**[Cite as *State ex rel. Sears Roebuck & Co. v. Indus. Comm.*, 2015-Ohio-1661.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State ex rel. Sears Roebuck & Company, | : | |
| Relator, | : | |
| v. | : | Case No. 14AP-576 |
| Industrial Commission of Ohio and Rita Stout, | : | (REGULAR CALENDAR) |
| Respondents. | : | |

D E C I S I O N

Rendered on April 30, 2015

*Taft Stettinius & Hollister, LLP*, and *Cynthia C. Felson*, for relator.

*Michael DeWine*, Attorney General, and *Eric J. Tarbox*, for respondent Industrial Commission of Ohio.

*Cox, Koltak & Gibson, LLP*, and *Ronald J. Koltak*, for Rita Stout.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

**{¶ 1}** Relator, Sears Roebuck & Company ("Sears"), has filed this original action requesting this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted temporary total disability ("TTD") compensation to respondent Rita Stout, and to order the commission to find that Stout is not entitled to that compensation.

**{¶ 2}** This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision,

including findings of fact and conclusions of law, and recommended that this court deny Sears' request for a writ of mandamus. (Attached as Appendix.)

**I. Facts and Procedural History**

**{¶ 3}** As more fully set forth in the magistrate's decision, Stout sustained a work-related injury on August 31, 2011, and her workers' compensation claim was allowed for lumbosacral strain, cervical strain, and bilateral upper trapezius strain. Stout returned to work in September 2011 under restrictions from her treating physician, Charles J. Marty, M.D. In March 2012, Dr. Marty requested a cervical MRI to address Stout's increased symptomology and extended her work restrictions. Stout informed Dr. Marty in April 2012 that although she was working eight-hour shifts, her supervisor complained that she "does not move fast enough". Dr. Marty also prescribed a more powerful pain medication at that time due to Stout's increased pain. Eventually, Dr. Marty placed further work restrictions on Stout, indicating she should only participate in sit-down work or should not walk or stand more than one hour per shift. Dr. Marty noted at a June 4, 2012 appointment that his requests for a cervical MRI and a consultation with a surgeon had been denied.

**{¶ 4}** At an October 30, 2012 appointment, Dr. Marty noted his requests for an MRI and a surgical consultation for Stout had been approved. The parties agree that Stout retired from her employment with Sears in November 2012.

**{¶ 5}** Following her retirement, Stout had a surgical consultation on February 21, 2013 with William Zerick, M.D., as approved by the commission, during which he reviewed her MRI results. Based on Dr. Zerick's examination and conclusions, Stout filed a motion requesting substantial aggravation of pre-existing cervical stenosis at C4-5, C5-6, and C6-7. Over objections from Sears, both the district hearing officer ("DHO") and the staff hearing officer ("SHO") authorized the additional allowances.

**{¶ 6}** Stout then filed a motion on January 2, 2014 requesting TTD compensation based on the newly allowed conditions. Initially, the DHO denied the request based on a lack of contemporaneous medical evidence that Stout was unable to work when she left her employment with Sears. Stout appealed, and on May 15, 2014 the SHO vacated the prior DHO order and granted Stout's motion for TTD compensation from November 30, 2012 forward. Sears appealed the SHO's order, and the commission denied the appeal. After the commission denied Sears' request for reconsideration, Sears filed this

mandamus request. On January 22, 2015, the magistrate issued a decision recommending this court deny Sears' request for a writ of mandamus.

## II. Objections to Magistrate's Decision

**{¶ 7}** Sears sets forth the following objections to the magistrate's decision:

> 1. The medical evidence in the record does not support a finding that Stout was unable to continue working at her light duty employment at Sears at the time she retired.
>
> 2. The Magistrate erred when she found that the Commission made a determination that Stout did not abandon the entire workforce when no such determination was made.

## III. Discussion

### A. First Objection – Ability to Continue Working

**{¶ 8}** Sears' first objection relates to the magistrate's finding that Stout's injury prevented her from returning to work. More specifically, Sears asserts the magistrate erred in finding the commission appropriately relied on evidence of Stout's post-retirement medical condition in awarding TTD.

**{¶ 9}** As the magistrate correctly noted, the commission did not need contemporaneous medical evidence in order to determine that Stout's retirement was based, at least in part, on her allowed conditions. "[A]n injury-induced retirement is involuntary and does not preclude TTD compensation." *State ex rel. AT&T Teleholdings, Inc. v. Indus. Comm.*, 10th Dist. No. 11AP-369, 2012-Ohio-3380, ¶ 18, citing *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 10th Dist. No. 11AP-533, 2012-Ohio-2469, ¶ 5. " '[T]he nature of the claimant's retirement is a factual question that revolves around the claimant's intent at the time of retirement and * * * questions of credibility and the weight to be given evidence are within the commission's discretion as fact finder." *Id.*, quoting *Hoffman* at ¶ 59, citing *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. It is not this court's role to consider the facts and determine the worker's motivation in retiring as it is the commission that sits as the trier of fact in determining whether a worker's retirement was injury induced and involuntary. *Id.*, citing *Hoffman* at ¶ 60. The commission does not abuse its discretion in concluding a retirement was injury induced where the record contains some evidence to support that conclusion. *Id.*, citing *Hoffman* at ¶ 46.

**{¶ 10}** Here, the commission cited Stout's testimony that her retirement was based, at least in part, on her allowed conditions. To the extent Sears argues the commission could not rely on Stout's testimony alone to conclude her retirement was injury-induced, "[w]e have previously held that a finding of an injury-induced retirement is not dependent upon production of evidence that a physician advised the worker to retire." *AT&T Teleholdings, Inc.*, at ¶ 19, citing *State ex rel. Black v. Indus. Comm.*, 10th Dist. No. 10AP-1168, 2012-Ohio-2589, ¶ 18. Thus, the fact that a record lacks documentation of a physician's opinion advising a claimant to retire "constitutes relevant, but not determinative, evidence of claimant's motivation for retiring." *Id.* The commission further cited Drs. Marty and Zerick's medical evidence following Stout's retirement that corroborated Stout's testimony. Because the magistrate correctly concluded some evidence in the record supported the commission's decision regarding the reason for Stout's retirement and, therefore, the commission did not abuse its discretion, we overrule Sears' first objection.

**B. Second Objection – Abandoning the Entire Workforce**

**{¶ 11}** Sears' second objection relates to the magistrate's assertion that Sears argued the commission abused its discretion by finding that Stout did not abandon the entire workforce. Sears claims it never made such an argument, and instead argued the commission abused its discretion by failing to *address* whether Stout had abandoned the entire workforce.

**{¶ 12}** Sears relies on *State ex rel. Floyd v. Formica Corp.*, 140 Ohio St.3d 260, 2014-Ohio-3614, for the proposition that a claimant who is no longer part of the workforce is not entitled to an award of TTD compensation because the claimant can have no lost earnings. In *Floyd*, the Supreme Court of Ohio held that "the critical issue for postretirement eligibility for [TTD] compensation is whether the injured worker permanently abandoned the entire job market after retirement. This is a factual question for the commission that depends primarily on what the claimant intended." *Id.* at ¶ 16, citing *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 383 (1989). The Supreme Court further instructed that the commission may infer intent "from words spoken, acts done, and other objective facts," and that the commission "must consider all relevant circumstances existing at the time of the alleged abandonment, including evidence of the claimant's intention to abandon the work place as well as acts by

which the intention is put into effect." (Citations omitted.) *Id*., citing *Diversitech Gen*. at 383. Sears argues that because the commission never addressed whether Stout permanently abandoned the entire job market after retirement, this court should issue a limited writ to order the commission to make this determination.

**{¶ 13}** Sears asserts the magistrate erroneously relied on this court's decision in *State ex rel. Floyd v. Formica Corp.*, 10th Dist. No. 11AP-928, 2012-Ohio-5769, and not the Supreme Court's decision. We first note that the Supreme Court affirmed this court's decision in *Floyd*. Additionally, as the magistrate correctly noted, "[t]his court's decision in *Floyd* was not a new pronouncement of law." (Magistrate's Decision, at ¶ 44.) Instead, the magistrate cited *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 44 (1987), and appropriately stated that a claimant's entitlement to TTD compensation "has always been dependent on both a causal relationship between the claimant's allowed conditions and a loss of earnings." (Magistrate's Decision, at ¶ 44.)

**{¶ 14}** As the magistrate noted, the facts in *Floyd* are distinguishable from the present case. In *Floyd*, the claimant was absent from the workplace for ten years before seeking an additional award of TTD compensation. Further, the claimant in *Floyd* requested TTD compensation back to the date of his surgery and did not argue he had been temporarily and totally disabled since the date of his retirement. Here, Stout sustained her injury in August 2011 and continually sought medical treatment from Dr. Marty, part of which was a requested MRI and surgical consultation which were denied. Stout retired on November 30, 2012 and finally underwent an MRI in March 2013, at which time she sought to have her claim allowed for additional conditions. Nearly one year after her retirement, the commission allowed her claim for the additional conditions, and in January 2014 she filed her motion seeking an award of TTD compensation dating back to the date of her retirement. The evidence here demonstrates that Stout continually sought medical treatment and additional allowances and followed the appropriate course of action until the commission ultimately allowed her claim. This case does not present the distinct temporal break that *Floyd* represents.

**{¶ 15}** *State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm.*, 139 Ohio St.3d 290, 2014-Ohio-1894 is more on point. In that case, the Supreme Court noted that "if the retirement is 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 the possibility by

abandoning the entire workforce." *Id.* at ¶ 15, citing *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089, ¶ 11. The Supreme Court then concluded that the court of appeals properly addressed the relevant issue of the claimant's retirement and determined the record contained evidence that the claimant retired because of his industrial injury and there was no evidence that the claimant had abandoned the entire workforce. *Id.* at ¶ 16.

**{¶ 16}** Here, the magistrate correctly noted that for the duration of the year that passed between Stout's retirement and her request for TTD benefits, Stout was treating her injuries and seeking additional allowances in her claim. Thus, there was no evidence in the record that Stout intended to abandon the entire workforce, and, as *Floyd* states, the commission may infer a claimant's intent from the surrounding circumstances. *Floyd*, 140 Ohio St. 3d 260, at ¶ 16.

**{¶ 17}** Because we agree with the magistrate's determination that the commission did not abuse its discretion by finding that Stout was entitled to an award of TTD compensation dating back to the date of her retirement, we overrule Sears' second objection.

**IV. Disposition**

**{¶ 18}** Following our independent review of the record pursuant to Civ.R. 53, we find that the magistrate correctly determined that Sears was not entitled to the requested writ of mandamus as there is some evidence in the record to support the commission's granting of Stout's TTD compensation. Accordingly, we adopt the magistrate's decision as our own, including the magistrate's findings of fact (with the correction that the date of the doctor's note in finding of fact No. 2 should be April 24, 2012) and conclusions of law. We therefore overrule Sears' objections to the magistrate's decision and deny Sears' request for a writ of mandamus.

*Objections overruled; writ of mandamus denied.*

TYACK and SADLER, JJ., concur.

**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State ex rel. Sears Roebuck & Company, | : | |
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M A G I S T R A T E ' S  D E C I S I O N

Rendered on January 22, 2015

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*Taft Stettinius & Hollister, LLP,* and *Cynthia C. Felson*, for relator.

*Michael DeWine*, Attorney General, and *Eric J. Tarbox*, for respondent Industrial Commission of Ohio.

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IN MANDAMUS

**{¶ 19}** Relator, Sears Roebuck & Company, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted temporary total disability ("TTD") compensation to respondent Rita Stout ("claimant"), and ordering the commission to find that claimant is not entitled to that compensation.

Findings of Fact:

**{¶ 20}** 1. Claimant sustained a work-related injury on August 31, 2011, and her workers' compensation claim was originally allowed for:

> Lumbosacral strain; cervical strain; bilateral upper trapezius strain.

**{¶ 21}** 2. Claimant returned to work for relator in September 2011 under restrictions from her treating physician Charles J. Marty, M.D. Office notes from claimant's visits to Dr. Marty specifically provide:

(a) September 19, 2011: This appears to be claimant's first visit to Dr. Marty following the injury. Dr. Marty noted that claimant denied any previous problems with her neck, but had prior trouble with her back, including surgery. Dr. Marty noted claimant had been employed for 21 years as a lead salesperson for relator, prescribed certain medications, instructed her to apply heat and stretch gently and noted that, if her symptoms did not improve, physical therapy and further imaging would be warranted. Dr. Marty indicated claimant "may continue to work cautiously at regular activity."

(b) March 27, 2012: Claimant was not improving, an MRI was recommended, and a referral to the pain management clinic for localized injections might be necessary. Dr. Marty also indicated that claimant would continue with the restrictions for an eight-hour shift.

(c) April 24, 2014: Claimant was "still working 8 hour shifts and states her supervisor is complaining all the time that she does not move fast enough." Dr. Marty further noted that claimant continued to complain of pain in the neck, headaches, and lumbosacral pain, slightly worse on the right side. Dr. Marty concluded that claimant could continue working with the same restrictions and if her symptoms did not improve, he would try new medications and again consider a referral to pain management. Dr. Marty noted that the request for an MRI had been denied.

(d) June 4, 2012:

> Since her last visit, she returned to work as scheduled with the restriction indicating sitdown work only with no walking or standing more than one hour per shift and she is limiting her shifts to 8 hours per day. The employee should be able to sit periodically as needed for comfort and change positions frequently as needed to stay loose. She states this is working out for the most part although she is on her feet a little bit more some days than others. She has had an exacerbation of pain in her right sacroiliac area since last night although this has been bothering her continuously anyway. She also still has a lot of stiffness in her neck.

> We have been trying to get approval for an MRI of her cervical spine and a consultation with her surgeon, Dr. Zerick, for evaluation of the low back. These were both denied and I wrote a letter appealing this to the MCO but, in the meantime, Ms. Stout has met with her new attorney and he is requesting records and, hopefully, can get things moving along regarding this evaluation.

**{¶ 22}** Dr. Marty further noted that claimant would continue working with the same restrictions and return in three weeks.

(e) June 25, 2012:

> Since her last visit, her symptoms have been about the same. She continues to work with the same restrictions doing sitdown work 8 hours per day.
>
> She received a copy of a motion in the mail that appears to be a request for an MMI determination based on an I.M.E. addendum done by Dr. Shadel after the original I.M.E. done 4/26/12 to which I have already responded with a letter to the MCO. Ms. Stout has a new attorney and I was expecting to hear something from him regarding records, etc. but he may have obtained these from the BWC website. Ms. Stout was not really sure what the motion was all about and I advised her to forward this to her attorney and also to ask him if he has everything he needs from us, including a copy of the letter from 5/9/12.
>
> She still reports pain at the base of her neck and in the right sacroiliac area primarily.
>
> She will continue to work with the same restrictions and return in 6 weeks for follow up.

(f) October 30, 2012:

> We have been waiting for a long time to get an MRI of her cervical spine to guide further treatment and also a consultation with Dr. Zerick, her back surgeon, to see if he feels her injury has compromised her pervious [sic] surgical repair. She finally had a hearing on 10/23/12 regarding these issues and both of them were allowed. Ms. Stout received her notification in the mail yesterday, 10/29/12, so there will be a 14 working day period of appeal before we will know if we can finally schedule the MRI and consultation.

> * * *
> She will return in 3 weeks at which point we will check the BWC website to see if there has been an appeal. If not, we will proceed with the MRI and consultation. If there is an appeal, of course, she will have to go to another hearing. In the meantime[,] she is to continue the same restrictions for work and the same medications.

**{¶ 23}** 3. Although there is no documentation in the stipulation of evidence to establish it, the parties all agree that claimant retired from her employment with relator in November 2012.

**{¶ 24}** 4. On February 21, 2013, claimant was examined by William Zerick, M.D. In his report, Dr. Zerick noted:

> Rita Stout was in to see me today, February 21, 2013. I had last seen her back in 2007. She is now a 61-year-old woman who on August 31, 2011 while at work apparently at Sears a chair went out from under her, hitting the ground. Her head was forced forward. Since that time she has complained of neck, shoulder and back pain, as well as what she describes to be cervicogenic headaches, as well as pain, numbness and weakness into the right arm. She apparently has an allowance for 846 lumbar strain and sprain and 847 cervical strain and sprain.
>
> * * *
>
> **IMAGING STUDIES:** I reviewed an MRI of the cervical spine that shows cervical stenosis secondary to primarily bony hypertrophy at the C4-5, C5-6 and C6-7 levels, although I would note that her right arm radiculopathy and subsequent arm weakness is secondary to compression of her right C6 nerve root emanating at the C5-6 level.
>
> PHYSICAL EXAMINATION: The patient stands 5 feet 2 inches tall and weighs 270 pounds. Cervical range of motion is painful, but has a positive Spurling's maneuver with reproduction of right suprascapular and arm pain on the right in a radicular fashion. She has decreased motor strength of external humeral rotation on the right graded at 4/5 correlative of a right C6 radiculopathy. She has decreased sensation in a right C6 distribution. No long tract signs are elicited. Hoffman sign is negative. Reflexes are symmetric.

**IMPRESSION:**

1. Cervical stenosis C4-5, C5-6, C6-7 with right C6 radiculopathy and motor weakness with an allowance for cervical strain and sprain, 847.o.

**RECOMMENDATIONS:** At this point, I am going to send a copy of this on to her attorney, Mr. Ed Cox, as I am sure the argument will be that this is a degenerative issue, however, my understanding is that while indeed her images may demonstrate degenerative change or arthritic change, she was fine until her incident on August 31, 2011 and this should be compensable under the thought that this is an exacerbation of an underlying condition. Again, we will send a letter to Dr. Marty and to her attorney and hopefully we can get Mrs. Stout taken care of.

**{¶ 25}** 5. In a letter dated July 9, 2013, Dr. Zerick stated:

My recommendation was for her to undergo a cervical decompression with fixation/fusion to decompress her right C6 nerve root. However, because this is mired in the Workers' Compensation System that has not happened and this has been drug along.

Unfortunately she has no other insurance to cover this.

Quite frankly, I am happy to do this free of charge, but the fact of the matter is my bill is negligible when compared to the hospital bill. I have done this a long time and, quite frankly, it frustrates me when this woman has been hurt legitimately while working and while indeed the radiographic changes in her cervical spine are indeed arthritic, they were not causing her any problems prior to her fall while working at Sears on August 31, 2011.

At this point, I do not know what else to do. I am sure the people at Sedgwick are steadfastly guarding their pot of money to try to make this all go away. I know that my understanding is that they wanted to settle for $2500 and quite frankly for me this is not about whether or not she gets $2500 or not, this is about the fact that she now has a partly paralyzed arm that had she not been in the Workers' Compensation System would have been addressed appropriately when it happened. Instead, because she is mired in this system, it is much less likely now that she will get the strength back in her partly paralyzed arm. Again, if

> there is anything I can do, please feel free to let me know. Again, I am more than happy to do this woman's surgery for free to try to do what is right for her, but the problem is the significant expense is not me, it is the hospital charge. At the end of the day, what is right would be for this to be covered by Workers' Comp[ensation] as this is to me, and I am no lawyer, but to me a very clearly compensable injury.
>
> Addendum: Apparently even today's visit is not being covered by Workers' Comp[ensation]. She has no insurance so I did not charge her for today's visit.

**{¶ 26}** 6. Claimant filed a motion asking that her claim be additionally allowed for substantial aggravation of pre-existing cervical stenosis at C4-C5, C5-C6, C6-C7 on March 29, 2013.

**{¶ 27}** 7. On August 14, 2013, a district hearing officer ("DHO") relied on the reports of Dr. Zerick and her claim was additionally allowed for those conditions. Subsequent appeals by relator were ultimately denied and the DHO order was affirmed.

**{¶ 28}** 8. On January 2, 2014, claimant filed an application seeking the payment of TTD compensation from November 30, 2012 through December 3, 2013.

**{¶ 29}** 9. Claimant's motion was supported by the following evidence:

(a) The C-84 dated October 24, 2013 and signed by claimant indicated the last day she worked was August 12, 2012 and that she left because of the injuries she sustained at work. She further indicated that she cannot stand for very long due to constant pain, headaches, and constant throbbing. Claimant did indicate that, beginning in February 2013, she was receiving Social Security retirement benefits and disability.

(b) The October 31, 2013 report of Dr. Marty:

> This letter is in response to your communication of October 21, 2013, regarding Rita Stout. I will have my office staff complete the MEDCO-14 as you have requested. However, the circumstances might be a little cloudy in this situation. Ms. Stout was not actually taken off work by my office at that time. She was given restrictions and the company, supposedly, was accommodating these restrictions, but Ms. Stout never felt this was the case. Also, I believe she voluntarily retired from the company at that time and I am not sure if this will effect the situation or not.
>
> However, regarding whether or not she has been entitled to temporary total disability benefits starting November 30,

> 2012, I believe this could be supported because she really was symptomatic enough that she could not work under the circumstances that existed at the place of employment. If her restrictions had been accommodated as written, this may not have been the case but, as far as Ms. Stout is concerned, the restrictions were not accommodated and she continued to have significant symptoms which rendered her unable to work with the conditions on the job as they were at that time.

(c) The Medco-14 dated November 5, 2013 and signed by Dr. Marty who opined that claimant's cervical spinal stenosis at C4-5, C5-6, and C6-7 were the conditions preventing claimant from returning to work. The Medco-14 provides: "Please read attached medical." The Medco-14 specifically directed the trier of fact to read his attached records.

(d) The November 5, 2013 office note from Dr. Marty, stating:

> Since her last visit, the additional allowances for this substantial aggravation of pre-existing cervical stenosis at C4-5, C5-6, and C6-7 have been approved. * * * Ms. Stout is upset today because * * * the company appealed. * * * Apparently[,] the claim is not paying for any of Ms. Stout's medicines and I assume this will change now that there are additional allowances also. * * * She doesn't feel that the hydrocodone is working that well and I advised her that she could add a regular strength Tylenol tablet to each dose and possibly get [a] better effect. * * * I believe Dr. Zerick has already done paperwork to start the approval for the surgery.

**{¶ 30}** 10. Claimant's application for TTD compensation was heard before a DHO on March 5, 2014. The DHO denied the request because there was a lack of contemporaneous medical evidence that claimant was unable to work at the time she left her employment with relator. Specifically, the DHO stated:

> The request for temporary total disability compensation from 11/30/2012 to 12/03/2013 and to continue upon the submission of proof is denied. The District Hearing Officer finds that the Injured Worker voluntarily retired from the work force on 12/01/2012 and leaving her light duty job of her own volition in September, 2012. The Injured Worker is therefore not eligible for temporary total disability compensation.
>
> There is no written documentation in this file that the Injured Worker disputed whether the Self-Insuring

> Employer was accommodating her written work restrictions at the time she left her light duty job. The Injured Worker now testifies after the fact that her restrictions were not being met and that she left her job more than one year ago based on the failure of the Employer to accommodate her restrictions. This assertion is not supported by any of the medical evidence or other documentation on file. Mr. Webb testified that he was in the office at the time the Injured Worker indicated her intention to retire and that there was no discussion that she could not perform her work or that her restrictions were not being honored. Mr. Webb further testified that the Injured Worker seemed happy and said she wanted to retire to spend more time with family. Under these circumstances, the District Hearing Officer finds that the Injured Worker has failed to demonstrate that her retirement was injury induced and that she is entitled to the compensation requested by the motion.

**{¶ 31}** 11. Claimant appealed and the matter was heard before a staff hearing officer ("SHO") on May 15, 2014. The SHO vacated the prior DHO order and granted the requested period of TTD compensation, stating:

> It is the order of the Staff Hearing Officer that the request for temporary total disability compensation is granted from 11/30/2012 through 12/02/2013 and to continue upon submission of medical proof based on a finding that the Injured Worker left her employment (at least in part) due to the allowed conditions recognized in the claim. This finding is based on the 01/31/2013 MRI, the 02/21/2013 and 07/09/2013 reports of Dr. Zerick, the 03/29/2013 [sic] and 11/05/2013 office notes, 10/31/2013 report and 11/05/2013 MEDCO-14 and off work slip of Dr. Marty and the 10/02/2013 Staff Hearing Officer order which additionally allowed this claim for the multiple level cervical stenosis conditions. The Staff Hearing Officer finds that these conditions were impacting the Injured Worker beginning in at least late 2012 to support that she left her employment due to her inability to perform even the light duties requested of her, despite the difference in opinion of the parties as to whether those duties complied with the restrictions of Dr. Marty or not. The Staff Hearing Officer finds the 07/09/2013 report of Dr. Zerick compelling as it indicates that the situation was so serious that he was willing to waive his fees if it would expedite the surgical process. Therefore, the Staff Hearing Officer also relies on the testimony of the Injured Worker that she indicated that she was quitting (at least in part) due to the allowed conditions

> recognized in this claim and that she is thus not legally barred to the receipt of temporary total disability compensation as asserted by the Employer.

**{¶ 32}** 12. Relator's appeal was refused by order of the commission mailed June 11, 2014.

**{¶ 33}** 13. Relator's request for reconsideration was denied by order of the commission mailed July 16, 2014.

**{¶ 34}** 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

**{¶ 35}** The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

**{¶ 36}** TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement ("MMI"). *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

**{¶ 37}** Relator asserts the commission abused its discretion when it found that claimant's retirement was related to the allowed conditions in the claim. Specifically, relator contends that the commission failed to cite any contemporaneous medical evidence to establish that claimant's retirement was related to the allowed conditions in the claim, and further failed to address whether or not claimant had abandoned the entire job market after her retirement.

**{¶ 38}** Pursuant to this court's decision in *State ex rel. AT & T Teleholdings, Inc. v. Indus. Comm.*, 10th Dist. No. 11AP-369, 2012-Ohio-3380, the magistrate finds that contemporaneous medical evidence was not required in order for the commission to

determine that claimant's retirement from her job with relator was based, at least in part, on the allowed conditions in her claim.

**{¶ 39}** Historically, this court first held that, where the employee has taken action that would preclude a return to the former position of employment, even if the employee were able to do so, the employee is not entitled to continue TTD benefits since it is the employee's own action, rather than the industrial injury, which prevents a return to the former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist.1985). The *Jones & Laughlin* rationale was adopted by the Supreme Court of Ohio in *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987), wherein the court recognized a "two-part test" to determine whether an injury qualified for TTD compensation. *Ashcraft* at 44. The first part of the test focuses on the disabling aspects of the injury whereas the latter part determines if there are any other factors, other than the injury, which prevented the claimant from returning to the former position of employment. *Id.*

**{¶ 40}** In *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988), the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary. In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989), the court stated the question of abandonment is primarily one of intent. As such, it may be inferred from words spoken, acts done, and/or other objective facts. As the court noted, all relevant circumstances existing at the time of the alleged abandonment should be considered.

**{¶ 41}** In *State ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517, this court upheld a commission award of TTD compensation, stating:

> Although Ford argues that the commission wrongly relied upon claimant's testimony at the hearing before the staff hearing officer ("SHO"), this court has before found that it is within the commission's discretion to credit a claimant's testimony that his or her motivation for the departure from the job was based upon the allowed conditions, as the commission is the sole evaluator of credibility. See *State ex rel. Mid-Ohio Wood Products, Inc. v. Indus. Comm.*, Franklin App. No. 07AP-478, 2008-Ohio-2453, at ¶ 18. Furthermore, we also found in *Mid-Ohio Wood Products* that there is nothing that requires there be objective medical

> evidence corroborating a claimant's testimony regarding his or her motivation for abandonment of employment. *Id.* Notwithstanding, we noted in *Mid-Ohio Wood Products* that there were various doctors' office notes indicating claimant reported suffering pain that supported claimant's testimony regarding her motivation for abandoning employment.

*Id.* at ¶ 5.

**{¶ 42}** In the present case, the commission cited claimant's testimony that her retirement was based, at least in part, on the allowed conditions of her claim. Further, the commission did cite evidence, including medical evidence, following claimant's retirement, which corroborated her testimony. As such, the magistrate finds that the commission did not abuse its discretion in finding claimant's departure from her job with relator was involuntary because it was related to the allowed conditions in her claim.

**{¶ 43}** Relator argues further that, in the event this court finds that the commission did not abuse its discretion by finding that claimant's retirement was, at least in part, related to the allowed conditions in her claim, this court should still grant a limited writ of mandamus ordering the commission to consider whether or not claimant had abandoned the entire work market, and was therefore not entitled to an award of TTD compensation. Relator cites this court's decision in *State ex rel. Floyd v. Formica Corp.*, 10th Dist. No. 11AP-928, 2012-Ohio-5769, and asserts that a claimant who is no longer part of the workforce can have no lost earnings and, thus, is not entitled to an award of TTD compensation. For the reasons that follow, the magistrate finds that this court's decision in *Floyd* does not necessitate the granting of a limited writ of mandamus here.

**{¶ 44}** This court's decision in *Floyd* was not a new pronouncement of law. Instead, entitlement to TTD compensation has always been dependent on both a causal relationship between the claimant's allowed conditions and a loss of earnings. *See Ashcraft, Rockwell,* and *Diversitech Gen. Plastic.* There can be no lost earnings if a claimant is voluntarily no longer part of the active workforce because a claimant who voluntarily leaves the entire labor market no longer has a loss of earnings since they are no longer in a position to return to work. *Ashcraft* at 44.

**{¶ 45}** The distinction between a decision to retire from a particular employer and a decision to leave the workforce entirely was highlighted in *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. Pierron suffered an industrial injury in

1973. The claim was allowed and Pierron's doctor imposed medical restrictions that were incompatible with Pierron's former position of employment. The employer offered Pierron a light-duty position consistent with those restrictions, and Pierron accepted the offer. Pierron continued to work in that position for the next 23 years.

**{¶ 46}** In 1997, the employer informed Pierron that it was eliminating his light-duty position. It was undisputed that the employer did not offer Pierron an alternate position. Instead, the employer gave Pierron the option to retire or be laid off. Pierron chose retirement.

**{¶ 47}** In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, Pierron sought TTD compensation and the commission denied his request.

**{¶ 48}** Pierron filed a mandamus action seeking an order compelling the commission to award TTD compensation. In affirming this court's decision to deny mandamus relief, the court stated:

> 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.

*Id.* at ¶ 10.

**{¶ 49}** While the court recognized that Pierron did not initiate his departure from Sprint/United, the court also recognized 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, the commission and courts presume it to be a lifestyle choice, and as stated in *State ex rel. Pepsi-Cola Bottling Co. v. Morse*, 72 Ohio St.3d 210, 216 (1995), workers' compensation benefits were never intended to subsidize lost or diminished

earnings attributable to lifestyle decisions. Pierron did not choose to leave his employer in 1997, but once that separation nevertheless occurred, he had a choice: seek other employment or work no further. Pierron chose the latter and cannot, therefore, credibly allege that his lack of income from 2001 and beyond is due to industrial injury. As such, he was ineligible for temporary total disability compensation.

**{¶ 50}** Pursuant to *Pierron,* when a claimant's departure from the entire work force is not motivated by the industrial injury, the claimant is ineligible for TTD compensation because any loss of income is not causally related to the industrial injury. *Pierron* does not conflict with the principle set forth in *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, that a claimant remains eligible for TTD compensation if the claimant is still disabled at the time of the claimant's departure from his employer, regardless of whether the departure is voluntary or involuntary. As noted in *Pierron,* there is a significant difference between a claimant's voluntary or involuntary separation from a particular employer at a time when the claimant is still disabled, and a claimant's voluntary decision to leave the entire workforce.

**{¶ 51}** *Floyd* was decided by this court in 2012. Darren Floyd sustained a work-related injury in March 2000. He was able to return to light-duty employment until such work was no longer available and his employer began paying him TTD compensation. In April 2001, at age 63, Floyd began receiving Social Security retirement benefits. TTD compensation continued until his allowed conditions were found to have reach MMI in June 2006.

**{¶ 52}** Floyd had additional surgery in 2008 and his employer agreed to pay him TTD compensation until he reached MMI in May 2009. In 2010, Floyd's treating physician sought authorization for additional surgery and Floyd requested TTD compensation. Floyd's employer challenged the request and ultimately the commission determined that, although Floyd's departure from his former position of employment was not voluntary, Floyd's actions since that time demonstrated an intent to not re-enter the workforce, and denied his request for TTD compensation. Floyd filed a mandamus action, which this court denied.

**{¶ 53}** In its decision, this court discussed *State ex rel. Corman v. Allied Holdings, Inc.*, 10th Dist. No. 10AP-38, 2010-Ohio-5153, ¶ 60:

> In *Corman,* after suffering an industrial injury in January 2002, the injured worker was unable to return to his former position of employment and began receiving TTD compensation. Relator's TTD compensation continued until July 14, 2003 when his injury was determined to have reached MMI. In April 2003, the injured worker, at age 56, applied for and began receiving retirement benefits effective April 1, 2003. Following a surgery in March 2009, the claimant sought TTD compensation from the date of surgery and continuing. The commission denied the injured worker's request finding that at the time of his retirement his intent was to voluntarily abandon the workforce. A mandamus action followed.
>
> Because he was receiving TTD compensation and was unable to return to his former position of employment when he retired, the injured worker argued his retirement was not voluntary and that he was therefore entitled to the requested compensation six years later. This court disagreed. Relying on *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 896 N.E.2d 140, 2008–Ohio–5245, the court framed the issue as not whether he was entitled to retain TTD compensation after retirement, but rather, whether the injured worker was "entitled to TTD compensation six years later when there is some evidence that relator had retired from the entire work force ." *Corman* at ¶ 10.
>
> Similar to the injured worker in *Corman,* relator was unable to return to his former position of employment and began receiving TTD compensation that continued until he was determined to have reached MMI. Here, the magistrate focuses on the time periods in which relator received TTD compensation after retirement, but disregards the time periods in which he did not. As *Corman* instructs, a determination of one's intent at the time of retirement may still be relevant even though one is receiving TTD compensation and is unable to return his former position of employment at the time of retirement.
>
> The voluntary nature of abandonment is a factual question within the commission's final jurisdiction. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 508 N.E.2d 936 (1987). This question is primarily one of intent which may be inferred from words spoken, acts done, and other

> objective facts. *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 544 N.E.2d 677 (1989). In a mandamus action, at issue is whether the evidentiary record legally supports the determination or whether a gross abuse of discretion occurred.
>
> Thus, the issue herein is whether this record contains some evidence to support the commission's determination that relator intended to voluntarily abandon the workforce in 2001 when his employment with Formica ended. In reaching its determination, the commission relied on relator's application for and receipt of Social Security retirement benefits beginning in 2001 and relator's testimony that he had not worked or sought work since his 2001 departure from Formica. We conclude this constitutes some evidence to support the commission's determination. *Pierron; State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648, 670 N.E.2d 234 (1996).

*Floyd* at ¶ 11-15.

**{¶ 54}** Relator asserts that, just as the commission found that Floyd and Pierron had abandoned the entire workforce, the commission abused its discretion here by finding that claimant did not. However, the magistrate disagrees. Although the commission found that Floyd's original departure from the workforce was involuntary, Floyd's absence from the workforce for ten years before seeking an additional award of TTD compensation, demonstrated an intent to abandon the workforce. While the commission found that Pierron's departure from his former position of employment was voluntary, the commission found that Pierron's actions, actually, his inaction in the months and years that followed evidenced an intention to leave the workforce. Pierron was out of the workforce for approximately six years before he sought additional TTD compensation. This court found, in both instances, that the commission did not abuse its discretion in finding that such a long period of time, ten and six years, was some evidence that Floyd and Pierron abandoned the entire labor market. That is not the factual situation here.

**{¶ 55}** In the present case, claimant sustained her injury in November 2011 and her claim was allowed for relatively minor conditions. In September 2011, claimant returned to work with restrictions. In March 2012, Dr. Marty requested an MRI and a consultation which relator denied. On November 30, 2012, claimant retired. In March

2013, claimant finally underwent an MRI and, in March 2013, she sought to have her claim allowed for additional conditions. Eight months after she retired, Dr. Zerick was treating her for free and indicating that he was willing to operate on her despite the fact that relator was continuing to challenge the additional allowances. It was not until October 2013, one year after she retired, that the commission allowed her claim for those additional conditions and, in January 2014, she filed her motion seeking an award of TTD compensation all the way back to the date of her retirement.

**{¶ 56}** By comparison, both Floyd and Pierron requested TTD compensation back to the date of their surgeries and never argued that they had been temporarily and totally disabled since the date of their retirements. Here, relator challenged claimant's claim and testing at every turn. Although relator offered claimant light-duty work and, at least, initially accommodated her restrictions, there is some evidence in the record several months before she retired indicating that relator was not accommodating those restrictions. Further, the record is clear that claimant's injuries were more substantial than those conditions originally allowed as evidenced by the subsequent MRI and surgery. Based on these facts, this case is easily distinguishable from both *Floyd* and *Pierron* and there is some evidence in the record that claimant's departure from her employment was barred, at least in part, on her allowed conditions. The magistrate finds that relator has not demonstrated that the commission abused its discretion by finding that claimant was entitled to an award of TTD compensation and a limited writ of mandamus is not warranted.

**{¶ 57}** Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by awarding claimant TTD compensation and this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

**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).