

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lloyd Hunt,	:	
Relator,	:	
v.	:	No. 11AP-1066
Roadway Express, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on November 8, 2012

Casper & Casper, and Ronald M. Kabakoff, for relator.

Thomas & Company, LPA, and Christopher Aemisegger, for respondent Roadway Express, Inc.

Michael DeWine, Attorney General, and Corinna V. Efkeman, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

TYACK, J.

{¶ 1} Lloyd Hunt filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying him permanent total disability ("PTD") compensation and to grant him PTD compensation or at least review issues related to his entitlement to the compensation.

{¶ 2} In accord with Loc.R. 13, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued the appended magistrate's decision which contains findings of

fact and conclusions of law. The magistrate's decision includes a recommendation that we grant a writ compelling the commission to revisit the issue of Hunt's alleged voluntary abandonment of the entire job market.

{¶ 3} Counsel for Roadway Express, Inc., Hunt's former employer, has filed objections to the magistrate's decision. Counsel for Hunt has filed a memorandum contra. The case is now before the court for a full, independent review.

{¶ 4} Hunt voluntarily left his employment with Roadway Express, Inc., after 34 years with the company. As a result, he was denied temporary total disability ("TTD") compensation when he applied for it after his retirement.

{¶ 5} Almost three years later, Hunt applied for PTD compensation. A staff hearing officer ("SHO") found that Hunt's retirement barred him from receiving PTD compensation, relying heavily upon the earlier ruling regarding TTD compensation.

{¶ 6} Leaving an employer for reasons unrelated to an industrial injury has been found by the Supreme Court of Ohio to bar receipt of TTD compensation. It has not been found to be a bar to receiving PTD compensation unless the injured workers abandon the workforce completely.

{¶ 7} The SHO who ruled upon Hunt's application for PTD compensation did not expressly address the issue of permanent abandonment of employment. Hunt was still in his 50s when he retired. He testified that he had two sons who owned their own businesses for whom he intended to work. Since he already had jobs lined up, he did not need vocational rehabilitation, so he refused vocational rehabilitation. This set of facts led our magistrate to recommend that the commission address the precise issue involved, not a related issue regarding TTD compensation.

{¶ 8} The objection on behalf of the commission reads:

The commission did not abuse its discretion in finding Hunt's voluntary retirement from Roadway constituted an abandonment of the work force.

{¶ 9} We disagree. The earlier order regarding TTD compensation addressed a different issue than total abandonment of the workforce. Our magistrate correctly recognized the distinction and made the correct recommendation.

{¶ 10} The objection on behalf of the commission is overruled.

{¶ 11} The objection filed on behalf of Roadway Express, Inc., reads:

THE MAGISTRATE ERRED AS A MATTER OF LAW IN FINDING THAT THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION BY FAILING TO DISCUSS OR DETERMINE WHETHER RELATOR VOLUNTARILY ABANDONED THE ENTIRE JOB MARKET.

{¶ 12} The objection is factually wrong. The magistrate did, in fact, address the issue. The magistrate chose not to make the final factual determination on an issue the commission did not address due to a misapplication of the concept of res judicata. Leaving one employer, for purposes of TTD compensation, is not the same as voluntarily abandoning the workforce entirely.

{¶ 13} Roadway Express, Inc.'s objection is also overruled.

{¶ 14} Both sets of objections having been overruled, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. We, therefore, grant a writ of mandamus compelling the commission to vacate its order denying PTD compensation and compelling the commission to expressly address the issue of whether Hunt voluntarily abandoned the entire workforce before he applied for PTD compensation.

Objections overruled; writ granted.

SADLER and FRENCH, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Lloyd Hunt,	:	
	:	
Relator,	:	
	:	
v.	:	No. 11AP-1066
	:	
Roadway Express, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 23, 2012

Casper & Casper, and Ronald M. Kabakoff, for relator.

Thomas & Company, LPA, and Christopher Aemisegger, for respondent Roadway Express, Inc.

Michael DeWine, Attorney General, and Corinna V. Efkeman, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 15} Relator, Lloyd Hunt, 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 denied his application for permanent total disability ("PTD") compensation after finding that he had voluntarily abandoned his employment with Roadway Express, Inc. ("Roadway") and either order the commission to

grant him PTD compensation or to reconsider his application and determine whether or not he abandoned the entire job market.

Findings of Fact:

{¶ 16} 1. Relator sustained a work-related injury on February 24, 1981, and his workers' compensation claim has been allowed for the following conditions: "strain right elbow; strain lower back."

{¶ 17} 2. Although relator was not pain free, he was able to continue working for Roadway without any restrictions until he submitted his voluntary resignation effective August 31, 2006.

{¶ 18} 3. Paul Bunch, the office coordinator for Roadway, testified that relator's retirement had been coded to reflect a standard retirement due to age and years of service, not medical reasons. Further, Mr. Bunch testified that the coding also reflected that relator was not retiring to pursue other employment opportunities, but that he did not reflect any intention to pursue other employment opportunities.

{¶ 19} 4. The stipulation of evidence reflects that relator continued to have back pain and on September 13, 2006 relator underwent surgery. The following procedures were performed:

[One] Total laminectomy at L5 on the left.

[Two] Medial facetectomy at L4-L5.

[Three] Foraminotomy at L5 and S1 nerve roots on the left with microdissection and excision of extruded disk with recurrent herniation at L4-L5.

{¶ 20} 5. In July 2007, relator's treating physician William Tobler, M.D., completed a C-84 and certified that relator had been temporarily and totally disabled from August 31, 2006 to an estimated return-to-work date of November 1, 2007.

{¶ 21} 6. Relator's application for temporary total disability ("TTD") compensation was heard before a district hearing officer ("DHO") on October 3, 2007.

{¶ 22} 7. The DHO denied relator's request for TTD compensation after finding that he had voluntarily retired from his employment with Roadway on August 31, 2006, and that relator did not meet his burden of proving that the retirement was due to the allowed conditions in his claim.

{¶ 23} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on November 16, 2007. The SHO affirmed the prior DHO's order and denied the request for compensation after finding that relator had voluntarily retired and that he failed to present sufficient medical evidence that the retirement was due to the allowed conditions of his claim. Specifically, the SHO stated:

The Staff Hearing Officer finds that the injured worker took a voluntary retirement on 08/31/2006. The Staff Hearing Officer further finds that prior to the injured worker's retirement the injured worker was working full duty without restriction. The Staff Hearing Officer further finds the injured worker's most recent surgical procedures before his retirement [are] for conditions not related to the industrial injury that is recognized in this claim. The Staff Hearing Officer further finds that there is no medical evidence on file to demonstrate that the injured worker retired due to his disability. The Staff Hearing Officer therefore finds that the injured worker has not met his burden of demonstrating that there is a causal relationship between his retirement and the industrial injury that is recognized in this claim. The Staff Hearing Officer finds that the injured worker has not met his burden of demonstrating that his retirement was not voluntary. The Staff Hearing Officer therefore finds that the injured worker's retirement was voluntary and that the injured worker is not entitled to the payment of temporary total disability compensation from 08/31/2006 through the present and continuing.

This order is based upon the employee record information submitted by the employer on 10/03/2007, the injured worker's medical evidence contained in the claim file, and [*State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988)].

{¶ 24} 9. Relator's further appeal was refused by order of the commission mailed December 19, 2007.

{¶ 25} 10. Relator did not pursue the matter further.

{¶ 26} 11. On September 15, 2010, relator filed an application for PTD compensation.

{¶ 27} 12. According to his application, he was 62 years of age; had applied for and was receiving Social Security Disability Benefits; had graduated from high school and attended one year of college; had served in the Navy; and could read, write, and perform

basic math. Relator also indicated that he used a back brace and cane as needed and that he wore a weight belt and foot brace. Relator also indicated that he had never participated in rehabilitation services and that he did not desire to undergo an evaluation.

{¶ 28} 13. Relator's application for PTD compensation was heard before an SHO on April 12, 2011, and was denied. At the hearing, relator testified that he had been forced to abandon his employment with Roadway due to the allowed conditions in his claim and, as such, his retirement was involuntary. Relator also testified that, at the time he retired, he had intended to pursue other employment opportunities in the workforce, such as working in his son's business.

{¶ 29} 14. The SHO determined that relator's voluntary abandonment of his employment precluded his receipt of PTD compensation, stating:

By way of background, the Injured Worker retired from the named Employer on 08/31/2006. He subsequently filed a motion on 08/16/2007, requesting a period of temporary total disability compensation beginning on 08/31/2006 because he had had surgery following his retirement. This request was set for hearing in front of a Staff Hearing Officer on 11/16/2007. In that order, the Industrial Commission denied the payment of temporary total disability compensation, finding that the Injured Worker's retirement on 08/31/2006 was voluntary and that the Injured Worker was working full-duty, without restriction up until the date of retirement. The Staff Hearing Officer therefore denied the request for temporary total disability compensation and specifically found that the retirement was a voluntary retirement and unrelated to the 05/24/1981 industrial injury. The appeal to that order was refused by the Industrial Commission and the Injured Worker did not pursue further action on that matter. The Staff Hearing Officer finds that the issue of whether the Injured Worker's retirement was voluntary is *res judicata*. In making this finding, the Staff Hearing Officer relies upon the decision in State ex rel. Crisp v. Indus. Comm. (1992), 64 Ohio St.3d 507.

The Staff Hearing Officer finds that the Industrial Commission previously determined that the Injured Worker in this claim had voluntarily retired. The Staff Hearing Officer finds that this issue has already been ruled upon by the Industrial Commission and the Injured Worker is not entitled to relitigate that determination. Because the Staff Hearing Officer finds that the Injured Worker voluntarily

retired, he is not entitled to an award for permanent total disability compensation pursuant to O.A.C. 4121-3-34 (D) (1) (d) and O.R.C. Section 4123.58. Therefore, the Staff Hearing Officer orders that the application, filed on 09/15/2010, is denied.

This order is based upon the Industrial Commission order from the hearing on 11/16/2007, the Crisp case, and O.A.C. 4121-3-34 (D) (1) (d) and O.R.C. Section 4123.58.

{¶ 30} 15. Relator's request for reconsideration was denied by order of the commission mailed July 2, 2011.

{¶ 31} 16. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 32} For the reasons that follow, it is this magistrate's decision that this court should grant relator's request for writ of mandamus.

{¶ 33} 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).

{¶ 34} The relevant inquiry in a determination of permanent total disability is claimant's ability to do any sustained remunerative employment. *State ex rel. Domjancic v. Indus. Comm.*, 69 Ohio St.3d 693 (1994). Generally, in making this determination, the commission must consider not only medical impairments but also the claimant's age, education, work record and other relevant non-medical factors. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167 (1987). Thus, a claimant's medical capacity to work is not dispositive if the claimant's non-medical factors foreclose employability. *State ex rel. Gay v. Mihm*, 68 Ohio St.3d 315 (1994). The commission must also specify in its order what evidence has been relied upon and briefly explain the reasoning for its decision. *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991).

{¶ 35} In this mandamus action, relator argues that he testified that he had not intended to abandon the entire workforce at the time that he retired from Roadway. Relator argues that, after determining that he had voluntarily retired from Roadway, the commission never addressed or determined whether or not he abandoned the entire job

market. Absent this finding, relator argues that the commission abused its discretion when it denied his application for PTD compensation.

{¶ 36} When an employee retires from the work place for reasons unrelated to his or her allowed conditions, the retirement is deemed voluntary and precludes the employee from receiving TTD compensation. However, where an employee's departure from the work place is caused by the allowed conditions in the claim, then the departure is involuntary and does not automatically preclude the receipt of TTD compensation. Whether or not an employee has abandoned their employment is largely a question of intent which may be inferred from words spoken, acts done, as well as other objective facts. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40 (2008).

{¶ 37} In support of his argument, relator cites *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994). In that case, the Ohio Supreme Court indicated that when an employee retires prior to becoming permanently and totally disabled, the employee is precluded from receiving PTD compensation only when the retirement is voluntary and constitutes an abandonment of the entire job market. Relator contends that his retirement from Roadway may have been voluntary; however, his testimony establishes that he did not abandon the entire job market.

{¶ 38} In support of its decision, the commission cited *State ex rel. Crisp v. Indus. Comm.*, 64 Ohio St.3d 507 (1992). In that case, the claimant, Willie Crisp, sustained a work-related injury but was able to continue working for his employer for many years until he decided to retire. Crisp was able to elect from various retirement options including early retirement, retirement due to a disability, or general retirement based on age plus years of service. Crisp chose the latter option, a retirement based on ages plus years of service.

{¶ 39} Six years later, Crisp applied for TTD compensation; however, the commission determined that he was precluded from receiving TTD compensation because he had voluntarily retired for reasons unrelated to his allowed conditions.

{¶ 40} Thereafter, Crisp filed an application for PTD compensation. The commission denied his application finding, among other things, that its prior decision regarding the voluntary nature of Crisp's retirement constituted res judicata and that Crisp was precluded from relitigating the issue.

{¶ 41} In upholding the commission's decision, the Supreme Court of Ohio stated in *Crisp*:

An employee-initiated retirement that is not precipitated by industrial injury is considered "voluntary." *State ex rel. Rockwell Internatl. v. Indus. Comm. (1988)*, 40 Ohio St.3d 44, 531 N.E.2d 678. Voluntary retirement precludes permanent total disability compensation. *State ex rel. Chrysler Corp. v. Indus. Comm. (1991)*, 62 Ohio St.3d 193, 580 N.E.2d 1082. In this case, claimant's permanent total disability denial was based on, among other things, voluntary retirement. Claimant argues that there is no evidence to support the commission's conclusion that he voluntarily retired. Upon review, we reject claimant's belated attempt to raise this argument.

Claimant seeks to relitigate an issue that was conclusively decided in early 1987. Claimant ignores the fact that the voluntary retirement issue was determined by a district hearing officer in November 1986. The commission ultimately affirmed that decision by an order mailed May 12, 1987, and the determination was not, thereafter, reversed. The issue must, therefore, be considered *res judicata*. See *Whitehead v. Gen. Tel. Co. (1969)*, 20 Ohio St.2d 108, 49 O.O.2d 435, 254 N.E.2d 10.

Id. at 508.

{¶ 42} The magistrate finds that the commission did not misapply the court's holding from *Crisp*. However, to the extent that relator argues that he did not abandon the entire job market and, was entitled to an award of PTD compensation, the magistrate finds that the commission did abuse its discretion.

{¶ 43} Ohio Admin.Code 4121-3-34 (D)(1) provides:

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

{¶ 44} In *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648 (1996), the claimant, Pearl J. McAtee, sustained a work-related injury to his knee. As a result of surgery and his altered gait that followed, McAtee also developed low back problems that

eventually required surgery. McAtee's job duties were modified to accommodate his restrictions and the record was devoid of any evidence that he had missed work due to the allowed conditions thereafter.

{¶ 45} At age 62, McAtee retired. Given the option of a PTD retirement and an early retirement at employee option, McAtee chose the latter in spite of the fact that he would have received greater benefits had he taken a PTD retirement. Further, McAtee applied for regular, not disability, Social Security Benefits at that time.

{¶ 46} Two years later, McAtee filed an application for PTD compensation and asserted that his retirement had been caused by the allowed conditions in his claim. The commission denied his application for PTD compensation based on his work history following his injury and surgeries, the fact that he took a regular retirement rather than a disability retirement at age 52, and chose to receive Social Security Retirement Benefits rather than Social Security Disability Benefits.

{¶ 47} Ultimately, the Ohio Supreme Court upheld the commission's determination after finding that there was some evidence in the record that his retirement was unrelated to his injury and therefore voluntary, and that there was some evidence demonstrating his intent to abandon the entire workforce. Specifically, the court noted his early retirement, receipt of Social Security Benefits, application for pension benefits, and his failure to seek other employment after he retired, as demonstrating his intent to abandon the entire job market.

{¶ 48} In the present case, pursuant to *Crisp*, the commission's prior determination that relator's retirement from Roadway was voluntary and precluded him from receiving TTD compensation was res judicata and the commission did not abuse its discretion in so finding. However, the commission never discussed or determined, whether, following his voluntary retirement from Roadway, relator voluntarily abandoned the entire workforce. Absent a determination on this issue, the commission did abuse its discretion when it denied relator's application for PTD compensation.

{¶ 49} Based on the foregoing, it is this magistrate's decision that relator has demonstrated that the commission abused its discretion in denying his application for PTD compensation and this court should grant his request for a writ of mandamus and

order the commission to determine whether or not relator voluntarily abandoned the entire job market.

/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).