[Cite as *State ex rel. AT&T Teleholdings, Inc. v. Indus. Comm.*, 2012-Ohio-3380.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. AT&T Teleholdings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-369
The Industrial Commission of Ohio and Deborah Warner,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on July 26, 2012

Porter Wright Morris & Arthur, LLP, Fred J. Pompeani and *Rebecca A. Kopp*, for relator.

Michael DeWine, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Spitler & Williams-Young Co., L.P.A., Marc G. Williams-Young and *William R. Menacher*, for respondent Deborah Warner.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, AT&T Teleholdings, Inc. ("AT&T), commenced this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding temporary total disability ("TTD") compensation to respondent Deborah Warner ("claimant"), and to enter an order denying said compensation.

{¶ 2} The matter was assigned to a magistrate of this court pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision

that included findings of fact and conclusions of law and a recommendation that this court deny the requested writ. The magistrate's decision is appended to this decision.

{¶ 3} For the reasons that follow, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, and deny the requested writ of mandamus.

I. BACKGROUND

{¶ 4} AT&T employed claimant for nearly 35 years. In February 2008, claimant held the position of "supply attendant." During her employment, and at least as early as 2004, AT&T had established a buyout program known within AT&T as the voluntary supplemental income protection program ("buyout" or "VSIPP"). The VSIPP contemplates the replacement of nonsurplus AT&T employees by surplus employees in order to reduce excess workforce. Nonsurplus employees participating in the program voluntarily terminate their employment, thereby vacating their positions, which are then filled by surplus employees. A nonsurplus employee leaving AT&T receives a buyout payment at the time he or she terminates their employment.

{¶ 5} AT&T requires that eligible employees interested in being considered for the buyout program execute and submit a "VSIPP Candidate Request Form" documenting their interest. On January 22, 2008, claimant signed such a form, making herself a potential candidate for participation in the buyout program. The form provided that she was under no obligation to accept a VSIPP buyout offer should AT&T make one. It further advised that, if an offer to participate were made, she would have two business days to confirm her acceptance and willingness to voluntarily terminate her employment. Claimant had submitted similar forms on other occasions prior to 2008.

{¶ 6} On February 12, 2008, claimant slipped and fell on an ice-covered dock during her employment and suffered an injury to her left shoulder, for which she received workers' compensation. On June 27, 2008, she underwent surgery to repair her shoulder. Claimant thereafter received TTD compensation.

{¶ 7} On January 27, 2009, claimant's doctor, Dr. Levine, released her to return to work on February 12, with restrictions against lifting objects greater than five pounds, overhead motions, and repetitive movements. Claimant's supply attendant position

involved lifting objects up to 75 pounds, which was not compatible with her medical restrictions.

{¶ 8} On February 9, 2009, claimant returned to work at AT&T and was assigned light-duty work within her medical restrictions.

{¶ 9} On February 16, 2009, AT&T advised claimant through a "VSIPP Employee Letter" that she was a potential candidate for the VSIPP program. The letter indicated that claimant had two working days to accept the offer. Claimant indicated on the face of the letter her acceptance of the buyout offer and returned the letter to the company. AT&T thereafter matched a surplus employee to claimant's supply attendant position, and, on April 9, 2009, she signed a form which stated "I elect to voluntarily terminate my employment with AT&T and ACCEPT SIPP benefits." AT&T paid claimant $31,000 as a lump-sum VSIPP payment. Claimant's last day on AT&T's payroll was April 10, 2009.

{¶ 10} On January 25, 2010, Dr. Levine completed a request for authorization for workers' compensation purposes of additional left-shoulder surgery. AT&T requested an additional medical examination by a second doctor, Dr. Purewal, who concluded on March 8, 2010 that additional surgery was "necessary and appropriate and directly related to the work-related injury of [February] 12, 2008." Claimant underwent the second surgery on April 16, 2010.

{¶ 11} On May 27, 2010, Dr. Levine certified a period of TTD beginning on April 16, 2010, the date of the second surgery, through an estimated return-to-work date of July 17, 2010. Claimant moved for TTD compensation for a period beginning April 16, 2010.

{¶ 12} On August 3, 2010, a district hearing officer ("DHO") heard claimant's motion for TTD. At the hearing, claimant testified that she accepted the buyout offer, left AT&T, and began receiving pension benefits because of her shoulder injury and her inability to do her former job.

{¶ 13} The DHO issued an order denying claimant's motion for TTD based on her conclusion that claimant had abandoned the workforce on April 10, 2009, claimant's last day on the AT&T payroll. The DHO noted that claimant had testified that she accepted the buyout in February of 2009 "because, with her injury she did not believe that she could continue to work." But the DHO further observed that "it appears that modified work

would have continued to be made available to [claimant] had she chose[n] to continue employment."

{¶ 14} Claimant administratively appealed the DHO order and, on September 17, 2010, a staff hearing officer ("SHO") conducted a hearing. The SHO found, contrary to the DHO, that claimant's acceptance of the buyout was not voluntary but, rather, was prompted by her injury. He noted that claimant's pension was reduced because she retired prior to reaching age 55. He further observed that claimant's total income after retirement, consisting of retirement benefits and Social Security disability benefits, totaled nearly $13,000 per year less than she made at the time of her injury. Moreover, the SHO recounted that claimant had testified that she had been offered—and refused—a buyout in the fall of 2007, only months before her February 2008 injury. He further observed that "the contemporaneous medical records support [claimant's] testimony that her decision to accept the [buyout] was involuntary in nature, since her motivation for retiring was the pain and restrictions that were proximately related to the allowed conditions in this claim." (See SHO order at 4.) The SHO concluded that AT&T had "not met its burden of proving that the persuasive evidence supports a factual finding of a 'voluntary abandonment.' "

{¶ 15} AT&T timely appealed to the commission. On October 26, 2010, the commission refused AT&T's appeal. AT&T thereafter initiated this original action in mandamus.

II. Relator's Objections

{¶ 16} On January 4, 2012, relator filed five objections to the magistrate's decision. Claimant filed a memorandum in reply on January 18, 2012, and the commission filed a memorandum contra on January 30, 2012. Relator's objections are as follows:

> 1. The Magistrate erroneously denied AT&T's request for a full writ of mandamus, in that the Stipulated Record of Evidence shows that the requested temporary total disability compensation is barred on the ground that Claimant voluntarily retired from her employment with AT&T.
>
> 2. The Magistrate erred by concluding that this Court's prior decision in State ex rel. Furrie, Jr. v. Indus. Comm., 10th Dist. No. 03AP-370, 2004-Ohio-1977, fails to compel the conclusion that Claimant is ineligible for temporary total

> disability compensation on grounds that allegedly she financially benefited from taking her retirement.
>
> 3. The Magistrate incorrectly concluded that there is contemporaneous medical evidence corroborating Claimant's testimony that her retirement was injury induced.
>
> 4. The Magistrate erred by concluding that pre-printed declarations on the retirement forms stating that Claimant was electing to voluntarily terminate her employment with AT&T does not compel the legal conclusion that she voluntarily abandoned her employment with AT&T and is thus ineligible for temporary total disability compensation.
>
> 5. The Magistrate erred by concluding that Claimant's signing a VSIPP candidate request form prior to her industrial injury does not point to the conclusion that her retirement cannot be injury induced.

{¶ 17} In its first objection to the magistrate's decision, AT&T argues that an award of TTD to claimant is barred because she voluntarily retired. AT&T emphasizes that the documents claimant executed repeatedly used the word "voluntary" in describing the buyout program and her termination from employment. AT&T further points out that the record does not include any indication that Dr. Levine advised her to retire and establishes that she was working light duty at the time of her separation from the company without any expectation that the light-duty position would end in the foreseeable future.

{¶ 18} We have recently reaffirmed that an injury-induced retirement is involuntary and does not preclude TTD compensation. *State ex rel. Hoffman v. Rexam Beverage Can Co.*, 10th Dist. No. 11AP-533, 2012-Ohio-2469, ¶ 5. "[T]he nature of the claimant's retirement is a factual question that revolves around the claimant's intent at the time of retirement and * * * questions of credibility and the weight to be given evidence are within the commission's discretion as fact finder." *Id.* at ¶ 59, citing *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. The commission sits as the trier of fact in determining whether a worker's retirement was injury-induced, and therefore involuntary, and it is not this court's responsibility to consider the facts and determine the worker's motivation in retiring. *Id.* at ¶ 60. The commission does not

abuse its discretion in concluding that a retirement was injury-induced where some evidence is contained in the record to support that conclusion. *Id.* at ¶ 46.

{¶ 19} The implied premise underlying AT&T's objection is that, in order for the commission to find that a claimant's retirement was injury-induced, the commission must have before it medical evidence documenting an express recommendation by a physician that a worker retire. But AT&T has failed to cite any precedent to support that premise and we reject it. We have previously held that a finding of an injury-induced retirement is not dependent upon production of evidence that a physician advised the worker to retire. *State ex rel. Black v. Indus. Comm.*, 10th Dist. No. 10AP-1168, 2012-Ohio-2589, ¶ 18. Accordingly, the fact that the record lacks documentation of a physician's opinion advising claimant to retire, constitutes relevant, but not determinative, evidence of claimant's motivation for retiring.

{¶ 20} Claimant testified that she would not have retired but for her shoulder injury. The commission chose to accept that testimony. Its conclusion that claimant's retirement was injury-induced is bolstered by the fact that she refused a buyout that had been offered to her in the fall of 2007, only months prior to her February 2008 injury. In short, some evidence supported the commission's conclusion that claimant's retirement was injury-induced. Accordingly, the commission did not abuse its discretion. AT&T's first objection is therefore not well-taken.

{¶ 21} In its second objection, AT&T similarly argues that claimant was ineligible to receive TTD because she financially benefited from her retirement, citing *State ex rel. Furrie, Jr. v. Indus. Comm.*, 10th Dist. No. 03AP-370, 2004-Ohio-1977. AT&T argues that the fact that claimant received a lump-sum payment of $31,000 at the time of her retirement is dispositive and precludes her receipt of TTD after her "elective decision" to voluntarily retire. We disagree. We acknowledge that the financial implications of claimant's retirement were relevant to determination of her motivation for retiring. But no single fact is dispositive or conclusive in determining claimant's intent. Furthermore, determination of the weight of the evidence was a matter for the commission.

{¶ 22} Moreover, the magistrate concluded that: (1) *Furrie* does not stand for the proposition that a retirement cannot be injury-induced simply because the claimant receives a financial benefit for retiring; and (2) the evidence was not clear that claimant

was better off financially in the long term as a result of accepting the buyout and retiring as opposed to continuing to work. We concur with the magistrate's analysis. See Appendix, ¶ 70-74. AT&T's second objection is therefore not well-taken.

{¶ 23} In its third objection, AT&T objects to the magistrate's conclusion that there is "an abundance of medical evidence corroborating claimant's testimony that she retired because of her injury." AT&T argues that the record lacked contemporaneous medical evidence to corroborate claimant's testimony that she was induced to retire by her injury, and that "[w]ith the exception of Claimant's testimony at the Industrial Commission hearing, there is no medical evidence in the record recommending or even suggesting that Claimant retire due to the allowed conditions in this claim." (AT&T's objections at 5.)

{¶ 24} AT&T makes this argument despite the fact that Dr. Levine noted on January 6, 2009 that claimant on that date continued to experience pain and tenderness; that her recovery had "plateaued"; and that she had been referred to another physician, Dr. Atallah, for pain management treatments. Moreover, Dr. Purewal noted in a report dated December 20, 2010, that claimant was continuing to experience "chronic aching with weakness and also tenderness at the left shoulder." Dr. Purewal further observed that, following claimant's 2008 surgery, she "went through physical therapy but continued to have problems with restricted range of motion" and "received treatment from Joseph Atallah, MD, with trigger point injections." Dr. Purewal's observations, although not made contemporaneously with claimant's decision to retire, tend to support the conclusion that claimant was experiencing pain and restricted range of motion at the time of that decision.

{¶ 25} This court recently considered a similar argument in a case where the commission determined that a retiree had not voluntarily abandoned his employment despite the absence of contemporaneous medical evidence. We did not find an abuse of discretion warranting the issuance of a writ of mandamus. Rather, we observed that:

> [W]e do not believe that the commission is bound by the medical evidence existing at the time the claimant filed for retirement to determine the voluntary nature of the departure. In a case involving permanent total disability, the Supreme Court, * * * found that: "[w]hile the commission may characterize retirement as voluntary based on a lack of contemporaneous medical evidence of disability, see [*State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011–

> Ohio–3089], it is not required to do so, because there may be other evidence that substantiates the connection between injury and retirement." *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011–Ohio–5027, ¶ 7.

State ex rel. Tamarkin Co., Giant Eagle, Inc. v. Indus. Comm., 10th Dist. No. 11AP-625, 2012-Ohio-2866, ¶ 4.

{¶ 26} At its root, AT&T's third objection constitutes a challenge to claimant's credibility as to her testimony that her injury induced her to retire. Precedent establishes that, while contemporaneous medical evidence is relevant to the commission's evaluation of a claimant's testimony concerning the claimant's motivation for retiring, ultimately determination of a claimant's credibility rests with the commission, and the commission's determination will be accepted so long as some evidence supports its decision. AT&T's third objection is therefore not well-taken.

{¶ 27} In its fourth objection, AT&T argues that repeated use in the buyout documentation of the word "voluntary" to describe claimant's termination compels the conclusion that her retirement was voluntary for purposes of applying the voluntary-abandonment doctrine. The magistrate observed, however, that the word "voluntary" has a specialized meaning in the workers' compensation context. We agree. Voluntary retirement is not synonymous with voluntary abandonment of employment for workers' compensation purposes. In analyzing whether a claimant has voluntarily abandoned employment, one must "look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire." *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44, 46 (1988). An "involuntary retirement" for purposes of the voluntary abandonment doctrine is a retirement that is causally related to the industrial injury. *Id.* at syllabus.

{¶ 28} AT&T further states that claimant was "working in a light duty position which would have continued for the foreseeable future" had she not accepted the buyout offer. (AT&T's Objections at 6.) AT&T thus suggests that the availability of light-duty work compels the conclusion that appellant is ineligible for TTD or, alternatively, that her injury was not causally related to her decision to retire. We disagree.

{¶ 29} It is true that R.C. 4123.56(A)[1] provides for the *termination* of TTD payments "when work within the physical capabilities of the employee is made available by the employer or another employer." Claimant was therefore ineligible for TTD after her return to light-duty work in February 2009. Indeed, AT&T itself states that claimant was not receiving TTD compensation at the time of her voluntary retirement.

{¶ 30} AT&T has not, however, cited any authority to support the conclusion that the availability of light-duty work precludes the establishment of a new period of TTD. Nor are we aware of any such authority. Rather, "R.C. 4123.56 has been defined as compensation for wages lost when a claimant's injury prevents a return to *the former position of employment*." (Emphasis added.) *Hoffman* at ¶ 43, citing *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982). TTD benefits, once awarded, are properly payable until one of the grounds for termination stated in R.C. 4123.56 is established. *State ex rel. Walls v. Indus. Comm.*, 10th Dist. No. 10AP-866, 2011-Ohio-5765, ¶ 38. ("TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached [maximum medical improvement]. See

[1] In relevant part, R.C. 4123.56(A) provides:

> In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. 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.

R.C. 4123.56(A); *State ex rel. Ramirez* [supra]."). Moreover, R.C. 4123.56(A) expressly provides that 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."

{¶ 31} Accordingly, that part of R.C. 4123.56(A) that deals with the availability of light-duty work is applicable in determining the propriety of *terminating* TTD. This case, however, concerns eligibility for a new period of TTD beginning on the date of claimant's second surgery—not discontinuation of ongoing TTD benefits. AT&T does not suggest that it, or anyone else, had offered claimant an opportunity to perform light-duty work compatible with her medical restrictions after her second surgery and that she had refused it. Had AT&T provided evidence of this nature, claimant would not have been entitled to ongoing TTD.

{¶ 32} In short, the critical fact for purposes of determining whether appellant had voluntarily abandoned the workplace is whether claimant's shoulder injury was causally related to her retirement—not whether she could have continued to work at AT&T in a light-duty capacity.

{¶ 33} It is also true that a worker may permanently remove himself from the workforce so as to make the worker ineligible thereafter for a new period of TTD benefits. That is, a claimant's complete abandonment of the entire workforce in the months following either voluntary or involuntary abandonment will preclude TTD compensation altogether. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. But, in the case at bar, neither claimant nor AT&T produced any evidence as to the actions, if any, claimant took to seek employment in the one-year period[2] between her retirement and her second surgery. Nor did the record include evidence either supporting or rebutting the conclusion that claimant had decided never to work again in the future. *Cf.*

[2] We note that, in *Pierron*, a four-year period expired between retirement and the claim seeking establishment of a new period of TTD. *Id.* at ¶ 11. Similarly, the Supreme Court of Ohio recently affirmed our approval of a commission determination that a retiree had permanently abandoned the labor force where there was evidence that the retiree had never sought other work in a six-year period following his retirement. *State ex rel. Corman v. Allied Holdings, Inc.*, ___ Ohio St.3d ___, 2012-Ohio-2579, affirming *State ex rel. Corman v. Allied Holdings, Inc.*, 10th Dist. No. 10AP-38, 2010-Ohio-5153, ¶ 6. In the case at bar, only one year passed between claimant's retirement and the proposed effective date of her second period of TDD, during which the evidence supports the conclusion that claimant continued to experience injury-related pain and decreased range of movement.

Pierron; *State ex rel. Lackey v. Indus. Comm*. 10th Dist. 08AP-262, 2009-Ohio-4208. Accordingly, the commission lacked evidence that claimant had permanently removed herself from the workforce after her retirement. Moreover, "because voluntary job abandonment is an affirmative defense, the burden of proof with respect to demonstrating voluntary abandonment/job departure falls upon the employer or the administrator." *State ex rel. Black v. Indus. Comm.*, 10th Dist. No. 10AP-1168, 2012-Ohio-2589, ¶ 18. We therefore defer to the commission's evaluation that claimant had not disqualified herself from payment of TTD benefits under the doctrine established in *Pierron* by voluntarily and permanently removing herself from the workforce. AT&T's fourth objection is therefore not well-taken.

{¶ 34} In its fifth and final objection, AT&T observes that claimant signed the buyout candidate form prior to her injury. It argues that this fact compels the conclusion that claimant's retirement was not injury-induced. But, the record clearly reflects that preliminary participation in the buyout program by executing the form did not bind an employee to accept a buyout offer. Claimant testified that every employee in her department had filled out one of the forms, which was no more than a request to be considered for future buyouts. Moreover, the fact that she signed a similar form at a previous point in time, was offered a buyout and refused it, refutes AT&T's implication that signing the form meant that claimant had at that time, and prior to her injury, decided to take a buyout if it were offered to her. AT&T's fifth objection is therefore not well-taken.

III. CONCLUSION

{¶ 35} We have independently reviewed the record and overrule AT&T's five objections. We reject its argument that review of the evidence "conclusively proves" that claimant's decision to retire constituted voluntary abandonment of employment. The weight of the evidence was a matter for the commission to determine, and it determined, based on some evidence in the record, that claimant had not voluntarily abandoned her employment with AT&T. We therefore adopt the magistrate's decision as our own, including the findings of fact and conclusions of law therein, and deny the requested writ of mandamus. *Objections overruled; writ denied.*

BRYANT and TYACK, JJ., concur.

———————————

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. AT&T Teleholdings, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-369
The Industrial Commission of Ohio and Deborah Warner,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on December 21, 2011

Porter Wright Morris & Arthur, LLP, Fred J. Pompeani, and *Rebecca A. Kopp,* for relator.

Michael DeWine, Attorney General, and *John R. Smart,* for respondent Industrial Commission of Ohio.

Spitler & Williams-Young Co., L.P.A., Marc G. Williams-Young, and *William R. Menacher,* for respondent Deborah Warner.

IN MANDAMUS

{¶ 36} In this original action, relator, AT&T Teleholdings, Inc. ("AT&T" or "relator"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding temporary total disability ("TTD")

compensation to respondent Deborah Warner ("claimant") beginning April 16, 2010, and to enter an order denying the compensation on eligibility grounds.

Findings of Fact:

{¶ 37} 1. On February 12, 2008, claimant slipped and fell on an ice-covered dock while employed as a "supply attendant" for AT&T, a self-insured employer under Ohio's workers' compensation laws.

{¶ 38} 2. The industrial claim (No. 08-812093) is allowed for:

> Concussion; dorsal/thoracic muscle strain; partial thickness rotator cuff tear, left shoulder; substantial aggravation of pre-existing acromioclavicular joint arthritis, left shoulder; partial thickness rotator cuff tear, left shoulder; substantial aggravation of pre-existing acromioclavicular joint arthritis, left shoulder.

{¶ 39} 3. On June 27, 2008, claimant underwent left shoulder surgery performed by Jason W. Levine, M.D. The operative report lists the following surgical procedures performed:

> [One] Left shoulder arthroscopy[.]
> [Two] Biceps tenotomy.
> [Three] Rotator cuff repair[.]
> [Four] Acromioplasty.
> [Five] Distal clavicle excision.

{¶ 40} 4. On January 6, 2009, claimant was examined by Dr. Levine on a follow-up visit. Dr. Levine wrote:

> HISTORY OF PRESENT ILLNESS: This is a 5[3]-year-old female status post left rotator cuff repair in June 2008. This patient states that her pain has improved since prior to the surgery, however over the past few weeks she has had little to no improvement in her pain or range of motion. The patient currently has stopped going to any physical therapy after the physical therapist said that she had plateaued in her progression and improvement.
>
> * * *
>
> IMPRESSION: A 53-year-old female status post left rotator cuff repair in June 2008.

> PLAN: The patient was given a referral to see Dr. Atallah in pain management. We provided the patient with return to work papers with restrictions, including no lifting greater than 5 pounds, no overhead motion, no repetitive movements. We will see the patient back in 2 months.

{¶ 41} 5. On January 27, 2009, Dr. Levine issued a "release slip" that certifies that claimant may return to work on February 12, 2009 with the following restrictions:

> —no lifting greater than 5 lbs
> —no overhead motion
> —no repetitive movements

{¶ 42} 6. On or about February 9, 2009, claimant returned to work at AT&T.

{¶ 43} 7. AT&T offered to its employees a "Voluntary Supplemental Income Protection Program" ("VSIPP").

{¶ 44} 8. Earlier, on January 22, 2008, the month prior to her injury date, claimant signed an AT&T form captioned "VSIPP Candidate Request Form." The form contains the following pre-printed information:

> By submitting this Voluntary SIPP Candidate Request form, I understand the following:
>
> - I am under no obligation to accept a Voluntary SIPP Payment offer, nor is the Company obligated to offer me such payment.
> - I understand that, if such payment is offered to me, I will have two (2) business days following the offer to confirm my acceptance and my willingness to be voluntarily terminated by the Company.
> - I understand that if I accept this offer my decision may not be revoked.
> - If I fail to confirm or refuse acceptance, my Request will be canceled [and] I will be unable to resubmit a Request for thirty (30) calendar days.
> - This request will remain on file until such time that a SIPP offer is made to you or you notify the local Staffing Office in writing that you no longer wish to be considered for the VSIPP Candidate Request form.

{¶ 45} 9. On February 16, 2009, claimant signed a "VSIPP Employee Letter" indicating her acceptance of the "Voluntary SIPP offer." The letter she signed explained:

> Pursuant to article 26.40 of the CWA Contract, Non-Management Staffing is in the process of matching current qualified Surplus employees with Voluntary SIPP candidates. You have been identified as a potential candidate in the Voluntary SIPP program. This is a result of the VSIPP Candidate Request form that you submitted.
>
> After reviewing the information provided, you will have two (2) working days to confirm your acceptance of this potential offer[.] * * *

{¶ 46} 10. During March 2009, claimant's supply attendant position was matched with a "surplus employee" who accepted the transfer.

{¶ 47} 11. On April 9, 2009, claimant accepted AT&T's VSIPP offer by signing a form below the pre-printed declaration:

> I elect to voluntarily terminate my employment with AT&T and ACCEPT SIPP benefits.

(Emphasis sic.)

{¶ 48} 12. Claimant then received a lump sum severance of $31,000 in VSIPP benefits.

{¶ 49} 13. On January 25, 2010, Dr. Levine completed a C-9 request for authorization of additional left shoulder surgery.

{¶ 50} 14. On March 8, 2010, at relator's request, claimant was examined by S. S. Purewal, M.D. In his four-page narrative report, Dr. Purewal opines:

> Based on the above evaluation of this patient and review of the medical records and with specific reference to the MRI findings of January 15, 2010, it is my opinion that Ms[.] Warner's current left shoulder symptoms and findings are directly and causally related to the work-related injury of December [sic] 12, 2008, and the findings are due to the allowed condition of rotator cuff tear of the left shoulder[.]
>
> Ms. Warner did have surgery for repair of the rotator cuff along with other procedures at the left shoulder on June 27, 2008, but she has continued to have problems with restricted range of motion and weakness. An MRI has shown failure of the previous rotator cuff repair and significant

> atrophy of the rotator cuff muscles[.] Under these circumstances, surgery for revision rotator cuff repair along with preoperative testing and postoperative rehabilitation would be considered necessary and appropriate and directly related to the work-related injury of December [sic] 12, 2008[.]

{¶ 51} 15. On April 16, 2010, claimant underwent left shoulder surgery performed by Dr. Levine.

{¶ 52} 16. On May 27, 2010, Dr. Levine completed a C-84 certifying a period of TTD beginning April 16, 2010 to an estimated return-to-work date of July 17, 2010. Relator disputed the C-84.

{¶ 53} 17. On June 1, 2010, citing Dr. Levine's C-84, claimant moved for TTD compensation beginning April 16, 2010.

{¶ 54} 18. On August 3, 2010, a district hearing officer ("DHO") heard claimant's motion. The hearing was recorded and transcribed for the record. At the hearing, during direct examination by claimant's counsel, the following exchange occurred:

> Q Deborah, how long have you been employed with AT&T?
>
> A Almost 35 years.
>
> Q Now, the timeframe I'm asking you about is before January of 2008. In the years before that, had you signed a candidate form for this SIPP program in the past?
>
> A Several times.
>
> Q Had you been made an offer based upon that program?
> A Yes.
>
> Q And had you accepted or refused that offer?
>
> A Refused.
>
> Q Your understanding is that by signing the candidate form it simply made you a part of this program so that if the employer came to you with an offer to buy-out so that somebody else would get that job, you had that option, correct?
>
> A Yes.

Q You did not have to actually accept the offer?

A No.

Q By signing the candidate form, you were not quitting your job at that point in time that you signed the form, were you?

A No.

Q You had signed this form a number of times in the past?

A Yes.

Q When an offer was made and you refused it, did you then have to sign a new candidate form to be involved?

A After a month.

Q In 2007 you had been made an offer or in 2006, sometime before January of 2008? If you don't remember the exact date, that's not critical.

A I think the fall of the year before they offered it in our department.

Q One other question: To your knowledge, this program was this made available to just you or other employees?

A Everyone in that department that had filled one out.

Q So before January of 2008, you had refused an offer?

A Yes.

Q So in January you could sign a new form?

A Yes.

Q Then in February of 2008, you were hurt on the job in terms of your shoulder, right?

A Yes.

Q What was your job position in February of 2008?

A I was a supply attendant.

Q Did you ever after February of 2008, return to the job as a supply attendant?

A I went back - - when my year was up, I either had to go back to work or I had to retire.

Q Did you go back as a supply attendant?

A Yes.

Q How long did you work as a supply attendant?

A I didn't actually work. Our bosses were out of town and I had to wait for him to come in, but I had told him because I was no longer able to do the job, I told him I was going to take an early retirement.

Q Were you released in February of 2009, this is the timeframe we're talking about, were you released without medical restrictions?

A No.

Q In fact, Dr. Levine had indicated that you had restrictions of five pound lifting and no over head motion and no repetitive motion with your arm; is that correct?

A That's correct. On my job I would have had to lift 75 pounds.

Q When you went back in February of '09, your last day of employment was when; do you remember?

A I think I went back the 11th or 12th - -

Q The 12th of February.

A --and I had to stay there for three days until my boss came into town. He told me to stay there, he told me not to really do anything because he didn't want me to get hurt on the job again.

Q What did you do?

A I sat there talking to people and read stuff on the computer.

Q You didn't do any work as a supply attendant?

A No.

Q You did apply for Social Security Disability?

A Yes.

Q Was that approved?

A Yes.

Q When you filled out an application for Social Security Disability, you had to list your medical problems for which you were applying?

A Yes.

Q Was one of those problems you listed your shoulder injury?

A Yes, and they also paid me back to the day for that injury.

Q They found you disabled back to February of 2008?

A Yes.

Q Your last full year of employment, how much did you earn?
A About 58,000.

Q The buy-out, there's a cap on the buy-out with the SIPP program that you took?

A Yes.

Q What was that?

A 31,000. The contract came up and it was - -

Q How much did you get from the buy-out?

A I think 33

Q $33,000?

A Yes.

Q That's a one-time thing?

A Yes.

* * *

Q How much is your pension from them? You have an annuity?

A I rolled it over into an annuity and I get 2,000 a month.

Q How much do you get a month Social Security?

A Now that Medicare kicks in, 17.

Q 1,700?

A Like 1,780 or something.

* * *

Q And I will point blank ask her at this point: Your decision to take the buy-out and retire, was that motivated by your shoulder injury and your inability to do your job?

A One thing might be kind of messed up, I probably didn't explain that part to you, that what I said about retiring. I had all that vacation time, they didn't actually offer that to me until April, not February.

HEARING OFFICER: So that's why we have your last day on the payroll as April 10th.

A Yes, but they offered me April, not February.

Q But my question to you is: Did your decision to do all this was because of your shoulder problem?

A Yes.

(Tr. 6-17.) (Emphasis omitted.)

{¶ 55} During the hearing, the following exchange occurred between the hearing officer and claimant:

> [Q] When had you planned on retiring, had you thought that through?
>
> [A] Well, I didn't plan on that soon. I had went through a divorce and I was by myself, and I've been there since high school. I hadn't planned on retiring until at least 62.

(Tr. 17.)

{¶ 56} 19. Following the August 3, 2010 hearing, the DHO issued an order denying claimant's C-84 request for TTD compensation. The DHO's order explains:

> The District Hearing Officer finds that the Injured Worker was temporarily and totally disabled due to surgery performed on 04/16/2010. The District Hearing Officer further finds that the Injured Worker abandoned the workforce on 04/10/2009.
>
> The Injured Worker had returned to light-duty with the risk Employer on 02/09/2009. While the Injured Worker returned to her former position of employment, her duties were modified in order to accommodate the Injured Worker's restrictions. This was done informally within the Injured Worker's department. It appears that modified work would have continued to be made available to the Injured Worker had she chose to continue employment. After returning to employment on 02/09/2009, the Injured Worker explored her retirement options. Since she had worked for the Employer for more than thirty years, the Injured Worker was eligible for her retirement along with a SIPP program. The SIPP program is an incentive program used to reduce the Employer's workforce in departments with excess manpower. The Injured Worker had explored this program in the past but had not accepted the SIPP program until after her return to work in February of 2009. The last date the Injured Worker was on the Employer's payroll was 04/10/2009.
>
> The Injured Worker argues that she had not seriously explored, and certainly had not accepted, the SIPP program in the past and chose to accept the [p]rogram in February of

> 2009 because, with her injury she did not believe that she could continue to work. However, there is no indication in the Injured Worker's medical [records] that her doctor was removing her from employment and it appears that the Injured Worker could have continued to work modified or full duty with her risk Employer.
>
> Therefore, the District Hearing Officer finds that the Injured Worker is not eligible for temporary total disability benefits.

{¶ 57} 20. Claimant administratively appealed the DHO's order of August 3, 2010.

{¶ 58} 21. Following a September 17, 2010 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order and awards TTD compensation beginning April 16, 2010, the date of claimant's surgery. The SHO's order explains:

> The Injured Worker's C-86 motion, filed 06/01/2010, requests the payment of temporary total disability compensation, "from April 16, 2010, to July 16, 2010, and continuing, based upon continuing proof of disability."
>
> The requested beginning date of temporary total disability compensation is the date that the Injured Worker underwent a left shoulder rotator cuff revision surgery at the University of Toledo Medical Center, performed by her attending orthopedic specialist, Jason William Levine, M.D., for treatment of the allowed conditions under this claim.
>
> Dr. Levine filed a C-9 Physician's Request for Medical Service, dated 01/25/2010, requesting authorization for the aforesaid left shoulder rotator cuff revision surgery. Therefore, the Self-Insuring Employer had the Injured Worker examined by an independent orthopedic specialist, Sukhjit S. Purewal, M.D., on 03/08/2010. After reviewing the Injured Worker's medical records and performing a physical examination, Dr. Purewal stated his professional medical opinion that, "Based on the above evaluation of this patient and review of the medical records, and with specific reference to the MRI findings of January 15, 2010, it is my opinion that Ms. Warner's current left shoulder symptoms and findings are directly and causally related to the work-related injury of *December* 12, 2008 (sic-*February* 12, 2008), and the findings are due to the allowed condition of rotator cuff tear of the left shoulder. Ms. Warner did have

surgery, for repair of the rotator cuff, along with other procedures, at the left shoulder on June 27, 2008, but she has continued to have problems with restricted range of motion and weakness. An MRI has shown failure of the previous rotator cuff repair and significant atrophy of the rotator cuff muscles. Under these circumstances, surgery for revision rotator cuff repair, along with pre-operative testing and post-operative rehabilitation, would be considered necessary and appropriate and directly related to the work-related injury of *December* 12, 2008" (sic – *February* 12, 2008). Furthermore, Dr. Purewal stated his professional medical opinion that, post-operatively, the Injured Worker, "Will need approximately 6 months of healing and recuperation * * *, before she could be evaluated for maximum medical improvement."

Thus, even the Employer's own independent medical evaluator, Sukhjit S. Purewal, M.D., supports the Injured Worker's request for temporary total disability for a period of 6 months from the date of the surgery of 04/16/2010 (thus, from 04/16/2010 through approximately 10/16/2010).

However, the Self-Insuring Employer is contesting the payment of temporary total disability compensation, in this claim, based upon the fact that the Injured Worker took a retirement "buy-out" under the Employer's Voluntary Supplemental Income Protect[ion] Program (VSIPP), which she accepted on 02/16/2009, and said buy-out offer became effective 04/09/2009. Thus, the Employer contends that the Injured Worker's retirement, effective 04/09/2009, bars the payment of temporary total disability compensation based on her "voluntary abandonment" of her former position of employment.

In support of the Employer'[s] argument, its legal representative cites the case of State [ex] rel. Furrie v. Indus. Comm., No. 03AP370 (Ohio App. 10 Dist.) (2004). In that case, the Court of Appeals held that the evidence supported a finding that the Injured Worker voluntarily chose to retire, for reasons unrelated to the allowed injury, and that the voluntary retirement prevented his return to his former position of employment, and therefore, resulted in his relinquishment of his entitlement to temporary total disability benefits. In the Furrie case, the Injured Worker testified that he pursued retirement because the combined amount that he was receiving in temporary total disability

compensation and extended disability benefits was less than the amount that he was eligible to receive in retirement benefits. The Court of Appeals cited the Ohio Supreme Court's decision in the case of State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, and stated that, "When determining whether a Claimant qualified for TTD Compensation, the Court utilizes a two-part test. The first part of the test focuses on the disability aspects of the injury. The second part of the test determines if there are any factors, other than the injury, which prevent Claimant frome [sic] returning to their former position of employment."] The Court of Appeals went on to state that, "Credibility of witnesses and the weight to be given evidence are clearly within the discretion of the Commission, as fact finder."

The facts in this case are distinguishable from the facts in the Furrie case. The testimony of the Injured Worker in this claim indicates that, at the time of her injury, she was making approximately $58,000 per year. By taking the Voluntary Supplemental Income Protection Program offer, the Injured Worker received a one time payout of approximately $31,000. She then received a reduced retirement pension, because she was under 55 years of age. Therefore, she changed her retirement into an annuity, so that she would receive approximately $2,000 per month (which is still $34,000 less than she made at the time of her injury). The Injured Worker also applied for Social Security disability income benefits and was awarded those benefits, retroactivity, back to the date of the injury in this claim, as said award was based upon the disability conditions allowed in this claim. Thus, the Injured Worker would have a total income of approximately $3,780 per month or $45,360 per year, from the combination of her annuity and Social Security Disability benefits, nearly $13,000 per year less than she made at the time of her injury. As previously indicated above, Nicholas Furrie, Jr., testified, in the Furrie case, that he pursued retirement because the amount that he received in retirement benefits would be more than the combined amount of temporary total disability compensation and extended disability benefits.

The Employer also cited the Ohio Supreme Court decision in the case of State ex rel. Smith v. Indus. Comm. (1990), 50 St.3d 45. In the Smith case, the Claimant initiated pension paperwork prior to his date of injury. Therefore, the Industrial Commission, in the Smith case held that, since he

filled out the pension paperwork, prior to his date of injury, that was evidence of his intent to retire even before the workplace injury occurred. The Employer in the instant claim submitted evidence that the Injured Worker had completed a VSIPP Candidate Request Form on 01/22/2008, before the date of injury in this claim, of 02/12/2008. Thus, the Employer further argues that Injured Worker's, "Choice to retire is in no way connected to her work-related injuries."

This Staff Hearing Officer does not find that argument to be persuasive. The Injured Worker's testimony, at hearing, indicated that she had signed a VSIPP Candidate Request Form a number of times in the past. In fact, she further testified that she had previously completed a VSIPP Candidate Request Form and actually been offered a "buy out", in the fall of 2007. However, she had refused that offer. Therefore, under the VSIPP program, she had to wait a period of 30 days before completing another VSIPP Candidate Request Form, which is the reason that she completed the most recent form, on 01/22/2008. In fact, she testified that *every employee in her department* had filled out one of the VSIPP Candidate Request Forms. Said Form was just a request to be considered for future "buyouts" and was not an actual application to retire.

Furthermore, the Injured Worker testified that, when she received the most recent offer of a "buy out" under the VSIPP program, on 02/16/2009, she accepted the offer this time, because her physician had placed her on restrictions of no lifting over 5 pounds, no overhead lifting and no repetitive motion with her arm. She further testified that, in her former position of employment, as a supply attendant, she had to lift up to 75 pounds. She further testified that she had been released to return to work only a week prior to the "buy out" offer and, since that release to return to work was a release to *restricted duty*, with no lifting greater than 5 pounds, no overhead motion and no repetitive movements of the left upper extremity, "I didn't actually work. Our bosses were out of town and I had to wait for him to come in, but I had told him, because I was no longer able to do the job, I told him I was going to take an early retirement.... and I had to stay there for three days, until my boss came into town. He told me to stay there, he told me not to really do anything, because he did not want me to get hurt on the job, again.... I sat there, talking to people and read stuff on the computer."

She testified that she didn't actually do any work as a supply attendant during that week prior to the "buy out" offer.

Therefore, it is the finding of this Staff Hearing Officer that the Injured Worker's completion of a VSIPP Candidate Request Form, on 01/22/2008, was not the same as the actions of the Injured Worker in the Smith case, where he actually completed his application for retirement benefits, prior to the date of injury. Therefore, this Staff Hearing Officer does not find the Employer's argument to be persuasive.

Furthermore, the Employer argues that the Injured Worker had returned to her "former position of employment" on 02/09/2010. This Staff Hearing Officer does not find said statement to be accurate. While the Injured Worker had returned to a job classification of "supply attendant", as previously indicated above, she testified that the supply attendant job required her to lift up to 75 pounds. However, the office notes from her attending orthopedic specialist, Jason W. Levine, M.D., dated 01/06/2009, indicates that, "This patient states that her pain has improved since prior to the surgery (of 06/27/2008), however, over the past few weeks, she has had little to no improvement in her pain or range of motion. The patient currently has stopped going to any physical therapy, after the physical therapist said that she had plateaued in her progression and improvement." Upon physical examination of the Injured Worker, Dr. Levine noted that she only had four out of five strength in the supraspinatus, infraspinatus, subscapularis and teres minor muscles. More importantly, he noted that the Neer and Hawkins signs were both positive, as well as the subscapularis isolation test, which was both positive and painful. Therefore, Dr. Levine made a referral for the Injured Worker to see Joseph Noshi Atallah, M.D., a pain management specialist at the University of Toledo Medical Center. Finally, at the office visit of 01/06/2009, Dr. Levine stated that, "We provided the patient with return to work papers, with restrictions, including no lifting greater than 5 pounds, no overhead motion, no repetitive movements." His return to work slip then indicated that the Injured Worker could return to work, with those restrictions, as of 02/12/2009.

As previously indicated above, the Injured Worker was referred to a pain management specialist, Joseph Noshi

> [Atallah], M.D., who provided the Injured Worker with two series of five different injections over the left shoulder blade area.
>
> Thus, it is the finding of this Staff Hearing Officer that the contemporaneous medical records support the Injured Worker's testimony that her decision to accept the Supplement[al] Income Protection Program "buy out" was involuntary in nature, since her motivation for retiring was the pain and restrictions that were proximately related to the allowed conditions in this claim.
>
> Therefore, it is the finding of this Staff Hearing Officer that the Injured Worker's motivation for her decision to retire is based upon disability factors related to impairment proximately cased by the allowed conditions in this claim. Therefore, it is the further finding of this Staff Hearing Officer that the Employer has not met its burden of proving that the persuasive evidence supports a factual finding of a "voluntary abandonment" that would preclude the payment of temporary total disability compensation.
>
> Therefore, it is the order of this Staff Hearing Officer that temporary total disability compensation is hereby GRANTED for the period from 04/16/2010 (the date of the Injured Worker's left shoulder rotator cuff revision surgery) through 07/16/2010, and is to continue thereafter upon submission of competent supporting medical proof of a temporary and total disability resulting from impairment due to the allowed conditions in this claim.
>
> This portion of the order is based upon the C-84 Physician's Disability Statement completed by the Injured Worker's attending orthopedic specialist Jason Levine, M.D., on 05/27/2010.

(Emphases sic.)

{¶ 59} 22. On October 28, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 17, 2010.

{¶ 60} 23. On January 28, 2011, the three-member commission, on a two-to-one vote, mailed an order denying relator's request for reconsideration.

{¶ 61} 24. On April 14, 2011, relator, AT&T Teleholdings, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 62} Four issues are presented: (1) whether this court's decision in *State ex rel. Furrie, Jr., v. Indus. Comm.*, 10th Dist. No. 03AP-370, 2004-Ohio-1977, compels the conclusion that claimant is ineligible for TTD compensation on grounds that allegedly she financially benefited from taking her retirement; (2) whether the commission's finding that the retirement was injury induced must be reversed on grounds that allegedly there is no contemporaneous medical evidence corroborating claimant's hearing testimony that her retirement was injury induced; (3) whether the pre-printed declarations on forms claimant signed indicating that claimant elected "to voluntarily terminate [her] employment with AT&T" compels the legal conclusion that claimant voluntarily abandoned her employment with AT&T, and is thus ineligible for TTD compensation; and (4) whether claimant's signing a VSIPP Candidate Request form on a date prior to her industrial injury compels the conclusion that her retirement cannot be injury induced.

{¶ 63} Before addressing the issues, it may be helpful to review relevant case law.

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

{¶ 65} In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary.

{¶ 66} In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, the court held that a claimant's acceptance of a light-duty job did not constitute an abandonment of his former position of employment. The *Diversitech Gen.* court stated, at 383:

> * * * The question of abandonment is "primarily * * * [one] of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts. * * * All relevant circumstances existing at the time of the alleged abandonment should be considered." * * *

{¶ 67} An injured worker who has voluntarily abandoned his employment may thereafter reinstate his TTD entitlement. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. The syllabus of *McCoy* states:

> A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶ 68} In *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, the court clarified its holding in *McCoy*. In *Jennings*, the court reemphasized that a claimant who has abandoned his or her former job does not reestablish TTD eligibility unless the claimant secures another job and was removed from subsequent employment by the industrial injury.

{¶ 69} In *State ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517, ¶5, this court upheld a commission award of TTD compensation:

> * * * Although Ford argues that the commission wrongly relied upon claimant's testimony at the hearing before the staff hearing officer ("SHO"), this court has before found that it is within the commission's discretion to credit a claimant's testimony that his or her motivation for the departure from

> the job was based upon the allowed conditions, as the commission is the sole evaluator of credibility. See *State ex rel. Mid-Ohio Wood Products, Inc. v. Indus. Comm.*, Franklin App. No. 07AP-478, 2008-Ohio-2453, at ¶ 18. Furthermore, we also found in *Mid-Ohio Wood Products* that there is nothing that requires there be objective medical evidence corroborating a claimant's testimony regarding his or her motivation for abandonment of employment. *Id.* Notwithstanding, we noted in *Mid-Ohio Wood Products* that there were various doctors' office notes indicating claimant reported suffering pain that supported claimant's testimony regarding her motivation for abandoning employment.

{¶ 70} Turning to the first issue, in *Furrie*, the commission denied TTD compensation to Nicholas Furrie, Jr. ("Furrie") on the basis that he voluntarily retired from his job. Upholding the commission's decision, this court stated:

> * * * In the present case, there was evidence before the commission, by way of relator's own testimony, that he pursued retirement because the combined amount he was receiving in TTD compensation and extended disability benefits was less than the amount of retirement benefits he was eligible to receive based upon his 30 years of service with the employer. The medical evidence did not indicate that relator was forced to retire because of the allowed conditions (i.e., there was no evidence that relator's doctor advised him to retire based upon his temporary disability) and, in fact, the district hearing officer cited testimony by relator that he did not pursue a disability retirement because he may want to pursue other employment in the future. The magistrate concluded that there was some evidence in the record to support the commission's finding that relator's retirement was motivated by financial reasons, and not due to the allowed conditions in the claim. Upon review, we find no error with that determination.

Id. at ¶3.

{¶ 71} According to relator, "[t]he court's reasoning in *Furrie* is directly on point to the facts at hand." (Relator's brief, at 8.) According to relator, because claimant accepted the VSIPP offer and thus received $31,000 in addition to her retirement pension, she "clearly financially benefited" from her retirement. (Relator's brief, at 8.) Relator suggests

that this financial benefit, in addition to her pension, compels the conclusion under *Furrie* that the retirement was voluntary. The magistrate disagrees with relator's argument.

{¶ 72} To begin, relator reads entirely too much into *Furrie*. *Furrie* does not stand for the proposition that a retirement cannot be injury induced when the claimant—retiree—receives a financial benefit for retiring. Also, unlike claimant here, Furrie himself testified that he pursued retirement for financial reasons.

{¶ 73} Moreover, the SHO's order of September 17, 2010 meticulously explains how claimant would have been financially better off in the long run had she not retired due to her injury. So even under relator's theory of financial benefit, the SHO showed that there was no true incentive financially for claimant to retire. When claimant retired, she gave up a job that paid $58,000 per year and, in turn, she received a lump-sum severance amount of $31,000. Her pension was reduced because she was 55 years of age.

{¶ 74} Thus, relator's reliance upon *Furrie* is misplaced.

{¶ 75} The second issue is easily answered. Contrary to relator's contention that there is no contemporaneous medical evidence to corroborate claimant's testimony that her retirement was injury induced, there is indeed an abundance of medical evidence corroborating claimant's testimony. Relator seems to suggest that the only medical evidence that can be viewed as supporting an injury-induced retirement must contain a doctor's recommendation that claimant retire. That suggestion is incorrect.

{¶ 76} The SHO's order of September 17, 2010 addresses some of the medical evidence corroborating claimant's hearing testimony. For example, the SHO discusses in some detail Dr. Levine's January 6, 2009 office note written about five weeks prior to claimant's February 16, 2009 signing of the "VSIPP Employee Letter" that set in motion the retirement process. That office note indicates that claimant was still having pain some seven months after her June 2008 surgery and thus claimant was referred to Dr. Atallah for pain management.

{¶ 77} The third issue is also easily answered. On April 9, 2009, as previously noted, claimant accepted AT&T's VSIPP offer by signing a form below the pre-printed declaration:

> I elect to voluntarily terminate my employment with AT&T and ACCEPT SIPP benefits.

(Emphasis sic.)

{¶ 78} Relator, in effect, argues that claimant is precluded from showing that her retirement was involuntary because she signed a document declaring that she had elected to "voluntarily terminate" her employment. This argument lacks merit. Clearly, as *Rockwell* holds, in workers' compensation cases involving the voluntary abandonment doctrine, the word "voluntary" has a specialized meaning—a retirement is not voluntary when it is causally related to the industrial injury.

{¶ 79} Here, there is no evidence in the record to even suggest that the phrase "voluntarily terminate" on the form signed by claimant refers to the judicially created doctrine of voluntary abandonment of employment.

{¶ 80} The fourth issue, as earlier noted, is whether claimant's signing a VSIPP Candidate Request form on a date prior to her industrial injury compels the conclusion that her retirement cannot be injury induced.

{¶ 81} The SHO adequately explained in his order why claimant's signing a VSIPP Candidate Request form on January 22, 2008 during the month prior to the industrial injury does not show that relator had decided to retire prior to her injury. The magistrate shall not repeat the SHO's order's well-reasoned discussion of this issue. Here, relator's argument simply invites this court to reweigh the evidence for the SHO and, by so doing, reaching a conclusion contrary to the one reached by the SHO. This court must decline the invitation because it is the commission that has the discretion to weigh the evidence submitted to it.

{¶ 82} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).