

[Cite as *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 2012-Ohio-2469.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gerald E. Hoffman,	:	
Relator,	:	
v.	:	No. 11AP-533
Rexam Beverage Can Company and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on June 5, 2012

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

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Gerald E. Hoffman ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶ 2} This matter was referred 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 deny the requested writ. No one has objected to the magistrate's findings of fact, and we adopt them as our own.

I. BACKGROUND

{¶ 3} Relator suffered a work-related knee injury in 2003. Following surgery in 2008, relator began receiving TTD compensation. Relator's physician thereafter opined that he had reached maximum medical improvement, and the commission terminated TTD compensation, effective April 30, 2009. Relator retired from his employment on August 1, 2009.

{¶ 4} In 2010, relator underwent additional knee surgery. His physician certified that he was temporarily totally disabled from the date of surgery to an estimated return-to-work date in 2011. Following a hearing, a district hearing officer denied relator's request for TTD compensation, and a staff hearing officer affirmed, on the grounds that relator retired voluntarily in 2009 and did not return to the workforce. In this mandamus action, the magistrate concluded that the commission did not abuse its discretion by denying relator compensation.

II. RELATOR'S OBJECTIONS

{¶ 5} In his first objection, relator contends that an injury-induced retirement is involuntary and cannot preclude TTD compensation. While we agree with this proposition, it ignores the commission's finding, supported by some evidence, that relator's retirement was not injury-induced. The commission examined the evidence, some of which supports the conclusion that relator retired voluntarily and did not try to re-enter the workforce. We agree with the magistrate's careful consideration of this issue, and we overrule relator's first objection.

{¶ 6} In his second objection, relator contends that the magistrate improperly placed upon him the burden of proving a negative, i.e., that he did not abandon his employment voluntarily. We disagree with relator's characterization of the magistrate's decision. As the magistrate explained, a claimant has the burden of proving entitlement

to TTD compensation. Here, relator put forward evidence in an attempt to meet that burden. Contrary evidence, however, showed that relator was not entitled to that compensation because he retired voluntarily from his employment in August 2009, and he did not return or attempt to return to the workforce thereafter. There is some evidence in the record to support the commission's denial of TTD compensation, and the magistrate properly declined to conclude otherwise. Accordingly, we overrule relator's second objection.

III. CONCLUSION

{¶ 7} Based on our independent review of this matter, and having overruled relator's objections, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. Accordingly, we deny the requested writ.

*Objections overruled;
writ of mandamus denied.*

SADLER and CONNOR, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gerald E. Hoffman,	:	
Relator,	:	
v.	:	No. 11AP-533
Rexam Beverage Can Company and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

NUNC PRO TUNC¹

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

Rendered on February 16, 2012

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

Michael DeWine, Attorney General, and John R. Smart, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 8} Relator, Gerald E. Hoffman, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's request for temporary total

¹ This Nunc Pro Tunc magistrate's decision was issued to correct a clerical error contained in the original decision issued on February 10, 2012, and is effective as of that date.

disability ("TTD") compensation on grounds that he had abandoned the entire workforce and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 9} 1. Relator sustained a work-related injury on February 11, 2003 and his workers' compensation claim was ultimately allowed for the following conditions: "contusion of right knee; current tear of right knee lateral meniscus; right knee degenerative joint disease."

{¶ 10} 2. Relator underwent the first of several knee surgeries on July 3, 2003.

{¶ 11} 3. Relator returned to work without restrictions on October 6, 2003.

{¶ 12} 4. Relator continued to have problems with his knee and ultimately began treating with Nabil Ebraheim, M.D. On March 13, 2008, Dr. Ebraheim administered an injection to relator's right knee and released him to return to work with the following restrictions: no climbing ladders and stairs and no excessive ambulation.

{¶ 13} 5. Respondent Rexam Beverage Can Company ("Rexam") was unable to accommodate those restrictions. Relator has not returned to work since March 13, 2008.

{¶ 14} 6. In a C-84 dated March 20, 2008, Dr. Ebraheim opined that relator could not return to his former position of employment but that he could return to modified work provided he not climb ladders or stairs and provided that there was no excessive ambulation.

{¶ 15} 7. Following a May 13, 2008 hearing before a district hearing officer ("DHO") relator began receiving TTD compensation from February 13, 2008 and continuing.

{¶ 16} 8. Relator continued to have problems with his knee and, as previously stated, underwent several additional surgeries.

{¶ 17} 9. In August 2008, relator began receiving Social Security Disability.

{¶ 18} 10. On October 17, 2008, relator's wife contacted Rexam and informed them that relator would be retiring effective November 1, 2008.

{¶ 19} 11. In a letter dated November 3, 2008, Charlotte V. Reilly, Vice President of benefits for Rexam, sent relator a letter following up on the retirement package that

had been sent to relator. Relator was informed that he could elect to retire and receive an early retirement benefit since he had met both the age and service requirements (63 years old with over 30 years of service) and that, in addition, he was eligible for the special retirement payment otherwise known as the vacation lump sum payment. With regards to relator's workers' compensation claim, Reilly informed relator of the following:

Per our records, you went out on Workers' Compensation effective 2.21.2008.

Since you are currently on a Workers' Compensation status, you cannot elect to retire and begin your pension benefit unless you do not intend to return to work following the completion of Workers' Compensation.

(Emphasis sic.)

{¶ 20} 12. On or about November 11, 2008, relator informed Rexam that he was not retiring at this time and that he would return the paperwork.

{¶ 21} 13. On or about November 13, 2008, relator's wife informed Rexam that "she was not sure when Mr. Hoffman would return back to work, if ever, because of his leg."

{¶ 22} 14. Relator underwent additional surgery on January 23, 2009, and Dr. Ebraheim continued to certify that he was temporarily totally disabled.

{¶ 23} 15. Because of the statement in Dr. Ebraheim's April 20, 2009 office note that he would see relator again in one year, Rexam inquired as to whether or not relator had reached maximum medical improvement ("MMI").

{¶ 24} 16. In response to the question, Dr. Ebraheim indicated that relator had reached MMI as of May 1, 2009.

{¶ 25} 17. Physical therapy notes from May 4, and 5, 2009 indicate relator was discharged from therapy because four out of four goals had been reached. Relator indicated that he was "having no difficulty anymore and continuing to amb[ulate] for distances daily."

{¶ 26} 18. According to an office note from Dr. Ebraheim dated July 10, 2009, relator was doing well. He did have some popping in his knee but without pain. He reported that his knee was "much better than it was previously."

{¶ 27} 19. Relator retired on August 1, 2009.

{¶ 28} 20. In an order mailed July 8, 2009, the Ohio Bureau of Workers' Compensation ("BWC") notified relator that his TTD compensation was terminated on April 30, 2009, because his physician of record opined that he had reached MMI effective May 1, 2009.

{¶ 29} 21. Relator appealed the order of the BWC terminating his TTD compensation.

{¶ 30} 22. Relator's appeal was heard before a DHO on August 3, 2009. The BWC order was affirmed on grounds that relator's physician of record, Dr. Ebraheim, had opined that he had reached MMI effective May 1, 2009.

{¶ 31} 23. On December 21, 2010, relator underwent a revision of his total knee replacement.

{¶ 32} 24. On December 28, 2010, Dr. Ebraheim certified that relator was temporarily totally disabled from the date of surgery through an estimated return-to-work date of March 21, 2011.

{¶ 33} 25. A BWC claims service specialist sent a letter to Rexam dated January 12, 2011, inquiring about the nature of relator's August 1, 2009 retirement. The BWC needed to know if he "retired because he had his time in, age or was it do [sic] to his disability 2/11/03."

{¶ 34} 26. In an e-mail dated January 13, 2011, the BWC was notified that "Mr. Hoffman retired under a retirement other than disability."

{¶ 35} 27. Relator's request for TTD compensation was heard before a DHO on February 16, 2011. The DHO denied the request for TTD compensation stating:

The Injured Worker was found at maximum medical recovery as of 05/01/2009 based upon a finding of maximum medical recovery from her attending physician. The Injured Worker has also has [sic] been in receipt of Social Security Disability since October 2008. The Injured Worker retired on 08/01/2009 from her [sic] employer. The Injured Worker

also is now in receipt of Social Security Retirement commencing in September 2010.

The Injured Worker underwent total knee replacement on 12/21/2010 performed by Dr. Ebraheim, M.D. The issue of receipt of temporary total compensation as effected by retirement has always been on a case by case basis. The Injured Worker is eligible for benefits upon a finding that he has not abandoned the work force despite the receipt of pension benefits based on years of service. In the instant case it is clear that the Injured Worker is not going to return to the labor market. There has been no return to work even at restricted duty since any of the operative dates cited in the above portion of this order. It is clear that this Injured Worker will not return to any position in the labor market due to age and the severity of the knee injury.

Temporary total compensation is therefore DENIED as requested from 12/21/2010 to present.

(Emphasis sic.)

{¶ 36} 28. Relator's appeal was heard before a staff hearing officer ("SHO") on March 25, 2011. The SHO modified the DHO order and denied TTD compensation in its entirety as follows:

The Staff Hearing Officer finds that the Injured Worker was found to have reached a level of maximum medical improvement on 05/01/2009 based upon a finding of maximum medical improvement from his attending physician. The Injured Worker has been in receipt of social security disability benefits since October of 2008. The Injured Worker then retired on 08/01/2009 from his employment. The Injured Worker's social security disability compensation has now switched to social security retirement beginning September of 2010.

This Staff Hearing Officer notes that the Injured Worker underwent a second total knee arthroplasty on 12/21/2010, performed by Dr. Ebraheim, M.D. The Injured Worker has filed for receipt of temporary total disability commencing from the date of surgery through 03/11/2010 and continuing.

This Staff Hearing Officer finds that the Injured Worker is not entitled to temporary total disability benefits. This Staff

Hearing Officer notes that the Injured Worker has taken a voluntary retirement. The records on file indicate that at the time the Injured Worker began the [sic] his retirement benefits, the retirement a retirement of years not a disability retirement. Further, the Staff Hearing Officer notes that the Injured Worker was receiving social security disability at that time as well, which also points to an intention not to return to the workforce.

The only indication at hearing that the Injured Worker did not intend to abandoned the entire workforce was his testimony at hearing. The Injured Worker testified that he did apply for one position as a greeter at Walmart. However, there is no documentation to that effect on file. No other attempts or any documented attempts at a search for light duty work to show an intention to return to or remain in the workforce is present in the file. Therefore, there is a lack of sufficient evidence to establish that the Injured Worker did not intend to abandoned the workforce at the time of his retirement. The Staff Hearing Officer finds insufficient persuasive evidence to establish that the Injured Worker has any intention of returning to the workforce or that he has made any attempts to return to work within his restrictions. As a result, the Staff Hearing Officer finds that the retirement is an abandonment of employment.

{¶ 37} 29. Relator's further appeal was refused by order of the commission mailed April 21, 2011.

{¶ 38} 30. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 39} The issue before this court involves whether or not a person can make the decision to voluntarily abandon the entire workforce when they cannot return to their former position of employment.

{¶ 40} Relator contends that the answer is no because an injured worker cannot voluntarily abandon their job if they are unable to perform that job at the time they leave.

{¶ 41} The commission argues that the answer is yes. Depending on the circumstances, an injured worker can make the decision to, not only retire from their

present employer, but voluntarily abandon the entire workforce thereby breaking the causal connection between their work-related injury and any future loss of wages.

{¶ 42} The magistrate finds that an injured worker can make the decision to take a retirement from their current employer at any time and, if the injured worker never attempts to or returns to any employment thereafter, the commission can find that the injured worker had the intent to abandon the entire workforce thereby breaking the causal connection between the allowed conditions and any future wage loss.

{¶ 43} R.C. 4123.56 has been defined as compensation for wages lost when a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982). Where an employee's own actions, for reasons unrelated to the injury, preclude him or her from returning to their former position of employment, he or she is not entitled to TTD benefits, since it is the employee's own actions, rather than the injury, that precludes return to the former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (1985). When demonstrating whether an injury qualifies for TTD compensation, a two-part test is used. The first part of the test focuses on the disabling aspects of the injury. The second part of the test determines if there are any factors, other than the injury, which would prevent claimant from returning to his or her former position of employment. *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987). However, only a voluntary abandonment precludes the payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988). As such, voluntary abandonment of a former position of employment can, in some instances, bar eligibility for TTD compensation.

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

{¶ 45} If it is determined that a claimant's retirement from a job was voluntary, TTD compensation can be awarded only if the claimant has re-entered the workforce and, due to the allowed conditions from the industrial injury, becomes temporarily and totally disabled while working at the new job. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. However, a claimant's complete abandonment of the entire workforce precludes the payment of TTD compensation all together. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (1985), and *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000).

{¶ 46} In each of the cases relied on by relator, the commission had made the determination that the claimant's retirement was not voluntary and TTD compensation was awarded on that basis. In each of those cases, the employers filed mandamus actions arguing that the commission had abused its discretion in finding that the claimants' retirements were not voluntary. In each case, this court denied the employers' request for a writ of mandamus finding that the commission's factual determination that each of those claimants' retirement had been involuntary did not constitute an abuse of discretion because there was some evidence in the record to support the commission's determination.

{¶ 47} Specifically, in *State ex rel. Reliance Elec. Co. v. Wright*, 92 Ohio St.3d 109 (2001), the claimant, Leon Stevens, sustained a work-related injury in 1986. In September 1998, Stevens underwent surgery for a total right knee replacement. In March 1999, his treating physician certified TTD beginning December 19, 1997 to an estimated return-to-work date of April 1, 1999; however, Stevens was able to return to light-duty work. In May 1999, Stevens elected to take an age and service retirement; however, approximately one month prior to his retirement, the employer closed its plant.

{¶ 48} In February 2002, Stevens underwent a second total knee replacement and his treating physician completed another C-84 certifying that Stevens was temporarily totally disabled from December 19, 1997 to the present and again indicated that, while Stevens was unable to return to his former position of employment, he could return to light-duty employment.

{¶ 49} Because the employer refused to pay TTD compensation, Stevens filed a motion and ultimately the commission determined that he was entitled to that period of TTD compensation based upon a finding that his retirement had not been voluntary.

{¶ 50} The employer filed a mandamus action here which was denied. Specifically, finding that the commission's determination that Stevens' retirement was not voluntary was supported by some evidence, this court found that the commission did not abuse its discretion.

{¶ 51} Likewise, in *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, the claimant, David L. Franks, sustained a work-related injury in April 2005. Franks was never able to return to work at Mid-Ohio following the April 2005 injury.

{¶ 52} Franks continued having problems treating for the allowed conditions. In March 2006, Franks' treating physician completed a C-84 certifying a period of disability beginning in July 2005, the date of his first examination. Because Mid-Ohio refused to pay compensation, Franks filed a motion with the commission.

{¶ 53} Ultimately, the commission determined that Franks' departure from the workplace was not voluntary. Specifically, the commission relied on Franks' testimony that he never returned to work after the injury because he was unable to do so. Mid-Ohio sought a writ of mandamus in this court.

{¶ 54} The main issue was whether the commission could exclusively rely on Franks' testimony to determine that his post-injury failure to return to work at Mid-Ohio was injury induced and thus involuntary under the standard set forth in *Rockwell* and its progeny. Finding that the commission could find Franks' testimony credible, this court concluded that the commission did not abuse its discretion in making the factual determination that Franks' failure to return to work after his injury was due to the injury and that TTD compensation was payable.

{¶ 55} In *State ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517, the claimant Veda R. Irby had sustained a work-related injury in April 1997. Following surgery, Irby was unable to return to her former position of employment, but was able to return to a light-duty position at Ford until 2003.

{¶ 56} In March 2003, Irby retired from Ford. At the time, she was 58 years of age and had completed 30 years of service. An office note from her treating physician indicated that Irby was "retiring at the end of this year in hopes that getting off the concrete floor will make a big difference." *Id.* at ¶ 14.

{¶ 57} In May 2007, Irby underwent total knee replacement surgery and requested TTD compensation from the date of the surgery. Ford denied the request finding that she had voluntarily retired in March 2003 and was not entitled to benefits. Irby filed a motion with the commission seeking an award of compensation.

{¶ 58} Ultimately, the commission determined that Irby's retirement was involuntary and relied on the aforementioned office note indicating that Irby hoped that her retirement from employment would help to ease her symptoms of pain. As such, the commission found that she was entitled to TTD compensation.

{¶ 59} Ford filed a mandamus action asserting that the facts surrounding Irby's retirement were similar to the facts involving the retirement of the claimant in *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. This court rejected Ford's argument that this court should reconsider the facts and determine the nature of Irby's retirement. This court again stated that the nature of the claimant's retirement is a factual question that revolves around the claimant's intent at the time of retirement and that questions of credibility and the weight to be given evidence are within the commission's discretion as fact finder. Because there was some evidence in the record to support the commission's determination that Irby's retirement was involuntary, this court upheld the determination and denied Ford's request for a writ of mandamus.

{¶ 60} As in the *Ford Motor Co* case, relator herein is asking this court to consider the facts surrounding Hoffman's retirement and make the determination that Hoffman's retirement was not voluntary but that it was involuntary. However, that is not this court's responsibility. Provided that the commission relied on some evidence, it is not an abuse of discretion for the commission to determine that relator's retirement was voluntary.

{¶ 61} In support of its order, the commission points to several decisions wherein the commission had determined that the claimants' retirements were voluntary and

denied them TTD compensation. The claimants filed mandamus actions in this court and the requests for writs of mandamus were denied because there was some evidence in the record to support the commission's determination that the claimants' retirements were voluntary.

{¶ 62} In *Pierron*, the claimant, Richard Pierron, sustained a work-related injury in 1973 and was never able to return to his former position of employment but was able to perform a light-duty job. Pierron continued to work in that position for the next 23 years.

{¶ 63} In 1997, the employer notified Pierron that the light-duty position was being eliminated and that he could either elect to retire or be laid-off. Pierron chose retirement.

{¶ 64} In the years that followed, Pierron remained unemployed with the exception of a brief part-time job. In late 2003, Pierron filed a motion seeking TTD compensation beginning in June 2001.

{¶ 65} Ultimately, the commission had determined that Pierron had voluntarily abandoned the workforce when he retired in 1997. The commission noted that he could have accepted a lay-off and sought other work but he chose otherwise. Finding that his departure from the workforce was wholly unrelated to his allowed conditions, the commission denied the motion for TTD compensation.

{¶ 66} Pierron filed a mandamus action in this court and this court determined that Pierron's retirement was voluntary and that his actions following retirement evinced an intent to abandon the entire labor market.

{¶ 67} Pierron appealed the matter to the Supreme Court of Ohio; however, the Supreme Court affirmed this court's decision. The court reiterated that the voluntary or involuntary nature of an employee's departure from their job is a factual matter for the commission to determine and provided there is some evidence in the record to support the commission's determination, a writ of mandamus is not appropriate.

{¶ 68} Likewise, in *State ex rel. Corman v. Allied Holdings, Inc.*, 10th Dist. No. 10AP-38, 2010-Ohio-5153, the claimant, Ronald R. Corman, sustained a work-related injury in January 2002. Corman was unable to return to his former position of

employment and began receiving TTD compensation. In April 2002, Corman underwent surgery; unfortunately, Corman had significant complications and further surgery was required. Corman continued receiving TTD compensation.

{¶ 69} Following an independent medical examination wherein the physician determined that Corman's allowed conditions had reached MMI and that he was able to return to work activities with restrictions, Allied Holdings filed a motion asking that Corman's TTD compensation be terminated.

{¶ 70} The commission heard Allied Holdings' argument, concluded that Corman's allowed conditions had indeed reached MMI, and terminated his TTD compensation.

{¶ 71} Corman retired on April 1, 2003.

{¶ 72} In July 2003, Corman asked that his claim be allowed for additional conditions which was granted. Thereafter, Corman had surgery and sought the reinstatement of TTD compensation.

{¶ 73} Ultimately, the commission determined that Corman's retirement was voluntary despite his testimony to the contrary. The commission noted that his retirement letter did not indicate that his retirement was in any way related to the industrial injury, and that Corman had not returned to any work thereafter. As such, the commission had determined that Corman had voluntarily retired from the workforce on April 1, 2003 and was not entitled to TTD compensation.

{¶ 74} Corman filed a mandamus action in this court arguing that the commission's decision was not supported by some evidence; however, this court disagreed. This court specifically noted that the commission had some evidence before it from which the commission, as the evaluator of the evidence, could rely and found that the commission did not abuse its discretion.

{¶ 75} Relator has cited several cases wherein the court found that the commission did not abuse its discretion in finding that the claimants had not voluntarily abandoned the workforce. Conversely, the commission has cited several cases wherein the court found that the commission did not abuse its discretion in finding that the claimants had voluntarily abandoned the workforce. All of the cases present similar

factual patterns and yet, in some of these cases, the commission determined that the claimants had not voluntarily abandoned their employment and in others the commission determined that they had. The nature of a claimant's retirement is a factual question that revolves around the claimant's intent at the time of retirement and questions of credibility and the weight to be given evidence are within the commission's discretion as fact finder.

{¶ 76} The SHO found that relator's retirement in August 2009 was voluntary and provided the following rationale: (1) records pertaining to his retirement indicate that it was a retirement of years and not disability; (2) relator began receiving Social Security Disability in August 2008; (3) aside from his testimony that he applied for a job as a Walmart greeter, relator provided no evidence that he sought any other employment; and (4) relator failed to present sufficient persuasive evidence to establish an intent to return to the workforce.

{¶ 77} Counsel for relator argued that his receipt of Social Security Disability indicates that his retirement was caused by the allowed conditions in his claim. This may or may not be true. Relator could have provided the commission with a copy of his application for Social Security Disability on which he would have provided the medical basis for his request but he did not. Relator had the burden of proving that his retirement was involuntary by establishing that he left the workforce in August 2009 because of the allowed conditions in the claim. Further, in physical therapy notes from May 2009 and an office note from Dr. Ebraheim dated July 10, 2009, relator's knee was greatly improved. Relator retired August 1, 2009. There is no other medical evidence after July 10, 2009 until the December 21, 2010 surgery indicating that relator's knee was bothering him. The SHO determined that relator failed to meet his burden of proof.

{¶ 78} Because the commission's order is supported by some evidence that relator's retirement was voluntary, relator is not entitled to a writ of mandamus.

{¶ 79} In relator's second argument, relator contends that this court should apply the doctrine from *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), and the cases which followed and that, because he was not able to return to his former position of employment when he retired, he remained eligible for TTD

compensation and the commission abused its discretion. Relator cites the same cases which followed *Pretty Prods.*, as *Corman* did. Specifically, relator cites to *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646. As this court noted in *Corman*, in each of the aforementioned cases, the claimants were receiving TTD compensation when their employers terminated their employment and ceased paying TTD compensation. This court found that those situations are not analogous to a factual situation where a claimant is not receiving TTD compensation, retires, and then thereafter seeks the reinstatement of TTD compensation. If the commission makes the determination that the claimants' retirement was voluntary, then the claimants are not entitled to an award of TTD compensation. Conversely, if the commission determines that the claimants' departure from the workplace is involuntary, the claimants remains eligible for an award of TTD compensation.

{¶ 80} Because there is some evidence in the record to support the commission's determination that relator voluntarily retired and did not attempt to re-enter the workforce thereafter, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and this court should deny his request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).