pulling and squatting/kneeling.

h. On or about June 20, 2008, my direct supervisor, Annette Wynsinck, contacted me and informed me not to return to work on Monday, June 23, 2008, as there would be no work available within my restrictions.

i. Approximately one week later, I received a copy of a Sauder posting stating the company was offering severance packages to qualified employees.

j. Because I had no income, and no job to return to at Sauder, I accepted the severance package offered, as it gave me some income, and allowed me to draw out my 401(k).

k. I stated on the severance form "Severance has nothing to do with my workers' compensation claim", to make sure that my claim would still be open for me to pursue medical and compensation benefits. I was concerned about my claim as I had been advised on or about May 14, 2008 from Donna Sadelson, the Sauder workers' compensation manager, that I would not be covered by workers' compensation for my current low back condition.

> l. I had no intention to "abandon" my former position of employ[ment] as packer, nor any other position of employment with Sauder when I filed for the severance. I did so only because I was advised that I would not have a job to return to on June 20, 2008.
>
> m. If Sauder would provide me with work within my limitations, I would gladly accept a position.

{¶46} 19. On February 26, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order January 22, 2009.

{¶47} 20. On March 16, 2009, relator moved the three-member commission for reconsideration.

{¶48} 21. On May 2, 2009, the commission issued an interlocutory order stating:

> It is the finding of the Industrial Commission that the Injured Worker has presented evidence of sufficient probative value to warrant adjudication of the request for reconsideration regarding the alleged presence of a clear mistake of law of such character that remedial action would clearly follow.
>
> Specifically, it is alleged that the Staff Hearing Officer mistakenly construed the severance agreement as a voluntary abandonment of employment when the Injured Worker had been receiving temporary total disability compensation, was unable to return to his former position of employment, and the employer no longer had work available within the Injured Worker's restrictions.
>
> The order issued 02/26/2009 is vacated, set aside and held for naught.
>
> Based on these findings, the Industrial Commission directs that the Injured Worker's request for reconsideration, filed 03/16/2009, is to be set for hearing to determine whether the alleged mistake of law as noted herein is sufficient for the Industrial Commission to invoke its continuing jurisdiction.

{¶49} 22. The commission hearing on reconsideration was scheduled for August 4, 2009. Sauder's counsel prepared and filed a "Position Statement" for the August 4, 2009 hearing. In the "Position Statement," Sauder's counsel asserted:

> * * * Rockey also told Ms. Sadelson that he wanted to retire from the workforce so he could travel with his partner who was already retired. Rockey said that he was merely looking to supplement his income until he was eligible for Social Security at age 62 on 3/26/09. * * *

{¶50} The magistrate can find no evidence in the record to support the above-quoted factual assertion of Sauder's counsel.

{¶51} 23. Following the August 4, 2009 hearing, the commission issued an order finding that it did not have grounds for the exercise of continuing jurisdiction. Thus, the commission held that the SHO's order of January 22, 2009 "remains in full force and effect."

{¶52} 24. On September 23, 2009, relator, Gary A. Rockey, filed this mandamus action.

Conclusions of Law:

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

{¶54} The commission, through its SHO's order of January 22, 2009, determined that relator voluntarily abandoned the workforce when he signed the severance document and then failed to seek other employment. The main issue is whether the commission's determination that relator abandoned the workforce is supported by the relied-upon evidence cited in the SHO's order. The commission did not determine

whether the job departure itself was voluntary. Although not cited by the SHO's order, *Pierron*, a case discussed by the parties, is controlling in the disposition of this action.

{¶55} Preliminarily, a review of the case law regarding the judicial development of the doctrine of voluntary abandonment of employment is in order. The distinction between job abandonment and workforce abandonment should be noted.

{¶56} 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.

{¶57} 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.

{¶58} 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 circumstances existing at the time of the alleged abandonment should be considered." * * *

{¶59} 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.

{¶60} 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.

{¶61} Recently, the Supreme Court of Ohio decided *Pierron*, a case that is instructive here.

{¶62} 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.

{¶63} 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.

{¶64} 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.

{¶65} 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.

{¶66} Analysis begins here with the observation that the DHO's order of December 3, 2008 found that relator had "voluntarily abandoned his job." The DHO's order does not address workforce abandonment.

{¶67} On appeal, the SHO's order of January 22, 2009 vacates the DHO's order of December 3, 2008 and determines that relator "abandoned the workforce." Thus, while both the DHO and SHO denied compensation on eligibility grounds, the SHO's

order specifically rejects the DHO's determination that relator voluntarily abandoned his job and instead determines that relator abandoned the workforce.

{¶68} Significantly, in its "Position Statement" to the SHO, Sauder seemingly concedes that relator's job departure was involuntary, but, nevertheless, advances the theory that relator abandoned the workforce due to his subsequent failure to search for other employment. The SHO whose order is at issue was apparently persuaded by Sauder's "Position Statement" arguing that relator had voluntarily abandoned the workforce, even if he did not voluntarily abandon his job at Sauder.

{¶69} The SHO improperly determined the time period following the job departure during which relator can be held accountable for a job search under *Pierron*.

{¶70} The SHO's order found that relator "has not attempted to work since the resignation," thus inferring that some seven months had passed between the June 23, 2008 resignation and the January 22, 2009 hearing date. This inference ignores that the claimed period of disability begins September 2, 2008 based upon Dr. Frank's report of that date. That is, only 40 days had passed between the resignation date and the start of the claimed period of disability.

{¶71} If relator were found, based on the medical evidence, to be temporarily and totally disabled as of September 2, 2008 as he claims, under the law, he is not required to search for other employment during his period of TTD. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630; *State ex rel. Nelson McCoy Pottery Co. v. Wilson* (1990), 56 Ohio St.3d 28. Thus, it was a clear abuse of discretion for the SHO

to hold relator accountable for a failure to search for work during the very period relator claimed he was disabled.

{¶72} Moreover, in the *Pierron* case, Pierron requested TTD compensation to begin June 2001 following his retirement in 1997. Thus, Pierron was held accountable for his failure to search for work during a period that spanned some four years.

{¶73} In the magistrate's view, where the key evidence relied upon to support workforce abandonment is the duration of the failure to pursue other employment, a 40 day period is insufficient to support a finding of workforce abandonment, at least under the circumstances of this case.

{¶74} Accordingly, based upon the above analysis, the magistrate concludes that the commission abused its discretion in determining relator ineligible for TTD compensation based upon a finding of workforce abandonment.

{¶75} The SHO's order of January 22, 2009 determines only that relator abandoned the workforce. The SHO did not actually engage in an analysis as to why it was not found that relator had voluntarily abandoned his job at Sauder.

{¶76} There is no cause to order the commission to revisit the job abandonment issue. It was Sauder's burden administratively to prove a voluntary job abandonment if that is what it wanted to pursue. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 83-84. But Sauder did not take the position that relator voluntarily abandoned his job. Rather, it was Sauder's position that relator abandoned the workforce when he failed to search for work following the job departure at Sauder. Relator had no burden to disprove a voluntary job abandonment. Id. Moreover, even in this action,

Sauder does not claim that the commission abused its discretion in failing to address the job abandonment question.

{¶77} The commission has yet to weigh the medical evidence pertinent to relator's October 10, 2008 motion.

{¶78} 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 22, 2009, and to enter a new order that, in a manner consistent with this magistrate's decision, adjudicates relator's October 10, 2008 motion for TTD compensation.

/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).