ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-2002

RONALD R. CORMAN
Relator-Appellant,

-vs-

ALLIED HOLDINGS, INC.,
Respondents-Appellees.

ON APPEAL FROM FRANKLIN COUNTY
COURT OF APPEALS, TENTH APPELLATE DISTRICT

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND OHIO ASSOCIATION FOR JUSTICE URGING REVERSAL ON BEHALF OF RELATOR-APPELLANT

Philip J. Fulton (0008722)
Ross R. Fulton (0082852)
PHILIP J. FULTON LAW OFFICE
89 East Nationwide Blvd., Suite 300
Columbus, Ohio 43215
(614) 224-3838
FAX: (614) 224-3933
Phil@Fultonlaw.com
Ross@Fultonlaw.com

Counsel for *Amicus Curiae*,
Ohio Association of Claimants' Council
Ohio Association for Justice

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*.....6

INTRODUCTION.....7

ARGUMENT

I. THE TENTH DISTRICT'S DECISION HAS NO LEGAL BASIS AND IS IRRECONCIABLE WITH SUPREME COURT PRECEDENT THAT VOLUNTARY ABANDONMENT IS DETERMINED AT THE TIME OF DEPARTURE.....10

II. THIS COURT SHOULD OVERTURN THE JUDICIALLY CREATED VOLUNTARY ABANDONMENT DOCTRINE.....17

CONCLUSION.....24

CERTIFICATE OF SERVICE.....25

TABLE OF AUTHORITIES

CASES

Angell Manufacturing Co., 2003-Ohio-6469, at ¶ 82.....11, 12, 16

Bickers v. S & W Life Ins. Co., 116 Ohio St. 3d 351, 2007-Ohio-6751, 879 N.E.2d 201, ¶ 24...21

Fassig v. State, ex rel. Turner (1917), 95 Ohio St. 232, 116 N.E. 104.....17

Freese v. Consolidated Rail Corp. (1983), 4 Ohio St.3d 5, 445 N.E.2d 1110.....17

Lemke v. Brush Wellman, Inc. (1984), 84 Ohio St.3d 161, 702 N.E.2d 420.....19, 22

McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E. 1, ¶ 37.....8, 9, 10, 18

Ritcher Produce Co. Inc. v. Ohio Dept. of Adm. Servs. (1999), 85 Ohio St.3d 194, 206, 707 N.E.2d 871.....10, 18

State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, 517 N.E.2d 533.....11

State ex rel. Baker v. Indus. Comm. (2000), 87 Ohio St.3d 561, 722 N.E.2d 67 (Baker I).....9

State ex rel. Baker v. Indus. Comm. (2000), 89 Ohio St.3d 376, 732 N.E.2d 355 ("Baker II").....9, 10, 22

State ex rel. Bettman v. Christen (1934), 128 Ohio St. 56, 190 N.E. 233.....19

State ex rel. Brown v. Indus. Comm. (1993), 68 Ohio St.3d 45, 623 N.E.2d 55.....11, 15

State ex rel. Corman v. Allied Holdings, Inc., No 10AP-38.....7, 8, 12, 14, 15, 16

State ex rel. Diversitech Gen. Plastics Film Div. v. Indus. Comm. (1989), 45 Ohio St.3d 381, 544 N.E.2d 677.....13

State ex rel. General Electric Corp. v. Indus. Comm., 2004-Ohio-5585, 103 Ohio St.3d 420, 816 N.E.2d 588.....18

State ex rel. Gross v. Indus. Comm., 112 Ohio St.3d 65, 2006-Ohio-6500 (Gross I).....9, 10

State ex rel. Gross v. Indus. Comm. ("*Gross II*"), 115 Ohio St.3d 249, 874 N.E.2d 1162, 2007-Ohio-4916, ¶ 57 (O'Connor, dissent).....9, 10, 18, 20, 21, 22

State ex rel. Jones & Laughlin Steel Corp v. Indus. Comm., 29 Ohio App.3d 145, 504 N.E.2d 451.....10, 11

State ex rel. Newark Group Indus., Inc. v. Indus. Comm., 2002-Ohio-4851.....11, 15, 16

State ex rel. Pepsi-Cola Bottling Co.. v. Morse (1995), 72 Ohio St.3d 210, 648 N.E.2d 827.....13

State ex rel. Pierron v. Indus. Comm., 120 Ohio St.3d 40, 2008-Ohio-5249.....12, 13, 14, 15

State ex rel. Pretty Products v. Indus. Comm. (1996), 77 Ohio St.3d 5, 1996 Ohio 132.....8, 11, 12, 13, 14, 15, 16, 17

State ex rel. Price v. Cent. Serv., Inc., 97 Ohio St.3d 245, 2002-Ohio-6397, 779 N.E.2d 195....19

State ex rel. Ramirez v. Indus. Comm. (1982), 69 Ohio St.3d 630, 433 N.E.2d 586.....10

State ex rel. Rockwell International v. Indus. Comm., 40 Ohio St.3d 44, 521 N.E.3d 678.....11, 12, 13

State ex rel. S. Rosenthal Co. v. Indus. Comm., 2004-Ohio-549.....11, 15

State ex rel. Stevens v. Indus. Comm., 110 Ohio St.3d 32, 2006-Ohio-3456, 859 N.E.2d 55, at ¶¶11-13.....9, 19, 22

State ex rel. Super Valu, Inc. v. Indus. Comm., 115 Ohio St.3d 224, 2007 Ohio 4920.....13, 14

State ex rel. Watts v. Schottenstein Stores Corp., (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202..13

Thomas v. Freeman, 79 Ohio St.3d 221, 224, 680 N.E.2d 997.....19, 21

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849.....9, 19, 20

STATUTES

R.C. 4121.61.....19

R.C. 4123.53.....20

R.C. 4123.54(A)(2).....18

R.C. 4123.54(I).....18

R.C. 4123.56.....11, 21

R.C. 4123.56(A).....14

R.C. 4123.56(D).....18

R.C. 4123.58.....21

R.C. 4123.58(D)(3).....18

OTHER

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 1997, an essay by Antonin Scalia with commentary by Amy Gutmann, editor, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin.....22

Antonin Scalia, *The Rule of Laws as a Law of Rules*, 56 UNIV. OF CHICAGO L. REV. 4 (Fall 1989).....10, 22

Fulton, Ohio Workers' Compensation Law, 2/14, Lexis Nexis.....11

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization of 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was founded to advance the founding ideals of the NACCA and to promote the education of workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

The OACC and OAJ file this amicus brief to ask this Court to reverse the decision of the Court of Appeals for the Tenth Appellate District and grant Relator-Appellant's writ of mandamus. The OACC and OAJ adopt the statement of facts set forth in Relator-Appellant, Ronald Corman's, merit brief.

INTRODUCTION

Ron Corman suffered a severe knee injury on January 30, 2002, requiring three separate surgeries in April, 2002 and causing infection and septis complications. *State ex rel. Corman v. Allied Holdings, Inc.*, No 10AP-38, Magistrate decision (Attachment A). Following the injury, Mr. Corman was medically unable to return to his former position. Id. at ¶ 3. On April 3, 2003, the employer filed a motion seeking the termination of Mr. Corman's temporary total disability compensation on the basis that his condition had reached maximum medical improvement. Id. On April 7, 2003, Mr. Corman submitted a letter to the Central State Retirement Fund requesting retirement effective April 1, 2009. Id. In regard to his intent on retiring, Mr. Corman later submitted to the claim the following affidavit.

> 1 I retired in April, 2003, from my job as a car hauler at age, 57. The only reason that I retired at that time was due to my industrial injury to my right knee in Claim No. 02-808990. At that time, Dr. Lawhon, told me that I could never return to work as a car hauler due to my knee injury. My employer at that time was trying to cut off my temporary total disability compensation. They had me examined by Dr. Randolph, who stated that I was at maximum medical improvement. Because I was unable to return to work at my old job, I had to make sure that I had money coming in, so I was forced to take early retirement. Again, I was only 57 years old at the time.
>
> 2 By taking retirement in April, 2003, I received far less than the amount that I made when I was working as a car hauler. I did not want to stop working at that time, but I had to due to the fact that my right knee condition prevented me from getting a release to return to work. I could not pass the DOT physical due to my right knee condition. Also, by taking early retirement in 2003, I lost retirement income, because my retirement pay would have been much higher had I been able to work to age, 62.
>
> 3 My retirement was not voluntary. It was forced on me by my industrial injury to my right knee in Claim No. 02-808990.

Id. at ¶ 22. At a hearing on July 14, 2003, a district hearing officer terminated Mr. Corman's temporary total disability compensation as of July 14, 2003 on the basis that his allowed conditions had reached maximum medical improvement. Id. at ¶ 13. Mr. Corman's claim was

subsequently allowed for the additional condition of aggravation of pre-existing osteoarthritis of right knee. Id. at ¶ 15. After undergoing a full knee replacement for this condition on March 30, 2009, Mr. Corman requested the payment of temporary total disability. Id. at ¶ 18. The Industrial Commission, however, denied payment on the basis that Mr. Corman had voluntarily abandoned the work force.

OACC and OAJ request that mandamus be granted because the Tenth District Court of Appeals vastly expanded the voluntary abandonment doctrine in a way that renders this Court's precedents obsolete. This Court has long held that voluntary abandonment is determined ***at the time*** of the claimant's departure. *State ex rel. Pretty Products v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 1996 Ohio 132. Specifically, if a claimant is unable to physically perform his employment at the time of separation, then the voluntary abandonment doctrine is henceforth inapplicable. Id.

The Tenth District effectively overruled this long-standing precedent, however, holding that even if a claimant's separation was involuntary, benefits can nonetheless be denied if the claimant subsequently abandons the workforce. *State ex rel. Corman v. Allied Holdings, Inc.*, No 10AP-38, at ¶ 4 (Attachment A). The Tenth District provides no basis for making such a determination. Its' ruling is an activist policy decision that vastly expands voluntary abandonment and renders this Court's long-standing precedent superfluous. Even worse, it ignores the fact that voluntary abandonment is an affirmative defense that was waived when the Commission terminated Mr. Corman's TTD benefits in 2003 based upon maximum medical improvement ("MMI")—and not voluntary abandonment.

This is why Supreme Court precedent holds that it is the legislature—and not the judiciary's role—to create workers' compensation policy. *McCrone v. Bank One Corp.*, 107

Ohio St.3d 272, 2005-Ohio-6505, 839 N.E. 1, ¶ 37. But courts abandoned this policy with the creation of the voluntary abandonment doctrine, inserting themselves as the policy-maker to determine when a claimant is eligible for TTD. *State ex rel. Gross v. Indus. Comm.* (*"Gross II"*), 115 Ohio St.3d 249, 874 N.E.2d 1162, 2007-Ohio-4916, ¶ 57 (O'Connor, dissent) ("the voluntary-abandonment doctrine from which this case arises is a judicially created exception rather than an exception created by the legislature."). Accordingly, this Court should apply the test declared in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849, *(Galatis)* to determine whether voluntary abandonment should be rescinded. See *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d 32, 2006-Ohio-345, 859 N.E.2d 55, at ¶¶11-13 (applying *Galatis* to overturn a judge-made exception in the workers' compensation context). See also *Gross II*, 2007-Ohio-4916, at ¶ 57 (O'Connor, dissent)(inviting the Court to apply *Galatis* to voluntary abandonment because of the incongruity between the Court's statement that it is for the legislature to create exceptions to claimant eligibility and yet accepting the judge-made voluntary abandonment doctrine).

Once *Galatis* is applied, it is clear that voluntary abandonment should be overturned. Voluntary abandonment was incorrectly adopted because it is the General Assembly's duty—and not a court's—to create workers' compensation exceptions. Id. at ¶ 20. Perhaps because of this unwise judicial intrusion into the policy-making arena, the voluntary abandonment doctrine has created more confusion than any other area of workers' compensation law. *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 732 N.E.2d 355 ("Baker II"). Twice this Court has had to reconsider and reverse itself regarding this doctrine, demonstrating its practical unworkability. *State ex rel. Baker v. Indus. Comm.* (2000), 87 Ohio St.3d 561, 722 N.E.2d 67 (Baker I) and *State ex rel. Baker v. Indus. Comm.* (2000) 89 Ohio St.3d 376, 732 N.E.2d 355

(Baker II); *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 (Gross I) and *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007 Ohio 4916 (Gross II). The Tenth District's decision aptly demonstrates that courts continue to alter and expand this doctrine in unpredictable ways, introducing uncertainty into the law. See Antonin Scalia, *The Rule of Laws as a Law of Rules*, 56 UNIV. OF CHICAGO L. REV. 4 (Fall 1989) (clear rules are preferable to ad-hoc adjudicative determinations because it promotes predictability and certainty and avoids judicial bias). Thus, this Court should return to the judiciary's proper role in workers' compensation law and reverse the judicially created voluntary abandonment doctrine.

ARGUMENT

I. THE TENTH DISTRICT'S DECISION HAS NO LEGAL BASIS AND IS IRRECONCIABLE WITH SUPREME COURT PRECEDENT THAT VOLUNTARY ABANDONMENT IS DETERMINED AT THE TIME OF DEPARTURE

The judicially created[1] voluntary abandonment doctrine actually originated in the Tenth District Court of Appeals in *State ex rel. Jones & Laughlin Steel Corp v. Indus. Comm.*, 29 Ohio App.3d 145, 504 N.E.2d 451. In *Jones & Laughlin*, the appellate court held that voluntary retirement may be a basis for denying the payment of temporary total disability compensation. Id. But the *Jones & Laughlin* Court did not explain why it was venturing in the policy making arena reserved to the legislature. Id. See *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505 (policy making is reserved for the General Assembly).[2]

[1] In *Gross II*, 2007-Ohio-4916, at ¶ 57, Justice O'Connor recognized that voluntary abandonment was a judicially created doctrine, despite the fact that workers' compensation is a statutory-based scheme. Id. (O'Connor dissent), quoting *Ritcher Produce Co. Inc. v. Ohio Dept. of Adm. Servs.* (1999), 85 Ohio St.3d 194, 206, 707 N.E.2d 871.

[2] This author suggests it was due to the fear that the decision in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.3d 630, 433 N.E.2d 586 defining temporary total disability as "a disability which prevents a worker from returning to his former position of employment" would lead to ongoing awards without any closure. The business community complained that *Ramirez* was one of five Supreme Court rulings which placed them at a competitive

Regardless, this Court adopted the *Jones & Laughlin* rationale in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517 N.E.2d 533, when it applied the voluntary abandonment doctrine to an injured worker who was incarcerated. Nonetheless, this Court held in *State ex rel. Rockwell International v. Indus. Comm.*, 40 Ohio St.3d 44, 521 N.E.3d 678, that the doctrine does not apply to an injury-induced retirement. Thus, not every abandonment will preclude the payment of temporary total disability compensation; only voluntary abandonment has that effect. *Id.*

Consequently, in *State ex rel. Pretty Products v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 1996 Ohio 132, this Court emphasized that eligibility for the payment of future temporary total disability compensation hinges on the timing and character of the claimant's departure from the job. Crucially, abandonment ***does not apply*** when a claimant lacks the physical capacity for employment at the time they leave their employ. Id. at 6-7 Specifically, "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." Id., quoting *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 623 N.E.2d 55. If the claimant does not have this physical capacity, it ends the inquiry and voluntary abandonment is simply ***not*** applicable to that claim. Id.

Furthermore, voluntary abandonment is an affirmative defense that must be raised by the employer. *State ex rel. S. Rosenthal Co. v. Indus. Comm.*, 2004-Ohio-549; *State ex rel. Newark Group Indus., Inc. v. Indus. Comm.*, 2002-Ohio-4851. "The burden of proof with respect to voluntary abandonment falls upon the employer or the administrator." *Angell Manufacturing*

---

disadvantage with other states. Shortly thereafter, the General Assembly responded and amended R.C. 4123.56. See Fulton, Ohio Workers' Compensation Law, 2/14, Lexis Nexis.

Co., 2003-Ohio-6469, at ¶ 82. Like other affirmative defenses, if the employer fails to raise voluntary abandonment, it is waived. Id. As the burden falls upon the employer or the administrator to prove, the Commission must explicitly find that voluntary abandonment is applicable. Id.

In the present case, it is undisputed that Mr. Corman involuntarily left employment because of his industrial injury. *State ex rel. Corman v. Allied Holdings, Inc.*, No 10AP-38, Magistrate Decision at ¶¶ 3, 22 (Attachment A). Mr. Corman was receiving temporary total disability compensation and was unable to return to his former position of employment when he retired and left the work force on April 1, 2003. Id. His TTD benefits were subsequently terminated because he reached MMI—it was accepted that he was medically unable to return to his employment. Id. Therefore, under *Rockwell* and *Pretty Products*, the voluntary abandonment doctrine does not apply to Mr. Corman because he involuntarily left his position at the time of separation. *Pretty Prods.*, 77 Ohio St.3d at 6-7. Yet the Tenth District held that Mr. Corman is foreclosed from receiving temporary total disability compensation, citing *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5249, as support for the origin of a new principle of workplace abandonment. In so doing the Tenth District implicitly overrules *Pretty Products* and *Rockwell*, holding that "this principle applies even when the claimant's separation from a specific employer is deemed involuntary." *Corman*, No 10AP-38, at ¶ 8 (Attachment A). The Tenth District cites to *Pierron* as the basis for this new doctrine, alleging that there is a significant difference between a claimant's voluntary or involuntary separation from a particular employer at a time when the claimant is disabled, versus a claimant's voluntary decision to leave the entire work force. Id.

The *Pierron* per curiam decision, however, did not create a broad new doctrine as advocated by the Tenth District. Notably, *Pierron* did not hold that it was announcing either a new "workplace abandonment" doctrine or overturning longstanding law. Rather, it was a very fact specific case dealing with "intent" because "abandonment of employment is largely a question" 'of intent'... [that] may be interred from words spoken, acts done, and other objective facts.'" *Pierron*, 2008-Ohio-5245, at ¶10, citing *State ex rel. Diversitech Gen. Plastics Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 544 N.E.2d 677. In *Pierron*, the "intent" for voluntary abandonment was found when the claimant left his light duty employment through retirement after numerous years of employment.[3]

Clearly, the Tenth District's new doctrine engulfs the voluntary abandonment doctrine, rendering the concepts developed in *Rockwell* and *Pretty Product*s insignificant. For example, *Pretty Products* is rendered irrelevant because it no longer ends the abandonment inquiry even when the abandonment was involuntary at the time of separation. Additionally, this new doctrine renders other decisions addressing temporary total disability superfluous. For instance, in *State ex rel. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007 Ohio 4920,[4] this Court reiterated that TTD is designed to "compensate for the temporary loss of earnings sustained while the claimant is unable to return to the former position of employment due to injury." *Id.* at ¶ 7. The Court further held that voluntary abandonment derives from the defense that the claimant's inability to return to their former position of employment is not due to injury. *Id.* The Court held that a claimant's refusal to return to other employment ***does not implicate***

[3] It is interesting to note that *Pierron* used a wage loss case, *State ex rel. Pepsi-Cola Bottling Co.. v. Morse* (1995), 72 Ohio St.3d 210, 648 N.E.2d 827, to support this proposition, especially since voluntary abandonment does not apply to wage loss. *State ex rel. Watts v. Schottenstein Stores Corp.*, (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202.
[4] *Super Valu* and *Pierron* were decided within a year of each other. There is no mention in *Pierron* that this Court was questioning its *Super Valu* holding.

abandonment. *Super Valu*, 115 Ohio St.3d at 226. In *Super Valu*, the Court discussed how the R.C. 4123.56(A) eligibility termination of "refusal of suitable alternate employment," is separate from a voluntary abandonment defense and applies to situations where there is no doubt that the claimant cannot return to his or her former position of employment. *Super Valu*, 115 Ohio St.3d at 226. Notably, under the Tenth District's theory, *Super Valu* should have been decided differently. The claimant's refusal of a light-duty offer would have constituted 'abandonment' under the new Tenth District doctrine because the claimant left the workforce. Thus, the *Super Valu* holding would no longer be good law.

The Tenth District provides no explanation or excuses for its judicial activism. But its lack of concern over its break with precedent reveals a true misunderstanding of the voluntary abandonment doctrine:

> *Pierron* does not conflict with the principles set forth in *Pretty Prods.*, *OmniSource*, and *Reitter Stucco*, 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.
>
> ...
>
> Here, the question is not whether relator was entitled to retain his TTD compensation after he retired from Allied. In fact, after relator retired from Allied he continued to receive TTD compensation until several months later when the commission determined he was at maximum medical improvement. Rather, the issue is whether relator is entitled to TTD compensation six years later when there is some evidence that relator had retired from the entire work force.

Corman No 10AP-38, at ¶ ¶ 9-10 (Attachment A).

The above quotes underscore the Tenth District's failure to discern a key component of an abandonment analysis: the moment of departure. The appellate court focuses entirely on the date of his total knee replacement, but that ***is not the date*** for his departure from the workforce.

Ron Corman left the workforce on April 1, 2003, while he was receiving temporary total disability compensation and when it was undisputed that he was medically unable to return to his former position of employment. *Corman* No. 10AP-38, Magistrate decision (Attachment A). As noted, under Supreme Court precedent, this renders voluntary abandonment inapplicable to Mr. Corman's claim, because "a claimant can abandon a former position . . . ***only*** if he or she has the physical capacity ***at the time of the abandonment or removal.***" *Brown*, 68 Ohio St.3d at 48.

Yet the appellate court, with a sleight of hand, discusses the precedent in the first paragraph above but then juxtaposes that principle to a date entirely unrelated to Mr. Corman's date of departure. To accomplish this, the appellant court inserts the phrase "regardless of whether the departure is voluntary or involuntary." But there is no statutory or precedential authority that supports a change of the discernable date in an abandonment analysis. A departure is either voluntary or involuntary and only the character of that departure is instructive to the abandonment analysis. The Tenth District's position is contrary to *Pretty Products* and all other precedents.

Two further points amplify the Tenth District's lack of understanding of voluntary abandonment. ***First***, *Pierron* actually supports Mr. Corman's position. As noted previously, *Pierron* was a fact-specific case analyzing a claimant's "intent" of whether he had abandoned his former position of employment. Although Mr. Corman's separation from his employment occurred while he was disabled and thus obviates any need to investigate the character of his departure, *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 623 N.E.2d 55, Mr. Corman's affidavit nonetheless shows that the intent of his departure was involuntary.

Second, voluntary abandonment is an affirmative defense which must be raised by the employer. *State ex rel. S. Rosenthal Co. v. Indus. Comm.*, 2004-Ohio-549; *State ex rel. Newark*

Group Indus., Inc. v. Indus. Comm., 2002-Ohio-4851. The employer did not raise this defense at the July 14, 2003 hearing and thus, waived this defense. *Corman*, No 10AP-38, Magistrate decision at ¶13 (Attachment A). Nor did the Commission find evidence of voluntary abandonment at that hearing; instead, the Commission determined that Mr. Corman had reached MMI. Id. Not only does this further illustrate that voluntary abandonment is not applicable because the Commission found that Mr. Corman lacked the physical capacity to return to his former position at the time of separation, but it also demonstrates that the voluntary abandonment defense was not applicable and thus waived. *Angell Manufacturing Co.*, 2003-Ohio-6469, at ¶ 82. It cannot later be resurrected.

Indeed, the Tenth District's attempt to reconcile this new theory with Mr. Corman's underlying facts is puzzling. As proof of its new theory, the Tenth District states that Mr. Corman rightfully received TTD compensation several months after retirement. *Corman*, No 10AP-38, at ¶ 10. Under *Pretty Products*, this demonstrates that Mr. Corman's separation was involuntary and renders voluntary abandonment inapplicable. Yet the Tenth District later posits that Mr. Corman abandoned his employment when applying for benefits after his knee replacement surgery. Thus, the Tenth District found that it was proper for Mr. Corman to receive TTD compensation several months after he retired but not several years later. However, no principled basis exists for this decision. How much time must pass before the Tenth District's theory applies? The Tenth District's holding creates an unworkable standard.

In sum, voluntary abandonment's basic tenet is that the defense only applies if a claimant has the physical capacity for employment at the time of abandonment or removal. Here, Mr. Corman was unable to return to his former position in 2003 at the time of separation. This ends the legal inquiry. Mr. Corman's TTD at that time was terminated because he reached MMI, not

because he voluntarily abandoned his former position. Accordingly, the employer cannot put forth this affirmative defense six years later in the claim. Despite this, the Tenth District created a new doctrine where although a claimant involuntarily left their employment, they nevertheless can be found to abandon the workforce years later. This overturns Supreme Court precedent and renders cases such as *Pretty Products* superfluous. This Tenth District activism should be rejected and this Court's precedent restored.

II. THIS COURT SHOULD OVERTURN THE JUDICIALLY CREATED VOLUNTARY ABANDONMENT DOCTRINE

The continued expansion and uncertainty inherent in the 'voluntary abandonment' doctrine demonstrates that this Court should return to its heritage and philosophy, leave policy-making to the General Assembly, and overturn the voluntary abandonment doctrine. It is the General Assembly—and not the courts—that are entrusted with determining who is entitled to workers' compensation benefits. The judicially created voluntary abandonment doctrine has been a clear diversion to this policy, developing akin to a common law doctrine. This anomaly should be rectified.

The Ohio General Assembly amended the Ohio Constitution in 1912 by adopting a provision expressly authorizing the enactment of workers' compensation legislation. *Fassig v. State, ex rel. Turner* (1917), 95 Ohio St. 232, 116 N.E. 104. This constitutional provision ***authorized the General Assembly*** to establish a workers' compensation program, and to enact laws establishing, administering, and regulating a state fund designed to compensate workers and their dependents for injuries sustained in the course of their employment. *Freese v. Consolidated Rail Corp.* (1983), 4 Ohio St.3d 5, 445 N.E.2d 1110. Under the statute, once a claimant is injured at work, they become entitled to the protections and benefits of the workers'

compensation system. Once a person is eligible, only the policy dictates of the Legislature can render that person ineligible. See *Gross*, 2007-Ohio-4916, at ¶ 20 ("The General Assembly, in its expression of public policy, has enacted certain exceptions to a claimant's eligibility for benefits.").

The legislature has readily passed new amendments enacting exceptions to a claimant's eligibility for benefits. For instance, in 1986, the General Assembly passed R.C. 4123.54(I) that denied benefits to prisoners. Similarly, in 1989, the General Assembly passed R.C. 4123.54(A)(2) that limited benefits to individuals who were under the influence of drugs and alcohol. Specific to the statute at issue here, the General Assembly amended R.C. 4123.56(D) to reduce TTD benefits for retirees. Finally, in 2006, the Legislature enacted R.C. 4123.58(D)(3), which declared that those who had voluntarily abandoned the workforce were ineligible for ***permanent total disability***.

As such, the General Assembly has been entrusted with making policy decisions regarding who is covered by the workers' compensation system and actively exercises that right. This Court has consistently recognized the Assembly's prerogative, holding that it "is not now, nor has it ever been, a judicial legislature." *Ritcher Produce Co. Inc*, 85 Ohio St.3d at 206. In *State ex rel. General Electric Corp. v. Indus. Comm.*, 2004-Ohio-5585, 103 Ohio St.3d 420, 816 N.E.2d 588, this Court held that "if the current statutory scheme is outdated, it is more appropriately the legislature's role to revise it." In *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005-Ohio-6505, this Court emphasized that "the General Assembly is the branch of state government charged by the Ohio Constitution to make public policy choices for the workers' compensation fund." Specifically, "it is the role of the legislature, not the judiciary, to carve out exceptions to a claimant's eligibility for TTD compensation." *Gross*, 2007-Ohio-4916, at ¶ 20.

This Court therefore follows rules of statutory interpretation when applying workers' compensation laws. The various provisions of the Workers' Compensation Act, being *in para materia*, must be construed consistently whenever possible. *State ex rel. Bettman v. Christen* (1934), 128 Ohio St. 56, 190 N.E. 233. *Expressio unius exlusio alterius* means the expression of one thing is the exclusion of the other. *Thomas v. Freeman*, 79 Ohio St.3d 221, 224, 680 N.E.2d 997. In other words, if a statute specifies one exception to a general rule, other exceptions or effects are excluded. Id. at 224-225.

This Court has recognized that circumstances exist where *stare decisis* should be overruled. Specifically, a departure from past decisions may be appropriate pursuant to *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849. The Court can overrule *stare decisis* where 1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, 2) the decision defies practical workability, and 3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St.3d 32, 850 N.E.2d 55, 2006-Ohio-3456, ¶ 11, quoting *Galatis*, paragraph one of the syllabus.

The *Stevens* decision is instructive. The *Stevens*' Court overturned *Lemke v. Brush Wellman, Inc.* (1984), 84 Ohio St.3d 161, 702 N.E.2d 420, and *State ex rel. Price v. Cent. Serv., Inc.*, 97 Ohio St.3d 245, 2002-Ohio-6397, 779 N.E.2d 195, which had held that under R.C. 4121.61, a natural increase in earnings over time is a special circumstance. The *Stevens'* Court found that the *Price* and *Lemke* rule was "confusing and unworkable from a practical perspective." Id. The Court recognized that it is the General Assembly—and not the Courts—that should set workers' compensation policy, stating that "we also repeat our entreaty to the

General Assembly to address this shortcoming in the workers' compensation system." Id. at ¶ 13.

In *Gross II*, Chief Justice O'Connor invited the Court to apply the *Galatis* test to voluntary abandonment. As she wrote:

> After recognizing that the legislature enacted the exceptions to eligibility for benefits that are set forth in R.C. 4123.53, the majority asserts that 'it is the role of the legislature, not the judiciary, to carve out exceptions to a claimant's eligibility for TTD compensation.' I too, am aware that this court is not now, nor has it ever been, a judicial legislature. But if this case rests simply on whether it is for the legislature alone to create exceptions to a worker's eligibility for benefits, then this majority's work is not done. It should engage promptly to overrule our decision in *Louisiana-Pacific* because the voluntary-abandonment doctrine from which this case arises is a *judicially created* exception rather than an exception created by the legislature. The majority, however, makes no effort to apply the *Galatis* analysis here. The court should either follow the law as we have recognized it, or it should overrule it. Instead of doing one or the other, the majority admonishes that exceptions to workers' compensation may arise only from legislative action, but seems quite content to allow some judicially created exceptions to TTD per *Louisiana-Pacific* but not others.

Id. at ¶¶57-58. This Court should now follow Justice O'Conner's counsel and apply *Galatis* to voluntary abandonment. The voluntary abandonment doctrine is improper as an example of judicial activism that is unworkable and should be overturned.

First, voluntary abandonment's creation was questionable. As noted, it is the General Assembly's prerogative to create exceptions to a claimant's eligibility for benefits. *Gross II*, 2007-Ohio-4916, at ¶ 20. The General Assembly frequently exercises this authority. Id. Yet the courts took the anomalous step of creating a doctrine to deny workers' compensation benefits outside of the General Assembly's purview. As Justice O'Connor emphasized, this places this Court in the impermissible policy position of deciding what exceptions to carve into TTD eligibility. Id. at ¶ 58.

This is particularly conspicuous because the General Assembly has chosen not to adopt the Court's policy. More striking, the General Assembly ***has*** enacted a voluntary abandonment doctrine under R.C. 4123.58 for permanent total disability, demonstrating that the General Assembly understands the voluntary abandonment doctrine and chose ***not to*** implement it in the TTD context. R.C. 4123.58 and R.C. 4123.56 must be construed *in para materi*, demonstrating that the inclusion of a voluntary abandonment exception for permanent total disability demonstrates an ***exclusion*** of such a legislative exception for TTD. *Thomas*, 79 Ohio St.3d at 224-225.

It has been suggested that the General Assembly perhaps permitted the development of the voluntary abandonment doctrine and that this "legislative inaction" suggested endorsement of the judicial development. See *Gross II*, 2007-Ohio-4916. However, there has been anything but legislative inaction on issues affecting temporary total disability eligibility by the abandonment doctrine, such as incarceration, retirement and alcohol/drug causation. Rather, as noted, the legislature has acted aggressively on temporary total disability eligibility policy issues, passing legislation in 1986, 1989, and 2000. Plus, it is also clear that the General Assembly knows how to make policy decisions regarding exceptions to a claimant's eligibility for disability benefits by its specific insertion of voluntary abandonment into R.C. 4123.58. Under the basic rules of statutory construction, this insertion shows that the General Assembly chose to exclude it from R.C. 4123.56. *Thomas*, 79 Ohio St.3d at 224 (the inclusion of an exception in one provision shows the purposeful exclusion of that exception in a separate proviso).

This Court has emphasized that it would be inappropriate to presume the superiority of its policy preference to supplant the choice of the legislature. *Bickers v. S & W Life Ins. Co.*, 116 Ohio St. 3d 351, 2007-Ohio-6751, 879 N.E.2d 201, ¶ 24 ("Moreover, it would be inappropriate

for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature. For it is the legislature, and not the courts, to which the Ohio Constitution commits the determination of the policy compromises necessary to balance the obligations and rights of the employer and employee in the workers' compensation system."). A Court acting in a restrained manner shies away from making law, regardless of its policy preferences, and instead applies the law as written, ***inviting*** the legislature to create law. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 1997, an essay by Antonin Scalia with commentary by Amy Gutmann, editor, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin. That is precisely what the *Stevens* Court did, and it should be the Court's posture here. See *Stevens*, 2006-Ohio-3456, at ¶ 13 ("We also repeat our entreaty to the General Assembly to address this shortcoming in the Workers' Compensation system.").

Second, this doctrine has proven to be confusing and unworkable. See id. (the *Stevens* Court overturned the *Lemke* rule because it was difficult to apply in practice). Perhaps because it is judicially created law, the voluntary abandonment exception is determined on a case-by-case basis, leading to much uncertainty. See *Gross II*, 2007-Ohio-4916 (O'Connor dissent) at ¶ 58 (the Court seems content to allow some judicially created exceptions and not others); Antonin Scalia, *The Rule of Laws as a Law of Rules*, Univ. of Chicago L. Rev., Vol. 56, No. 4 (Fall 1989) (clear rules are preferable to ad-hoc adjudicative determinations because it promotes predictability and certainty and avoids judicial bias). This Court has recognized that the voluntary abandonment doctrine has caused more confusion than any other area of the workers' compensation law. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376, 732 N.E.2d 355.

Twice, the Ohio Supreme Court has reconsidered cases and upon reconsideration, reversed itself.[5]

One needs to look no further than the present case to understand this doctrine's unworkability. The Tenth District—without any General Assembly action—has vastly expanded the abandonment doctrine, now holding that even if a claimant involuntarily left their former position of employment, they can still be excluded from receiving benefits because a lapse of time may transform that involuntary abandonment into a voluntary abandonment. The outer limits of 'abandonment' continually change and expand, leaving parties with no more guidance beyond what the latest decision holds. And, as Justice O'Connor counsels courts seem content to allow some judicially-created exceptions but not others, with no principled distinction. Like *Stevens*, this judicially-created rule is practically unworkable and the issue should be returned to the legislature where it rightfully belongs.

Third, abandoning this precedent does not impose an undue hardship upon any party. Instead, it merely returns the policy-making process to the General Assembly. As noted above, the General Assembly is continually making policy exceptions to workers' eligibility for benefits. Defendants who have relied upon this defense have ample representation at the state house to seek this policy exception through the proper arena—the state legislature.

In sum, voluntary abandonment is inconsistent with this Court's long standing instruction that workers' compensation policy is the province of the General Assembly—and not this Court. This Court should return the power to the General Assembly to create policy, and reclaim this Court's heritage as a body of judicial restraint.

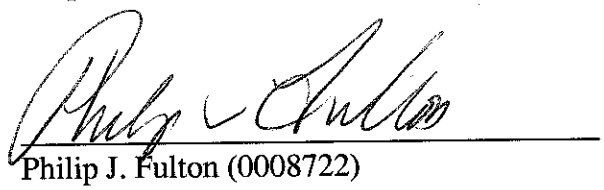
---

[5] For full citations see page 4.

CONCLUSION

For the foregoing reasons, OACC and OAJ urge this Court to overturn the decision of the Tenth District Court of Appeals and grant a writ of mandamus on behalf of the Relator-Appellant.

Respectfully submitted,



Philip J. Fulton (0008722)
Ross R. Fulton (0082852)
PHILIP J. FULTON LAW OFFICE
89 E. Nationwide Blvd., Suite 300
Columbus, OH 43215
(614) 224-3838 FAX (614) 224-3933
phil@fultonlaw.com
ross@fultonlaw.com
Counsel for *Amicus Curiae*,
Ohio Association of Claimants' Council
Ohio Association for Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular U.S. mail on this 14th day of March, 2011, upon:

William E. Clements (0012686)
Paul A. Lewandowski (0085588)
CLEMENTS, MAHIN & COHEN, LPA, CO.
35 E. Seventh Street, Suite 710
Cincinnati, OH 45202
Loveland, Ohio 45140

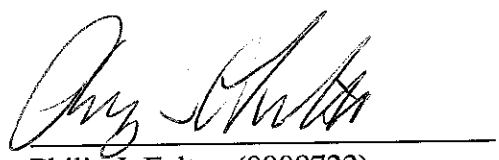
Counsel for Relator-Appellant,
Ronald Corman

William J. Wahoff (0024169)
Richard Goldberg (0002483)
SCOTT, SCRIVEN & WAHOFF, LLP
50 West Broad Street, Suite 2500
Columbus, OH 43215

Counsel for Respondent-Appellee,
Allied Holdings, Inc.

Charissa D. Payer (0064452)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215

Counsel for Respondent-Appellee,
Industrial Commission of Ohio



Philip J. Fulton (0008722)
Ross R. Fulton (0082852)

20726 - T98

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ronald R. Corman, :

Relator, :

v : No. 10AP-38

Allied Holdings, Inc. and : (REGULAR CALENDAR)
The Industrial Commission of Ohio,

Respondents. :

D E C I S I O N

Rendered on October 21, 2010

Clements, Mahin & Cohen, L.P.A., Co., William E. Clements and *Paul A. Lewandowski*, for relator

Scott, Scriven & Wahoff, LLP, William J Wahoff and *Richard Goldberg*, for respondent Allied Holdings, Inc.

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Ronald R. Corman, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying relator's request to reinstate his temporary total disability ("TTD") compensation. Relator also requests this court to order the commission to find

ATTACHMENT A

that his retirement was not voluntary and to award him TTD compensation beginning March 30, 2009.

{¶2} Pursuant to Civ.R. 53 and Loc.R 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is attached hereto. The magistrate found that there was some evidence to support the commission's determination that relator's retirement from the work force was voluntary. The magistrate also found that even if relator's March 2009 surgery constituted a new and changed circumstance, the commission did not abuse its discretion in determining that relator voluntarily abandoned the work force when he retired, and that the reinstatement of TTD compensation was not warranted Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus

{¶3} Relator has filed objections to the magistrate's decision. Citing primarily *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, *State ex rel. Reitter Stucco v. Indus. Comm.*, 117 Ohio St 3d 71, 2008-Ohio-499, and *State ex rel Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, relator first argues that a claimant can abandon a former position of employment or remove himself from the work force only if he has the physical capacity to return to his former position of employment at the time of the abandonment or removal. Because he was receiving TTD compensation and was unable to return to his former position of employment when he retired from Allied Holdings, Inc. ("Allied"), relator argues that his retirement from Allied was not voluntary Therefore, relator argues that he was entitled to

TTD compensation six years later due to a new and changed circumstance involving his industrial injury. We disagree.

{¶4} It is well-established that TTD compensation is intended to compensate an injured worker for the loss of earnings incurred while the industrial injury heals. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, ¶9, citing *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44. However, there can be no lost earnings, or even a potential for lost earnings, if the claimant is voluntarily no longer part of the active work force. Id. A claimant who voluntarily leaves the entire labor market "no longer incurs a loss of earnings because he is no longer in a position to return to work." *Ashcraft* at 44. Under these circumstances, there simply is no causal relationship between the industrial injury and the voluntary decision to leave the entire work force. Consequently, when the reason for leaving the labor market is unrelated to the industrial injury, TTD compensation is foreclosed. *Pierron* at ¶9, citing *State ex rel. Rockwell Internatl. v. Indus. Comm* (1988), 40 Ohio St.3d 44. This principle applies even when the claimant's separation from a specific employer is deemed involuntary. *Pierron* at ¶11.

{¶5} The distinction between a decision to retire from a particular employer and a decision to leave the work force entirely was highlighted in *Pierron*. 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.

{¶6} 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

{¶7} In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, Pierron moved for TTD compensation. The commission denied Pierron's request.

{¶8} Pierron filed an action in mandamus 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.
>
> 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.

{¶9} 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 *Pretty Prods.*, *OmniSource*, and *Reitter Stucco*, 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 work force.

{¶10} Here, the question is not whether relator was entitled to retain his TTD compensation after he retired from Allied. In fact, after relator retired from Allied, he continued to receive TTD compensation until several months later when the commission determined he was at maximum medical improvement. Rather, the issue is whether relator is entitled to TTD compensation six years later when there is some evidence that relator had retired from the entire work force. Given these circumstances, we find that the magistrate correctly applied the holding in *Pierron*. Therefore, we overrule relator's objections.

{¶11} Lastly, relator argues that the magistrate erred when she went beyond the decision of the commission in finding that relator's surgery did not constitute a new and changed circumstance. Because relator misreads the magistrate's decision, we disagree.

{¶12} Contrary to relator's contention, the magistrate did not find that relator's surgery did not constitute a new and changed circumstance. Although the point could have been more clearly stated, the magistrate found that even if relator's surgery constituted a new and changed circumstance, the commission did not abuse its discretion when it denied relator TTD compensation. On page 21 of the magistrate's decision, the magistrate states that the commission did not abuse its discretion in finding that relator never intended to return to the work force Therefore, even if relator's surgery could be considered a new and changed circumstance, the reinstatement of TTD compensation was not warranted because relator did not lose any wages. For the reasons previously stated, we find no error in the magistrate's analysis and we overrule relator's last objection.

{¶13} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law Therefore, we adopt the magistrate's findings of fact and conclusions of law as clarified herein In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

Objections overruled; writ of mandamus denied.

BRYANT and McGRATH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ronald R. Corman,	.	
Relator,	.	
v	:	No. 10AP-38
Allied Holdings, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	
	.	

MAGISTRATE'S DECISION

Rendered on June 22, 2010

Clements, Mahin & Cohen, L.P.A., Co., *William E. Clements* and *Paul A. Lewandowski*, for relator.

Scott, Scriven & Wahoff, LLP, *William J. Wahoff* and *Richard Goldberg*, for respondent Allied Holdings, Inc

Richard Cordray, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶14} Relator, Ronald R. Corman, has filed this original action asking this court to issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's request to reinstate his temporary total disability ("TTD") compensation after finding that he had voluntarily retired from the workforce on April 1, 2003, and ordering the commission to find that his

retirement was not voluntary and award him TTD compensation beginning March 30, 2009.

Findings of Fact:

{¶15} 1. Relator sustained a work-related injury on January 30, 2002, and his workers' compensation claim was originally allowed for "right knee strain." The self-insured employer, Allied Holdings, Inc. ("Allied"), additionally allowed relator's claim for "right medial meniscus tear, right knee "

{¶16} 2. At the time of his injury, relator was 56 years old and was employed by Allied as a car hauler and truck driver

{¶17} 3. Following the injury, relator was unable to return to his former position of employment and began receiving TTD compensation.

{¶18} 4 On April 3, 2002, relator underwent arthroscopic surgery. The post-operative diagnoses were. "Right complex tear of the posterior horn of the medial meniscus", "Complete ACL"; "Loose osteochondral fragment with notch impingement"; and "Grade 2-3 chondromalacia of the patella."

{¶19} 5. Unfortunately, relator had significant complications following the April 3, 2002 knee surgery and developed an infection

{¶20} 6. On April 13, 2002, relator underwent the following surgical procedure: "Video orthroscopy [sic], irrigation and debridement. Partial synovectomy, adhesions right knee." The post-operative diagnosis was: "Septic arthrosis right knee, postop "

{¶21} 7. Relator continued having problems and a third surgery was performed on April 24, 2002. The following procedures were performed. "Examination under anesthesia"; "Video arthroscopy"; "Manipulation of knee"; "Arthroscopy debridement of

adhesions"; and "Partial synovectomy and lavage." The post-operative diagnosis was: "Septic arthrosis postop right knee."

{¶22} 8. Following this third surgery, relator began an aggressive regime of physical therapy.

{¶23} 9. On January 16, 2003, relator's treating physician, S. Michael Lawhon, M.D., completed a statement for return to work indicating that relator was off work "if [he] cannot meet followup restrictions." Dr. Lawhon also indicated that relator could return to work, with certain restrictions, however, he did not provide a specific return-to-work date.

{¶24} 10. Relator was examined by David C. Randolph, M.D., on January 20, 2003 In his January 28, 2003 report, Dr. Randolph provided his physical findings upon examination, identified the medical records which he reviewed, and opined that relator's prognosis for recovery was fair. As Dr. Randolph noted, relator had participated in physical therapy; however, it was "clear that his functional capabilities have not favorably responded to this form of intervention to date." Dr. Randolph noted that relator had a significant amount of degeneration in his knee, some of which dated back to a 1998 knee injury. Dr. Randolph noted further that relator's allowed physical conditions had reached maximum medical improvement ("MMI") and opined that relator was capable of returning to work with the following restrictions

> It is my opinion Mr Corman is capable of work related activities which do not require prolonged standing or walking. He is capable of sitting for up to 60 minutes. He can stand or walk up to 30 minutes. He should avoid squatting. He can bend, twist and stoop on an occasional basis and lift and carry objects weighing up to 10 pounds. He should avoid climbing stairs and ladders and avoid walking on uneven surfaces. It is my opinion these restrictions are permanent.

{¶25} 11. On April 3, 2003, Allied filed a motion with the commission asking that relator's TTD compensation be terminated based upon Dr. Randolph's January 28, 2003 report wherein he concluded that relator's allowed condition had reached MMI.

{¶26} 12. In a letter to Central State Retirement Fund dated April 7, 2003, relator requested retirement. That letter provides: "I, Ronald Corman * * *, would like to start my retirement to be effective as of 4-1-2003."

{¶27} 13. Allied's motion to terminate relator's TTD compensation was heard before a district hearing officer ("DHO") on July 14, 2003. Based on the January 28, 2003 report of Dr. Randolph, the DHO found that relator's allowed condition had reached MMI and terminated his TTD compensation as of the date of hearing, July 14, 2003.

{¶28} 14. No appeal was taken from that order

{¶29} 15. On July 16, 2003, relator filed a motion asking that his claim be additionally allowed for "aggravation of pre-existing osteoarthritis of right knee." Relator supported his motion with the June 2, 2003 office note of Dr. Lawhon indicating that he agreed with Dr. Randolph's opinion that relator's allowed conditions had reached MMI. The December 9, 2003 report of Thomas A. Bender, M.D , was also submitted Dr. Bender opined that relator's claim should be allowed for the additional condition of aggravation of pre-existing osteoarthritis, right knee, and he opined further that relator was unable to return to his former position of employment. However, Dr. Bender did not believe that relator's allowed condition had reached MMI as he would be considered a candidate for knee replacement surgery. In a follow-up letter dated December 23, 2003, Dr. Bender opined that, if relator did not proceed with the right total knee replacement surgery, his allowed conditions were at MMI.

{¶30} 16. Relator's motion was heard before a DHO on January 7, 2004. Based upon the office note of Dr Lawhon and the report of Dr. Bender, the DHO granted relator's motion to have his claim additionally allowed for aggravation of pre-existing osteoarthritis of right knee.

{¶31} 17. Relator's treating physician, Dr. Lawhon, died and relator began being seen by Charles D. Miller, M.D. In office notes from January 2005 through January 2009, Dr. Miller chronicled increased problems with relator's right knee culminating in the decision to proceed with the total knee replacement which was performed on March 30, 2009.

{¶32} 18. Following his surgery, relator filed a motion seeking TTD compensation beginning March 30, 2009, the date of the latest surgery, and continuing. As noted in the motion, Allied had denied relator's request based upon Allied's contention that relator had voluntarily retired from his employment and was not entitled to TTD compensation.

{¶33} 19. In support of his application for TTD compensation, relator attached his medical records including the office notes of his treating physician, Dr. Miller. In his July 15, 2004 office note, Dr. Miller refilled relator's prescriptions and noted: "At this time he is too early medical retirement. He has been getting along fairly well with that and does not desire anything else done at this time, which is reasonable." The office notes which followed from January 6, 2005 through January 27, 2009, reveal that relator's knee condition gradually worsened until January 27, 2009, when Dr. Miller recommended: "At this time, after a long discussion with him, I recommend he be scheduled for a right total knee replacement. He has been advised of the surgery, its inherent risks and potential

complications and once it is approved, we will proceed with it since he failed with other modalities."

{¶34} 20. Other evidence in the record includes the April 7, 2003 letter from relator indicating that he would like his retirement to be effective April 1, 2003. Also included is the May 1, 2009 letter from Charles Corsello, an analyst in the pension processing department for Allied, indicating that relator was currently receiving a retirement benefit effective April 1, 2003.

{¶35} 21. Relator's request to reinstate his TTD compensation effective March 30, 2009, the date of his latest surgery, was heard before a DHO on June 10, 2009. The DHO denied relator's request after finding that relator's voluntary retirement on April 1, 2003 precluded the reinstatement of TTD compensation commencing March 30, 2009. The DHO explained:

> The Hearing Officer finds that the Injured Worker's retirement on 04/01/2003 was voluntary. In coming to this conclusion the Hearing Officer relies on the Injured Worker's testimony that the reason he decided to take regular retirement was that by doing so he would receive the maximum benefit available to him.
>
> Second, a review of the Injured Worker's retirement letter dated 04/07/2003 does not indicate that the Injured Worker's retirement is in any way related to his industrial injury. The letter does not indicate that his retirement is a medical retirement.
>
> The Injured Worker's attempt to characterize his departure from the work force is involuntary is belied by the fact that there is no evidence whatsoever that the Injured Worker sought to return to the work force or sought any viable work during any period of time since he retired The Hearing Officer finds that the Injured Worker's failure to seek other employment or attempt to return to the work force in any capacity classifies the Injured Worker's retirement as voluntary.

Based upon the three factors noted above the Hearing Officer finds that the Injured Worker's retirement from the work force on 04/01/2003 was voluntary and precludes the payment of temporary total disability compensation commencing 03/30/2009.

The DHO addressed and rejected relator's legal arguments as follows:

The Injured Worker's representative argued that the Injured Worker is entitled to payment of temporary total disability compensation as the Injured Worker was receiving temporary total disability compensation at the time of his retirement on 04/01/2003. The Injured Worker's representative relies on State ex rel. Omni Source Corp. v. Indus Comm (2007) 113 Ohio St 3d 303 and State ex rel Reitter Stucco v. Indus. Comm. (2008) 117 Ohio St 3d 71.

The Hearing Officer finds that these cases are distinguishable because they involve discharges for violation of a written work rule and the present case involves voluntary retirement from the work force. Further, the cases cited by the Injured Worker involves a request for payment of temporary total disability compensation contemporaneous with the Injured Worker's discharge from work for violation of a written work rule. In the present case the requested period of disability is being requested approximately six years following the Injured Worker's voluntary retirement from the work force.

As the Injured Worker voluntarily retired from the work force on 04/01/2003, the Hearing Officer finds that the Injured Worker is not entitled to payment of temporary total disability compensation commencing 03/30/2009.

The Hearing Officer relies on the Injured Worker's retirement letter dated 04/07/2003, the 05/01/2009 letter from Charles Corsello, the Injured Worker's testimony at hearing, as well as State ex rel. Pierron v. Indus. Comm. (2007) 172 Ohio App. 3d 168, State ex rel. Rockwell International v. Indus. Comm. (1998) 40 Ohio St. 3d 44 and State ex rel. Baker Material Handling Corp v Indus Comm. (1994) 69 Ohio St. 3d 202.

{¶36} 22 Relator appealed and attached an affidavit stating:

1 I retired in April, 2003, from my job as a car hauler at age, 57. The only reason that I retired at that time was due to my

> industrial injury to my right knee in Claim No. 02-808990. At that time, Dr. Lawhon, told me that I could never return to work as a car hauler due to my knee injury. My employer at that time was trying to cut off my temporary total disability compensation. They had me examined by Dr. Randolph, who stated that I was at maximum medical improvement. Because I was unable to return to work at my old job, I had to make sure that I had money coming in, so I was forced to take early retirement. Again, I was only 57 years old at the time.
>
> 2 By taking retirement in April, 2003, I received far less than the amount that I made when I was working as a car hauler. I did not want to stop working at that time, but I had to due to the fact that my right knee condition prevented me from getting a release to return to work. I could not pass the DOT physical due to my right knee condition. Also, by taking early retirement in 2003, I lost retirement income, because my retirement pay would have been much higher had I been able to work to age, 62.
>
> 3 My retirement was not voluntary. It was forced on me by my industrial injury to my right knee in Claim No. 02-808990.

{¶37} 23. Relator's appeal was heard before a staff hearing officer ("SHO") on September 1, 2009 The SHO affirmed the prior DHO's order stating.

> * * * The Staff Hearing Officer finds that the Injured Worker's retirement on 04/01/2003 was voluntary. The Staff Hearing Officer finds from that the Injured Worker's testimony that the reason he decided to take regular retirement was that by doing so he would receive the maximum cash benefit available to him. The Staff Hearing Officer finds that the Injured Worker's retirement letter, dated 04/07/2003, does not indicate that the Injured Worker's retirement is in anyway related to his industrial injury. The Staff Hearing Officer finds that the letter does not indicate that his retirement is a medical retirement. The Staff Hearing Officer finds that the Injured Worker's characterization as departure from work-force as involuntary is not supported by the fact that there is no evidence whatsoever that the Injured Worker sought to return to the workforce or sought any viable work during any period of time since he retired.
>
> The Staff Hearing Officer finds that the Injured Worker's failure to seek other employment or attempt to the workforce

> in any capacity classifies the Injured Worker's retirement as voluntary. The Staff Hearing Officer notes in the present case the requested period of the temporary total disability compensation is approximately six years following the Injured Worker's voluntary retirement from the workforce.
>
> Based upon the above information, the Staff Hearing Officer finds that the Injured Worker's retirement from the workforce on 04/01/2003 was voluntary and precludes the payment of temporary total disability compensation beginning 03/30/2009.
>
> As the Injured Worker voluntarily retired from the workforce on 04/01/2003, the Staff Hearing Officer finds that the Injured Worker is not entitled to the payment of temporary total disability compensation beginning 03/30/2009.
>
> This order is based upon the Injured Worker's letter, dated 04/07/2003, the Injured Worker's testimony, the office note of Charles D. Miller, M.D., dated 07/15/2004, as well as State ex rel. Pierron v. Ind. Comm. (2007) 172 Ohio App 3d 168; State ex rel. Rockwell International v. Ind. Comm. (1998) 40 Ohio St 3d 44 and State ex rel. Baker Material Handling Corporation v Ind. Comm (1994) 69 Ohio St 3d 202.

{¶38} 24 Relator's further appeal was refused by order of the commission mailed October 15, 2009, and relator filed this mandamus action.

Conclusions of Law:

{¶39} Relator argues that the commission abused its discretion in two respects: (1) the evidence upon which the commission relied to find that his retirement was voluntary fails to meet the "some evidence" standard; and (2) because relator was unable to return to his former position of employment at the time he retired, his retirement cannot preclude the reinstatement of TTD compensation citing *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, *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.

{¶40} The magistrate finds: (1) there is "some evidence" in the record upon which the commission could rely to find that relator's retirement was voluntary; and (2) the commission properly analyzed the relevant law in reaching its determination that relator's retirement was voluntary and precluded the reinstatement of TTD compensation following surgery

{¶41} 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* (1983), 6 Ohio St.3d 28.

{¶42} 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 MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶43} In the present case, relator's TTD compensation was terminated as of July 14, 2003, following a hearing before a DHO. Based upon the January 28, 2003 report of Dr. Randolph, the DHO determined that relator's allowed conditions had reached MMI. TTD compensation was *not* terminated because he retired (or was fired) and relator did not seek either TTD or wage loss compensation in the years prior to his 2009 surgery

{¶44} An important distinction in this case is the fact that relator's TTD compensation was *not* terminated because of his departure (retirement) from his job with Allied. It is because of this critical distinction that the line of cases upon which relator attempts to rely (*OmniSource* and *Reitter Stucco*) do not apply. And it is this distinction which leads to the application of cases such as *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, *State ex rel. McCoy v Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, and *State ex rel Pierron v. Indus. Comm.*, 120 Ohio St 3d 40, 2008-Ohio-5245.

ELIGIBILITY FOR TTD COMPENSATION IN GENERAL

{¶45} Pursuant to R.C. 4123.56 and *Ramirez*, temporary total disability is defined as a disability that prevents the claimant from returning to their former position of employment This eligibility standard is consistent with the purpose of TTD compensation, which is to compensate a claimant for the loss of earnings incurred while the injury heals. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42.

EFFECT OF A CLAIMANT'S ACTIONS

{¶46} In some cases, a claimant's own actions, rather than the work-related injury, may result in the claimant's inability to return to the former position of employment. A claimant can voluntarily abandon their former position of employment, thereby precluding eligibility for TTD compensation. For example, in *State ex rel Jones & Laughlin Steel Corp v Indus. Comm.* (1985), 29 Ohio App.3d 145, the claimant, Ernesto Rosado, was unable to return to his former position of employment at the time he retired. This court found that where a claimant has voluntarily retired and has no intention of ever returning

to that former position of employment, the claimant is not prevented from returning to that former position of employment due to the work-related injury.

{¶47} There are a number of other examples wherein a claimant has been denied continued TTD compensation based upon their voluntary abandonment of the former position of employment: *Ashcraft* (incarcerated claimant was precluded from receiving TTD compensation because he was presumed to have tacitly accepted the consequences of his voluntary acts leading to his incarceration and was deemed therefore to have voluntarily abandoned his former position of employment); *State ex rel. McGraw v. Indus. Comm.* (1990), 56 Ohio St.3d 137 (claimant who voluntarily abandoned his former position of employment by quitting his job for reasons unrelated to his injury was precluded from receiving TTD compensation), *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm*, 72 Ohio St.3d 401, 1995-Ohio-153 (claimant voluntarily abandoned his former position of employment when he was terminated for failing to report to work for three consecutive days, thereby precluding his eligibility for TTD compensation), and *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54, 2000-Ohio-273 (claimant voluntarily abandoned his former position of employment when he was terminated for testing positive for drugs in violation of a written company policy, thereby precluding his eligibility for TTD compensation).

REINSTATEMENT OF TTD COMPENSATION

{¶48} When a claimant reaches MMI, payment of TTD compensation ceases. R.C 4123.56(A). The commission's continuing jurisdiction, however, allows for the reinstatement of TTD compensation after an MMI determination if new and changed circumstances warrant. *State ex rel Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424. In

Bing, the court held that the temporary "flare-up" or exacerbation of an allowed condition was a new and changed circumstance supporting renewed compensation. This approach derives from the recognition that a claimant whose condition has previously been declared MMI could experience a temporary exacerbation of their allowed condition that justified further treatment or even TTD compensation while the claimant struggled to recover his or her previous level of well being. *State ex rel. Conrad v. Indus. Comm.* (2000), 88 Ohio St.3d 413. In *State ex rel. Chrysler Corp. v. Indus. Comm.*, 81 Ohio St.3d 158, 1998-Ohio-460, the court found that surgery could be a new and changed circumstance sufficient to reinstate TTD compensation for an individual whose condition had previously been declared MMI.

{¶49} In the present case, relator was receiving TTD compensation until July 14, 2003, when a DHO, relying on Dr. Randolph's January 28, 2003 report, found that relator's allowed conditions had reached MMI.

{¶50} After Dr. Randolph opined that relator's allowed conditions had reached MMI and after Allied had filed a motion seeking to terminate relator's TTD compensation based on a finding that his allowed conditions had reached MMI, relator took action and retired Relator gave his notice of retirement to Allied four days after Allied filed its motion to terminate his TTD compensation based on MMI. Relator requested that his retirement be effective beginning April 1, 2003, six days before Allied filed its motion to terminate his TTD compensation.

{¶51} Relator began receiving retirement payments and did not argue that he was entitled to any on-going TTD compensation after he retired. Relator's claim was additionally allowed for aggravation of pre-existing osteoarthritis in 2004, yet relator did

not seek either TTD or wage loss compensation at that time. It was not until six years later when relator had surgery for his allowed conditions that he requested TTD compensation be reinstated.

{¶52} In support of his argument that TTD compensation should be reinstated, relator cites a line of cases applying *Pretty Prods.* The following principles emerged from those cases: a claimant who is disabled when terminated from employment is not disqualified from receiving TTD compensation. *Pretty Prods.*; *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 1993-Ohio-141 The reason is that a claimant can abandon a former position of employment or remove themselves from the workforce *only* if they have the physical capacity for employment at the time of the abandonment or removal In *OmniSource*, the claimant, Johnny L. Calderwood, Jr., was discharged from his employment while receiving TTD compensation when his employer requested that he provide a valid commercial driver's license and Calderwood did not do so. The employer refused to pay TTD compensation, despite continuing medical certification, citing Calderwood's discharge. However, the commission reinstated Calderwood's compensation, reasoning that his discharge did not constitute a voluntary abandonment of employment because, among other things, Calderwood was already temporarily and totally disabled when fired and could not have voluntarily relinquished his former position of employment. Ultimately, the Supreme Court of Ohio agreed.

{¶53} Relator also cites *Reitter Stucco*. In that case, the claimant, Tony A. Mayle, was injured on the job and began receiving TTD compensation. Following surgery, Mayle undertook physical therapy in a work-conditioning program with the goal of improving his condition enough that he could return to his former position of employment. However, his

vocational team was unsure whether Mayle would ever be capable of performing the heavy physical demands of that job on a sustained basis.

{¶54} While unable to return to work, and while the employer was paying him wages in lieu of TTD compensation, Mayle was fired for comments made about the company's president At that time, the employer ceased paying TTD compensation.

{¶55} Mayle filed a motion with the commission for TTD compensation. An SHO awarded TTD compensation finding that Mayle was temporarily and totally disabled when he was fired, rendering *Pretty Prods.*, and not *Louisiana-Pacific,* controlling.

{¶56} The employer filed a complaint in mandamus in this court and the commission's decision was upheld. Thereafter, the employer appealed; however, the Supreme Court of Ohio determined that, because Mayle was medically incapable of returning to his former position of employment at the time of his discharge, his termination was not voluntary and he was entitled to TTD compensation.

{¶57} Relator also cites this court's decision in *State ex rel. Jorza v Indus. Comm.*, 10th Dist. No. 08AP-393, 2009-Ohio-1183, wherein this court applied the cases following *Pretty Prods* While receiving TTD compensation, the claimant, Charlotte A. Jorza, had accepted a "Special Attrition Program" that paid her for retiring from her employment with Delphi Packard Electric ("Delphi"). This court noted that, in *Pretty Prods.*, the Supreme Court of Ohio had "used the generic term 'departure' instead of specifying whether the departure was due to the employee having quit, having accepted a buy out, or having been fired " *Jorza* at ¶4 Accordingly, because Jorza was receiving TTD compensation at the time she accepted Delphi's "Special Attrition Program" retirement, this court determined that she remained eligible for TTD compensation.

{¶58} Delphi appealed this court's decision to the Supreme Court of Ohio. In its recent decision, the court reversed this court's judgment and granted a limited writ of mandamus. *State ex rel. Jorza v. Indus. Comm.*, 124 Ohio St.3d 265, 2010-Ohio-119. The court declined to address the issue of whether Jorza's buyout constituted a voluntary retirement and should not be governed by principles applicable to employment discharge cases. The court stated:

> We find that we cannot address this issue without further clarification from the commission on Jorza's disability status at the time that she left Delphi. The litigants' arguments proceed from the premise that Jorza was temporarily and totally disabled when her buyout became effective. Jorza, however, certified on her July 3, 2006 "Special Attrition Program conditions of Participation Release form" that she was "able to work and suffer[s] from no disability that would preclude [her] from doing [her] regularly assigned job." This certification is not only inconsistent with her assertion of disability, but also contradicts the only medical evidence in the record—an October 2, 2006 C-84 disability form that refers to a "constant severe" pain so debilitating that it prevented Jorza from doing her regular job as of June 2006.
>
> These contradictory statements, coupled with an incomplete record, foreclose further analysis. It is pointless to address arguments premised on the existence of a temporary total disability if the disability did not exist during the relevant period. For this reason, we order the commission to issue an amended order that clarifies whether or not Jorza was temporarily and totally disabled when she left Delphi."

Id. at ¶8-9.

{¶59} Although relator admits that "while it still remains unclear as to the direction the Supreme Court would have gone in *Jorza*" if the evidence the court wanted had been in evidence, relator argues that this court should apply our determination in *Jorza* and find that he is entitled to have his TTD compensation reinstated. At oral argument, counsel acknowledged that relator was *not* eligible for TTD compensation after his allowed

conditions had reached MMI until he had surgery. Because relator had been on TTD compensation at the time he retired, counsel argued that relator is automatically entitled to receive TTD compensation following surgery without needing to establish that he returned to work or that he ever intended to return to work. The magistrate disagrees.

{¶60} In all three of the above situations, the claimants were receiving TTD compensation when their employers terminated their employment and ceased paying TTD compensation. The above cases do not apply in the present situation As already stated, relator's TTD compensation ceased because the commission found that his allowed conditions had reached MMI. Relator's TTD compensation *did not cease* because he left employment with Allied Even though relator was unable to return to his former position of employment at the time he retired, the commission properly realized that the issue was whether or not relator voluntarily retired and abandoned the entire job market If relator could establish that he retired from Allied because of his allowed conditions, then his retirement would be considered involuntary. However, if relator was not able to establish that his retirement was due to the allowed conditions in his claim, but was for some other reason, then relator's retirement would be considered voluntary and could preclude further payment of TTD compensation. In the present case, the commission determined that relator did not establish that his retirement was directly related to his allowed conditions and, as such, the commission found that his retirement was voluntary. Thereafter, the commission considered whether or not relator had abandoned the entire job market and whether TTD compensation should be reinstated.

{¶61} The commission relied on *Baker*, *McCoy*, and *Pierron*. Those cases stand for the following proposition: once it is determined that a claimant's retirement from a job

was voluntary, an award of TTD compensation becomes less likely, but it is not precluded entirely, instead, a claimant who voluntarily retires will be eligible to receive TTD compensation if he or she re-enters the workforce and, due to the original injury, becomes temporarily totally disabled.

{¶62} The commission applied the proper law in this case. However, two questions remain: First, does the evidence upon which the commission relied constitute "some evidence" to support the commission's determination that his retirement was voluntary? For the reasons that follow, the magistrate finds that there was some evidence in the record to support the commission's determination Second, does the March 30, 2009 surgery constitute new and changed circumstances warranting the reinstatement of TTD compensation? The magistrate finds that it does not.

{¶63} As indicated in the findings of fact, the commission relied on the following evidence to find that relator's retirement was voluntary: (1) relator's April 7, 2003 notice of retirement; (2) relator's testimony at the hearing; and (3) Dr. Miller's office note dated July 15, 2004

{¶64} As noted previously, the voluntary nature of abandonment is a factual question within the commission's final jurisdiction *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18. 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.* (1989), 45 Ohio St.3d 381 In a mandamus action, at issue is whether the evidentiary record legally supports the determination or whether a gross abuse of discretion occurred.

{¶65} Relator's April 7, 2003 notice of retirement provides. "I, Ronald Corman * * *, would like to start my retirement to be effective as of 4-1-2003 " Nothing in relator's notice refers to the allowed conditions in his claim. Further, nothing in his notice mentions Allied's pending motion to terminate his TTD compensation. Simply put, there is nothing in this notice alone upon which the commission could rely to find that his retirement was related to his allowed conditions. Instead, the only conclusion which can be inferred from this piece of evidence is that relator's retirement was voluntary.

{¶66} The commission also relied on relator's testimony at the hearing. There is no copy of the transcript in the stipulated record for this court to review. However, testimony elicited at a hearing before the commission is no different than testimony given in any other civil or criminal court action. The hearing officer, sitting as the trier of fact, judges the credibility of the witness's testimony and determines the weight to be given that testimony *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165. Because there is a presumption of regularity regarding the commission's decisions, courts do not compel the commission to specifically, and expressly, disprove every potential basis for compensation, either real or imagined, before this court will uphold a commission's decision. See *State ex rel. Lovell v. Indus. Comm.*, 74 Ohio St 3d 250, 1996-Ohio-321. Relator has not attached portions of any transcript to establish that he testified that his retirement was based on his allowed conditions and the commission is not required to submit portions of relator's testimony to prove that his retirement was not related to the allowed conditions

{¶67} The commission cited a third piece of evidence upon which it relied and that is the July 15, 2004 office note of Dr. Miller which provides: "At this time he is too early

medical retirement He has been getting along fairly well with that and does not desire anything else done at this time, which is reasonable." Relator argues that Dr. Miller's statement that "[a]t this time he is too early medical retirement," is ambiguous and this magistrate agrees. Even reading the entire office note, without some explanation from Dr. Miller, it is impossible to determine what this sentence means.

{¶68} While relator argues correctly that Dr Miller's July 15, 2004 office note does not constitute some evidence to support the commission's determination that his retirement was voluntary, the other evidence which the commission cited (the April 7, 2003 notice of retirement and relator's testimony) both constitute some evidence upon which the commission could properly rely. Because there is some evidence in the record which was cited by the commission, this magistrate cannot say that the commission abused its discretion in determining that relator's retirement was voluntary and precluded further payment of TTD compensation.

{¶69} One final point needs to be addressed and that is whether relator's March 2009 surgery constitutes a new and changed circumstance warranting the reinstatement of TTD compensation The magistrate finds that it does not. Because TTD compensation is designed to compensate an injured worker for wages lost as a result of allowed conditions, the claimant actually has to demonstrate a loss of wages in order to have TTD compensation reinstated. In the present case, the record indicates that relator has not worked in the six years since he retired from Allied. Because relator never returned to work, the commission determined that, following his retirement, relator's actions demonstrated that he had completely abandoned the entire workforce and had no intention of returning to work. In *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d

648, 1996-Ohio-297, the Supreme Court of Ohio found that a claimant's early retirement, receipt of Social Security benefits, application for pension benefits, and failure to seek other employment following his departure from his former employer demonstrate an intent to abandon the workforce. At page 145 of the stipulated record, in a letter dated March 1, 2005, relator was informed by the Social Security Administration that he was entitled to monthly disability benefits beginning December 2002 Similar to the claimant in *McAtee*, relator retired, applied for and began receiving Social Security benefits, and failed to seek other employment following his departure from Allied. The commission did not abuse its discretion in finding that relator never intended to return to work and, in spite of the fact that his surgery could be considered a new and changed circumstance, the reinstatement of TTD compensation is not warranted because relator has not lost wages.

{¶70} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding that he voluntarily abandoned his employment when he retired in April 2003 and relator's request for a writ of mandamus should be denied.

s/s Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).