

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Carl S. Stitzel, Sr.,	:	
Relator,	:	
v.	:	No. 11AP-925
Roadway Express, Inc.	:	(REGULAR CALENDAR)
and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on October 23, 2012

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and Theodore A. Bowman, for relator.

Thomas & Company, LPA, and A. Brooke Phelps, for respondent Roadway Express, Inc.

Michael DeWine, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Carl S. Stitzel, Sr., requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied his application for permanent total disability ("PTD") compensation on grounds that he voluntarily abandoned the work force and to find that he is entitled to that compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded the commission did not abuse its discretion in determining relator had voluntarily abandoned his employment and in denying relator's application for PTD compensation. Accordingly, the magistrate recommended that this court deny the requested writ of mandamus.

I. RELATOR'S OBJECTION

{¶ 3} Relator has filed an objection to the magistrate's conclusions of law wherein relator challenges the magistrate's conclusion that the commission did not abuse its discretion in finding that he voluntarily abandoned his employment. The arguments raised in relator's objection are essentially the same as those raised to and addressed by the magistrate. While relator continues to challenge the evidence upon which the commission relied, as stated by the magistrate, "questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981)." (Magistrate's Decision, ¶ 33.) For the reasons stated in the magistrate's decision, we do not find merit to relator's objection.

{¶ 4} Accordingly, relator's objection to the magistrate's decision is overruled.

II. CONCLUSION

{¶ 5} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. We, therefore, overrule relator's objection to the magistrate's decision and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. Accordingly, the requested writ of mandamus is hereby denied.

*Objection overruled;
writ of mandamus denied.*

BROWN, P.J., and CONNOR, J., concur.

A P P E N D I X
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Roadway Express, Inc.	:	
and Industrial Commission of Ohio,	:	
Respondents.	:	
	:	

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

Rendered on June 14, 2012

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and Theodore A. Bowman, for relator.

Michael DeWine, Attorney General, and Rema A. Ina, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 6} Relator, Carl S. Stitzel, Sr., has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied his application for permanent total disability ("PTD") compensation on grounds that he had voluntarily abandoned the work force and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 7} 1. While working as a truck driver for Roadway Express, Inc. ("Roadway"), relator sustained a work-related injury on March 31, 1996 and his workers' compensation claim has been allowed for the following conditions:

SPRAIN OF NECK; SPRAIN OF RIGHT SHOULDER/ARM; SPRAIN LUMBAR REGION; AGGRAVATION OF PRE-EXISTING CERVICAL DISC DISEASE AT THE C-4-5 AND C5-6 LEVELS, WITH RESULTING DISC PROTRUSION AT THE C4-5 LEVEL AND DISC HERNIATION ON THE RIGHT AT THE C-5-6 LEVEL; RIGHT ROTATOR CUFF TENDONITIS; AGGRAVATION OF PRE-EXISTING DEGENERATIVE DISC DISEASE L5-S1; SPINAL STENOSIS L3-4 AND L4-5; DEGENERATIVE DISC DISEASE AT C6-7.

{¶ 8} 2. Between the date of his injury and September 30, 2009, the day he last worked, relator was off work due to his injuries for various periods of time, and was awarded 16 percent permanent partial disability.

{¶ 9} 3. There are two reports in the stipulation of evidence prepared within the year before he retired. Specifically, the record contains the December 3, 2008 report of David A. Wald, M.D., who examined relator for a consultation. Dr. Wald provided the following history of relator's injuries:

The patient is an active, independent 64-year-old man who works as a truck driver. He has a history of driving mainly being active and independent, pain free most of his life. He had one injury at the age of 20, motor vehicle collision with some back symptoms. He did end up seeing a physician at that time for it but the symptoms completely resolved. He does not report any major trauma. He did see chiropractors intermittently throughout his life for muscle spasms or strains at different parts of the body but overall no significant complaints, no chronic pain. He denies prior Worker's [sic] Compensation injuries or other injuries. On March 31, 1996, the patient states he injured himself while trying to hook up a trailer's fifth wheel being attached to it was struck when it came lose it threw him and knocked him against the truck and against the ground. He noted immediate pain and discomfort. He believes it was more on the right side than on the left. He reports to me that he saw physicians, chiropractors and ultimately a neurosurgeon, he ended up having a related rotator cuff tear which was

repaired. He had a number of injections in the lumbar spine, none in the cervical spine. Unfortunately, pain has persisted.

He presents to me today with a chief complaint of neck and back pain which he describes as chronic and debilitating. He has actually been considering lumbar and cervical spine surgery for a long time and actually saw Dr. Maliner, a neurosurgeon, in Hollywood, Florida for evaluation. Reportedly consideration of Dr. Maliner's he recommended consideration of more conservative options and that is why he presents today.

* * *

Regarding interventions, the patient has had numerous interventions over the course of his injury which is over ten years old. Most of these have provided only temporary relief. He has had numerous injections all of which have been in the low back, they provided temporary relief. He has been through therapy sessions with a lot of modalities, he has had traction, and nothing has provided any long-standing benefit. It does not sound as if he performs regular home exercise program.

He has had numerous injections all of which is in the lumbar spine. He has never had any injections in the cervical spine. They have only provided temporary relief.

As far as medications, he minimizes the use of medications in general. Actually he has taken no medication in the past 24 hours for pain and in fact does not believe he has taken anything for the past week. He has taken an occasional Advil for pain. He has been issued narcotics which he does not take. He has tried Darvocet, Percocet, Vicodin I believe he has also tried Ultram none of which has provided satisfactory relief, all of which he has chosen not to utilize. Additionally, he notes, although by nature, he is cautious about the use of medications. He is even further cautious because of his vocation being a truck driver.

{¶ 10} 4. Relator informed Dr. Wald that his neck pain was currently more problematic than his lower back and that the pain severely disturbed his sleep. Relator described the neck pain as constant, sharp/achy, and radiating to the back of his head. The pain is aggravated with increasing activity as well as with extension more so than

flexion. Relator also indicated that he had intermittent pain radiating into the right arm as well as persistent numbness along the lateral aspect of the arm and into the digits. Concerning his low back, relator reported that the pain was achy and sharp, more so on the right than the left, and that the pain radiates into his buttocks occasionally down his leg into the calf and foot. The pain is aggravated by increased activity and with driving his truck; the pain aggravates him at night and is a barrier to him sleeping.

{¶ 11} Dr. Wald noted the following past medical history:

[H]ypertension, open heart surgery, coronary artery bypass graft in 2005, and stents in 2006. He has had prostate surgery, hernia surgery and rotator cuff surgery. His primary physician is Dr. John Shook. His cardiologist is Dr. Cioci.

Dr. Wald set forth his impressions:

[One] Chronic Neck and back pain.

[Two] Arachnoiditis with abnormal findings on MRI on May 18, 2001.

[Three] Radiation to the right lower extremity.

[Four] Neck pain with radiation to the right upper extremity.

[Five] Sleep disturbance.

{¶ 12} Thereafter, Dr. Wald provided his physical findings upon examination as well as the medical records which he was provided for review. Dr. Wald stated further:

I spent a great deal of time with this patient. This is a very difficult situation. He has an old injury. He has objective clinical findings on physical examination and a lot of pain. Nonetheless, he stayed quite active. He continues to work full time at his job here in Florida driving trucks. His goal is to continue driving trucks but relieve his pain. The pain is quite severe and he has increasing questions as to whether or not he will be able to continue to manage driving the truck and has even considered disability. He is hoping for relief to continue working. Surgery has been a major consideration of his for a long time but apparently he has seen two different physicians one in Cleveland Clinic in Cleveland and one here in Hollywood, both of whom have recommended exhausting conservative options and in his report to me neither seem

enthusiastic that they would be able to reliably significantly relieve his pain with surgical intervention. Sleep disturbance is certainly contributing a lot here and part of it is by the very nature of his job, as described above. We took a while to discuss this, he has been through different cervical pillows, different mattresses, it does not sound like there is going to be any changes that we can make there that are going to significant benefit. It sounds like he has tried numerous different things and has an arrangement he is satisfied with presently, at least inside the home. He does have difficulty falling asleep, it seems like the back pain may have difficulty keeping him asleep. We talked about sleep hygiene which is obviously difficult given his career and we talked about medications. I think if we could bring some of his sleep under control he may be able to have better control of his pain.

We discussed sleeping medications. I am prescribing him Sonata 5 mg * * *. At this time, he agrees not to utilize his Sonata while he is working he will only use it in the days when he will not be driving the following day.

As far as pain, we discussed a lot of different options. Most of his discomfort occurs while he is actually working and driving his truck so we will look for medications that has low side effect profile. We will give him a trial of Lidoderm patch 5%, he will apply one to the painful area of the neck and one to the painful area of the low back, on in the morning, off in the evening. * * * I am going to recommend that he tries acetaminophen 325 mg one to two tablets * * *. We will see if this has any significant relief, it would be ideal, NSAID is another consideration but obviously they have other effects on GI and as well as the kidney.

{¶ 13} 5. Relator had a follow-up appointment with Dr. Wald. In his February 11, 2009 report, Dr. Wald identified his impressions:

[One] Chronic back pain, primary complaint with arachnoiditis and abnormal MRI findings.

[Two] Chronic neck pain.

[Three] Sleep disturbance.

Dr. Wald recommended the following:

It seems the pain has progressed, he is more uncomfortable. We talked about the different options. We will go ahead and use Cymbalta * * *. He understands that he should not drive while using the medication until he knows how it is going to affect him.

As far as sleep, he is given Ambien 5 mg * * * for his sleep disturbance, he has taken a lot of over-the-counter sleep medications in the past and even recently he finds actually they are preferable to what the Sonata was doing. Again, he understands that I am recommending he not use this while he is driving on days he is going to drive at least until he knows exactly how it is going to affect him.

For further pain relief he is given an order for a TENS unit, hopefully this will provide some adjunctive pain relief. He can use it while he is driving and really there will be no side effects with that. He is given a prescription for Darvocet to take as needed, he has taken this medication many times in the past, this is what appears to be best tolerated GI wise and provides adequate pain relief. Again, we will get him out to interventional spine physician for procedures.

{¶ 14} 6. In April 2009, relator initiated retirement paperwork. On those forms, relator identified his reason for leaving as "back problems." Relator also certified as follows: "I have not been and/or do not intend to become employed in any capacity (including self-employment) at any time after my retirement date." Relator retired effective September 30, 2009.

{¶ 15} 7. Relator filed his application for PTD compensation on August 17, 2010. According to his application, relator was 66 years of age, had applied for and was receiving Social Security retirement benefits, had graduated high school in 1962, was able to read, write, and perform basic math, and had not participated in rehabilitation services.

{¶ 16} 8. Dr. Wald referred relator to Gary Saff, M.D. Dr. Saff made the following diagnoses:

Cervical spondylosis w/o myelopathy [721.0]

Lumbosacral spondylosis w/o myelopathy [721.3]

Back pain w/ radiation, unspec. [724.4]

Brachia neuritis or radiculitis NOS [723.4]

Pain, low back [724.2]

Pain, neck [723.1]

Fibromyalgia/myositis, unspec. [729.1]

Dr. Saff opined that relator was permanently unable to return to work as a truck driver.

{¶ 17} 9. Relator also submitted the July 7, 2010 report of chiropractor, Lev Sudakov. Dr. Sudakov indicated that relator had been under his care since January 25, 2010 and that his neck, low back, and right shoulder pain rated five to six out of ten on a visual pain scale. Thereafter, Dr. Sudakov provided physical findings upon examination and opined as follows:

Based on my examination of Mr. Carl Stitzel, there is a reasonable degree of medical necessity that he will not be able to return to his previous employment as a truck driver. This condition has been well documented with other physicians prior to seeing me that correlates his injuries to the incident on March 31, 1996. He suffered a major impairment to more than 50% of his body. It is also my opinion that any heavy lifting or industrial work will easily aggravate and further worsen the condition which may cause more severe complications. He has been able to retain some function with physical therapy and chiropractic manipulation. He is in need of additional medical intervention including pain management for these cervical symptoms. I have also suggested that a current MRI of the lumbar spine be ordered.

I am also suggesting continuation of conservative physiotherapy and chiropractic care at a frequency of one to two times per week for an additional 6 weeks incorporating active rehabilitation, passive modalities and spinal manipulation. Specific exercises will be assigned to be performed in office and at home that focus on stabilization of postural muscles and improving range of motion in the right shoulder, cervical and lumbar spine. I've also suggested that Mr. Stitzel not over exert himself to limit exacerbations of the condition.

Dr. Sudakov noted the following restrictions:

[One] Lifting <20 lbs

[Two] No repetitive bending

[Three] No repetitive reaching

[Four] Limit sitting to 15 minutes followed by stretching

[Five] Limit walking or standing to 15 minutes[.]

{¶ 18} 10. Relator was examined by Jozef Hudec, M.D., on September 23, 2010. After identifying the medical records which he reviewed and after providing his physical findings upon examination, Dr. Hudec opined that relator's allowed physical conditions had reached maximum medical improvement ("MMI"). Specifically, Dr. Hudec noted the following:

Injured worker has been treated extensively with physical therapy, oral medications and injections. He had right shoulder surgery in 2001. He has been treated with pain medications. Surgical treatment of cervical and lumbar spine was not recommended by specialists. MRI scans of cervical and lumbar spine remained unchanged in past several years. The symptoms remained unchanged in past several years. Based on review of medical records, history and physical examination all treatment options have been exhausted and the condition of the claimant reached plateau.

Thereafter, Dr. Hudec assessed a 13-percent impairment and opined that relator is capable of performing at a sedentary work level.

{¶ 19} 11. Relator's application was heard before a staff hearing officer ("SHO") on April 5, 2011. The SHO denied relator's application after finding that he had voluntarily retired from his employment with Roadway and had not sought any employment thereafter.

{¶ 20} Concerning his retirement from Roadway, the SHO made the following statements:

The Staff Hearing Officer notes that this is a 1996 claim which is allowed for significant cervical and low back conditions. The Injured Worker alleges that his retirement in September of 2009 was directly related to the back

conditions allowed in the claim. However, the Staff Hearing Officer notes that on the retirement paperwork there is the box checked by the Injured Worker and signed which specifically says "I have not been and/or do not intend to become employed in any capacity (including self-employment) at any time after my retirement date." The Injured Worker's retirement date is 09/30/2009. This notation was signed on 05/18/2009.

[T]here is a prior retirement declaration form signed on 04/12/2009 which also indicates the box checked with the "I have not been employed in any capacity (including self-employment) at any time after my retirement date. I agree that if I do become employed after retirement period I will properly notify the fund." On this particular retirement declaration form, the retirement date is 05/30/2009. The Injured Worker did testify at hearing that he did continue to work until 09/29/2009, and his official retirement date was 09/30/2009.

The Injured Worker also testified that, at that time, he filed for Social Security retirement benefits. After discussing disability with the social security office, he was advised to file for the retirement benefits first and then for the disability. The Injured Worker testified that he did subsequently file for disability benefits which he alleges were granted. However, since the Injured Worker was already 65 years of age and entitled to the retirement benefits, his social security disability remained as a retirement benefit.

The Staff Hearing Officer finds that the Injured Worker's retirement date is 09/30/2009. At that time, the Injured Worker was not on temporary total disability related to the allowed conditions in this claim. In fact, this Staff Hearing Officer notes that the evidence on file indicates that the last C-84 filed requesting temporary total disability benefits ran through 08/08/2005. A review of the Bureau of Workers' Compensation benefits summary indicates that the last payment of temporary total disability benefits in this claim was 08/07/2005.

The Injured Worker had transferred terminals with Roadway Express and was working out of a Florida terminal at the time of his retirement. The Staff Hearing Officer notes that the Injured Worker testified that when he transferred to the terminal in Florida, the work was less strenuous than that of

driving in Ohio. However, the Injured Worker was still working in a full-duty capacity without restrictions at the time of his retirement.

The Staff Hearing Officer finds the Injured Worker took a retirement of years, not a disability retirement, and the Injured Worker was 65 years old at the time of his retirement. Therefore, the Staff Hearing Officer finds the Injured Worker's statement on the retirement forms that his reason for leaving was back problems is insufficient to establish that this is not a voluntary departure from the workforce.

Thereafter, the SHO discussed the medical evidence as follows:

The Staff Hearing Officer notes the only medical evidence, anywhere close to the time frame of the Injured Worker's retirement, is that of the examination of Dr. Wald dated 02/11/2009. Dr. Wald does note the Injured Worker had increasing back symptoms at that time. Dr. Wald reviewed the medications that the Injured Worker was taking and his ability to drive or not drive while taking his medications. Dr. Wald changed the Injured Worker's medications to some degree and added a different sleeping agent for the Injured Worker as he indicated a difficulty in sleeping. However, even at this time, Dr. Wald did not take the Injured Worker off work as a result of the allowed conditions in the claim. There is no temporary total disability request as a result of the allowed conditions in the claim. Further, other than cautions about which medications to use when driving, Dr. Wald does not indicate, based upon the allowed [conditions] in the claim, that the Injured Worker cannot perform his current full-duty unrestricted employment. Therefore, the Staff Hearing Officer finds no medical evidence contemporaneous with the Injured Worker's retirement that indicates he is unable to perform the duties of his former position of employment, or in this case, his current position of employment.

{¶ 21} Based on the above findings, the SHO applied case law and determined that relator was not entitled to PTD compensation, stating:

The Staff Hearing Officer notes that in the Supreme Court Case of McAtee v. Industrial Commission (1996) 76 Ohio St.3d 648, the Supreme Court indicated that [an] early non-disability retirement, receipt of social security benefits, an

application for pension benefits, and a failure to seek other employment following departure from work can all demonstrate an intention to leave the labor force. The Staff Hearing Officer finds that that is the case herein. The Injured Worker worked full-duty up through the date of his retirement. He took a retirement of years at a normal retirement age, and the Injured Worker clearly indicated on his retirement forms and also testified at hearing that he has not worked in any capacity since his retirement from Roadway. Further, the Staff Hearing Officer notes that the Injured Worker was not on temporary total disability benefits or on any type of restrictions at the time of his retirement related to the allowed conditions in the claim.

Based upon all of the above, the Staff Hearing Officer finds that the Injured Worker's retirement was a voluntary retirement and a departure from the workforce with no indication of any intention of returning to the workforce. There is no medical evidence on file during this time frame that indicates the Injured Worker is unable to work as a result of the allowed conditions in the claim. Therefore, the Staff Hearing Officer finds that the Injured Worker is not entitled to permanent and total disability benefits based upon his retirement.

{¶ 22} 12. Relator filed a request for reconsideration arguing that there is evidence that relator's retirement from Roadway was related to his allowed conditions and there is no requirement that a claimant produce contemporaneous medical evidence in order to support his testimony.

{¶ 23} 13. The commission determined that relator had presented evidence of sufficient probative value to warrant adjudicating the request for reconsideration, stating:

Specifically, it is alleged that the Staff Hearing Officer had no basis upon which to reject the reports from David A. Wald, M.D., from examinations of the Injured Worker conducted in the year prior to the Injured Worker's retirement, as evidence to support the Injured Worker's position that his retirement was hastened because of his work-related injury. It is alleged that the Staff Hearing Officer mistakenly required the Injured Worker to produce evidence of temporary total disability at the time of retirement to support the Injured Worker's testimony that his retirement

was injury induced. It is further alleged that the Injured Worker's retirement records indicating his retirement was due in part to "back problems" was improperly rejected because the Injured Worker did not choose to accept the employer's disability retirement option. Also, it is alleged that the Staff Hearing Officer's finding that Injured Worker indicated he did not intend to work in the future cannot be used to rebut his testimony that his retirement was injury induced.

{¶ 24} 14. Following a hearing, the commission denied relator's request for reconsideration in an order mailed August 25, 2011.

{¶ 25} 15. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 26} Relator argues that the commission abused its discretion when it determined that he had voluntarily abandoned his employment. Relator contends that there is evidence in the record establishing that he retired from his employment because of his back injury. Arguing that his retirement was causally related to the allowed conditions in his claim, relator contends that his retirement was involuntary and does not bar his receipt of PTD compensation. Further, relator contends that it is immaterial whether or not there is contemporaneous medical evidence from the time of his retirement that supports his contention that his allowed conditions motivated his to retire. Relator contends that his testimony was sufficient.

{¶ 27} For the reasons that follow, it is this magistrate's decision that the commission did not abuse its discretion.

{¶ 28} Whether a claimant is seeking an award of temporary total disability ("TTD") compensation for PTD compensation following their departure from their job, the commission is required to determine whether that departure was voluntary or involuntary. *See State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988). Where the departure is due to the allowed conditions in the claim, the departure is considered involuntary and does not affect the claimant's eligibility for TTD compensation. On the other hand, a voluntary departure is one that is not caused by the allowed conditions in the claim and precludes the payment of TTD compensation unless the claimant re-enters the work force and, due to the original industrial injury, becomes

temporarily and totally disabled while working at the new job. *State ex rel. Baker v. Indus. Comm.*, 87 Ohio St.3d 561 (2000), and *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. The commission is required to make a factual determination, based on all the surrounding circumstances, and determine whether the motivation for the claimant's departure was, in whole or in part, due to the allowed conditions. *State ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517.

{¶ 29} Ohio Adm.Code 4121-3-34(D) sets forth the commission's guidelines for the adjudication of PTD applications. Ohio Adm.Code 4121-3-34(D)(1)(b) states:

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

{¶ 30} *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994), paragraph two of the syllabus provides:

An employee who retires prior to becoming permanently and totally disabled is precluded from eligibility for permanent total disability compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market.

{¶ 31} The commission is required to engage in a two-step analysis to determine whether a claimant has voluntarily removed himself from the work force prior to becoming permanently and totally disabled such that a PTD is precluded. The first step requires the commission to determine whether the retirement or job departure was voluntary or involuntary. If the commission determines that the job departure was involuntary, the inquiry ends. If, however, the job departure is determined to be voluntary, the commission must consider additional evidence to determine whether the job departure is an abandonment of the entire work force in addition to an abandonment of the job. *See State ex rel. Kelsey Hayes Co. v. Grashel*, 10th Dist. No. 10AP-386, 2011-Ohio-6169, ¶ 56.

{¶ 32} In the present case, the commission relied on *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648 (1996), to find that relator's retirement was voluntary. In that case, Pearl J. McAtee sustained a work-related injury. McAtee was able to return to modified duties with his employer. At age 62, McAtee took an early retirement even though a disability retirement would have benefitted him financially. Two years later, McAtee sought PTD compensation. The commission denied his application and the Supreme Court of Ohio denied his request for a writ of mandamus finding that the commission relied on some evidence to find that McAtee abandoned the work force: McAtee chose early retirement, began drawing a pension and Social Security retirement benefits, and did not seek other employment following his departure from his former employer.

{¶ 33} In *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, the court stated that the question whether a claimant has abandoned their employment is largely a question of intent, which may be inferred from the words spoken, acts done, as well as other objective facts. As always, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981). Further, it is immaterial whether other evidence even if greater in quality and/or quantity, supports a decision contrary to the commission's. *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373 (1996).

{¶ 34} In the present case, the stipulation of evidence does contain one piece of evidence which could establish that relator's allowed conditions were, in part, the cause of his retirement. Specifically, on his retirement form, relator wrote his reason for leaving was "back problems." However, as the commission noted, there is no contemporaneous medical evidence to support relator's statement that his allowed conditions were the cause of his retirement.

{¶ 35} As noted in the findings of fact, the only medical evidence prepared during the year before he retired are the December 3, 2008 and February 11, 2009 reports of Dr. Wald. In those reports, Dr. Wald indicated that relator continued to have pain and that his pain had increased. However, Dr. Wald never indicated that relator was considering retiring and never placed any restrictions on relator. Instead, those reports

indicate that relator continued the same treatment which had enabled him to work for years without restrictions. Further, Dr. Wald's reports list non-allowed conditions and he recommends treatment options which relator never pursued.

{¶ 36} The presence of or lack of contemporary medical evidence is relevant in determining whether or not a claimant voluntarily abandoned the work force. *State ex rel. Lackey v. Indus. Comm.*, 10th Dist. No. 08AP-262, 2009-Ohio-4208. As the SHO stated, none of the contemporaneous medical evidence indicated that relator is unable to perform the duties of his former position of employment.

{¶ 37} In the present case, the commission determined that relator's departure from the work force was voluntary. The commission based that determination on the following findings: (1) up until the time he retired, relator worked full-duty; (2) on his retirement paperwork, relator specifically indicated that "I have not been and/or do not intend to become employed in any capacity (including self-employment) at any time after my retirement date;" (3) his retirement was a retirement of years at a normal retirement age; (4) relator was not receiving TTD compensation nor was he working under any type of restrictions at the time of his retirement; and (5) there was no medical evidence submitted contemporaneous to the time he retired, which would support his statement that his retirement was due to his allowed conditions.

{¶ 38} With regard to the medical evidence, the SHO correctly noted that, while Dr. Wald did indicate that relator had increasing back symptoms near the time he retired, Dr. Wald did not place relator on any restrictions. Instead, Dr. Wald reviewed the list of medications being prescribed to relator and determined whether or not he could drive while taking those medications. There is simply no medical evidence in the record which would indicate that relator was not able to perform his job.

{¶ 39} The commission identified some evidence in the record to support its conclusion that relator's retirement was voluntary. Given that relator did not return to the work force thereafter, it was not an abuse of discretion for the commission to deny him PTD compensation.

{¶ 40} Based on the forgoing, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks

STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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