[Cite as *State ex rel. Krogman v. B&B Ents. Napco Flooring, L.L.C.*, 2015-Ohio-1512.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph E. Krogman,	:	
Relator,	:	
v.	:	No. 14AP-477
B&B Enterprises Napco Flooring, LLC and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on April 21, 2015

Lisa M. Clark, for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman*, for respondent Industrial Commission of Ohio.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION

HORTON, J.

{¶ 1} Relator, Joseph E. Krogman, filed this original action in mandamus seeking a writ ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his request for temporary total disability ("TTD") compensation and ordering the commission to consider the merits of his application for such compensation.

{¶ 2} This court referred the matter to the magistrate pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate has rendered a decision that includes findings of fact and conclusions of law and recommends that this court deny relator's request for a writ of mandamus. The decision of the magistrate is attached as an appendix to this decision of the court. Relator has filed objections to the magistrate's decision, and the matter is now before the court for an independent review

based upon the stipulated evidence, the magistrate's decision, and the memoranda presented by the parties in support of and opposition to the relator's objections.

{¶ 3} The commission's denial of TTD compensation in this case is based upon a finding that relator had voluntarily abandoned the workforce. Relator's original claim relates to a 2003 traffic accident occurring in the course and scope of his employment. At various times over the ensuing years, relator has received TTD compensation, which terminated upon subsequent assessments determining that relator's allowed medical conditions had reached maximum medical improvement ("MMI").

{¶ 4} In 2012, relator applied for permanent total disability ("PTD") compensation. The commission denied PTD. The commission found that, based upon allowed conditions and nonmedical factors, relator was able to engage in sustained remunerative employment at the time of his application.

{¶ 5} Relator underwent further surgery in 2013, prompting the present application for TTD compensation. The commission's denial is based on workforce abandonment and cites the evidence demonstrating that appellant had not worked since 2004, and had made no effort to participate in vocational rehabilitation or otherwise improve his ability to gain re-employment since he last worked.

{¶ 6} Relator's objections to the magistrate's decision assert that the magistrate incorrectly applied *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48 (1993), and *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), in finding that the commission was not obligated to provide a specific date upon which relator had voluntarily abandoned the workforce. Relator asserts that, in the absence of such a specifically defined date of alleged withdrawal from the workforce, he is deprived of the opportunity to demonstrate that he lacked the physical capacity for employment at the time of the alleged abandonment.

{¶ 7} We find that the magistrate has correctly interpreted the pertinent law and applied it to the facts in the present case. The cases cited by appellant are job termination cases, which are subject to a specific date of termination of employment, rather than workforce withdrawal cases. We have consistently held, in conformity with governing Supreme Court cases, that workforce abandonment cases can develop over an extended period of years and involve assessment of many events. Such cases are not tied to a

specific date of explicit abandonment of the workforce. We maintain the distinction that job abandonment and workforce abandonment cases are not susceptible to identical treatment, and that a claimant may be found to have involuntarily abandoned a specific employment, but subsequently have voluntarily abandoned the workforce. In doing so, we apply *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245 and its progeny, as developed in the magistrate's decision.

{¶ 8} The voluntary nature of abandonment of the workforce is a factual question within the commission's final jurisdiction. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). The issue before us is whether the record contains some evidence to support the commission's determination that relator voluntarily abandoned the workforce over the intervening years between his last employment and his latest TTD application, regardless of whether his 2004 cessation of employment was voluntary or not. The recitation of evidence in the magistrate's decision establishes that there was some evidence to support the commission's determination in this respect.

{¶ 9} Following our independent review of the magistrate's decision and the record, we overrule relator's objections to the magistrate's decision and adopt the magistrate's findings of fact and conclusions of law as our own. We deny the requested writ of mandamus.

Objections overruled; writ of mandamus denied.

DORRIAN and LUPER SCHUSTER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Joseph E. Krogman,	:	
Relator,	:	
v.	:	No. 14AP-477
B&B Enterprises Napco Flooring, LLC and Industrial Commission of Ohio,	:	(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 16, 2014

Lisa M. Clark, for relator.

Michael DeWine, Attorney General, and *Colleen C. Erdman,* for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 10} In this original action, relator, Joseph E. Krogman, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the August 7, 2013 order of its staff hearing officer ("SHO") that denies relator's request for temporary total disability ("TTD") compensation beginning April 4, 2013 based upon a finding that relator is ineligible for the compensation because he has voluntarily abandoned the workforce, and to enter an order that adjudicates the merits of the application for TTD compensation.

Findings of Fact:

{¶ 11} 1. On May 15, 2003, relator was injured while operating his work van that he had stopped at a traffic light. Relator's vehicle was rear ended by another vehicle. At the time of the injury, relator was employed as a supervisor and installer for respondent B&B Enterprises, Napco Flooring, LLC ("B&B Enterprises"), a state-fund employer.

{¶ 12} 2. The industrial claim (No. 03-889337) is allowed for:

> Right trapezius strain; right elbow avulsion fracture; right lateral epicondylitis; right carpal tunnel syndrome; right shoulder rotator cuff tendonitis; right shoulder subacromial bursitis; right shoulder impingement syndrome; right triceps tendonitis; C6-7 disc protrusion; aggravation of pre-existing degenerative disc disease of the cervical spine; labral tear right shoulder.

{¶ 13} 3. Relator last worked in January, 2004.

{¶ 14} 4. On March 15, 2006, the Ohio Bureau of Workers' Compensation ("bureau") moved for termination of TTD compensation on grounds that the allowed conditions had reached maximum medical improvement ("MMI").

{¶ 15} 5. Following a July 17, 2006 hearing, a district hearing officer ("DHO") granted the bureau's motion. The DHO terminated TTD compensation as of July 17, 2006 based upon a finding that the allowed conditions of the claim had reached MMI.

{¶ 16} 6. On February 22, 2007, relator underwent surgery relating to the allowed conditions of the claim.

{¶ 17} 7. On April 4, 2007, the bureau issued an order reinstating TTD compensation as of the surgery date. The bureau's order was not administratively appealed.

{¶ 18} 8. On August 27, 2007, the bureau moved for termination of TTD compensation. In support, the bureau submitted an August 1, 2007 report from Donald Carruthers, M.D., who opined that the allowed conditions had reached MMI.

{¶ 19} 9. Following a September 27, 2007 hearing, a DHO issued an order granting the bureau's August 27, 2007 motion. The DHO terminated TTD compensation as of September 27, 2007 on grounds that the allowed conditions had reached MMI.

{¶ 20} 10. On May 25, 2012, relator filed an application for permanent total disability ("PTD") compensation.

{¶ 21} 11. Following an October 2, 2012 hearing, an SHO mailed an order on October 6, 2012 denying the PTD application.

{¶ 22} For the determination of residual functional capacity, Ohio Adm.Code 4121-3-34(B)(4), the SHO relied upon a report from Dr. Burton dated August 3, 2012, who opined that relator is able to perform light-work activity. Specifically, the SHO determined that the industrial injury precludes a return to the former position of employment, but nevertheless, permits sedentary and light-work.

{¶ 23} The SHO then addressed the non-medical factors:

> A review of the Injured Worker's past work experience demonstrates that the Injured Worker has been employed in skilled work activity in the past. The Hearing Officer finds that the Injured Worker's ability to engage in skilled employment in the past demonstrates that the Injured Worker would be able to engage in at least un-skilled entry-level employment in the future. The Injured Worker's ability to master this type of skilled employment demonstrates that the Injured Worker has an aptitude for retraining and would benefit from on-the-job training and would be able to learn to perform different types of work.
>
> A review of the Injured Worker's past work history demonstrates that the Injured Worker is able to apply information received through training and apply it to a work setting. The Injured Worker's past work experience has demonstrated that he has the ability to supervise the work of others, oversee various activities of a project including organizing materials and employees, keeping track of information and keeping abreast of various methods and technologies. The Injured Worker's past work experience has also demonstrated the Injured Worker's ability to make estimates and bids regarding jobs to be completed as well as the ability to use a computer. The Hearing Officer finds that these skills and abilities would transfer to at least entry-level sedentary employment activity.

{¶ 24} In the final paragraphs of the order, the SHO found that relator last worked on January 5, 2004, and that relator failed to engage in any type of rehabilitation efforts since his last date of work. The SHO concluded that, based upon the allowed conditions

and the non-medical factors, relator is able to engage in sustained remunerative employment.

{¶ 25} 12. On April 4, 2013, relator underwent surgery described in an operative report as "[m]icroscopic posterior cervical right C7 nerve root foraminotomy." The surgery was performed by Bradbury A. Skidmore, M.D.

{¶ 26} 13. On April 24, 2013, Dr. Skidmore completed a bureau form captioned "Physician's Report of Work Ability" ("Medco-14"). On the Medco-14, Dr. Skidmore certified that the April 4, 2013 surgery is causing temporary total disability.

{¶ 27} 14. On April 30, 2013, relator moved for TTD compensation beginning April 4, 2013.

{¶ 28} 15. Following a June 17, 2013 hearing, a DHO issued an order denying relator's April 30, 2013 motion. The DHO found that relator is ineligible for the compensation.

{¶ 29} 16. Relator administratively appealed the DHO's order of June 17, 2013.

{¶ 30} 17. Following an August 7, 2013 hearing, an SHO issued an order affirming the DHO's order of June 17, 2013. Concurring in the DHO's finding that relator is ineligible for the compensation, the SHO's order explains:

> The Injured Worker's motion requesting temporary total disability compensation for the period of 04/04/2013 through the present and continuing is denied.
>
> The Staff Hearing Officer finds that the Injured Worker has failed to meet his burden of proof in establishing that he is eligible for the requested period of temporary total disability compensation.
>
> The Staff Hearing Officer finds that the Injured Worker was last employed on 01/15/2004 [sic]. Further, the Injured Worker has not worked in any capacity since that time.
>
> The Staff Hearing Officer additionally finds that the Injured Worker had surgery for the allowed conditions on 04/04/2013. The Injured Worker is now requesting temporary total disability compensation for a period beginning on 04/04/2013, the date of his surgery.

> The Staff Hearing Officer finds that the Injured Worker filed an Application for Permanent and Total Disability Compensation which was denied by Staff Hearing Officer order issued 10/06/2012. In this order, the Staff Hearing Officer specifically made the finding that the Injured Worker is able to engage in sustained remunerative employment. This finding considers not only the impairments arising from the allowed conditions in this claim, but also the non-medical disability factors such as the Injured Worker's age, education and work experience. Significantly, the Staff Hearing Officer found that the Injured Worker has made no attempt to participate in any type of vocational rehabilitation program since he last worked in 2004.
>
> Although the denial of the Application for Permanent Total Disability compensation is not bar to the payment of subsequent periods of temporary total disability compensation, the findings made by the Staff Hearing Officer constitute some evidence of the Injured Worker's intent to voluntarily abandon the workforce.
>
> The Staff Hearing Officer finds that the Injured Worker has still not made any attempts to participate in vocational rehabilitation or otherwise engage in an activity designed to improve his ability to gain re-employment since he last worked in 2004.
>
> Additionally, the Staff Hearing Officer finds that the Injured Worker has not presented any evidence that the Injured Worker has attempted to, or is interested in, returning to employment. The file contains no evidence that the Injured Worker has made any attempt to engage in a job search.
>
> When the prior decision that the Injured Worker is medically capable of work is considered in conjunction with the Injured Worker's lack of effort to improve his employability and his lack of effort to find work, the Staff Hearing Officer concludes that the Injured Worker has no interest in returning to work.
>
> Therefore, the Staff Hearing Officer specifically finds that the Injured Worker has voluntarily abandoned the workforce.
>
> At hearing, Injured Worker's counsel relied on two cases, State ex rel. Cline v. Abke Trucking, Inc., 2012-Ohio-1914

> and State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm., 2012-Ohio-3335.
>
> The Staff Hearing Officer finds these cases [are] inapplicable to the case at hand because in each of these cases the Injured Worker's departure from the workforce was found to be involuntary. In Cline v. Abke Trucking, the Injured Worker's departure from the workforce was deemed involuntary because the facts of the case indicated that the Injured Worker was terminated from a subsequent position of employment as the result of a non-allowed condition.
>
> In Honda of America v. Indus. Comm., the Injured Worker's retirement from the workforce was deemed involuntary because the Injured Worker's retirement was causally related to the impairments arising from the allowed conditions in his claim.
>
> In the case at hand, the Staff Hearing Officer specifically finds that the Injured Worker's departure from the workforce is voluntary and therefore precludes the payment of temporary total disability compensation.
>
> All evidence on file was reviewed.
>
> This order is based on State ex rel. Pierron v. Industrial Comm. of Ohio (2008) 120 Ohio St.3d 40, State ex rel. Corman v. Allied Holdings, Inc. (2012) 132 Ohio St.3d 202 and State ex rel. Lackey v. Industrial Comm. of Ohio (2011) 129 Ohio St.3d 119.

{¶ 31} 18. On August 29, 2013, another SHO issued an order refusing relator's administrative appeal from the SHO's order of August 7, 2013.

{¶ 32} 19. On June 16, 2014, relator, Joseph E. Krogman, filed this mandamus action.

Conclusions of Law:

{¶ 33} The issue is whether the commission abused its discretion in finding that relator had voluntarily abandoned the workforce and therefore was ineligible for TTD compensation.

{¶ 34} In determining that relator voluntarily abandoned the workforce, the commission relied upon three cases which shall be reviewed here.

{¶ 35} The commission cites first to the seminal case of *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245.

{¶ 36} In *Pierron,* the claimant, Richard Pierron, was seriously injured in 1973 while working as a telephone lineman for Sprint/United Telephone Company ("Sprint/United").

{¶ 37} After Pierron's injury, his doctor imposed medical restrictions that were incompatible with his former position of employment as a lineman. Sprint/United offered Pierron a light-duty job consistent with those restrictions and Pierron continued to work in that position for the next 23 years.

{¶ 38} In 1997, Sprint/United informed Pierron that his light-duty position was being eliminated. Sprint/United did not offer Pierron an alternative position, but did give him the option to retire or be laid off. Pierron chose retirement.

{¶ 39} In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In later 2003, he moved for TTD compensation beginning June 17, 2001.

{¶ 40} Ultimately, the three-member commission determined that Pierron had voluntarily abandoned the workforce when he retired in 1997. Pierron then filed a mandamus action in this court. This court denied the writ and Pierron appealed as of right to the Supreme Court of Ohio.

{¶ 41} In affirming the judgment of this court and thus upholding denial of the writ, the *Pierron* court explained:

> We are confronted with this situation in the case before us. The commission found that after Pierron's separation from Sprint/United, his actions—or more accurately inaction—in the months and years that followed evinced an intent to leave the work force. This determination was within the commission's discretion. Abandonment of employment is largely a question " 'of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts.' " *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383, 544 N.E.2d 677, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 414 N.E.2d 1044. In this case, the lack of evidence of a search for employment in the years following

> Pierron's departure from Sprint/United supports the commission's decision.
>
> We recognize that Pierron did not initiate his departure from Sprint/United. We also recognize, however, that there was no causal relationship between his industrial injury and either his departure from Sprint/United or his voluntary decision to no longer be actively employed. When a departure from the entire work force is not motivated by injury, we presume it to be a lifestyle choice, and as we stated in *State ex rel. Pepsi–Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 216, 648 N.E.2d 827, workers' compensation benefits were never intended to subsidize lost or diminished earnings attributable to lifestyle decisions. In this case, the injured worker did not choose to leave his employer in 1997, but once that separation nevertheless occurred, Pierron had a choice: seek other employment or work no further. Pierron chose the latter. He cannot, therefore, credibly allege that his lack of income from 2001 and beyond is due to industrial injury. Accordingly, he is ineligible for temporary total disability compensation.

Id. at ¶ 10-11.

{¶ 42} The second case cited by the commission in its order is *State ex rel. Corman v. Allied Holdings, Inc.*, 132 Ohio St.3d 202, 2012-Ohio-2579, where the Supreme Court had occasion to apply the *Pierron* rationale regarding workforce abandonment.

{¶ 43} In *Corman*, the claimant, Ronald R. Corman, retired from his employment with Allied Holdings a year after his 2002 work injury. The record contains no evidence that he was medically incapable of other work.

{¶ 44} In 2009, the commission denied Corman's request for reinstatement of TTD compensation. The commission found, among other things, that Corman's retirement was voluntary and unrelated to his industrial injury. The commission noted that Corman never sought other work in the years after he left Allied Holdings, thus demonstrating his intent to permanently abandon the labor market.

{¶ 45} Corman filed a mandamus action in this court which ultimately denied the writ. Corman appealed as of right to the Supreme Court of Ohio.

{¶ 46} In affirming the judgment of this court and upholding the denial of the writ, the *Corman* court explained:

> There are important similarities between the case before us and *Pierron*. Both claimants sought TTC years after retiring from their former positions of employment. In those intervening years, neither individual made a credible effort to secure other employment. Neither claimant produced evidence of a medical inability to perform other work during those years, prompting the commission to conclude in each case that the claimant had permanently left the work force.
>
> * * *
>
> Corman's attempt to distinguish *Pierron* is not persuasive. Corman contends that he retired from his former position of employment with Allied Holdings because of his injury—a claim that was not made in *Pierron*. The commission, however, did not find that Corman's departure from Allied Holdings was injury-induced, but even if it had, it would not advance his cause. As in *Pierron*, there was no evidence of a medical inability to perform other work in the years between Corman's departure from Allied Holdings and his request for TTC, so Corman had the same choice as Pierron—seek other employment or work no further. When Corman elected the latter, he eliminated the possibility of, or potential for, lost wages. He cannot, therefore, credibly assert that he has lost income due to his industrial injury.

Id. at ¶ 6-7.

{¶ 47} The third case cited by the commission in its order is *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089. The claimant, Juan L. Lackey, injured his knee at work in 2001. Lackey drove trucks for Penske Truck Leasing Company, L.L.P. ("Penske"). Knee surgery was performed in 2003 and Lackey missed two months of work.

{¶ 48} Upon his return to work, Lackey drove full time for the next 15 months. During that time, he moved for the allowance of additional knee conditions, and on July 27, 2004, filed retirement papers with Penske. Nothing in the retirement papers indicated that the retirement was connected to the industrial injury. Lackey continued to work full time for the next three months until the retirement became effective on October 31, 2004.

{¶ 49} In December 2004, Lackey's claim was allowed for additional knee injuries. In November 2005, Lackey again had knee surgery and he requested that TTD compensation be reinstated.

{¶ 50} The DHO denied the request after finding that Lackey had voluntarily retired from his former position of employment for reasons unrelated to his industrial injury. The DHO found that at the time of the retirement, there was no medical evidence indicating that Lackey's industrial injury affected his ability to work.

{¶ 51} The DHO also found that Lackey's retirement constituted a voluntary abandonment of the entire labor market. On appeal, an SHO elaborated on that finding, stressing that in the 17 months since Lackey had retired, he had not looked for other work. The SHO also felt that Lackey's testimony also evinced an intention not to work again.

{¶ 52} After the three-member commission refused further appeal, Lackey filed a mandamus action in this court. This court denied the writ. Lackey then took an appeal as of right to the Supreme Court of Ohio.

{¶ 53} In affirming the judgment of this court and denying the writ, the Lackey court explained:

> Eligibility for compensation under these circumstances depends on whether the separation from employment was injury-induced. If it was not, a claimant may receive TTC only if he or she has found other employment and is later prevented from doing that job by a flare-up of the original industrial injury. *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 384, 732 N.E.2d 355. If departure was related to the injury, it is not necessary for the claimant to first obtain other employment, but it is necessary that the claimant has not foreclosed that possibility by abandoning the entire workforce. Id. at 383-384. That is because TTC compensates for "the loss of earnings which [a claimant] incurs while the injury heals." *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533. When a worker voluntarily exits the labor market, "he no longer incurs a loss of earnings because he is no longer in a position to return to work." Id.
>
> Lackey alleges that he left Penske because of his industrial injury. The commission found otherwise and also found that when Lackey left Penske, he retired from the larger labor market as well. Review supports the commission's order.

> There is no medical evidence indicating that when Lackey filed for retirement, his ability to perform his regular duties was adversely affected by his industrial injury. To the contrary, Lackey worked full-time for nearly a year before submitting his retirement notice and continued to work in that same capacity for another three months. This is hardly consistent with a condition so debilitating as to force an individual prematurely from his job.
>
> * * *
>
> The commission did not abuse its discretion in finding that Lackey's retirement was unrelated to his injury. Accordingly, Lackey could receive postretirement TTC only if he were gainfully employed elsewhere and prevented from doing that job by his industrial injury. That did not occur.

Id. at ¶ 11-13, 15.

{¶ 54} Having just reviewed the three cases cited by the SHO's order of August 7, 2013, the magistrate finds it appropriate to review *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), a case relied upon by relator here to fashion an argument for the granting of a writ by this court.

{¶ 55} In *Pretty Prods.,* the claimant, Maxine Dansby, injured her low back on two different occasions in the course of and arising out of her employment with Pretty Products, Inc. ("Pretty Products"). The first incident occurred in February 1990. Pretty Products certified the claim for "sprain/strain lumbosacral." After a period of absence from work, Dansby returned to her job at Pretty Products.

{¶ 56} On November 8, 1990, Dansby again left work and went to the hospital because of low back pain. She saw her attending physician, Dr. Alfred H. Magness, for treatment.

{¶ 57} In a series of medical excuse slips, Dr. Magness certified an inability to return to the former job. The last of these medical slips certified that Dansby could return to work on March 1, 1991.

{¶ 58} Dansby did not return to work on Friday, March 1, 1991 nor did she then produce an excuse slip that extended her disability. Dansby did not report to work on the

following Monday or Tuesday and, consequently, she was terminated pursuant to a provision of the union/management agreement.

{¶ 59} In August 1991, Dansby filed her second workers' compensation claim alleging that she injured her low back, neck, and shoulders on November 8, 1990. The employer refused to certify the claim. Later, in October 1991, Dansby moved for TTD compensation in the second claim beginning November 8, 1990.

{¶ 60} At a November 25, 1991 hearing, a DHO heard the allowance and compensation issues of the second claim. The DHO issued an order allowing the claim for "aggravation [of] pre-existing lumbosacral sprain/strain," but denied the request for TTD compensation based upon a finding that Dansby's discharge constituted a voluntary abandonment of her former position of employment.

{¶ 61} Dansby administratively appealed the DHO's order to the regional board of review which affirmed the DHO's order.

{¶ 62} On further appeal by Dansby, staff hearing officers modified the DHO's order, but denied the request for TTD compensation on voluntary abandonment grounds.

{¶ 63} Dansby filed a mandamus action in this court. This court denied the writ. Dansby appealed as of right to the Supreme Court of Ohio.

{¶ 64} In *Pretty Prods.*, the Supreme Court found that the order of the staff hearing officers was vague and subject to differing interpretations. Consequently, the court remanded the matter to the commission for clarification. In so doing, the *Pretty Prods.* court pronounced:

> The receipt of temporary total disability ("TTD") compensation rests on a claimant's inability to return to his or her former job as a direct result of an industrial injury. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586, syllabus. However, eligibility may be compromised when the claimant is no longer employed at that job. Once a claimant is separated from the former position of employment, future TTD compensation eligibility hinges on the timing and character of the claimant's departure.
>
> The timing of a claimant's separation from employment can, in some cases, eliminate the need to investigate the character of departure. For this to occur, it must be shown that the

> claimant was already disabled when the separation occurred. "[A] claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal." *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 48, 623 N.E.2d 55, 58.
>
> However, such situations are not common, and inquiry into the character of departure is the norm. While voluntary departure generally bars TTD compensation, an involuntary departure does not. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 531 N.E.2d 678. In the instant case, the commission found that claimant's departure was involuntary. Review of the commission's order, however, is hindered because it is susceptible of several different interpretations.

Id. at 6-7.

{¶ 65} While the *Pretty Prods.* case is at the core of the argument fashioned by relator for the granting of a writ by this court, it is necessary to review *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, a case that clarifies the rationale set forth in *Pretty Prods.* Parenthetically, it can be noted that the parties here fail to address *Reitter Stucco.*

{¶ 66} In *Reitter Stucco,* claimant, Tony A. Mayle, injured his back in 2003 while working for Reitter Stucco, Inc. ("Reitter Stucco"). Over the next several months, Mayle's back symptoms did not improve and surgery was recommended. Surgery was performed on July 12, 2004.

{¶ 67} After the surgery, Mayle underwent physical therapy and a work-conditioning program. Despite his conscientious and dedicated participation, Mayle's vocational team was unsure whether he would ever be capable of performing the heavy physical demands of his former position of employment.

{¶ 68} On April 15, 2005, Mayle was fired for comments made about the company's president and Reitter Stucco discontinued paying wages in lieu of TTD compensation. Thus, Mayle was prompted to file a motion for TTD compensation.

{¶ 69} A DHO denied the motion finding that Mayle's termination constituted a voluntary abandonment of the former position of employment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995).

{¶ 70} Upon administrative appeal, an SHO reversed the DHO finding that Mayle was temporarily and totally disabled when he was fired, rendering *Pretty Prods.* and not *Louisiana-Pacific,* controlling. The commission affirmed the order.

{¶ 71} Thereafter, Reitter Stucco filed in this court a mandamus action. This court upheld the commission's decision and Reitter Stucco appealed as of right to the Supreme Court of Ohio.

{¶ 72} In *Reitter Stucco,* the Supreme Court affirmed the judgment of this court. The Supreme Court explained:

> Two cases are pertinent here—*Louisiana-Pacific,* 72 Ohio St.3d 401, 650 N.E.2d 469, and *Pretty Prods.,* 77 Ohio St.3d 5, 670 N.E.2d 466. *Louisiana-Pacific* involves the classic voluntary/involuntary-departure debate, but in the context of a discharge, rather than the usual context of an employee's quitting. In *Louisiana-Pacific,* the claimant argued that his employer, and not he, initiated his separation from employment when it fired him. The employee argued that his separation was not a voluntary decision and must be considered an involuntary departure that did not disrupt his eligibility for temporary total compensation.
>
> We disagreed. Quoting *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202, we stated that although the employer may have formalized the separation, it was the claimant who had initiated it when he chose to engage in the misconduct that caused the firing. This statement stems from the principle that " 'one may be presumed to tacitly accept the consequences of his voluntary acts.' " *Louisiana-Pacific,* 72 Ohio St.3d at 403, 650 N.E.2d 469, quoting *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533.
>
> The presumption of tacit acceptance, however, is fair only if the consequence is one of which the claimant was, or should have been, aware. See *State ex rel. Liposchak v. Indus. Comm.* (1995), 73 Ohio St.3d 194, 652 N.E.2d 753. Thus, we established the three-part test in *Louisiana–Pacific* that defined a termination as "voluntary" when it is "generated by

> the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee." Id. at 403, 650 N.E.2d 469.
>
> *Pretty Prods.* was decided shortly after *Louisiana-Pacific.* In *Pretty Prods.*, we held that the character of the employee's departure—i.e., voluntary versus involuntary—is not the only relevant element and that the timing of the termination may be equally germane. In *Pretty Prods.*, we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled. Id., 77 Ohio St.3d at 7, 670 N.E.2d 466; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, ¶ 10. Thus, even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the discharge occurred.
>
> The present litigants treat the two cases as mutually exclusive, with the company urging that *Louisiana-Pacific* is dispositive and Mayle and the commission citing *Pretty Prods.* Yet *Louisiana-Pacific* and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. If the *Louisiana-Pacific* three-part test is satisfied, however, suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination. We thus take this opportunity to reiterate that *Louisiana-Pacific* and *Pretty Prods.* are not mutually exclusive and that they may both factor into the eligibility analysis.

Id. at ¶ 7-11.

{¶ 73} Analysis begins with the observation that, in *Pierron,* the claimant, Richard Pierron, chose to retire in 1997 after Sprint/United informed him that his light-duty warehouse position was being eliminated and that he was not being offered an alternate position. The *Pierron* court recognized that Pierron did not initiate his departure from

Sprint/United and that there was no causal relationship between his industrial injury and his departure from Sprint/United. Because Pierron chose not to seek other employment following his retirement, the court held that he had voluntarily abandoned the workforce. By his own inaction over the years following his separation from Sprint/United, Pierron evinced an intent to leave the workforce.

{¶ 74} A similar situation occurred in *Corman*. Claimant, Ronald R. Corman, voluntarily retired from his employment at Allied Holdings a year after his 2002 industrial injury. He never sought work in the years after he left Allied Holding, thus evincing an intent to permanently abandon the labor market. The *Corman* court noted that Corman had the same choice as *Pierron*—seek other employment or work no further.

{¶ 75} In *Lackey,* Juan L. Lackey, filed retirement papers with Penske on July 27, 2004. He continued to work full time for the next three months until the retirement became effective on October 31, 2004. In *Lackey,* the court did not mention the *Pierron* case. Rather, the *Lackey* court held that because the retirement was not injury-induced, Lackey was ineligible for TTD compensation unless he became subsequently employed, and due to his industrial injury, was unable to perform the subsequent employment. Because that did not occur, Lackey was ineligible for TTD compensation.

{¶ 76} Here, relator points out that, unlike the claimants in *Pierron, Corman,* and *Lackey*, he did not retire from his employment at B&B Enterprises. In fact, the record tells us very little about relator's separation from employment at B&B Enterprises. We are told simply that he was last employed in January 2004.

{¶ 77} Here, the commission did not engage in an inquiry as to whether relator's departure from his employment at B&B Enterprises was injury-induced and, thus, involuntary. That issue was not before the SHO who heard relator's request for TTD compensation on August 7, 2013.

{¶ 78} To reiterate a key portion of the decision in *Reitter Stucco,* the court states:

> In *Pretty Prods.*, we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, *at the time of departure*, the claimant is still temporarily and totally disabled.

(Emphasis added.) *Id.* at ¶ 10.

{¶ 79} The *Reitter Stucco* court further writes:

> [E]ven if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled *at the time the discharge occurred*.

(Emphasis added.) *Id.*

{¶ 80} Here, citing *Pretty Prods.,* relator argues that the commission abused its discretion when it found that he voluntarily abandoned the workforce, but failed to determine the "specific day" of the workforce abandonment. (Relator's Brief, 9.) According to relator, by failing to determine the date of his workforce abandonment, the commission deprived him of an opportunity to show that he was temporarily and totally disabled at the time of his workforce abandonment and, thus, remains eligible for TTD compensation. Relator's argument lacks merit.

{¶ 81} Contrary to what relator's argument suggests, even a permanent medical inability to return to the former position of employment does not excuse the failure to search for alternative employment. Thus, a finding of workforce abandonment cannot be precluded by a medical inability to return to the former position of employment.

{¶ 82} Moreover, relator's argument fails to recognize that *Pretty Prods.* and *Reitter Stucco* were job abandonment cases—not workforce abandonment cases.

{¶ 83} Relator's argument confuses the concepts of job abandonment and workforce abandonment and even seems to improperly merge the two. Job abandonment and workforce abandonment are not the same concepts. Job abandonment cases are necessarily focused upon the date of the job separation or departure. On the other hand, evidence of workforce abandonment can develop over an extended period of years and involve the assessment of many events.

{¶ 84} Moreover, a claimant can voluntarily abandon his job without voluntarily abandoning the workforce. Also, a claimant can involuntarily abandon his job, but subsequently voluntarily abandon the workforce.

{¶ 85} Here, the SHO's order of August 7, 2013 appropriately applies *Pierron* and its progeny in determining that relator evinced an intent to permanently abandon the workforce, thereby rendering him ineligible for TTD compensation.

{¶ 86} In determining a voluntary workforce abandonment, the SHO's order of August 7, 2013 looks at several factors or events that together evince an intent to abandon the workforce. First, the SHO noted that in denying the PTD application, the commission had determined in its October 6, 2012 order that relator is able to engage in sustained remunerative employment. Second, despite an ability to work, relator failed to participate in any type of vocational rehabilitation program since he last worked in 2004. Third, relator presented no evidence that he attempted to return to alternative employment or even that he was interested in returning to work, and fourth, there was no evidence that relator ever conducted a job search in the years following his last date of employment in 2004. Based on those factors, the SHO's order of August 7, 2013 appropriately found a voluntary abandonment of the labor market.

{¶ 87} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).