[Cite as *State ex rel. Black v. Indus. Comm.*, 2012-Ohio-2589.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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

D E C I S I O N

Rendered on June 12, 2012

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

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

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

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

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

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

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

{¶ 4} Park Ohio filed the following objections:

> 1. The Magistrate erred in failing to allow the Industrial Commission of Ohio discretion in making the factual determination whether [relator's] retirement was voluntary or involuntary.
>
> 2. The Magistrate erred in holding that the Industrial Commission of Ohio abused its discretion in determining that relator's job abandonment at Park Ohio was not induced by the allowed conditions of the Industrial claim by failing to apply the correct standard to determine whether there was some evidence to support the Commission's order.

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

> [I.] Dr. Panigutti's December 11, 2000 office note is indeed medical evidence that relator's decision to retire could have been induced by the industrial injury.
>
> [II.] [T]he commission[] misconstrued the medical evidence of record[].

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

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

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

> Billy Black was seen in our office today for evaluation of his back pain and leg weakness. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 11/15/2000. His date of injury was 10/17/2000.
>
> The current diagnoses are:
> 1. 847.2 Lumbar Sprain
> 2. 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc
>
> * * *
>
> Billy Black complained of back pain and leg weakness. Billy Black had the following objective physical findings of spondylolisthesis, decreased motion, leg weakness and aggravation of preexisting condition. Billy Black has a fair prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.
>
> We are recommending the following treatments:
> 1. Continue [physical therapy] at Concentra 2xweek for 4 weeks
>
> * * *

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

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

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

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

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

> He comes back today. He still has back pain. He is also getting some groin pain in his testicle.
>
> On examination today there is some question of bulging into the groin.
>
> Assessment and Plan: This is a gentleman with back pain with no significant leg pain. He does do heavy work and this [does] cause his symptoms to increase. We explained to him that his groin pain is unrelated to his back pain and he may have a hernia and should be checked by his primary care physician. At this time we will limit activities and no lifting greater [than] 50 pounds and no work greater than 8 hours for four weeks. We will see him back as needed.

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

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

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

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

> Q. Did they bring you back on light duty or what was goin' on?
>
> A. Well, it was supposed to be under light duty. But the job they give me, they just - - they just kept harassing me. They didn't want me to stay on light duty so. . .
>
> Q. Was this a sitting job on light duty in the office?
>
> A. No, no, no, no. I had to get out and actually clean. Like sweep and clean - -
>
> Q. What percentage of the - -
>
> A. - - the bathrooms and stuff.
>
> Q. What percentage of the work hour, just ballpark it, were you on your feet?
>
> A. The biggest part of it; biggest part of it.
>
> Q. Okay.
>
> A. I struggled all day long. Sometimes I'd sneak off somewhere and try to hide and sit down. But if they caught me doin' that, then I was in trouble so . . .
>
> Q. And it looks like you took a retirement in February 2001. Why was that? You were only 56 years old.

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

(Tr. 6-7.)

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

> It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.
>
> * * *
>
> The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing Officer finds that the Injured Worker's retirement was voluntary. *There is no medical evidence that it was induced by the industrial injury*. There is no evidence that any of his treating physicians advised him to retire and no temporary total disability was paid after he stopped working. * * * Since the Injured Worker never looked for work after his retirement he abandoned the work force. In this situation he is ineligible to receive permanent total disability compensation.

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

{¶ 23} Upon independent review of the magistrate's decision and the objections presented by the parties, we overrule all objections, adopt the magistrate's decision as our own, and issue a limited writ of mandamus ordering the commission to vacate the SHO's order mailed July 21, 2o1o, and enter a new order that properly determines relator's eligibility for PTD compensation in accordance with this decision and the law.

Objections overruled;
limited writ of
mandamus granted.

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

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Billy G. Black,	:	
Relator,	:	
v.	:	No. 10AP-1168
Industrial Commission of Ohio and Park Ohio Industries, Inc.,	:	(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 24, 2011

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

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

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

IN MANDAMUS

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

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

Findings of Fact:

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

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

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

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

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

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

> Billy Black was seen in our office today for evaluation of his back pain and leg weakness. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 11/15/2000. His date of injury was 10/17/2000.
>
> The current diagnoses are:
> [One] 847.2 Lumbar Sprain
> [Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc.
> * * *

> Billy Black complained of back pain and leg weakness. Billy Black had the following objective physical findings of spondylolisthesis, decreased motion, leg weakness and aggravation of preexisting condition. Billy Black has a fair prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.
>
> We are recommending the following treatments:
> [One] Continue [physical therapy] at Concentra 2xweek for 4 weeks
> * * *
>
> Billy Black is unable to perform regular job duties. Billy Black is unable to return to light or modified job duties. Billy Black has no other ailments which may limit his recovery. His dates of disability are from 10/17/2000 to 12/12/2000 (Estimated). The return to full duty work date is 12/13/2000 (Estimated).

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

> Billy Black was seen in our office today for evaluation of his back pain. Billy Black was first seen on 10/17/2000. Billy Black was last seen on 12/11/2000. His date of injury was 10/17/2000.
>
> The current diagnoses are:
>
> [One] 847.2 Lumbar Sprain
> [Two] 722.52 Degeneration Of Lumbar Or Lumbosacral Intervertebral Disc
> * * *
>
> * * *
>
> Billy Black complained of back pain. Billy Black had the following objective physical findings of improved pain, motion and strength. Billy Black has a good prognosis for improvement. Billy Black has not yet reached maximal medical improvement because this is the acute phase.
>
> * * *

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

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

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

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

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

> He comes back today. He still has back pain. He is also getting some groin pain in his testicle.
>
> On examination today there is some question of bulging into the groin.
> Assessment and Plan: This is a gentleman with back pain with no significant leg pain. He does do heavy work and this dose [sic] cause his symptoms to increase. We explained to him that his groin pain is unrelated to his back pain and he may have a hernia and should be checked by his primary care physician. At this time we will limit activities and no lifting greater that [sic] 50 pounds and no work greater than 8 hours for four weeks. We will see him back as needed. * * *

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

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

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

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

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

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

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

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

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

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

(Emphasis sic.)

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

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

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

> Q. What percentage of the work hour, just ballpark it, were you on your feet?
>
> A. The biggest part of it; biggest part of it.
>
> Q. Okay.
>
> A. I struggled all day long. Sometimes I'd sneak off somewhere and try to hide and sit down. But if they caught me doin' that, then I was in trouble so . . .
>
> Q. And it looks like you took a retirement in February 2001. Why was that? You were only 56 years old.
> A. Well, I was just in too much pain at the time, and I couldn't maintain my job that they expected me to there.
>
> Q. After they found that out, at any time did they offer you a sitting job in the office?
>
> A. No. There was never no sit-down jobs.
>
> Q. The company just doesn't have it, I would imagine?

(Tr. 6-7.)

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

> Q. After your retirement, did you apply for Social Security benefits?
>
> A. Yes, I did.

Q. And when was that?

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

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

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

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

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

* * *

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

A. No, no.
Q. Have you ever enrolled in a literacy program?

A. No.

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

A. I'm not hearing with them talking.

* * *

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

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

Q. Would you be interested in vocational training?

> A. I don't think it would do me any good. I - - you know, when I went to school, I mean, I doubled up on the years that I went there. And I wasn't able to learn, so I don't go - - I don't figure after all these years I'm going to be able to learn anything either. So along those lines . . .
>
> [Park Ohio's counsel] I have no further questions.
>
> HEARING OFFICER: I have just a couple. Mr. Black, did you work anywhere after you left Park Drop Forge?
>
> [Relator] No, ma'am.
>
> HEARING OFFICER: Did you look for work anywhere?
>
> [Relator] No, ma'am.

(Tr. 14-17.)

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

> It is the finding of the Staff Hearing Officer that the Injured Worker is ineligible to receive permanent total disability compensation because in 2001 he took a voluntary retirement and abandoned the work force.
>
> The Injured Worker sustained the instant injury on 10/17/00. Following the injury he received temporary total disability compensation until he returned to work on 12/13/00. When he returned to work he had a restriction of no lifting over twenty pounds. On 12/11/00 the Injured Worker notified the Employer that he intended to take retirement based on his years of service with the company. At the time the Injured Worker was fifty-six years old and [had] been with the Employer thirty-eight years. There is no medical evidence that any physician advised the Injured Worker to retire as a result of the allowed injuries. The Injured Worker saw his treating orthopedist in January 2001. At that time the lifting restriction was increased to fifty pounds due to groin pain which the doctor stated was unrelated to the Injured Worker's back condition.
>
> The Injured Worker last worked on 2/9/01 and officially retired on 2/28/01. He testified that he has neither worked nor looked for work since his retirement. The Staff Hearing

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

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

Conclusions of Law:

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

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

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

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

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

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

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

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

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

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

(Emphasis sic.)

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

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

Id. at ¶18.

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

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

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

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

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

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

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

NOTICE TO THE PARTIES

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