[Cite as *State ex rel. Kempinski v. Indus. Comm.*, 2012-Ohio-4125.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas Kempinski,	:	
Relator,	:	
v.	:	No. 10AP-1144
Industrial Commission of Ohio and Ameritech-Ohio SBC/Ameritech,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 11, 2012

Gruhin & Gruhin, and *Michael H. Gruhin*, for relator.

Michael DeWine, Attorney General, and *Rema A. Ina*, for respondent Industrial Commission of Ohio.

Porter Wright Morris & Arthur, LLP, *Fred J. Pompeani*, and *Rebecca A. Kopp*, for respondent Ameritech-Ohio SBC/Ameritech.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Thomas Kempinski, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator temporary total disability ("TTD") compensation for the period of January 4, 2008 through December 28, 2008, based upon

the commission's finding of a lack of contemporaneous medical proof relating to the disability from the allowed conditions to the period at issue, and denying TTD compensation after December 28, 2008, on the grounds that relator allegedly voluntarily retired from his employment with respondent, Ameritech-Ohio SBC/Ameritech ("Ameritech").

{¶ 2} The matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. On December 22, 2010, the magistrate issued the appended decision, including findings of fact and conclusions of law, recommending that this court issue a writ of mandamus ordering the commission to vacate its May 25, 2010 order to the extent that it denies TTD compensation, and to enter a new order that adjudicates relator's April 7, 2009 motion for TTD compensation.

{¶ 3} Ameritech has filed objections to the magistrate's decision, asserting that the magistrate erred in concluding that the commission's May 25, 2010 order denying TTD compensation violates *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991). Ameritech further argues that the magistrate erred in concluding that relator could be entitled to TTD compensation despite the fact he received non-occupational short-term disability payments and that his surgeries were paid for under his non-occupational insurance. Ameritech also challenges the magistrate's conclusion that the commission's finding of a lack of contemporaneous medical proof is not supported by some evidence in the record.

{¶ 4} In its brief submitted to the magistrate in response to relator's request for mandamus, the commission "concede[d]" that its order did not specifically state what medical evidence it was relying upon, and did not explain why the medical evidence was inadequate. (Commission Brief at 11.) The magistrate framed the primary issue in this action as whether the commission "correctly concedes" that its May 25, 2010 order denying TTD compensation beginning January 4, 2008 violates the dictates of *Noll*. (Magistrate's Decision at 15.)

{¶ 5} In *Noll*, the Supreme Court of Ohio directed the commission to "specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision," noting that "[a]n order of the commission should make it readily apparent from the four corners of the decision that there is some evidence supporting it." *Id.* at 206.

{¶ 6} In the instant action, the magistrate concluded that the order did not comply with *Noll*. More specifically, the magistrate determined that the commission's finding of a lack of contemporaneous medical proof of disability was not supported by some evidence, as the commission failed to adjudicate the issue of whether C-84s completed by several physicians established TTD, and the order failed to indicate what medical evidence the commission deemed unpersuasive. The magistrate also rejected the implication in the commission's order that relator could not have been temporarily and totally disabled during the relevant time period because of evidence he received non-occupational short-term disability payments/benefits.[1]

{¶ 7} Ameritech's contention that the commission could have properly determined that a claimant's receipt of non-occupational benefits constitutes substantial evidence that a period of disability is non-occupational in nature is not persuasive. Under the provisions of R.C. 4123.56, "temporary total disability is defined as a disability which prevents a worker from returning to his former position of employment." *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630, syllabus. As recognized by the magistrate, while R.C. 4123.56 provides for an offset of temporary non-occupational accident insurance benefits paid by the employer against workers' compensation benefits, the receipt of non-occupational payments itself is not dispositive of an injured worker's claim for TTD compensation. Rather, the commission, as ultimate arbiter of disability, determines whether the evidence establishes that a requested period of disability is causally related to allowed conditions. Further, we agree with the magistrate's conclusion (and the commission's admission) that the order fails to explain, contrary to *Noll*, what specific evidence the commission relied upon to support its order. We conclude, however, that we need not determine whether the medical evidence, including the C-84s and physician office notes, undermines the commission's finding of a lack of contemporaneous medical proof of disability during 2008 and leave analysis of the evidence to the commission.

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[1] In light of the magistrate's recommendation that the matter be remanded to the commission to again consider relator's entitlement to TTD compensation, the magistrate deemed it premature to address the issue of whether the commission abused its discretion in determining that relator's retirement was voluntary.

{¶ 8} Upon examination of the magistrate's decision, an independent review of the record, pursuant to Civ.R. 53, and consideration of Ameritech's objections, we find that the magistrate has properly determined the facts and the applicable law. Accordingly, we overrule Ameritech's objections and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's recommendation, we grant a writ of mandamus ordering the commission to vacate its order of May 25, 2010, to the extent it denies TTD compensation and to enter a new order, in compliance with *Noll,* that adjudicates relator's motion for TTD compensation.

Objections overruled, writ of mandamus granted.

SADLER and FRENCH, JJ., concur.

_____

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Thomas Kempinski,	:	
Relator,	:	
v.	:	No. 10AP-1144
Industrial Commission of Ohio and Ameritech-Ohio SBC/Ameritech,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on December 22, 2010

Gruhin & Gruhin, and *Michael H. Gruhin*, for relator.

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

Porter Wright Morris & Arthur, LLP, *Fred J. Pompeani*, and *Rebecca A. Kopp*, for respondent Ameritech-Ohio SBC/Ameritech.

IN MANDAMUS

{¶ 9} In this original action, relator, Thomas Kempinski, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order to the extent that it denies temporary total disability ("TTD") compensation for the period January 4 through December 28, 2008 on grounds that allegedly there is no

contemporaneous medical proof relating disability to the industrial injury, and to the extent that it denies TTD compensation after December 28, 2008 on grounds that allegedly relator voluntarily retired from his employment with respondent Ameritech-Ohio SBC/Ameritech ("Ameritech").

Findings of Fact:

{¶ 10} 1. On August 21, 1991, relator injured his lower back while employed as a service technician for Ameritech, a self-insured employer under Ohio's workers' compensation laws.

{¶ 11} 2. The industrial claim (No. L82725-22) is allowed for:

> Low back strain left; herniated disc L4, L5 and L5-S1; degenerative disc at L4-through S1; foraminal stenosis; epidural fibrosis, levels L5-S1 (aka post-laminectomy syndrome).

{¶ 12} 3. Following a period of TTD, relator returned to work at Ameritech in July 2007 at a modified job.

{¶ 13} 4. On December 20, 2007, attending physician Stephen R. Bernie, M.D., wrote:

> Mr. Kempinski returns to the office with increasing pain in his lower back. He continues to work for AT&T, but on light duty. He has difficulty getting to work because of the sitting for a long period of time in his car. He recently saw Dr. Kim of the Collis Orthopedic Group, who re-evaluated him and evaluated the recent MRI scan and suggested that he see a colleague in the group to evaluate pain referring from the piriformis muscle and possibly need to decompress the sciatic nerve. After evaluation, if this is not the case, Dr. Kim will perform a spinal surgery.
>
> * * *
>
> * * * He will continue working with restrictions. We will obtain a C-9 for evaluation of his sciatic nerve. He will continue taking Percocet (10/650, every 4-6 hours as needed for pain). He will have a follow-up visit in the next 2-3 weeks.

{¶ 14} 5. On January 3, 2008, Dr. Bernie completed a C-84 certifying TTD beginning January 4, 2008 to an estimated return-to-work date of February 11, 2008.

{¶ 15} 6. By letter dated January 10, 2008, Ameritech disputed the C-84 and indicated that an employer medical examination would be scheduled.

{¶ 16} 7. On January 29, 2008, relator underwent a surgical procedure performed by Louis Keppler, M.D. In his operative report, the surgery is described as "[e]xploration and decompression of sciatic nerve."

{¶ 17} 8. On July 9, 2008, relator underwent another surgery performed by Dr. Keppler. In his operative report, the surgery is described as "[l]eft L4 hemilaminotomy, medial facetectomy, with intertransverse and intercanalicular approach to disk herniation for diskectomy; intraoperative use of microscope."

{¶ 18} 9. In an August 15, 2008 office note, Dr. Keppler wrote:

> HISTORY: I spoke to him over the phone. He is still having some persistent numbness in his left leg. He says the OxyContin take away his back pain but he has this numbness in his left leg. * * *

{¶ 19} 10. In an August 21, 2008 office note, Dr. Keppler wrote:

> HISTORY: He comes in today after undergoing discectomy done about six weeks ago. I had a conversation with him on the phone. We increased his Lyrica. That seems to have helped with his numbness in his leg. He says this past week it seems to have improved. The numbness is not as severe.
>
> PHYSICAL EXAMINATION: Dr. Keppler went in and discussed with him his options. He himself noted that he is doing better. We are going to continue to observe him and observe the numbness he is having.

{¶ 20} 11. In an office note dated October 9, 2008, Dr. Keppler wrote:

> Tom Kempinski still has persistent leg pain. His EMG is not showing significant change. It does show evidence of L5-S1 radiculopathy. This may represent permanent nerve injury. I am recommending that a new MRI scan be performed as well as an MRI of the hip and pelvis to insure there is no further compression on the nerves. If that is the case, then it may be reasonable to refer him to Dr. Blades for

> consideration of spinal cord stimulator. He understands all this and we'll proceed with the testing.

{¶ 21} 12. In an office note dated October 30, 2008, Dr. Keppler wrote:

> Thomas Kempinski comes in today after undergoing MRI. It does show enlargement and increased signal in the left L5-S1 nerve root which corresponds to his left leg pain. Dr. Keppler went over his findings with him. He spent a couple days at St. John's for pain management and said he got much accomplished there. Next time he'll see us at St. Vincent's. Dr. Keppler would like him to undergo a decreasing Prednisone taper. We'll start at 60 and work our way down, 40/40, 20/20 and then 10. He'll give us a call on Monday to let us know how he is doing. I also gave him Vistoril that he is to take with his Percocet and we'll see how he responds to that. * * *

{¶ 22} 13. In an office note dated November 20, 2008, Dr. Keppler wrote:

> HISTORY: He comes in today having selective nerve root blocks done by Dr. Keppler. He did get relief, and he was also put on a tapering dose of Medrol. He is getting relief. Pain is starting to resurface.
>
> PLAN: He would like to undergo caudal block. So we will schedule him to flood the area to see if we can get some relief while he is still having relief with the cortisone. So we will need to get this scheduled as soon as possible. Dr. Keppler feels he would benefit with this, so we will get this scheduled as soon as possible. * * *

{¶ 23} 14. In an office note dated January 15, 2009, Dr. Keppler wrote:

> Thomas Kempinski persists with pain in his leg. He has had a good trial of conservative management with respect to Lyrica and analgesic medication. He has had his nerve compressed starting at the sciatic nerve both extraforaminally as well as within the canal. He has MRI evidence of radiculitis. I am recommending that he visit with Dr. Michael Stanton-Hicks, a specialist in chronic nerve pain and I have phone[d] Dr. Stanton-Hicks today about Mr. Kempinski's condition. I will await Dr. Stanton-Hicks report.

{¶ 24} 15. On January 15, 2009, Dr. Keppler wrote a letter to relator:

> I spoke to Dr. Michael Stanton-Hicks at the Cleveland Clinic with respect to your problem. * * * I would like Dr. Stanton-Hicks to examine you and evaluate your condition and determine if there he can offer you some help with the use of a spinal cord stimulator to treat your persistent nerve pain.

{¶ 25} 16. Ameritech records indicate that relator was paid "wage replacement benefits" for the period January 10 through December 10, 2008.

{¶ 26} 17. The record contains the terms of an agreement or contract between Ameritech and the Communications Workers of America ("union") effective April 4, 2004 through April 4, 2009. Section 26.21 of the contract provides:

> Supplemental Income Protection Program
>
> 26.21 If during the term of this Agreement, the Company notifies the Union in writing that a force surplus condition may exist as defined in Section: Force Adjustment, below, and said force surplus cannot be eliminated through force rearrangement, the Company shall offer Supplemental Income Protection Program (SIPP) benefits as follows:
>
> (A) Prior to a formal declaration of surplus, SIPP shall be offered to employees, in seniority order, in an anticipated Surplus Work Group, and to the extent necessary to eliminate the anticipated surplus. These employees will have four (4) working days to respond to the offer.
>
> Employees accepting SIPP as outlined above shall be required to remain with the Company until that date determined by management to be the employee's severance date in order for the employee to receive the SIPP payment.
>
> (B) An employee's election to leave the service of the Company and receive Supplemental Income Protection Program benefits may not be revoked.

{¶ 27} 18. By letter dated December 5, 2008, Ameritech offered relator an opportunity to participate in the Supplemental Income Protection Plan ("SIPP"). The letter informed relator that he had until Thursday, December 11, 2008 at 5:00 p.m.

central time to accept the SIPP offer by returning a signed "SIPP Employee Acknowledgement Form" to Ameritech's human resources office.

{¶ 28} 19. On December 11, 2008, relator signed the "SIPP Employee Acknowledgement Form" and timely returned it to Ameritech. Relator signed his name under the following pre-printed language:

> I DO elect to voluntarily terminate my employment with AT&T and ACCEPT SIPP benefits. I understand that my last day on the AT&T payroll will be December 28, 2008.

(Emphases sic.)

{¶ 29} 20. Pursuant to relator's timely acceptance of Ameritech's SIPP offer, relator received a lump-sum payment of $31,000 that corresponded to his 32 years of service.

{¶ 30} 21. On April 7, 2009, relator moved for an additional claim allowance and for TTD compensation beginning January 4, 2008.

{¶ 31} 22. On May 29, 2009, at Ameritech's request, relator was examined by Gordon Zellers, M.D. In his seven-page narrative report dated July 16, 2009, Dr. Zellers opined:

> * * * [U]pon acknowledging the patient's persistent symptom complex, it must be concluded that his claim-related complaints preclude him from being able to resume his original full-time, full-duty work activities as a building servicer as he would be unable to tolerate the lifting and/or prolonged ambulatory activities required of him by that occupation. At this point in time, any attempt to return to the work environment would need to be in direct compliance with the following claim-related physical limitations:
>
> [One] Sedentary labor activities only.
>
> [Two] A two pound maximum lifting limit on an occasional, as tolerated basis only.
>
> [Three] No prolonged sitting, standing or ambulating.
>
> [Four] This patient must be permitted to change body positions on a p.r.n. basis.

> [Five] This patient must be permitted to use his cane for all standing/ambulatory activities.
>
> [Six] No climbing activities.
>
> [Seven] No above groundwork should that environment pose a threat to the patient's safety.
>
> [Eight] No bending activities.
>
> [Nine] No squatting activities.
>
> [Ten] No repetitive activities involving the left lower extremity.
>
> [Eleven] This patient should not be exposed to vibratory stimuli.
>
> [Twelve] This patient should not be permitted to perform safety sensitive work activities while under the influence of sedative type medications.

{¶ 32} 23. On August 13, 2009, at the request of Ameritech's counsel, Dr. Zellers issued an addendum to his July 16, 2009 report:

> Despite this patient's compliance with very aggressive medical care, which has included multiple surgical procedures and extensive rehabilitation, his overall recovery as it relates to his lumbosacral spine region has been poor. At the time of my previous consultation, the patient was experiencing persistent, constant low back discomfort with refractory lower extremity radicular complaints and, objectively, his physical examination findings were consistent with his subjective presentation. As emphasized in the Conclusion Section of my previous report, the patient's treating physicians have ruled out the pursuit of any further surgical intervention. As a result, at this point in time, the patient's only remaining treatment option is to pursue aggressive pain management modalities.

{¶ 33} 24. On October 1, 2009, relator's April 7, 2009 motion was heard by a district hearing officer ("DHO"). The hearing was recorded and transcribed for the record. Following the hearing, the DHO issued an order additionally allowing the claim,

but denying TTD compensation beginning January 4, 2008 on grounds that relator had voluntarily retired. The DHO's order explains the denial of TTD compensation:

> The request for Temporary Total Disability Compensation from 01/04/2008 through the present, and to continue upon proof, is denied. The Hearing Officer finds that the Injured Worker was receiving short-term disability up until he voluntarily retired on 12/31/2008. The Injured Worker received a buyout of additional money as an incentive for accepting this retirement. The Injured Worker returned to work one day in order to receive his retirement. Thus, the Hearing Officer finds that the Injured Worker benefited financially from his retirement and the retirement was voluntary.

{¶ 34} 25. Relator administratively appealed the DHO's order of October 1, 2009.

{¶ 35} 26. On December 23, 2009, relator executed an affidavit stating:

> Prior to my industrial accident, my job classification with AT&T was Service Technician. This included climbing ladders, going up telephone poles, all duties related to telephone service repair and/or installation.
>
> Due to the work injury sustained in this claim, AT&T assigned me to light duty. My classification was changed to Helper. In that position, I assisted the service technician, but I did no climbing, no lifting, or other duties of a service technician.
> As of January 2008, I had been working for AT&T approximately 31 years.
>
> In August, 2006, I was taken off work and received Temporary Total Disability payments in this claim. My Temporary Total stopped in July, 2007, when I was found to be MMI.
>
> I returned to work, in a light duty capacity because of the allowed work injury back conditions. My back got progressively worse from July, 2007.
>
> I tried to keep working, but towards the end of 2007 and the beginning of January 2008, my back condition deteriorated to the point where I was in constant pain. I was having difficulty standing and walking. I was unable to perform light duty work. I went to see my doctor and was told I needed lumbar surgery to alleviate my pain.

My doctor completed a C84, certifying I could not work. I filed the C84 in order to receive funds while I recuperated from surgery. AT&T denied the C84.

As a result of the denied C84, I knew that AT&T would fight every aspect of my claim. I could not wait and play the workers' compensation game. I couldn't survive waiting for the hearing process to get approval for my temporary total disability or surgery. I decided that I would put "everything" through my employee disability policy and health insurance. I needed immediate medical treatment to get fixed up as soon in order to stop the pain and my incapacity. I needed immediate money to pay my bills while I recovered from surgery.

Dr. Keppler submitted disability forms to AT&T. I was paid through the disability division of AT&T from January 4, 2008 through December 11, 2008.

In November 2008, I started calling AT&T disability to find out if AT&T would place me on long term disability. I knew that the short term disability would expire after 12 months. November 2008 was my 11th month on short term disability.

I was told that because of my years of service, in excess of 30, AT&T could unilaterally decide to place me on retirement. I wanted the long term disability so I could return to work when I was able.

I desperately wanted to get onto long term disability because, under that plan, once the doctor felt I could return to light duty, AT&T would have to take me back to work. I never intended to retire from AT&T. I kept calling to find out what AT&T was going to do.

Towards the end of November and beginning of December 2008, I kept calling for status as to long term disability. I was getting concerned that I was going to be placed on forced retirement.

On December 5, 2008, AT&T issued a letter stating that I had until December 11, 2008 at 5:00 PM to inform AT&T whether I wanted to take SIPP. The letter stated that an answer was required prior to the deadline and, that once chosen, the decision was final.

> Because I was unable to get an answer from AT&T regarding the long term disability, I was terrified that, at any time after December 11th, I could be told that I was being placed on forced retirement due to years of service and I would lose the SIPP funds in the amount of $31,000.00.
>
> Prior to December 7, 2008, the approximate date I received the AT&T SIPP letter, at no time did I seek, inquire, or initiate retirement from employment. As set forth above, I had no desire to retire from AT&T. I wanted to return to light duty work when released by my doctor.

{¶ 36} 27. On February 8, 2010, Dr. Keppler completed a C-84 on which he certified TTD from January 14, 2008 to an estimated return-to-work date of March 1, 2010.

{¶ 37} 28. On February 22, 2010, relator's administrative appeal was heard by a staff hearing officer ("SHO"). The hearing was recorded and transcribed for the record.

{¶ 38} 29. Following the February 22, 2010 hearing, the SHO mailed an order on February 27, 2010 affirming the DHO's order. The SHO's order explains:

> The Staff Hearing Officer affirms the District Hearing Officer order which granted in part and denied in part the Injured Worker's C-86 motion.
>
> Injured Worker's counsel withdrew the request for consideration of payment of temporary total compensation from 01/04/2008 through 12/31/2008 as the Injured Worker received short-term disability benefits for this period and any award of temporary total compensation would not exceed the amount of compensation he had already been paid under the disability plan.
>
> The Staff Hearing Officer finds that the self-insuring employer has ACCEPTED the claim for "EPIDURAL FIBROSIS, LEVELS L5-S1 (AKA POST-LAMINECTOMY SYNDROME)" based on the 07/16/2009 report of Dr. Zellers. The Staff Hearing Officer concurs with the finding of the District Hearing Officer that the Injured Worker voluntarily retired on 12/31/2008 and therefore is not eligible for the payment of temporary total compensation beyond that date. In December, 2008, the employer offered a financial incentive to employees eligible for a traditional years of service retirement (the implication being that the

> plan was designed to reduce the size of the employer's work force). Mr. Kempinski testified that he was nearing the end of his short-term disability period and seeking a conversion to long term disability which would have potentially allowed him to return to work at some future date. He indicated that he was awaiting a response with respect to his long term disability status when the employer's financial incentive to retire package was offered. With the deadline for acceptance upon him and uncertain of his disability or retirement prospects, he stated that he accepted the financial inducement to retire.
>
> The Staff Hearing Officer finds that the Injured Worker elected to voluntarily retire on 12/31/2008. The Staff Hearing Officer finds that the Injured Worker was presented with a set of financial options and that he chose the option which he perceived was the most financially advantageous (given his particular circumstances). There is no evidence to suggest that the Injured Worker was forced or coerced to accept the incentive package (the same package was offered to other eligible employees based on years of service). The Staff Hearing Officer finds that the Injured Worker voluntarily retired based on his decision to accept the employer's financial incentive to retire and therefore is precluded from receiving payment of temporary total compensation.

(Emphases sic.)

{¶ 39} 30. Relator administratively appealed the SHO's order of February 22, 2010.

{¶ 40} 31. Following a May 25, 2010 hearing, the three-member commission, in a two-to-one vote, issued an order that vacates the SHO's order of February 22, 2010, recognizes an additional claim allowance, and denies TTD compensation beginning January 4, 2008. As to the issue of TTD compensation, the commission's order explains:

> At hearing before the Commission, the Injured Worker's attorney renewed the request for the payment of temporary total disability compensation from 01/04/2008 through the present, and to continue upon the submission of appropriate medical proof. Payment of temporary total disability compensation from 01/04/2008 through 12/28/2008 requires a determination of whether the Injured Worker's receipt of short-term disability benefits over this period was

in lieu of temporary total disability compensation. Payment of temporary total disability compensation after 12/28/2008 requires a determination of whether the Injured Worker's retirement was voluntary or involuntary.

The payment of temporary total disability compensation from 01/04/2008 through 12/28/2008, inclusive, is specifically denied due to a lack of contemporaneous medical proof relating the disability from the allowed conditions to the period at issue. The Injured Worker had low back surgery on 01/29/2008 and on 07/09/2008. The bills for these surgeries were filed by the Injured Worker with, and paid under, his non-occupational insurance. During the period the Injured Worker was off work as a result of these surgeries, the Injured Worker elected to receive non-occupational, short-term disability payments from the Employer. To further support its argument that the Injured Worker's surgeries and disability were non-occupational, the Employer pointed out that it had denied the Injured Worker's request for temporary total disability compensation for the period of disability in question. The Injured Worker did not protest the denial of temporary total disability compensation. Finally, the Employer argues that there is no sufficiently persuasive medical evidence on file that alters the previous formal designation of the period of disability as non-occupational. The Commission agrees.

During the time the Injured Worker was receiving short-term disability benefits, the Employer offered the workforce, including the Injured Worker, a Supplemental Income Protection Program (SIPP) benefit. By offering SIPP, the Employer was attempting to reduce its workforce due to economic factors. Under SIPP, a worker could elect to voluntarily retire in exchange for a financial incentive. For the Injured Worker, the financial incentive was $31,000.00, in addition to his retirement package. The Injured Worker was free to accept, or reject, the SIPP benefit by 12/11/2008.

The Injured Worker testified at hearing that when he was offered SIPP, he was near the end of his eligibility for short-term disability benefits. The Injured Worker had contacted the Employer in November and requested to be placed on non-occupational long-term disability. At the time he was offered SIPP, he was awaiting a decision on his application for long-term disability benefits. The Injured Worker further testified that if he was approved to receive long-term

disability benefits, he would be permitted to return to work once he was medically released by his physician. The Injured Worker asserted that as a result of the inaction on the long-term disability application, and the deadline for accepting or rejecting the SIPP incentive approaching, the Injured Worker elected to accept the financial incentives under the SIPP program and the $31,000.00 lump sum payment. There is no medical evidence, dated on or around, the month of December 2008, from the Injured Worker's treating physician advising the Injured Worker to retire due to the allowed conditions. The Injured Worker agreed that the last day upon which he would be on the Employer's payroll was 12/28/2008.

The Commission understands the difficulty of the Injured Worker's situation regarding the deadline for accepting the SIPP and the outstanding long-term disability application; however, the Commission finds that the Injured Worker did elect to retire rather than wait for the final decision on his pending application. There is no evidence in file that the SIPP was directed only to the Injured Worker to unfairly force him from the workforce. The SIPP was a workforce-wide employment tool utilized by the Employer under the Union Contract between SBC Midwest and the Communications Workers of America. The unfortunate timing of the SIPP does not render the Injured Worker's decision involuntary. The Injured Worker's voluntary retirement on 12/28/2008 precludes the payment of temporary total disability compensation.

The instant situation is distinguished from State ex rel. Jorza v. Indus. Comm., 124 Ohio St.3d 264, 2010-Ohio-119. In Jorza, the Supreme Court remanded the case to the Commission for clarification of the injured worker's disability status when her employment with the employer ended due to her acceptance of an incentive buyout. The injured worker therein had a pending application for the payment of temporary total disability compensation when her employment ended. In the instant case, the Injured Worker did not have any pending request for the payment of temporary total disability compensation when he accepted the workforce reduction incentive. As set forth above, the Injured Worker has specifically been found not temporarily and totally disabled due to the allowed conditions at the time of his election to retire and to accept the additional financial incentive of $31,000.00. Further, the Injured Worker

> believed, and testified at hearing, that if his long-term disability was denied, he would be forced to retire due to his seniority of over 31 years of service in January, 2009, and if he did not accept the SIPP, he would have lost out on the $31,000.00 incentive.
>
> Therefore, it is the finding of the Commission that the Injured Worker voluntarily abandoned the workforce when he accepted the SIPP incentives for his financial advantage. Furrie v. Indus. Comm., 10th Dist. App. No. 03AP-370, 2004-Ohio-1977. Therefore, temporary total disability compen-sation is specifically denied from 12/29/2008 through 05/25/2010.

{¶ 41} 32. On December 10, 2010, relator, Thomas Kempinski, filed this mandamus action.

Conclusions of Law:

{¶ 42} The main issue is whether the commission correctly concedes in this action that its May 25, 2010 order denying TTD compensation beginning January 4, 2008 violates *State ex rel. Noll v. Indus. Comm*. (1991), 57 Ohio St.3d 203.

{¶ 43} Finding that the commission's order does violate *Noll*, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 44} The commission's order denies TTD compensation for the period January 4 through December 28, 2008 and then, based upon its finding that relator voluntarily retired, denies TTD compensation beyond December 28, 2008.

{¶ 45} As earlier noted, on January 3, 2008, Dr. Bernie completed a C-84 certifying TTD beginning January 4, 2008 to an estimated return-to-work date of February 11, 2008. Also, on February 8, 2010, Dr. Keppler completed a C-84 on which he certified TTD from January 14, 2008 to an estimated return-to-work date of March 1, 2010. Thus, the initial period of TTD at issue, i.e., January 4 through December 28, 2008, was covered by the C-84s from Drs. Bernie and Keppler. It was the duty of the commission to adjudicate the question of whether those C-84s persuasively established TTD. The commission did not indicate in its order that it actually adjudicated the C-84s.

{¶ 46} In fact, the C-84s from Drs. Bernie and Keppler are not even mentioned in the commission's order. Rather, the commission's order states that TTD compensation

from January 4 through December 28, 2008 "is specifically denied due to a lack of contemporaneous medical proof relating the disability from the allowed conditions to the period at issue."

{¶ 47} Dr. Bernie's C-84 dated January 3, 2008 undermines the commission's belief that no contemporaneous medical proof exists. Dr. Bernie certified TTD at the very beginning of the period of his certification.

{¶ 48} While the C-84 of Dr. Keppler completed February 8, 2010 may, at first blush, appear to not be contemporaneous with the period being certified, Dr. Keppler's office notes show frequent ongoing office visits during the period of the certification.

{¶ 49} Dr. Keppler's office notes during the year 2008, as well as his two operative reports describing surgeries on January 29 and July 9, 2008, completely undermine the commission's finding of a lack of contemporaneous medical proof of disability during 2008.

{¶ 50} Thus, the commission's finding of a lack of contemporaneous medical proof is not supported by some evidence in the record before this court.

{¶ 51} The commission's order then states that the commission agrees with the employer—Ameritech—who "argues that there is no sufficiently persuasive medical evidence on file that alters the previous formal designation of the period of disability as non-occupational."

{¶ 52} What medical evidence did the commission determine was not sufficiently persuasive, and why was the medical evidence found unpersuasive? The commission's order does not tell us. This is a clear violation of *Noll*, the syllabus of which states:

> In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.

{¶ 53} It is indeed well settled that the commission need not list the evidence it considered. *State ex rel. Fultz v. Indus. Comm.*, 69 Ohio St.3d 327, 1994-Ohio-426; *State ex rel. Buttolph v. Gen. Motors Corp., Terex Div.*, 79 Ohio St.3d 73, 1997-Ohio-34. However, the commission must cite the evidence upon which it relies. *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St.3d 250, 1996-Ohio-321, citing *State ex rel. Mitchell v.*

Robbins & Myers, Inc. (1983), 6 Ohio St.3d 481. Also, the commission cannot issue an order that evades judicial review. Here, the commission's order does just that. That is, while declaring that "there is no sufficiently persuasive medical evidence on file," we are not told what evidence was found to be unpersuasive or why it was found so.

{¶ 54} The commission's order suggests that, despite the medical evidence of disability relating to the industrial injury, relator cannot be held to have been temporarily and totally disabled because he received so-called "non-occupational short-term disability payments from the employer" and because his two surgeries in 2008 were paid for under "his non-occupational insurance." This suggestion is erroneous.

{¶ 55} R.C. 4123.56(A) provides:

> If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

{¶ 56} In the magistrate's view, the commission here succinctly and correctly explains the fallacy of Ameritech's argument as adopted in the commission's order regarding the non-occupational disability payments and the payment of the surgeries by private insurance:

> * * * The fact that Kempinski's surgeries were paid for by his health insurance and that he was on short-term disability has no bearing on his entitlement to have a request for TTC addressed on the merits of the medical evidence. AT&T is arguing that since medical bills were paid for outside of the claim that meets the commission's duty to "specifically state that the medical evidence was insufficient to support an award of" TTC. * * * This assertion is without merit because who pays medical bills has nothing to do with deciding if the

> medical evidence contained in the actual records are related to the allowed conditions or not.
>
> Receiving short-term disability is not a "formal designation" of a time period as "non-occupational" and does not preclude an adjudication of a request for TTC on the merits. It is unclear what is meant by "previous formal designation" of the requested period as non-occupational. The commission is the agency that decides whether or not a requested time period of TTC is related to allowed conditions in a claim, and the commission had not previously done so. As long as a request for TTC is timely submitted the commission has a legal duty to adjudicate the request. Receiving short-term disability only has an effect on the amount of TTC that can be paid if awarded due to the offset provision of R.C. 4123.56(A)[.]
>
> * * *
>
> The record reflects that Kempinski would not have received additional money from a TTC payment because the short term disability payments were more than what he would have received for TTC payments. This case, however, shows that situations exist where adjudicating a request for TTC on the merits of the medical evidence has implications for an Injured Worker beyond the amount of an offset. As such, Kempinski was entitled to have his request for TTC decided on the merits of the medical evidence.

(Commission's Response to Ameritech's Supplemental Brief, at 2-3.)

{¶ 57} Thus, because the commission's denial of TTD compensation beginning January 4, 2008 violates *Noll*, this court must issue a writ of mandamus ordering the commission to again determine relator's entitlement to TTD compensation.

{¶ 58} As earlier noted, the commission's denial of TTD compensation beyond December 28, 2008 was premised upon its finding that relator had voluntarily retired from his employment at Ameritech.

{¶ 59} The magistrate finds that it would be premature for this court to address the question of whether the commission abused its discretion in determining that relator's retirement was voluntary. If the commission were to determine on remand that relator was temporarily and totally disabled at the time he elected to retire, the retirement cannot

be voluntary. *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132.

{¶ 60} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its May 25, 2010 order to the extent that it denies TTD compensation and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's April 7, 2009 motion for TTD compensation.

s/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).