[Cite as *State ex rel. Hart v. Indus. Comm.*, 2013-Ohio-1155.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Teresa Hart,	:	
Relator,	:	
v.	:	No. 12AP-77
Industrial Commission of Ohio and The Hoover Company,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 26, 2013

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Morrow & Meyer LLC and *Mary E. Reynolds*, for respondent The Hoover Company.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, Teresa Hart, commenced this original action naming as respondents the Industrial Commission of Ohio ("commission") and her former employer, The Hoover Company ("Hoover"). Relator requests a writ of mandamus ordering the commission to vacate its order denying her application for permanent total disability ("PTD") compensation on eligibility grounds and to adjudicate her application based upon the medical evidence of record.

{¶ 2} This court assigned the matter to a magistrate pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which is appended to this decision and includes findings of fact and conclusions of law. The magistrate recommended that this court grant the requested writ of mandamus. Both the commission and Hoover have filed objections to the magistrate's decision.

{¶ 3} For the reasons that follow, we adopt as our own the magistrate's decision, including the findings of fact and conclusions of law, and grant a writ of mandamus.

I. COMMISSION PROCEEDINGS

{¶ 4} Relator filed her application for PTD in April 2010. A staff hearing officer ("SHO") heard and denied relator's application for PTD compensation. In his order following a January 4, 2011 hearing, the SHO reported that relator had testified that the reason she retired on December 31, 2006, was that she could no longer perform her job duties due to a worsening of the injuries described in two previously allowed workers' compensation claims. But the SHO further found that "there is no medical evidence contemporaneous with her retirement to establish that the same was injury induced." (SHO order, at 2.) The SHO concluded that relator's retirement on or about December 31, 2006 was not injury-induced and that she had voluntarily abandoned her employment.

{¶ 5} The SHO reached the conclusion that there was no contemporaneous medical evidence of injury-induced retirement, despite the fact that the record included a medical report prepared by Timothy Lee Hirst, M.D. ("Dr. Hirst"). At relator's request, Dr. Hirst examined relator on January 5, 2007, i.e., five days after her retirement, and issued a seven-page written report also dated January 5, 2007. In his report, Dr. Hirst discussed relator's medical history and current physical condition and concluded that she had a combined 74 percent whole-person impairment. In a single sentence in his seven-page report, included under the caption "Current Work," Dr. Hirst stated that "[t]he claimant retired early (12/31/2006) due to her injuries." (Hirst report, at 2.)

II. The Magistrate's Decision

{¶ 6} The magistrate observed that the SHO had failed to reference Dr. Hirst's report in his decision and that the commission had not argued that the SHO *had* considered Dr. Hirst's report. Rather, the commission had argued that the SHO was justified in not considering Dr. Hirst's report because his statement concerning relator's

reasons for retiring early was not medical evidence. *See* Magistrate's Decision at ¶ 61 ("Respondents do not argue that the SHO considered Dr. Hirst's report. Rather, they seem to argue that the SHO was not required to consider the report because allegedly Dr. Hirst's statement that relator 'retired early * * * due to her injuries' is not medical evidence upon which the commission can rely. Respondents' argument misses the issue.").

{¶ 7} Ohio Adm.Code 4121-3-34(D)(1)(d) provides, in part, that "[i]f evidence of voluntary removal or retirement is brought into issue, the adjudicator *shall consider* evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement." (Emphasis added.) The magistrate concluded that "it cannot be disputed that a medical report of an examination of the allowed conditions of a claim that was performed five days after the retirement date necessarily contains evidence of the injured worker's medical condition at or near the time of the removal/retirement even if it can be argued that the medical report does not contain a medical opinion that the removal/retirement was injury induced." Magistrate's Decision, at ¶ 57. Accordingly, the magistrate determined that the commission, through its SHO, had abused its discretion in failing to consider Dr. Hirst's report when considering the issue of whether relator had retired because of her compensated injuries.

III. RESPONDENTS' OBJECTIONS

{¶ 8} In its objections, the commission asserts that the magistrate erred in failing to make certain finding of facts and in making certain conclusions of law. Specifically, the commission contends that the magistrate should have included as factual findings that relator had been examined by two physicians in 2003 and that, relying on their reports, the commission had increased the percentage of relator's permanent partial disability by 10 percent to 60 percent whole-person impairment.

{¶ 9} The commission further characterizes the magistrate's decision as including the following legal findings, which the commission contends are erroneous:

> (1) The claimant's statement to Dr. Hirst that she retired due to her industrial injury was medical evidence that the commission must consider when addressing an alleged voluntary retirement;

> (2) The claimant's statement to Dr. Hirst that she retired due to her industrial injury without any corroborating medical treatment or opinion could support a finding that the relator's retirement was injury-induced;
>
> (3) The hearing officer's order that "there is no medical evidence contemporaneous with [Hart's] retirement to establish that the same was injury induced" demonstrates that the commission failed to consider the report of Dr. Hirst;
>
> (4) The hearing officer must, contrary to the *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983) and *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), line of cases, explain that he considered, and why he rejected, Dr. Hirst's report and Hart's statement contained therein.

{¶ 10} Hoover's sole objection to the magistrate's decision states that "[t]he Magistrate erred in determining that the Industrial Commission of Ohio did not consider the January 5, 2007 report of Dr. Timothy Hirst."

IV. Analysis

{¶ 11} We first address the commission's objections to the magistrate's alleged conclusions of law.

Commission's First Challenged Conclusion of Law

{¶ 12} The commission first asserts that the magistrate erred in opining that the commission was required to consider Dr. Hirst's statement that relator had retired because of her industrial injury. The commission contends that the statement was not "medical evidence."

{¶ 13} We agree that Dr. Hirst's statement that "[t]he claimant retired early (12/31/2006) due to her injuries," construed in isolation, may not have been medical evidence. But, as the magistrate recognized, whether that particular statement was or was not medical evidence misses the issue. The statement was but one short sentence in a seven-page medical report prepared after a physical examination conducted within days of relator's retirement. The report in its entirety, which included specific medical findings upon examination, was medical evidence submitted by relator. The report documents Dr. Hirst's findings upon physical examination as to range of motion, use of aids such as a

cane and back brace, the physical impacts of relator's past surgeries, and a description of her impairments. The report also contained a recitation of symptoms reported by relator to Dr. Hirst, including the impact of her injuries on her daily activities. It stated Dr. Hirst's medical conclusions as to the percentage of relator's whole-person impairment. When reviewed in its totality, Dr. Hirst's report clearly constituted contemporaneous medical evidence. The commission therefore had a duty to consider it, pursuant to Ohio Adm.Code 4121-3-34(D)(1)(d).

Commission's Second Challenged Conclusion of Law

{¶ 14} Similarly, we reject the commission's argument that the commission could not find appellant's retirement to be injury-induced in the absence of corroborating medical evidence. We have previously acknowledged that the commission is not constrained by medical evidence existing at the time the claimant filed for retirement in determining the voluntary nature of the departure. We have observed that "[i]n a case involving permanent total disability, the Supreme Court * * * found that '[w]hile the commission may characterize retirement as voluntary based on a lack of contemporaneous medical evidence of disability, * * * it is not required to do so, because there may be other evidence that substantiates the connection between injury and retirement.' " (Internal citation omitted.) *State ex rel. The Tamarkin Co., Giant Eagle, Inc. v. Indus. Comm.*, 10th Dist. No. 11AP-625, 2012-Ohio-2866, ¶ 4, quoting *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011-Ohio-5027, ¶ 7. We have held that the commission may find that a retirement was injury-induced in the absence of evidence that a physican advised the worker to retire. *State ex rel. Black v. Indus. Comm.*, 10th Dist. No. 10AP-1168, 2012-Ohio-2589, ¶ 18. Moreover, we have recognized that the commission may find an injury-induced job abandonment even in the absence of "objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment." *State ex rel. Mid-Ohio Wood Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, ¶ 18. The commission "must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions." *Id.* We further recognized in *Mid-Ohio Wood Prods.* that the commission

may consider office notes of a physician documenting a claimant's reports of pain experienced after an injury. *Id.*

{¶ 15} We therefore find that the magistrate did not misstate the law in recognizing that the commission may, in its discretion in an appropriate case, find that a worker's retirement was injury-induced even in the absence of corroborating medical evidence prepared contemporaneously with the retirement.

Commission's Third Challenged Conclusion of Law

{¶ 16} We further reject the commission's argument that the magistrate erred in concluding that the commission had failed to consider Dr. Hirst's medical report. The magistrate noted that the SHO did not mention Dr. Hirst's report in the order. Instead, the SHO stated that "there was no medical evidence contemporaneous with the Injured Worker's retirement to establish that the Injured Worker's retirement was injury induced." (SHO order, at 2.) The magistrate reasonably inferred from this statement that the SHO had accepted the commission's contention that there was no contemporaneous medical evidence. *See* Magistrate's Decision at ¶ 67 ("T]he SHO's order strongly suggests reliance upon [the employer's] counsel's alleged absence of medical evidence contemporaneous with the retirement—an allegation that proves to be inaccurate.").

Commission's Fourth Challenged Conclusion of Law

{¶ 17} Finally, citing *State ex rel. Mitchell v. Robbins & Myers, Inc.*, 6 Ohio St.3d 481 (1983), and *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), the commission contends that the hearing officer was not required to include in his report an express statement that he had considered Dr. Hirst's report and rejected it. We find, however, that this case does not turn on the SHO's failure to discuss Dr. Hirst's report. Rather, the magistrate recognized that the SHO had affirmatively denied the existence of any medical evidence of relator's physical condition dating from the time of her retirement, including Dr. Hirst's report. In denying the existence of any contemporaneous medical report, the SHO implicitly conceded his failure to consider Dr. Hirst's report. That failure violated Ohio Adm.Code 4121-3-34(D)(1)(d), thereby constituting an abuse of discretion.

Hoover's Objection

{¶ 18} Similarly, Hoover argues that the SHO did consider Dr. Hirst's report but "rejected" it. (Hoover's Objection, at 2.) But as discussed above, the SHO's decision contradicts that interpretation. The SHO affirmatively described the record as lacking contemporaneous medical evidence of relator's physical condition at the time of her retirement. That statement was incorrect.

{¶ 19} In its objection, Hoover additionally acknowledges relator's argument that Dr. Hirst's January 2007 report constitutes contemporaneous medical evidence of disability but challenges the relevance of the report because it "never opines that Hirst [sic] was unable to work, but rather recorded the work history reported by Hart [sic]." (Hoover's Objection, at 2.) However, as discussed above, a finding of injury-induced retirement is not dependent upon the existence of a medical opinion that a worker was unable to work. And even a cursory review of Dr. Hirst's report reveals that it contains far more than a mere recitation of relator's work history.

Alleged Deficiencies in Findings of Fact

{¶ 20} Finally, the commission argues that the magistrate's findings of fact were incomplete because they failed to include the facts that relator was examined in July and December 2003 and was found by the first of the two physicians to have whole-person impairment of 80 percent and 40 percent by the second, resulting in the commission increasing relator's permanent partial disability to 60 percent total.

{¶ 21} The magistrate's failure to include these proposed findings of fact does not, however, warrant our rejection of the magistrate's recommendation. The magistrate concluded that the commission had erred procedurally in failing to consider Dr. Hirst's 2007 medical report as required by Ohio Adm.Code 4121-3-34(D). Failure to comply with the regulation constituted an abuse of discretion. Relator's physical condition in 2003 does not impact that conclusion.

Premature Nature of Arguments Concerning Merits of PTD Application

{¶ 22} Finally, all of the parties have presented arguments relative to the ultimate merits of relator's application for PTD compensation. Those arguments are premature. The commission decided this case on *eligibility* grounds; i.e., it accepted Hoover's affirmative defense that relator had voluntarily abandoned her employment. The

magistrate has recommended only that we order the commission to reconsider the issue of whether relator's retirement was voluntary, as opposed to injury-induced, upon evaluation of all the relevant evidence, including Dr. Hirst's report. The magistrate expressed no opinion as to the merits of relator's application for PTD.

V. CONCLUSION

{¶ 23} We have independently reviewed the record and overrule the objections of the commission and Hoover. We adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Therefore, we grant a writ of mandamus ordering the commission to determine whether relator's retirement was injury-induced in light of all the relevant evidence, including Dr. Hirst's 2007 medical report. If the commission determines that the retirement was injury-induced, it shall at that point further adjudicate the PTD application on the merits.

Objections overruled; writ of mandamus granted.

TYACK and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Teresa Hart,	:	
Relator,	:	
v.	:	No. 12AP-77
Industrial Commission of Ohio and The Hoover Company,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on October 12, 2012

Philip J. Fulton Law Office, and *Chelsea J. Fulton*, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Morrow & Meyer LLC and *Mary E. Reynolds*, for respondent The Hoover Company.

IN MANDAMUS

{¶ 24} In this original action, relator, Teresa Hart, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her application for permanent total disability ("PTD") compensation on eligibility grounds, and to enter an order that adjudicates the application based upon the medical evidence of record.

Findings of Fact:

{¶ 25} 1. On September 17, 1985, relator sustained an industrial injury while employed as a group leader on an assembly line for respondent, The Hoover Company ("Hoover"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 26} 2. The September 17, 1985 injury (Claim No. 896384-22) is allowed for:

> Herniated disc L4-5 with foot drop; cervical myofascitis; cauda equine syndrome; right hip fracture; atony of bladder.

{¶ 27} 3. Relator has had at least two low back surgeries and two surgeries on her right hip.

{¶ 28} 4. Relator also has an industrial injury (Claim No. 02-850744) that is allowed for:

> Right carpal tunnel syndrome; right tenosynovitis of the wrist.

{¶ 29} 5. The official date of diagnosis for Claim No. 02-850744 is June 24, 2002.

{¶ 30} 6. On September 13, 2002, relator underwent a right carpal tunnel release, which was performed by Anthony Pentz, M.D.

{¶ 31} 7. Following her September 2002 surgery, relator returned to work at Hoover at a light-duty position until she took a non-disability early retirement on or about December 31, 2006.

{¶ 32} 8. On January 5, 2007, five days after her retirement, relator was examined at her own request by Timothy Lee Hirst, M.D. for the allowed conditions in the 1985 claim. Dr. Hirst examined to determine the percentage of permanent partial disability in the claim.

{¶ 33} 9. Dr. Hirst issued a seven-page narrative report in which he opined that relator has a combined 74 percent whole person impairment in the 1985 claim.

{¶ 34} Dr. Hirst's report is divided into several sections which contain a heading printed in bold type.

{¶ 35} Under "**History,**" Dr. Hirst states:

> The claimant was working as a group leader at the Hoover Company on September 27, 1985 when she lifted a conveyor full of parts. She felt a pulling sensation in her lower back.

> After going home, the pain intensified and she went to Dr. Pelkowski, a local chiropractor[.] Her condition deteriorated and Dr[.] Pelkowski referred her to Dr. David Smith, an orthopedic surgeon, for a consultation[.]
>
> Surgery consisting of Lumbar Laminectomy and Discectomy at L4-5 was performed on May 1, 1990[.] She remained under the care of Dr[.] Smith until she was able to return to work.
>
> A second surgery was performed on February 8, 1992[.] This consisted of decompression and excision of the herniated nucleus pulposus, fusion at L4-5 with GSP plate fixation[.]
>
> On March 24, 1992, a third surgery, a cystoscopy, was performed[.]
>
> In July 1997, the claimant suffered a fall as a result of her leg giving out. Dr. Cochran and Dr[.] Moretta subsequently treated her for a right hip fracture[.] It was determined that this condition was a compensable consequence of the original injury[.] Dr[.] Cochran performed surgery on November 14, 1997 at Doctor's Hospital, which consisted of a hip replacement arthroplasty that consisted of peri cutaneous pin fixation of the fracture utilizing three cannulate screws. The claimant underwent a second surgical procedure for the right hip at Aultman Hospital in August of 2000[.] This procedure was performed by Dr. Pentz and consisted of removal of two pins and insertion of hardware into the ball of the injured worker's right hip[.]
>
> * * *

{¶ 36} Under "**Present Complaints**" Dr. Hirst states:

> The claimant can no longer play sports, climb, run or "do things with the kids[.]" She is unable to bend or do most exercise because of her back and hips. At church she can't sit comfortably. Her legs cramp up and give out on her. She can only sleep about two hours before she has to move and get up[.] Then, when she returns to bed, she doesn't sleep well. She wears one or two back braces at all times[.] Two prior auto accident [sic] did not cause any problems with the cervical, hip, or lumbosacral areas in this claim.

{¶ 37} Under "**Current Work,**" Dr. Hirst states:

> The claimant retired early (12/31/2006) due to her injuries[.]

{¶ 38} Under "**Discussion,**" Dr. Hirst states:

> The claimant's impairments are the loss of motion of the hip right, the loss of motion, the spasm and guarding, and the neurological losses of the lumbosacral regions, the loss of motion and the spasm and guarding of the cervical region; and the various bladder, bowel, and sexual problems due to the caude equina[.]

{¶ 39} 10. Earlier, on December 17, 2004, Dr. Pentz completed a C-9 request for physical therapy to be performed three times per week for a four-week period in the 1985 claim. Hoover's third-party administrator approved the C-9 request on January 7, 2005. However, the record before this court contains no documentation showing that relator actually received the approved physical therapy treatments.

{¶ 40} 11. On October 13, 2009, Dr. Pentz wrote:

> I have reviewed the patient's allowed claims and it is indeed my medical opinion that this patient is permanently and totally disabled as a direct result of her allowed Workman's Compensation conditions.
>
> Unfortunately between her claims, she can neither stand nor sit for protracted periods of time and any significant manual labor is out of the question. Based on her claims, I do not see that she can be involved in sustained remunerative employment.

{¶ 41} 12. On April 19, 2010, relator filed an application for PTD compensation. In support, relator submitted the October 13, 2009 report of Dr. Pentz.

{¶ 42} 13. On August 2, 2010, at the commission's request, relator was examined for the allowed conditions of the two industrial claims by John A. Elias, M.D. In his six-page narrative report, Dr. Elias opines:

> I believe Ms. Hart is incapable of any further work. She has had her injuries since the mid-80[']s and worked hard up until 3 years ago despite having two low back surgeries, foot drop and bladder atony. Subsequently, she had surgery concerning her carpal tunnel syndrome and right wrist, which has impaired some of her fine motor abilities. She

> cannot sit or stand for a long time. She cannot use her dominant right hand for repetitive of [sic] heavy work. I feel this combination causes her to be permanently impaired and incapable of work.

{¶ 43} 14. On a Physical Strength Rating form dated August 2, 2010, Dr. Elias indicated by his mark "[T]his Injured Worker is incapable of work."

{¶ 44} 15. On May 17, 2010, at Hoover's request, relator was examined by Alan H. Wilde, M.D., for the allowed conditions of the two industrial claims. In his seven-page narrative report, Dr. Wilde opined:

> Based on the allowed conditions of the above claims, in my opinion Ms. Hart would be capable of engaging in sustained remunerative employment in the sedentary work classification.
>
> * * *
>
> Ms. Hart should not do any lifting of more than 10 pounds. She should not be engaged in repeated stair climbing, stooping or crawling.

{¶ 45} 16. Following a January 4, 2011 hearing, a staff hearing officer ("SHO") issued an order denying relator's PTD application. The SHO's order explains:

> It is the finding of the Staff Hearing Officer that the Injured Worker sustained two industrial injuries while working for the Self-Insuring Employer.
>
> On 09/17/1985, the Injured Worker was lifting a pan of parts weighing approximately 50 pounds when she felt an immediate pain in her low back. As a result, the Injured [W]orker had two low back surgeries and developed foot drop which caused her to fall and fracture her right hip. The Injured Worker subsequently had two surgeries on her right hip.
>
> As a result of the injuries in claim number 896384-22, the Injured Worker returned to work with the Self-Insuring Employer in a lighter duty job which required more repetitive motion with her hands. The Injured Worker began to experience pain and numbness in her right wrist and on 06/24/2002 she was diagnosed with right carpal tunnel syndrome which was accepted by the Self-Insuring Employer

as a new injury in claim number 02-850744. The Injured Worker had surgery to her right wrist in September of 2002 and returned to work in her lighter duty position until she took a non-disability early retirement on or about 12/31/2006.

It is the finding of the Staff Hearing Officer that the Injured Worker's non-disability early retirement from the Self-Insuring Employer on 12/31/2006 was not due to the allowed conditions in the claims at hand and, therefore, was a voluntary departure from the job market by the Injured Worker so as to preclude the receipt of an award of Permanent and Total Disability Compensation.

The Injured Worker testified that the reason she retired on or about 12/31/2006 was that as a result of the injuries in her claims her condition worsened so that she could no longer perform her then current job duties with the Self-Insuring Employer. However, counsel for the Self-Insuring Employer stated that prior to the Injured Worker's retirement the last medical treatment received by the Injured Worker in either of the claims at hand occurred in 2004 and that there was no medical evidence contemporaneous with the Injured Worker's retirement to establish that the Injured Worker's retirement was injury induced. Pursuant to the Ohio Supreme Court's holding in State ex rel. Baker Material Handling Corp. v. Indus. Comm. (1994), 69 Ohio St.3d 201 an Injured Worker is ineligible for an award of permanent total disability compensation when the Injured Worker voluntarily retires prior to becoming permanently and totally disabled and the retirement was not injury induced. Should the retirement be non-injury induced then a further inquiry must be made as to whether the Injured Worker intended to leave the labor force. As noted above, at the time the Injured Worker retired from her job duties with the Self-Insuring Employer on or about 12/31/2006 she had not received medical care in either of the claims at hand since 2004 and there is no medical evidence contemporaneous with her retirement to establish that the same was injury induced. With respect to the Injured Worker's intent to leave the labor force, no evidence has been provided by the Injured Worker in the form of testimony and/or written documentation establishing that she intended to work after her retirement and conducted a job search to obtain new employment. As such, the Staff Hearing Officer finds that the Injured Worker's retirement on or about 12/31/2006 was not injury

> induced and at the same constituted an abandonment of the workforce by the Injured Worker thereby precluding the Injured Worker from receiving Permanent and Total Disability Compensation.

{¶ 46} 17. On February 1, 2012, relator, Teresa Hart, filed this mandamus action.

Conclusions of Law:

{¶ 47} The main issue is whether the commission abused its discretion in determining that relator's December 31, 2006 retirement from her employment at Hoover was not induced by the allowed conditions of her two industrial claims.

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

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

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

{¶ 50} Paragraph two of the syllabus of *State ex re. Baker Material Handling Corp. v. Indus. Comm.* (1994), 69 Ohio St.3d 202, 631 N.E. 2d 138, states:

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

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

> The case law indicates that a two-step analysis is involved in the determination of whether a claimant has voluntarily removed himself from the workforce prior to becoming PTD such that a PTD award is precluded. The first step requires the commission to determine whether the retirement or job departure was voluntary or involuntary. If the commission determines that the job departure was involuntary, the

> inquiry ends. If, however, the job departure is determined to be voluntary, the commission must consider additional evidence to determine whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. *State ex rel. Ohio Dept. of Transp. v. Indus. Comm.*, Franklin App. No. 08AP-303, 2009-Ohio-700.

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

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

(Emphasis sic.)

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

> We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its

> discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury.

Id. at ¶ 18.

{¶ 54} Analysis begins with the observation that on January 5, 2007, five days after her retirement from her employment at Hoover, relator was examined by Dr. Hirst, who wrote "[t]he claimant retired early (12/31/2006) due to her injuries." In addition to this statement regarding the retirement, Dr. Hirst set forth findings regarding relator's medical impairment resulting from the allowed conditions of the two industrial claims.

{¶ 55} Ohio Adm.Code 4123-3-34(D)(1)(d)'s command that "the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement" would seem to compel the adjudicator to consider the January 5, 2007 report of Dr. Hirst in determining whether the December 31, 2006 retirement was injury induced.

{¶ 56} However, the SHO states in his January 4, 2011 order that "there is no medical evidence contemporaneous with her retirement to establish that the same was injury induced." There is no reference to Dr. Hirst's report in the SHO's order.

{¶ 57} Clearly, it cannot be disputed that a medical report of an examination of the allowed conditions of a claim that was performed five days after the retirement date necessarily contains evidence of the injured worker's medical condition at or near the time of the removal/retirement even if it can be argued that the medical report does not contain a medical opinion that the removal/retirement was injury induced.

{¶ 58} Thus, even if we were to delete from Dr. Hirst's January 5, 2007 report his statement that "[t]he claimant retired early (12-31-2006) due to her injuries," the report would still contain evidence of relator's medical condition at or near the time of her retirement. And, under Ohio Adm.Code 4121-3-34(D)(1)(d), the commission has the duty to consider the evidence contained in the medical report.

{¶ 59} For example, Dr. Hirst's report states:

Discussion

> The claimant's impairments are the loss of motion of the hip right, the loss of motion, the spasm and guarding, and the neurological losses of the lumbosacral regions, the loss of motion and the spasm and guarding of the cervical region; and the various bladder, bowel, and sexual problems due to the caude equina[.]

{¶ 60} Clearly, the above medical findings of Dr. Hirst are evidence of relator's medical condition at or near the time of retirement and the rule commands the commission to consider such evidence.

{¶ 61} Respondents do not argue that the SHO considered Dr. Hirst's report. Rather, they seem to argue that the SHO was not required to consider the report because allegedly Dr. Hirst's statement that relator "retired early * * * due to her injuries" is not medical evidence upon which the commission can rely. Respondents' argument misses the issue.

{¶ 62} According to respondents, Dr. Hirst's statement that relator "retired early * * * due to her injuries" is simply his reporting of what relator must have told him during the examination. Thus, respondents conclude that the statement is not Dr. Hirst's medical opinion that the retirement was injury induced.

{¶ 63} In effect, respondents invite this court to interpret Dr. Hirst's report and his statement regarding the retirement in favor of respondents' view and, on that basis, declare that the commission was not under a duty to consider any of the medical evidence contained in the report.

{¶ 64} It is the commission that is charged with the duty to weigh the evidence before it. Ordinarily, this court does not weigh the evidence for the commission in a mandamus action.

{¶ 65} Thus, it is inappropriate for this court to interpret Dr. Hirst's statement that relator "retired early * * * due to her injuries" and to determine for the commission whether the statement is Dr. Hirst's medical opinion or simply a reporting of what relator told him at the examination.

{¶ 66} Clearly, Ohio Adm.Code 4123-3-34(D)(1)(d) required the commission to consider Dr. Hirst's report in determining whether relator's December 31, 2006

retirement was injury induced because Dr. Hirst's report contains evidence of relator's medical condition at or near the time of retirement.

{¶ 67} But the SHO reports in his order that counsel for Hoover stated at the hearing that "there was no medical evidence contemporaneous with the Injured Worker's retirement to establish that the Injured Worker's retirement was injury induced." Later in the order, the SHO finds "there is no medical evidence contemporaneous with her retirement to establish that the same was injury induced." Dr. Hirst's report is not mentioned in the order. Thus, the SHO's order strongly suggests reliance upon counsel's alleged absence of medical evidence contemporaneous with the retirement—an allegation that proves to be inaccurate. *See State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915. Clearly, this was an abuse of discretion that warrants a writ of mandamus.

{¶ 68} Pointing to Hoover's January 7, 2005 approval of Dr. Pentz's C-9 request for physical therapy, relator argues that Hoover's counsel was incorrect in telling the SHO at the hearing that, prior to the retirement, the last medical treatment in either claim occurred in 2004.

{¶ 69} Because the SHO adopted counsel's assertion regarding lack of treatment that relator argues to be inaccurate, relator contends that the commission further abused its discretion.

{¶ 70} Hoover and the commission counter relator's argument by pointing to the absence of evidence that relator actually received the physical therapy that was approved in January 2005. Respondents also argue that, even if relator received medical treatment in early 2005, the lack of medical treatment beyond physical therapy in early 2005 is significant and can be relied upon to support a finding that the retirement was not injury induced.

{¶ 71} In the magistrate's view, given that the commission abused its discretion regarding Dr. Hirst's report, this court need not resolve the matter regarding treatment.

{¶ 72} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of January 4, 2011 that denies relator's PTD application, and, in a manner consistent with this magistrate's decision, enter a new order that determines whether relator's retirement

was injury induced. If the commission determines that the retirement was not injury induced, it shall further adjudicate the PTD application on the merits.

/S/ MAGISTRATE
KENNETH W. MACKE

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).