

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Honda of America Mfg., Inc.,	:	
	:	
Relator,	:	No. 11AP-528
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and Robert Corlew,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on July 24, 2012

Vorys, Sater, Seymour & Pease LLP, and Robert A. Minor, for relator.

Michael DeWine, Attorney General, and Derrick Knapp, for respondent Industrial Commission of Ohio.

Law Office of Stanley Jurus, and Frank A. Vitale, for respondent Robert Corlew.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Honda of America Mfg., Inc., seeks a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding temporary total disability ("TTD") compensation to respondent, Robert Corlew ("claimant"), and ordering the commission to find that he is not entitled to that compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate determined that the commission did not abuse its discretion when it awarded TTD compensation to claimant. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

I. BACKGROUND

{¶ 3} Claimant suffered a work-related injury in 2003 and received various periods of TTD compensation until it was determined that his allowed physical conditions had reached maximum medical improvement ("MMI"). Based on the finding of MMI, claimant's TTD compensation was terminated effective February 29, 2008. Thereafter, claimant was told his employment with relator would end on December 31, 2008, with the termination of relator's medically inactive transition program. Therefore, claimant elected to retire.

{¶ 4} In 2009, claimant's request for authorization for surgery was approved and surgery was performed in December 2009. Claimant sought TTD compensation from the date of surgery to an estimated return-to-work date in 2011. Following a hearing, a district hearing officer granted claimant's request for TTD compensation, and a staff hearing officer affirmed. The matter was heard before three members of the commission who determined claimant's request for TTD compensation should be granted.

II. RELATOR'S OBJECTION

{¶ 5} Relator has filed an objection to the magistrate's decision arguing that the magistrate failed to focus on the proper issue presented. According to relator, the magistrate focused on the issue of voluntary abandonment of employment, instead of the issue raised by relator which is whether one has to suffer economic loss in order to be entitled to TTD compensation. We disagree with relator's characterization of the magistrate's decision. The magistrate appropriately explored the relevant issues, thereby establishing that the position advanced by relator is not supported by law.

{¶ 6} In *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 10th Dist. No. 11AP-533, 2012-Ohio-2469, this court reviewed the commission's denial of a post-retirement request for TTD compensation. Like claimant, the injured worker in *Hoffman* suffered a

work-related injury and received TTD compensation until the conditions were determined to have reached MMI. Approximately three months after the MMI determination, the injured worker retired. Sixteen months after retiring, the injured worker underwent surgery and sought TTD compensation from the date of the surgery. The requested compensation was denied in *Hoffman* because the commission determined the injured worker's retirement was voluntary. Speaking through the magistrate, this court stated that in circumstances where a claimant is not receiving TTD compensation, retires, and then thereafter seeks reinstatement of TTD compensation, "[i]f 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 remain eligible for an award of TTD compensation." *Id.* at ¶ 79.

{¶ 7} As the magistrate stated in her decision, there are a number of cases in which TTD compensation has been reinstated after retirement, and the relevant inquiry is whether or not the retirement is voluntary. Here, the record contains evidence that claimant retired because of the industrial injury that also precluded him from returning to the work force. Thus, we conclude the magistrate correctly addressed the pertinent issues and overrule relator's objection to the magistrate's decision.

III. CONCLUSION

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objection overruled;
writ of mandamus denied.*

BRYANT and TYACK, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Honda of America Mfg., Inc.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-528
	:	
Industrial Commission of Ohio and Robert L. Corlew,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 21, 2012

Vorys, Sater, Seymour & Pease LLP, and Robert A. Minor,
for relator.

Michael DeWine, Attorney General, and Derrick L. Knapp,
for respondent Industrial Commission of Ohio.

Law Office of Stanley Jirus, and Frank A. Vitale, for
respondent Robert L. Corlew.

IN MANDAMUS

{¶ 9} Relator, Honda of America Mfg., 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 awarding temporary total

disability ("TTD") compensation to respondent Robert L. Corlew ("claimant"), and ordering the commission to find that he is not entitled to that compensation.

Findings of Fact:

{¶ 10} 1. Claimant began his employment with Honda in February 1988.

{¶ 11} 2. Claimant sustained a work-related injury on December 5, 2003, and his workers' compensation claim has been allowed for the following conditions: "Contusion of right wrist; right wrist tendonitis; carpi ulnaris sub sheath tear; triffibrocartilage tear; anxiety disorder."

{¶ 12} 3. Claimant received various periods of TTD compensation until February 29, 2008, when his TTD compensation was terminated following a February 29, 2008 hearing before a district hearing officer ("DHO"), who found that claimant's allowed physical conditions had reached maximum medical improvement ("MMI").

{¶ 13} 4. Between December 2006 and December 2008, claimant participated in Honda's medically inactive transition program ("MIT"). The MIT program provides an injured worker with periods of disability compensation while the injured worker pursues various rehabilitation efforts. It is undisputed that claimant participated in the MIT program and completed his various assignments.

{¶ 14} 5. In March 2008, Honda offered claimant some type of vocational rehabilitation. Claimant initially indicated that he was willing to participate but needed to discuss the matter with his attorney. As such, the case was closed on grounds that claimant was not interested in the program at that time.

{¶ 15} 6. After the MIT program ended in December 2008, claimant was informed that his employment with Honda would end December 31, 2008.

{¶ 16} 7. Because he was eligible to retire, claimant elected to do so.

{¶ 17} 8. In March 2009, claimant's treating physician, Charles B. May, D.O., filed a C-9 requesting authorization for surgery.

{¶ 18} 9. Honda initially denied the request pending an independent medical examination ("IME") by its examining expert, Dr. Goula, who opined that the requested surgery was medically necessary and appropriate.

{¶ 19} 10. In an ex parte order mailed June 18, 2009, it was determined that Honda had approved the request for surgery, as follows:

It is hereby the finding of the Hearing Officer that the Self-Insuring Employer has accepted the Injured Worker's C-86 filed 04/14/2009 requesting authorization of C-9 dated 03/17/2009 for surgery, reconstruction, distal radial ulnar joint with either ulnar shortening or ligament reconstruction with a palmaris longus tendon graft, Orthopedic Surgeon, Dr. Stutzman.

{¶ 20} 11. The surgery was performed on December 29, 2009 by Desmond J. Stutzman, D.O.

{¶ 21} 12. On February 9, 2010, claimant filed a motion seeking an award of TTD compensation beginning December 29, 2009 and continuing based on C-84s submitted by Drs. May and Stutzman. Those C-84s requested the payment of TTD compensation from December 29, 2009 through an estimated return-to-work date of October 19, 2011.

{¶ 22} 13. The request for TTD compensation was heard before a DHO on April 29, 2010. The DHO issued an interlocutory advisement order taking the matter of advisement, as follows:

This claim is taken under advisement for further review, consideration, and research by the District Hearing Officer prior to publishing of a final order. The file is referred to District Hearing officer Charney.

The Self-Insuring Employer is hereby ordered to comply with the above findings.

This order is interlocutory in nature and not subject to appeal.

{¶ 23} 14. Thereafter, the DHO determined that TTD compensation should be paid beginning December 29, 2009 based on the operative report from Dr. Stutzman of the same date, Dr. Stutzman's January 21, 2010 C-84, Dr. May's January 14, 2010 C-84, and the various office notes and C-9s in the file from Dr. May.

{¶ 24} 15. Honda appealed and the matter was heard before a staff hearing officer ("SHO") on June 24, 2010. The SHO also determined that TTD compensation should be awarded, stating:

It is the finding and order of the Staff Hearing Officer that the Injured Worker's C-84 request for temporary total compensation filed 01/28/2010, is granted. It is the finding and order of the Staff Hearing Officer that the Injured Worker underwent a surgical procedure on 12/29/2009 which is causally related to the allowed conditions in this claim. The Staff Hearing Officer finds that the date of surgery and a usual and customary recuperative period has caused the Injured Worker to be temporarily disabled and incapable of returning to any form of employment. It is therefore the order of the Staff Hearing Officer that temporary total disability compensation benefits from 12/29/2009 through 03/28/2010, and continuing upon submission of appropriate medical evidence documenting the Injured Worker's disability to be due to the allowed conditions in this claim, are to be paid less any benefits previously received. This order is based upon the operative report dated 12/29/2009 from Dr. Stutzman, the C-84 dated 01/28/2010 and treatment notes from Dr. May.

The Self-Insuring Employer is hereby ordered to comply with the above findings.

{¶ 25} 16. Honda appealed, and the matter was heard before three members of the commission on August 12, 2010. At the hearing, Honda's entire argument was based on its contention that TTD compensation was not payable to claimant because he was not experiencing an economic loss. Honda clarified its position at the hearing indicating that it was not making any argument related to voluntary abandonment, refusal of a good-faith job offer, or voluntary retirement, nor that claimant continued to be at MMI. In fact, Honda conceded that, medically, claimant was again temporarily and totally disabled as a result of the surgery performed on that date. The only issue raised by Honda was that there must be an economic loss before TTD compensation can be awarded. Claimant testified that he retired from Honda because of the industrial injury and that he wanted to return to the workforce, but his allowed conditions precluded him from doing so. As such, claimant argued that his separation from employment was involuntary and that he was, therefore, still eligible to receive TTD compensation because it was undisputed that the allowed conditions in his claim were causing him to be disabled.

{¶ 26} 17. The commission rejected Honda's argument and determined that TTD compensation should be paid, as follows:

The Employer proffered no case law or statutory authority to support its position, nor has the Commission found any such authority, other than that pertaining to an Injured Worker's receipt of wages in lieu of temporary total disability compensation. See e.g., State ex rel. Rubin v. Indus. Comm. (1938), 134 Ohio St. 12. The Injured Worker has not worked, received wages or received any temporary total disability compensation since 12/16/2008, nor has he received any other benefits related to his industrial injury since that date. The Injured Worker did receive his retirement benefits.

R.C. 4123.56(A) specifically states "(t)he termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled." The statute does not contain any requirement that the Injured Worker must be suffering an economic loss at the time the allowed industrial condition again becomes temporarily totally disabling. The statute is clear, however, that the termination of temporary total disability compensation does not preclude the payment of temporary total disability compensation at another point in time if the Injured Worker again becomes temporarily totally disabled. The Injured Worker, who had his temporary total disability compensation terminated by Industrial Commission order on 02/29/2008, again became temporarily totally disabled 12/29/2009, the date he had surgery. Consequently, by statute, temporary total disability compensation is granted beginning 12/29/2009. It is undisputed that the Injured Worker was unable to return to his former position of employment, that he was not working, that his condition temporarily worsened, and that he was not receiving wages. The Employer's "no economic loss" theory bars temporary total disability compensation only if the Injured Worker's retirement benefits are considered a wage replacement. The Commission is aware of no authority for such conclusion when an Injured Worker's retirement is injury induced. To the contrary, the statute itself coordinates the simultaneous receipt of temporary total disability compensation and social security retirement benefits. See R.C. 4123.56(D).

Therefore, the Commission concludes that the Injured Worker has met the statutory requirements for temporary total disability compensation.

The self-insuring Employer is hereby ordered to comply with the above findings.

{¶ 27} 18. Thereafter, Honda filed the instant mandamus action in this court.

{¶ 28} 19. The matter is currently before the magistrate for determination.

Conclusions of Law:

{¶ 29} Honda argues that TTD compensation is defined as compensation for wages lost where 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); *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987). Citing *State ex. rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25 (2002), Honda argues that, as such, in order to qualify for an award of TTD compensation, claimant was required to prove not only that he lacked the medical capacity to return to his former position of employment but that there was a causal relationship between the industrial injury and an actual loss of earnings.

{¶ 30} For the reasons that follow, the magistrate finds that the commission did not abuse its discretion by finding that claimant was entitled to an award of TTD compensation because his retirement was due to the allowed conditions in his claim and, therefore, involuntary; that he had desire to return to work; and that it was undisputed that the allowed conditions in his claim rendered him temporarily totally disabled.

{¶ 31} 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. *Ramirez*. 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).

{¶ 32} When determining 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. *Ashcraft*. 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.

{¶ 33} 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.

{¶ 34} 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. *McCoy*. However, a claimant's complete abandonment of the entire workforce precludes the payment of TTD compensation all together. *Jones & Laughlin Steel Corp. and State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000).

{¶ 35} Honda's reliance on *McCoy* is misplaced. In *McCoy*, the Ohio Supreme Court determined that, where an injured worker *voluntarily retires*, that injured worker becomes eligible for TTD compensation *only if* he or she re-enters the workforce and, as a result of the original industrial injury, becomes temporarily and totally disabled while working at that new job.

{¶ 36} *McCoy* would apply here only if claimant had voluntarily retired from his employment with Honda. However, Honda does not contest the involuntariness of claimant's retirement. Further, Honda does not dispute that claimant is temporarily and totally disabled as a result of the allowed conditions in the claim. Honda is, however, misapplying the holding from *McCoy* here.

{¶ 37} There are many cases which could be cited where injured workers were found to have involuntarily retired from their former position of employment, had not

returned to work, were rendered temporarily and totally disabled due to the allowed conditions in the claim, and were awarded TTD compensation in spite of the fact that, because they were not working, they had no lost wages. Because the commission looks at the intent of the injured worker, the commission can find that an injured worker who involuntarily retires from his or her former position of employment yet wants to be working at the time he or she is temporarily and totally disabled does qualify for TTD compensation because, but for the allowed conditions in the claim, that injured worker would be working.

{¶ 38} 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.

{¶ 39} 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.

{¶ 40} 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.

{¶ 41} 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.

{¶ 42} 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.

{¶ 43} Franks continued having problems and 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.

{¶ 44} 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.

{¶ 45} 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.

{¶ 46} 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 able to return to a light-duty position at Ford until 2003.

{¶ 47} 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.

{¶ 48} 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.

{¶ 49} 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.

{¶ 50} 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.

{¶ 51} On March 6, 2012, Honda submitted the recent Ohio Supreme Court decision in *State ex rel. Akron Paint & Varnish, Inc. v. Gullotta*, Slip Opinion No. 2012-Ohio-542, in further support of its argument. However, the magistrate finds that the *Akron Paint* case does not apply here.

{¶ 52} In *Akron Paint*, the claimant Guiseppe Gullotta, injured his back and was unable to return to his job. After several weeks receiving TTD compensation, Gullotta returned to light-duty work consistent with his doctor's medical restrictions.

{¶ 53} On March 14, 2007, Gullotta's treating physician found that his physical capabilities had improved and reduced his work restrictions. Based on those new lesser restrictions, Akron Paint increased Gullotta's job duties. Gullotta saw his treating physician in April 2007; however, his work restrictions remained the same.

{¶ 54} Gullotta complained to his employer about his job duties and, on April 16, 2007, Gullotta spoke with a vice-president who offered him another position, also within his physical limitations. Gullotta indicated that he did not want that job either, and he immediately resigned and left the premises.

{¶ 55} Four months later, Gullotta requested a period of TTD compensation beginning in April 2007. Gullotta's request was denied by a DHO who found that Gullotta had voluntarily abandoned his employment and removed himself from the workforce. On appeal, an SHO vacated the DHO's order but denied the requested period of TTD compensation for a different reason. The SHO determined that the period of disability was not causally related to Gullotta's industrial injury but, rather, was due to his refusal to

return to his light-duty job or to accept a suitable alternative employment that Akron Paint had offered. The SHO expressly noted that Gullotta was medically unable to return to his former position of employment at the time he quit, so his resignation could not be deemed a voluntary abandonment.

{¶ 56} In March 2008, Gullotta's claim was allowed for an additional condition, and he filed a motion seeking TTD benefits. A DHO denied the request on grounds that Gullotta had refused a light-duty job offer and that he had failed to present evidence that his additionally allowed medical condition resulted in greater work restrictions.

{¶ 57} On appeal, an SHO reversed the prior DHO order and determined that Gullotta's newly allowed medical condition constituted evidence of new and changed circumstances.

{¶ 58} Akron Paint filed a mandamus complaint in this court. Adopting the decision of the magistrate, this court agreed that the commission had abused its discretion when it relied on the additionally allowed medical condition as a new and changed circumstance. This court further concluded that Gullotta had not submitted evidence justifying a renewed period of TTD compensation in light of his previous refusal of the light-duty job made available by Akron Paint. The court noted that, even if the medical evidence demonstrated that Gullotta's condition had worsened since his resignation, he "has lost no wages during the period of claimed disability for which he can be compensated." *State ex rel. Akron Paint & Varnish, Inc. v. Gullotta*, 10th Dist. No. 09AP-492, 2010-Ohio-1321, ¶ 47.

{¶ 59} There is a significant distinction between Gullotta's absence from the workforce and claimant's absence from the workforce, and this distinction renders *Akron Paint* inapplicable here. Although Gullotta and claimant were both unable to return to their former positions of employment, Gullotta was offered and refused light-duty work. Pursuant to *McCoy*, and the cases which followed, because Gullotta could have been working but was not working because he chose not to accept a light-duty job offer, Gullotta was required to return to work before he could receive TTD compensation for a later period of disability. At the time he sought TTD compensation, Gullotta had no wages to replace because he refused a light-duty job offer and removed himself from the workforce. By comparison, claimant was likewise unable to return to his former position

of employment. However, claimant did not refuse a good-faith offer of work within his restrictions. Honda informed claimant that his employment would end on December 31, 2008. Because he was eligible to retire, claimant elected to do so.

{¶ 60} Gullotta was denied TTD compensation not based on medical evidence but, rather, on the statutory bar of compensation when a claimant has unjustifiably refused light-duty work made available by the employer. In such a case, the claimant must return to some other employment before the claimant can become eligible for TTD compensation. By comparison, it is undisputed that claimant left his employment with Honda after several years of rehabilitation and his participation in Honda's MIT program. Honda decided that the MIT program would terminate, and Honda did not have any other employment to offer claimant. Because he was eligible to retire, claimant did so. Further, claimant requested surgery soon after he retired. Very little time passed between the date he retired and the date he requested surgery. Here, there was no evidence that claimant had abandoned the entire workforce, and Honda has not argued otherwise. The fact that he did not refuse an offer of alternative employment distinguishes claimant's situation from Gullotta's situation, and the court's decision in *Akron Paint* does not lead to a different conclusion here.

{¶ 61} Honda's focus is misplaced, and its argument is not supported by law.

{¶ 62} Based on the foregoing, it is this magistrate's decision that Honda has not demonstrated that the commission abused its discretion in awarding TTD compensation to claimant, and this court should deny Honda's 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).