[Cite as *State ex rel. Tamarkin Co., Giant Eagle, Inc. v. Indus. Comm.*, 2012-Ohio-2866.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. The Tamarkin Company, Giant Eagle, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-625
The Industrial Commission of Ohio and Jerald Sulka,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 26, 2012

Rademaker, Matty, Henrikson & Greve LLC, Kirk R. Henrikson, and *Mark B. Marong,* for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis,* for respondent Industrial Commission of Ohio.

Rush E. Elliott, for respondent Jerald Sulka.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, the Tamarkin Company, Giant Eagle, Inc., 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 that awarded temporary total disability ("TTD") compensation to respondent, Jerald Sulka ("claimant"), and to enter an order denying said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court deny relator's request for a writ of mandamus. Relator has filed objections to the magistrate's decision.

{¶ 3} In its first objection, relator argues that the magistrate erred when she found that the commission did not abuse its discretion when it determined claimant did not voluntarily abandon his employment. Relator asserts that, in determining voluntary abandonment, the magistrate and commission erroneously looked at claimant's medical condition at the time he retired rather than at the time he filed for retirement, as the Supreme Court of Ohio did in *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089. Relator raises no specific argument and does not contest any specific reasoning by the magistrate. The magistrate addressed *Lackey* and found it inapplicable here. The magistrate found that, in contrast to *Lackey*, where it was uncontroverted that there was no contemporaneous medical evidence at the time the claimant filed his retirement paperwork, in the present case, she could not determine whether there was contemporaneous medical evidence because there were no office notes from June or July 2010. Furthermore, the magistrate found that the claimant testified he completed his retirement paperwork because of significant pain, and the commission could rely upon such. The magistrate also found that the present case differs from *Lackey* because the claimant here sought TTD compensation before the effective date of his retirement, and there was no period of unemployment between the date of his retirement and the date he sought TTD compensation.

{¶ 4} We agree with the magistrate's conclusions. Although it is clear that the court in *Lackey* determined that the claimant voluntarily exited the workforce because there was no medical evidence indicating that, when he filed for retirement, his ability to perform his regular duties was adversely affected by his industrial injury, we do not believe that the commission is bound by the medical evidence existing at the time the claimant filed for retirement to determine the voluntary nature of the departure. In a case involving permanent total disability, the Supreme Court, citing *Lackey*, found that "[w]hile the commission may characterize retirement as voluntary based on a lack of contemporaneous medical evidence of disability, see [*Lackey*], it is not required to do so,

because there may be other evidence that substantiates the connection between injury and retirement." *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011-Ohio-5027, ¶ 7. Here, the commission relied upon claimant's testimony that he effectuated his retirement paperwork because his injuries were causing such significant pain that he did not feel safe performing his job duties, as well as Dr. Russell Morrison's December 7, 2010 office note indicating that the excruciating pain suffered by claimant was making it difficult for him to work. This evidence substantiates the connection between claimant's allowed conditions and his retirement. *See, e.g., State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, ¶ 18 (it is within the commission's discretion to credit a claimant's testimony that his or her motivation for the departure from the job was based upon the allowed conditions, as the commission is the sole evaluator of credibility). For these reasons, and those cited by the magistrate, we find no error in the commission's determination, in this respect, and we overrule relator's first objection.

{¶ 5} In its second objection, relator argues that the magistrate erred when she assumed the existence of medical evidence that is not present in the record, namely office notes of Dr. Morrison from June to September 2010. By doing this, relator contends, the magistrate effectively placed the burden on relator to show that claimant was not temporarily and totally disabled, although claimant was given the same opportunity to provide any evidence of TTD as of the date he filed his retirement paperwork. Relator indicates that, despite the magistrate's unsupported assumption, it knows of no other office notes from Dr. Morrison during these periods.

{¶ 6} We fail to see any prejudicial error in the magistrate's finding in this respect. The magistrate indicated it was reasonable to assume that there were office notes from Dr. Morrison from June, July, August, and September 2010, because it appeared that claimant had been previously seeing Dr. Morrison once per month. The magistrate then indicated that, because any notes from this period were not in the record, she could not review them. The magistrate did not appear to penalize relator in this respect but merely indicated the lack of office notes from June to September 2010 made it impossible to review whether there was contemporaneous medical evidence to support claimant's argument that his retirement was due to his injuries. Importantly, given our finding that the commission could properly consider claimant's condition as of the date of departure,

the magistrate's finding, in this regard, was inconsequential. Therefore, we overrule relator's second objection.

{¶ 7} In its third objection, relator argues that the magistrate erred when she omitted from her consideration the August 10, 2010 office note from Dr. Morrison, which was made roughly one month after claimant filed for retirement on July 16, 2010. As a result of the omission, relator contends that the magistrate was wrong when she found that the medical evidence most proximate to claimant's retirement paperwork filing was the May 27, 2010 office note of Dr. Morrison. Relator then argues that the August 2010 office note shows no changes from the May 27, 2010 office note, as both show pain of eight out of ten with constant pain and swelling, and also shows pain levels and symptoms consistent with office notes dating back to November 2009.

{¶ 8} In her decision the magistrate stated that there was no office note from Dr. Morrison for, among other months, August 2010. However, as alleged by relator, the stipulation of evidence contains an office note from Dr. Morrison dated August 10, 2010. Thus, the magistrate's finding that the May 27, 2010 office note was the one completed nearest to the July 16, 2010 retirement paperwork was wrong. However, the issue again becomes whether any prejudice resulted. Because the magistrate agreed with the commission that the date of retirement is the proper date for determining whether the departure was voluntary, the fact that the August 2010 office note was consistent with the office notes dating back to November 2009 is of no consequence to whether claimant was temporarily and totally disabled in December 2010. Although we agree that the magistrate's factual statement was incorrect, we find any error in omitting from her consideration Dr. Morrison's August 10, 2010 office note was not prejudicial. Therefore, relator's third objection is overruled.

{¶ 9} In its fourth objection, relator argues that the magistrate erred when she found that the commission did not abuse its discretion when it used Dr. Morrison's office note from December 2010 to support its determination of claimant's medical condition at the time he filed for retirement in July 2010. Specifically, the commission found that claimant effectuated his retirement paperwork in July 2010 because the allowed conditions were causing him pain, and he did not feel safe performing his job duties, relying upon Dr. Morrison's December 2010 office note. Relator points out that there were similar office notes from August, October, and November 2010, which would have

been closer to the filing date of the retirement paperwork. Given our prior determination that the commission properly considered claimant's condition as of his retirement date, this argument is not well-taken, and relator's fourth objection is overruled.

{¶ 10} In its fifth objection, relator argues that the magistrate erred when she found that the commission did not abuse its discretion when it failed to consider claimant's medical condition at the time he filed for retirement in July 2010 but only considered his medical condition five months after he decided to leave the workforce. Again, given our previous determination that the commission properly considered claimant's condition as of his retirement date, this argument is not well-taken, and relator's fifth objection is overruled.

{¶ 11} In its sixth objection, relator argues that the magistrate erred when she denied its motion to include additional evidence in the record, in which relator sought to supplement the record with the retirement declaration form submitted in July 2010 by claimant to relator. In the motion, relator indicated that it obtained the form after the commission hearings, and then filed it with the commission. In his memorandum contra relator's motion, claimant argued that the document should not be added to the record because the district hearing officer and staff hearing officer did not have the document before them at the time they issued their respective orders. The magistrate agreed with claimant and denied the motion because the form was not considered by the commission.

{¶ 12} We find the magistrate did not err when she denied relator's motion to include additional evidence in the record for the reason cited. In a mandamus action, at issue is whether the evidentiary record legally supports the determination or whether an abuse of discretion occurred. *State ex rel. Corman v. Allied Holdings, Inc.*, 10th Dist. No. 10AP-38, 2010-Ohio-5153, ¶ 64. This court would not be able to determine whether the evidentiary record legally supported the commission's determination or whether the commission abused its discretion if we were to add evidence to the record not before the commission. Furthermore, although relator also argues that the magistrate erred when she then mentioned in her decision that the record lacked the retirement declaration form, we disagree. Given the magistrate rightfully precluded the addition of the form to the record on mandamus, she could then properly indicate that the form was not part of the record before this court. For these reasons, relator's sixth objection is overruled.

{¶ 13} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of relator's objections, we overrule relator's objections. We adopt the magistrate's findings of fact and conclusions of law, except for the erroneous statement that the record did not contain an August 2010 report from Dr. Morrison, as explained above. Therefore, we deny relator's request for a writ of mandamus.

Objections overruled; writ denied.

BRYANT and DORRIAN, JJ., concur.

[Cite as *State ex rel. Tamarkin Co., Giant Eagle, Inc. v. Indus. Comm.*, 2012-Ohio-2866.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The State of Ohio ex rel. The Tamarkin Company, Giant Eagle, Inc.	:	
Relator,	:	
v.	:	No. 11AP-625
The Industrial Commission of Ohio and Jerald Sulka,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 13, 2012

Rademaker, Matty, Henrikson & Greve LLC, Kirk R. Henrikson and *Mark B. Marong*, for relator.

Michael DeWine, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Rush E. Elliott, for respondent Jerald Sulka.

IN MANDAMUS

{¶ 14} Relator, The Tamarkin Company, Giant Eagle, Inc., 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 granting temporary total disability ("TTD") compensation to claimant, Jerald Sulka, and ordering the commission to find that Sulka had voluntarily abandoned the work force when he retired and was ineligible for TTD compensation.

Findings of Fact:

{¶ 15} 1. Sulka sustained a work-related injury on July 31, 1990 and his workers' compensation claim has been allowed for the following conditions: "FRACTURE RIGHT GREAT TOE; LACERATION RIGHT GREAT TOE; SYMPATHETIC DYSTROPHY OSTEOARTHRITIS OF 1ST METATARSAL PHALANGEAL JOINT."

{¶ 16} 2. Sulka was off work for approximately the next three years.

{¶ 17} 3. Sulka returned to work in 1993 and continued to work, without restrictions, until December 2010, shortly before his retirement.

{¶ 18} 4. On January 15, 2010, Sulka sustained an injury to his left hand and arm when he fell while walking his dog.

{¶ 19} 5. Sulka attempted to have his claim additionally allowed for fracture left distal radius arguing that the allowed conditions in his claim precipitated the fall and consequently the injury.

{¶ 20} 6. Sulka's motion seeking the additional left arm condition was denied following a May 7, 2010 hearing before a district hearing officer ("DHO").

{¶ 21} 7. Sulka appealed; however, following the hearing before a staff hearing officer ("SHO") on June 8, 2010, Sulka's request was denied.

{¶ 22} 8. Although none of the retirement documents are contained in the stipulation of evidence, it is undisputed that Sulka completed the paperwork for retirement in July 2010 indicating that he would retire effect December 31, 2010.

{¶ 23} 9. The record contains office notes from Sulka's treating physician, Russell A. Morrison, D.O., from November 11, 2009 through December 7, 2010. In each of those notes, Dr. Morrison indicated that Sulka complained of constant pain, swelling, numbness in his right foot and toes. Sulka's pain ranged from 7 to 9 on a 10 point scale through August 10, 2010. Office notes from October 5, November 2, and December 7, indicate that Sulka's pain level was often a 10 out of 10. In the October office note, Dr. Morrisson noted that Sulka's foot was cool and pale and he had tremors in his toes. Dr. Morrison made a notation concerning Sulka's range of motion; however, the magistrate finds it to be illegible. In the November office note, Dr. Morrison again noted that Sulka's foot was cool and pale and that he had tremors in his toes. At that time, it appears that Sulka informed Dr. Morrison that he was filing for disability. In a December 7, 2010 office

note, Dr. Morrison specifically noted that Sulka's pain was severe and that he was having difficulty working and walking. Dr. Morrison again noted that Sulka's foot was pale and cool

{¶ 24} 10. On December 9, 2010, Sulka filed a motion requesting TTD compensation beginning December 8, 2010. In support, Sulka included the December 7, 2010 C-84 indicating that Sulka was unable to return to his employment and that he likewise could not return to other employment. Dr. Morrison provided an estimated return-to-work date of January 10, 2011. In terms of objective findings, Dr. Morrison noted that Sulka's right foot pain was severe and that the right foot was pale and cool. In terms of subjective findings, Dr. Morrison noted that Sulka had constant pain and swelling in his right foot as well as numbness at times. Sulka also included the aforementioned office note from Dr. Morrison also dated December 7, 2010 indicating that Sulka's pain was severe and that he was having difficulty working and walking.

{¶ 25} 11. Sulka also filed a C-86 motion asking for the authorization of a pain management consultation as well as aquatic therapy and rehabilitation three times a week for six weeks. That motion was filed January 3, 2011. In support of his motion, Sulka included a C-9, the December 7, 2010 office note from Dr. Morrison, an additional office note from December 16, 2010, an EMG dated October 21, 2008, and Dr. Erickson's medical review dated December 20, 2010.

{¶ 26} 12. Dr. Erikson, who had examined Sulka previously, examined him again. In a December 20, 2010 report, Dr. Erikson opined that the requested pain management consultation was not necessary or appropriate for Sulka's treatment and that the passive aquatic therapy was likewise not necessary or appropriate treatment for Sulka's allowed conditions.

{¶ 27} 13. Sulka also requested TTD compensation from December 8, 2010 through an estimated return-to-work date of February 14, 2011.

{¶ 28} 14. Sulka's motions were heard before a DHO on February 10, 2011 and were denied. The DHO denied the requested TTD compensation after finding that the preponderance of the medical evidence failed to establish that any alleged disability was independently attributed to the allowed conditions in the claim. The DHO also noted that Sulka had testified that he had worked without restriction since 1993 through July 2010

when he began to prepare the paperwork necessary for retirement based upon 30 years of service. The DHO concluded that Sulka voluntarily abandoned his employment and that TTD compensation should be denied. The DHO also relied on the medical reports from Dr. Erickson and found that the requested treatment should not be allowed.

{¶ 29} 15. Sulka appealed, and the matter was heard before an SHO on March 21, 2011. The SHO vacated the prior DHO order in its entirety and granted the C-9 request and the period of TTD compensation. First, the SHO determined that there was sufficient medical evidence to establish by a preponderance of evidence that the allowed condition independently resulted in Sulka being temporarily and totally disabled. The SHO relied on the C-84 reports of Dr. Morrison filed December 8, 2010, January 7 and February 11, 2011, as well as the December 7, 2010 office note indicating that claimant's pain was a 10 out of 10 and that he had difficulty working and walking.

{¶ 30} The SHO rejected relator's contention that Sulka was not eligible to receive TTD compensation because he pursued a 30-year retirement effective January 1, 2011. The SHO stated:

> * * * The Staff Hearing Officer finds that the Injured Worker prepared paperwork to effectuate a 30 year retirement in July 2010 with an effective retirement date of 01/01/2011. However, the Injured Worker testified at hearing that he effectuated this retirement paperwork because the allowed conditions in this claim were causing such significant pain that he did not feel safe in performing his job duties as a truck driver. This testimony appears to be corroborated by the 12/07/2010 medical office note of Dr. Morrison wherein Dr. Morrison notes the excruciating pain suffered by the Injured Worker and that such pain was making it difficult for the Injured Worker to work or to walk.

Thereafter, the SHO relied on *State ex rel Pretty Prods. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), and the cases which followed indicating that an injured worker can abandon a former position of employment or remove himself or herself from the work force only if he or she has a physical capacity for employment at the time of the abandonment or removal. The SHO indicated that the medical evidence established that Sulka was temporarily and totally disabled at the time his retirement went into effect on January 1, 2011. The SHO reasoned:

> It is well established law that an Injured Worker can abandon a former position or remove himself or herself from the work force *only if he or she has a physical capacity for employment at the time of the abandonment or removal*. (See, State ex rel. Brown v. Industrial Commission (1993), 68 Ohio St. 3d 45). Furthermore, in State ex rel. Reitter Stucco v. Industrial Commission (2008), 117 Ohio St. 3d 71, the Ohio Supreme Court stated:
>
> *Pretty Products* was decided shortly after Louisiana-Pacific. In *Pretty Products,* we held that the character of the employee's departure i.e., voluntary versus involuntary—is not the only relevant element and that the timing of the termination may be equally germane. In *Pretty Products,* we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of the departure, the claimant is still temporarily and totally disabled. (*Id*. at page 2).
>
> In the present claim, the medical evidence establishes that the Injured Worker was temporarily and totally disabled at the time that his retirement went into effect on 01/01/2011.
>
> More recently, in State ex rel. Scott v. Industrial Commission (2009), unreported decision of the 10th District Court of Appeals, 2009 WL 4932207, the Court of Appeals held that, "In as much as relator was medically unable to return to his former position of employment at the time he accepted Delphi's 'special attrition program,' he remains eligible for temporary total disability compensation." (*Id*. at page 4).
>
> The present Staff Hearing Officer finds that the decision set forth in Brown, Reitter Stucco, and Scott are controlling here. Given these decisions, and the finding of this Staff Hearing Officer that the Injured Worker was temporarily and totally disabled from the ability to perform his job duties prior to the effective date of his retirement of 01/01/2011, the Staff Hearing Officer rejects the Employer's argument that the Injured Worker is ineligible for temporary total disability compensation in this claim.

{¶ 31} The SHO also determined that the treatments requested should be authorized finding sufficient medical evidence established by a preponderance of the

evidence that this treatment was warranted and/or reasonably related to the allowed conditions in the claim. The SHO relied on the C-9 and office note of Dr. Morrison.

{¶ 32} 16. Relator's appeal was denied by order of the commission mailed April 13, 2011.

{¶ 33} 17. Thereafter, relator filed a request for reconsideration arguing that the commission should focus on Sulka's ability to work at the time he initiated the paperwork for his retirement and not his physical condition at the time he actually retired. Relator argued that this evidence established Sulka filled out his retirement paperwork because he had 30 years of service. Relator argued that the December 7, 2010 office note of Dr. Morrison did not establish a new injury or changed circumstances to warrant a period of TTD compensation after Sulka had worked for 17 years without restrictions.

{¶ 34} 18. Relator's request for reconsideration was denied by order mailed June 1, 2011.

{¶ 35} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 36} In arguing that Sulka voluntarily abandoned the work force, relator argues that the medical evidence does not establish that Sulka was disabled at the time he began completing his retirement papers.

{¶ 37} The commission responds, indicating that the voluntary nature of abandonment is a factual question within the commission's final jurisdiction, citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). The commission argues that it was not required to find that Sulka voluntarily retired merely because in July 2010, the medical records do not establish any change in his circumstances. The commission argues that it is within its discretion to consider all the evidence, including Sulka's testimony, and find that Sulka was working in pain and, essentially trying to hold out until his 30 years of retirement was effectuated.

{¶ 38} It is this magistrate's decision that the commission did not abuse its discretion when it determined that Sulka had not voluntarily abandoned his job.

{¶ 39} 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 (10th Dist.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. 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.

{¶ 40} The voluntary nature of any claimant's departure from the work force 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.

{¶ 41} 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 work force 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 work force precludes the payment of TTD compensation all together. *Jones; State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000).

{¶ 42} As indicated, the voluntary nature of any claimant's departure from the work force is a factual question which centers around the claimant's intent at the time of retirement and consideration must be given to all relevant circumstances existing at the time of the alleged abandonment. The determination of such intent is a factual question which must be determined by the commission.

{¶ 43} When considering whether or not a particular claimant's departure from the work force is voluntary, the commission has considered factual situations which have certain similarities. In similar circumstances, the commission has determined that one injured worker's retirement was voluntary and that another's was not. However, because, in each instance, the commission had some evidence before it upon which it relied, both this court and the Ohio Supreme Court have declined the invitation to reweigh the evidence and reach a different conclusion.

{¶ 44} 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 with 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.

{¶ 45} 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.

{¶ 46} 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.

{¶ 47} 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.

{¶ 48} 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.

{¶ 49} 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.

{¶ 50} Ultimately, the commission determined that Franks' departure from the work place 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.

{¶ 51} 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.

{¶ 52} In *State ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517, the claimant, Veada 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 unable to return to a light-duty position at Ford until 2003.

{¶ 53} 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.

{¶ 54} 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.

{¶ 55} 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.

{¶ 56} 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 the 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.

{¶ 57} As in the *Ford Motor Co.* case, relator herein is asking this court to consider the facts surrounding Sulka's retirement and make the determination that Sulka's retirement was not involuntary but that it was voluntary. 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 Sulka's retirement was involuntary.

{¶ 58} As indicated previously, there are many cases wherein which the commission came to a different conclusion and determined the retirement was voluntary even though the facts were similar. For example, 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.

{¶ 59} 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.

{¶ 60} 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.

{¶ 61} Ultimately, the commission had determined that Pierron had voluntarily abandoned the work force 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 work force was wholly unrelated to his allowed conditions, the commission denied the motion for TTD compensation.

{¶ 62} 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.

{¶ 63} 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.

{¶ 64} 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.

{¶ 65} Following an independent medical examination wherein the physician determined that Corman's allowed conditions had reached maximum medical improvement ("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.

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

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

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

{¶ 69} 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 work force on April 1, 2003 and was not entitled to TTD compensation.

{¶ 70} 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.

{¶ 71} Relator argues that, pursuant to *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089, this court should find that the commission abused its discretion when it determined that Sulka's retirement was not voluntary. In *Lackey*, the claimant, Juan L. Lackey, sustained a work-related injury in June 2001 when he injured his left knee while employed as a truck driver for the employer, Penske Truck Leasing Company, L.L.P. ("Penske"). Lackey's claim was originally allowed for left knee strain; however, over the next couple of years, Lackey's claim would be additionally allowed for more serious knee conditions. Lackey underwent left knee surgery in June 2003.

{¶ 72} On July 27, 2004, Lackey signed retirement forms listing October 31, 2004 as his last day of work and the actual termination date for his employment with Penske. In an August 2004 letter, Lackey's counsel informed Penske's third-party administrator that Lackey's decision to retire at this time was primarily driven by increasing severity of his left knee pain and that Lackey was likely to seek some form of light-duty employment after he retired.

{¶ 73} On November 16, 2005, Lackey underwent another knee surgery and his physician completed a C-84 certifying TTD compensation from November 16, 2005 to an estimated return-to-work date of March 27, 2006.

{¶ 74} Lackey's motion was heard before a DHO who denied the requested period of compensation finding that Lackey had voluntarily retired from his employment on October 31, 2004. The DHO indicated that Lackey took a full retirement and not a disability retirement and that there was no medical evidence indicating the retirement was in any way related to the allowed condition.

{¶ 75} Upon appeal, an SHO affirmed the prior DHO order and denied the request for compensation. The SHO noted that Lackey testified that the only reason he had not sought employment since his retirement was that he would be financially penalized through a reduction of retirement benefits. The SHO determined that Lackey had

voluntarily retired and had no intention of returning to employment and denied the request for TTD compensation.

{¶ 76} Lackey filed an administrative appeal and included an affidavit stating that his knee had become progressively worse over time, that he was having difficulty operating the clutch, and that he no longer felt safe driving a truck. He indicated that his retirement was just for the allowed condition and that the only reason he did not seek employment after his retirement was that he was waiting for his surgery to be approved. Lackey's appeal was denied.

{¶ 77} Lackey sought a writ of mandamus in this court; however, that request was denied. This court, through its magistrate, found that the commission did not abuse its discretion by concluding that Lackey took a full retirement rather than a disability retirement and that there was no medical evidence indicating that his retirement was related to the industrial injury. This court in *State ex rel. Lackey v. Indus. Comm.*, 10th Dist. No. 08AP-262, 2009-Ohio-4208, ¶ 5, concluded:

> [T]he commission properly considered the retirement document, the absence of contemporaneous medical evidence documenting the causal relationship between relator's injury and his retirement, the admitted absence of a post-retirement job search, and relator's testimony during the proceedings.

{¶ 78} On appeal, the Ohio Supreme Court affirmed this court's decision. That court stated:

> There is no medical evidence indicating that when Lackey filed for retirement, his ability to perform his regular duties was adversely affected by his industrial injury. To the contrary, Lackey worked full-time for nearly a year before submitting his retirement notice and continued to work in that same capacity for another three months. This is hardly consistent with a condition so debilitating as to force an individual prematurely from his job.

Id. at ¶ 13.

{¶ 79} Relator argues that the application of *Lackey* to the facts of this case demonstrates that the commission abused its discretion by finding that Sulka's retirement was not voluntary. Relator emphasizes that the medical evidence available in July was not sufficient to show that he was disabled given that he continued to work.

{¶ 80} As in the numerous cases above discussed, the determination of whether or not an injured worker's retirement is voluntary or involuntary, is a factual determination to be made by the commission and it is not the province of this court to substitute its conclusion for that of the commission.

{¶ 81} For the foregoing reasons, the magistrate finds that the application of *Lackey* to these facts does not warrant a different decision.

{¶ 82} In *Lackey*, this court was provided a copy of Lackey's retirement documents to review. The commission found that Lackey took a full retirement and not a disability retirement. In the present case, there are no retirement documents in the stipulation of evidence for the court to review and it cannot be determined whether or not the commission had those documents.

{¶ 83} Another distinction between the two situations is that Lackey's request for TTD compensation came approximately one year after his retirement. In the present case, Sulka filed his application for TTD compensation before his retirement was effective. Unlike *Lackey*¸ it cannot be said that Sulka retired and did not seek other employment.

{¶ 84} Concerning the medical evidence, the magistrate notes that relator argues that the court focused on the fact that there was no contemporaneous medical evidence in the record from July 2004 when Lackey signed the paperwork to retire. The earliest office notes from Dr. Morrison are from November 12, 2009. Sulka indicated that his pain was an 8 out of 10 and that he had constant pain, swelling and numbness in his right foot and a decrease in range of motion. The office note nearest the time he prepared the retirement documents is May 27, 2010. Sulka's complaint at that time indicated that his pain was an 8 out of 10 and that he had constant pain and swelling in his right foot and numbness in his toes. There are no office notes from June, July, August, or September. Inasmuch as Sulka had been seeing Dr. Morrison once a month, it is reasonable to assume that there are office notes covering that time period; however, because they are not in the stipulated evidence, this court cannot review them. The next office note available is from October 5, 2010 at which time Sulka now rated his pain at an 8 to 10 out of 10, still had constant pain and swelling in his right foot, and numbness. In that office note, Dr. Morrison noted that his foot was cool and pale, that he had tremors in his toes, and a decrease range of motion in his toes. The next note, November 2 and December 7, 2010, show that Sulka continued

to have pain at a level of 10 out of 10. As such, it is impossible for this court to review whether or not there was contemporaneous medical evidence supporting Sulka's argument that his retirement was due to the allowed conditions in his claim. Further, the SHO specifically relied on Sulka's testimony that he effectuated the retirement paperwork because the allowed conditions were causing such significant pain that he no longer felt safe performing his job duties as a truck driver.

{¶ 85} In *Lackey*, it was uncontroverted that there was no contemporaneous medical evidence at the time Lackey filed his retirement paperwork. In the present case, the magistrate cannot determine whether or not there was contemporaneous medical evidence in the record because there are no office notes from June or July 2010, near the time Sulka filled out the paperwork. Also, because we do not have medical records prior to November 2009, this court cannot know whether or not Sulka's condition was gradually worsening over time. We do know that in November 2009, Sulka had significant pain. This may or may not represent an increase in his pain from earlier in the year. We do know that Sulka fell in January 2010 and that, on January 21, 2010, his pain was a 9 out of 10. And we do know that by October 2010, Sulka's pain level increased. Sulka testified that he completed the paperwork for retirement because of significant pain. As in *Mid-Ohio*, the commission can rely on his testimony concerning his condition and reasons for retiring.

{¶ 86} Further, this case differs from the *Lackey* case because Sulka sought TTD compensation before the effective date of his retirement and there was no period of unemployment between the date of his retirement and the date he sought TTD compensation. All of the above were significant factors which were discussed in *Lackey*, and which are absent here.

{¶ 87} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in awarding TTD compensation to Sulka after finding that his retirement was involuntary and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Books
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).