[Cite as *State ex rel. Hootman v. Replex Mirror Co.*, 2011-Ohio-3788.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Arita Hootman,	:	
Relator,	:	
v.	:	No. 10AP-649
Replex Mirror Company and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 2, 2011

William R. Hamelberg, for relator.

Michael DeWine, Attorney General, and *Allan Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

FRENCH, J.

{¶1} Relator, Arita Hootman, filed an original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant a writ of mandamus ordering the commission to vacate its April 22, 2010 order that finds workforce abandonment and to enter a new order that adjudicates the merits of relator's application for TTD compensation beginning January 28, 2010. No objections to the magistrate's decision have been filed.

{¶3} Having found no errors on the face of the magistrate's decision, we adopt that decision, including the findings of fact and conclusions of law contained in it, as our own, except that we correct a typographical error in paragraph 44. Accordingly, we grant a writ of mandamus ordering the commission to vacate its April 22, 2010 order that finds workforce abandonment and to enter a new order that adjudicates the merits of relator's application for TTD compensation beginning January 28, 2010.

Writ of mandamus granted.

BRYANT, P.J., and TYACK, J., concur.

A P P E N D I X

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Respondents.	:	

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

Rendered on April 18, 2011

William R. Hamelberg, for relator.

Michael DeWine, Attorney General, and *Allan Showalter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} In this original action, relator, Arita Hootman, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying her temporary total disability ("TTD") compensation beginning January 28, 2010 and to enter an order granting the compensation.

Findings of Fact:

{¶5} 1. On October 9, 2003, relator injured her lower back while employed as a factory supervisor for respondent Replex Mirror Company ("employer"), a state-fund employer. On that date, relator felt a "snap" in her lower back when she bent down to disconnect a vacuum hose.

{¶6} 2. The industrial claim (No. 03-428857) is allowed for "sprain lumbar region; L3-4 disc displacement; annular tear L4-5; adjustment disorder with depressed mood." The claim is disallowed for "disc displacement at L4-5."

{¶7} 3. On October 14, 2003, relator initiated treatment with chiropractor Christopher L. Gehrisch, D.C.

{¶8} 4. Relator has undergone three lower back surgeries. The surgeries were performed in July 2006, November 2007, and on January 28, 2010.

{¶9} 5. On August 27, 2008, while receiving TTD compensation for the allowed physical conditions of the claim, relator was examined at the Ohio Bureau of Workers' Compensation's ("bureau") request by Ryan D. Herrington, M.D. Dr. Herrington examined only for the allowed physical conditions of the claim. In his five-page narrative report, Dr. Herrington opined that the allowed physical conditions had reached maximum medical improvement ("MMI"), that it "is unlikely [relator] is able to return to her former position of employment," and that she is capable of sustained remunerative employment "in a sedentary capacity."

{¶10} 6. On September 18, 2008, citing Dr. Herrington's report, the bureau moved for termination of TTD compensation on grounds that the industrial injury had reached MMI.

{¶11} 7. Following a November 3, 2008 hearing, a district hearing officer ("DHO") issued an order terminating TTD compensation effective the hearing date on grounds that the allowed conditions had reached MMI.

{¶12} 8. Relator administratively appealed the DHO's order of November 3, 2008.

{¶13} 9. Following a December 11, 2008 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of November 3, 2008. Exclusively relying upon Dr. Herrington's report, the SHO terminated TTD compensation effective November 3, 2008 based upon a finding that the allowed conditions of the claim had reached MMI.

{¶14} 10. On February 27, 2009, relator moved for a psychiatric claim allowance.

{¶15} 11. On April 1, 2009, the bureau mailed an order additionally allowing the claim for "adjustment disorder with depressed mood."

{¶16} 12. The bureau's April 1, 2009 order was not administratively appealed.

{¶17} 13. On August 25, 2009, orthopedic surgeon, R. Douglas Orr, M.D., completed a C-9 request for authorization of lower back surgery.

{¶18} 14. Apparently, the bureau denied the C-9 request.

{¶19} 15. Following a November 13, 2009 hearing, a DHO issued an order granting the C-9 request. The DHO's order of November 13, 2009 was not administratively appealed.

{¶20} 16. On January 28, 2010, relator underwent lower back surgery. The operative report of Dr. Orr describes the surgical procedure as a "redo bilateral L5-S1 laminotomy, foraminotomy."

{¶21} 17. Earlier, on January 27, 2010, treating chiropractor Bryce Arndt, D.C., completed a C-84 certifying TTD beginning January 28, 2010. On the C-84, Dr. Arndt wrote "[p]atient to receive surgery on low back this week, will require therapy following procedure."

{¶22} 18. Following a March 12, 2010 hearing, a DHO issued an order denying relator's C-84 request for TTD compensation.

{¶23} 19. Relator administratively appealed the DHO's order of March 12, 2010.

{¶24} 20. Following an April 22, 2010 hearing, an SHO issued an order stating that the DHO's order is "modified." The SHO's order explains:

> * * * The Staff Hearing Officer reaches the same ultimate conclusion reached by the District Hearing Officer that the C-84 filed 01/28/2010 is properly denied. However, the District Hearing Officer order is modified to substitute the following rationale for the decision in place of that of the District Hearing Officer's rationale.
>
> The Injured Worker's C-84 request for payment of temporary total disability compensation filed 01/28/2010 is denied. Payment of temporary total disability compensation is specifically denied from 01/28/2010 through 03/12/2010, the date of the District Hearing Officer hearing, and to continue. The Staff Hearing Officer finds the Injured Worker has not met her burden of proof with regard to entitlement of this period of temporary total disability compensation.
>
> The Staff Hearing Officer finds that the requested start date of 01/28/2010 corresponds with the Injured Worker's surgery in this claim. The Staff Hearing Officer notes that surgery was

specifically approved by a District Hearing Officer order issued 11/18/2009. That order approved the bilateral L5 foraminotomy surgery. Therefore, the Staff Hearing Officer does not find it proper to deny the payment of temporary total disability compensation based on an indication that surgery was for a non-allowed condition, as the surgery was previously approved by the Industrial Commission in this claim.

However, the Staff Hearing Officer finds that the Injured Worker is not properly entitled to the payment of temporary total disability compensation in this claim post this latest surgery. The Staff Hearing Officer finds that the Injured Worker was previously found to have reached maximum medical improvement in this claim for the allowed physical conditions on 11/03/2008. At the time of the 11/03/2008 hearing, the District Hearing Officer had relied on the medical report of Dr. Herrington dated 09/17/2008 in finding the Injured Worker had reached Maximum medical improvement. The Staff Hearing Officer notes that Dr. Herrington's report specifically indicated that the Injured Worker was not able to return to her former position of employment. However, Dr. Herrington specifically indicated that the Injured Worker was capable of participating in sustained remunerative employment in a sedentary capacity at that time. It appears that between the time of the maximum medical improvement finding on 11/03/2008, and the dated of the Injured Worker's surgery on 01/28/2010, the Injured Worker made no attempt to return to work consistent with her physical capacity of sedentary work as found by Dr. Herrington. The Staff Hearing Officer notes that the Injured Worker has not worked since approximately 2005. Based on the Pierron [v. Indus. Comm., 120 Ohio St.3d 40, 2008-Ohio-5245] Supreme Court case, the Staff Hearing Officer finds that the Injured Worker is not entitled to the payment of temporary total disability compensation following her surgery. Dr. Herrington had opined that the Injured Worker was physically capable of performing sedentary work at the time of the maximum medical improvement finding in November of 2008. The Injured Worker thereafter chose not to seek employment consistent with that sedentary capability and was not in the workforce at the time of her alleged new period of disability on 01/28/2010. The Staff Hearing Officer therefore finds that the

> Injured Worker had no lost earnings to replace as of the time of the 01/28/2010 surgery as the Injured Worker was not a part of the active workforce at that time, despite Dr. Herrington's opinion of a sedentary work capability.
>
> Based on the above, the Injured Worker's C-84 request filed 01/28/2010 remains denied. The Staff Hearing Officer has reviewed and considered all the evidence on file prior to rendering this decision.

(Emphasis sic.)

{¶25} 21. The record contains the commission's notice of the April 22, 2010 hearing. The commission's notice states:

> ISSUES TO BE HEARD:
> 1) Temporary Total Disability

{¶26} 22. On May 14, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of April 22, 2010.

{¶27} 23. On July 9, 2010, relator, Arita Hootman, filed this mandamus action.

Conclusions of Law:

{¶28} Citing *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, the commission, through its SHO, determined that relator is ineligible for TTD compensation because, following the commission's MMI determination, she failed to search for the sedentary work that Dr. Herrington found her capable of performing in a report upon which the commission exclusively relied to support its MMI determination. Based upon those findings, the commission concluded that relator voluntarily abandoned the workforce and is, thus, ineligible for TTD compensation.

{¶29} The main issue is whether the commission's reliance upon *Pierron* is misplaced. Finding that it is, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶30} Analysis begins with a review of the *Pierron* case.

{¶31} Richard Pierron was seriously injured in 1973 while working as a telephone lineman for Sprint/United Telephone Company ("Sprint/United"). Thereafter, Sprint/United offered him a light-duty warehouse job consistent with his medical restrictions, and he continued to work in that position for the next 23 years.

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

{¶33} In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, he moved for TTD compensation beginning June 2001. The commission denied the motion finding that Pierron had voluntarily abandoned his former position of employment. In its decision, the commission wrote:

> [T]he injured worker voluntarily abandoned the work force when he retired in 1997. Despite the dissent's attempt to characterize the departure from the work force as involuntary, there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired. The injured worker's choice to retire was his own. He could have accepted a lay-off and sought other work but he chose otherwise. It is not just the fact of the retirement that makes the abandonment voluntary in this claim, as the passage of time without the injured worker having worked speaks volumes. The key point * * * is that the injured

> worker's separation and departure from the work force is wholly unrelated to his work injury.

Industrial Commission decision, quoted in *Pierron*, at ¶6.

{¶34} Holding that the commission did not abuse its discretion in denying Pierron TTD compensation, the *Pierron* court explains:

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

{¶35} Thus, the *Pierron* case involved a job departure followed by years of failure to seek other employment. While the job departure was not of Pierron's choosing, he, nevertheless, abandoned the workforce by his inaction after the job departure.

{¶36} Unlike the *Pierron* case, the instant case does not actually involve a job departure. That is, relator's job status with respect to his employer of injury was not the subject of the commission's determination of TTD ineligibility.[1] Here, the commission focused exclusively upon relator's inaction following the commission's MMI determination. Under such circumstances, the instant case marks the commission's expanded application of the *Pierron* rationale to TTD eligibility.

{¶37} Because the commission endeavors here to apply *Pierron* to post MMI inactivity, it may be helpful to set forth basic law regarding a claimant's right to further TTD compensation after an initial determination of MMI.

{¶38} R.C. 4123.56(A) provides that TTD compensation shall not be paid "when the employee has reached the maximum medical improvement." The statute further provides:

> * * * The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

[1] On March 17, 2009, at the bureau's request, relator was examined by psychologist Ken Tecklenburg, Ph.D. In his 13-page narrative report, Dr. Tecklenberg states: "[s]he was terminated in May 2004 and she attempted another job in May 2005 but only lasted a few weeks due to pain." Apparently, the employer has not claimed that the job termination was voluntary.

{¶39} To reinstate TTD compensation after an MMI determination, new and changed circumstances must be shown. *State ex rel. Josephson v. Indus. Comm.*, 101 Ohio St.3d 195, 2004-Ohio-737. The only new and changed circumstances sufficient to re-entitle a worker to TTD compensation is the worsening of the allowed conditions accompanied by a prognosis that the worsening is only temporary. Id.

{¶40} Turning to the instant case, underpinning the commission's conclusion of workforce abandonment is its finding that relator was physically capable of performing sedentary work following the MMI finding.

{¶41} However, shortly after the commission's MMI determination, relator moved for a psychiatric claim allowance which the bureau recognized on April 1, 2009. With the recognition of the psychiatric condition, it can no longer be said that Dr. Herrington's opinion that relator can perform sedentary employment is supported by an evaluation of all the allowed conditions in the claim. Under such circumstances, Dr. Herrington's report is not some evidence supporting a necessary determination that all of the allowed conditions of the claim permit sedentary work.

{¶42} Here, the commission's determination of residual functional capacity following the MMI determination is akin to a commission determination of residual functional capacity during adjudication of an application for permanent total disability ("PTD") compensation. See Ohio Adm.Code 4121-3-34(B)(4)'s definition of "residual functional capacity." Accordingly, in determining that residual functional capacity was at the sedentary level following the MMI determination, the commission was required to consider all of the allowed conditions of the claim just as it does in its adjudication of

PTD applications. See *State ex rel. Johnson v. Indus. Comm.* (1988), 40 Ohio St.3d 339; *State ex rel. Cupp v. Indus. Comm.* (1991), 58 Ohio St.3d 129; *State ex rel. Zamora v. Indus. Comm.* (1989), 45 Ohio St.3d 17; *State ex rel. Didiano v. Beshara* (1995), 72 Ohio St.3d 255; *State ex rel. Roy v. Indus. Comm.* (1996), 74 Ohio St.3d 259.

{¶43} The commission's failure to rely upon some evidence to support a necessary finding that all of the allowed conditions of the claim permit sedentary work is fatal to its reliance upon the *Pierron* concept that workforce abandonment can occur by a failure to seek employment that the claimant is capable of performing.

{¶44} Thus, even if there can be expanded application of the *Pierron* rational[e] to a claimant's inaction following an MMI determination, that cannot occur here because the commission has failed to support its finding of sedentary work capacity with some evidence that all of the allowed conditions permit sedentary work.

{¶45} In short, the commission's exclusive reliance on Dr. Herrington's report flaws its determination of a capacity for sedentary work and, thus, fatally undermines its conclusion of workforce abandonment.

{¶46} The magistrate further notes that citing *State ex rel. Canter v. Indus. Comm.* (1986), 28 Ohio St.3d 377, relator contends that the commission's notice of the April 22, 2010 hearing fails to satisfy due process of law in apprising of the issue to be heard. Relator claims that the commission was required to specifically notice the issue of sedentary work capacity. Given that Dr. Herrington's report is not some evidence of sedentary work capacity based upon all of the allowed conditions, it is unnecessary to

address relator's challenge to the commission's notice of the April 22, 2010 hearing. Accordingly, the magistrate does not address relator's due process claim.

{¶47} Accordingly, for all of the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of April 22, 2010 that finds workforce abandonment, and to enter a new order that adjudicates on the merits relator's C-84 application for TTD compensation beginning January 28, 2010.

/s/ Kenneth W. Macke
KENNETH W. MACKE
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).