

1 The State ex rel. DeZarn, Appellant, v. Industrial Commission of Ohio,
2 Appellee.

3 [Cite as *State ex rel. DeZarn v. Indus. Comm.* (1996), _____ Ohio St.3d
4 _____.]

5 *Workers' compensation -- Application for permanent total disability*
6 *compensation -- Compensation denied when Industrial*
7 *Commission determines claimant's age, not injury, was the*
8 *overwhelming impediment to a return to work -- Commission's*
9 *denial of compensation not an abuse of discretion when*
10 *supported by "some evidence."*

11 (No. 94-1232--Submitted December 5, 1995--Decided February 7,
12 1996.)

13 Appeal from the Court of Appeals for Franklin County, No.
14 93APD04-554.

15 In 1983, appellant-claimant, Howard S. DeZarn, injured his back and
16 knees while in the course of and arising from his employment with the
17 Cincinnati Area Council on Aging. He immediately returned to work, but
18 was "terminated" five weeks later. The character of (firing or layoff) and
19 reason for termination are unknown. Claimant's workers' compensation
20 claim was allowed for "sprain of left knee, dislocated medial meniscus,

1 cartilage right knee and sciatic radiculitis of low back.” Treatment

2 throughout has been conservative.

3 Claimant moved to California in 1985. In 1988, claimant filed a

4 motion with appellee, Industrial Commission of Ohio, for permanent total

5 disability compensation. Dr. Robert Bingham reported that same year that

6 claimant was incapable of sustained remunerative employment.

7 In 1991, at the commission’s request, Dr. Lee A. Woolf examined

8 claimant. Dr. Woolf ultimately assessed a twenty-seven percent permanent

9 partial impairment attributable to claimant’s allowed conditions. Dr. Woolf

10 concluded, “This gentleman, somewhere in his 60’s, age uncertain, was not

11 entirely cooperative in this examination, but I think that we were able to

12 secure the correct measurements and things to arrive at a determination.

13 The true limiting factor on his ability to work, in my opinion, is time and the

14 natural progression of aging. I think his industrial mishaps have long ago

15 healed and what he has is what he has. ***”

16 The commission denied permanent total disability compensation, but

17 the Court of Appeals for Franklin County, pursuant to claimant’s mandamus

18 complaint, returned the cause to the commission for further consideration

1 and amended order, under *State ex rel. Noll v. Indus. Comm.* (1991), 57
2 Ohio St. 3d 203, 567 N.E.2d 245. The commission again denied
3 compensation, stating:

4 “The reports of Doctor(s) Bingham, [and] Woolf were reviewed and
5 evaluated. The order is based particularly upon the reports of Doctor(s)
6 [sic] Woolf, evidence in the file and/or evidence adduced at the hearing.

7 “The claimant is 71 years old and has a work history as a construction
8 worker, logger and heavy equipment operator. Commission Specialist, Dr.
9 Woolf, has indicated that the claimant has a 27% permanent partial
10 impairment from the allowed conditions in the claim. He further indicated
11 that the true limitation [sic] factor on his ability to work was time and the
12 natural progression of aging. Given the relatively small percentage of
13 impairment assigned by Dr. Woolf, the claimant’s age is the primary
14 obstacle in his returning to work. It is found that the disability resulting
15 from the allowed conditions of the claim do[es] not permanently preclude a
16 return to any form of sustained remunerative employment.”

17 Claimant again filed a complaint in mandamus in the court of appeals,
18 alleging that the commission had abused its discretion in once more denying

1 permanent total disability compensation. The court of appeals denied the
2 writ.

3 This cause is now before this court upon an appeal as of right.

4 *William D. Snyder & Associates* and *J. Jeffrey Albrinck*, for appellant.

5 *Betty D. Montgomery*, Attorney General, and *Charles Zamora*,

6 Assistant Attorney General, for appellee.

7 *Per Curiam*. Claimant seeks to compel a permanent total disability
8 compensation award pursuant to *State ex rel. Gay v. Mihm* (1994), 68 Ohio
9 St.3d 315, 626 N.E. 2d 666. For the reasons to follow, we deny the
10 claimant's request and affirm the judgment of the court of appeals.

11 Preliminary to any consideration of *Gay* relief is a finding that *Noll*
12 has not been met. *State ex rel. Sebestyen v. Indus. Comm.* (1994), 71 Ohio
13 St.3d 36, 641 N.E.2d 197. In this case, the commission clearly articulated
14 its reason for the denial of permanent total disability compensation--
15 claimant's age, not injury, was deemed to be the overwhelming impediment
16 to a return to work.

17 In *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App. 3d
18 757, 763, 598 N.E.2d 192, 196, the court of appeals observed:

1 “The non-medical factors include those that may, in certain instances,
2 be held to constitute causation for the person being unable to engage in
3 substantially remunerative employment despite the medical disability from
4 the allowed condition(s). For example, claimant may be disabled at age
5 fifty-five from returning to the former position of employment but, at that
6 time, be capable of obtaining sustained remunerative employment within the
7 medically limiting capabilities that the claimant has, after considering all
8 non-medical factors, including age. Ten or fifteen years may elapse with the
9 physical condition remaining approximately the same. At that time, the age
10 factor may be combined with the disability to disqualify claimant from any
11 sustained remunerative employment. *In that event, the Industrial*
12 *Commission should have the discretion to find that the sole causal factor is*
13 *the increase in age rather than the allowed disability.”* (Emphasis added.)

14 *Speelman* makes an outstanding point. Permanent total disability
15 compensation was never intended to compensate a claimant for simply
16 growing old. Therefore, the commission must indeed have the discretion to
17 attribute a claimant’s inability to work to age alone and deny compensation
18 where the evidence supports such a conclusion.

