

In accord with Loc.R. 12(M), the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision which includes a recommendation that we deny the requested relief.

Counsel for Mr. Sinnott has filed objections to the magistrate's decision. Counsel for the commission and counsel for Ironton Iron, Inc. (Mr. Sinnott's former employer) have each filed a memorandum in response. The case is now before the court for a full, independent review.

Mr. Sinnott worked in the same plant for Ironton Iron, Inc., and its predecessors for thirty-five years. He injured his right heel in 1992 and has minimal residual disability as a result of that injury.

In 1994, Mr. Sinnott injured his back. His workers' compensation claim has been recognized for "lumbar sprain" and "aggravation of pre-existing foraminal and spinal stenosis L4-5, L5-S1 bilaterally." He has had a laminectomy and spinal canal decompression to attempt to alleviate his pain. However, the pain returned following the surgery.

Mr. Sinnott is now sixty-two years old. His ability to function is clearly limited. According to his medical history given to James H. Rutherford, M.D., Mr. Sinnott can only walk about one-half a block before his legs start to get numb and throb with pain. Mr. Sinnott claimed he can sit for approximately one hour before pain sets in. As a result, he uses a TNS unit about eight hours per day. An EMG study is supportive of this history.

The commission in refusing PTD compensation for Mr. Sinnott relied upon the medical report of commission specialist Robert Turner, M.D. Dr. Turner reported:

*** The pain limits just about anything after [a] short of period time. He doesn't bend or lift very much. He can stand for short periods of time and walking [sic]. He can sit for short periods of time then he must change his position. He has been tried on multiple anti-inflammatory drugs with limited success.

Despite these findings, Dr. Turner found Mr. Sinnott capable of sustained remunerative employment.

Dr. Turner completed an Occupational Activity Assessment for Mr. Sinnott and checked the space marked "0-3 HRS" for each of the activities of sit, stand and walk.

A staff hearing officer, addressing the merits of Mr. Sinnott's application for PTD compensation, found him capable of sustained remunerative employment.

The magistrate of this court who filed the magistrate's decision noted the definition of "sedentary work" contained in Ohio Adm.Code 4121-3-34(B)(2)(a). The definition reads:

"Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

The magistrate then relied upon *State ex rel. Toth v. Indus. Comm.* (1997), 80 Ohio St.3d 360. The *Toth* decision, with minimal analysis, stated that part-time work

constitutes sustained remunerative employment. *Toth* cited as authority for its assertion that part-time work constitutes sustained remunerative employment two cases which are not on point. One case, *State ex rel. Wiseman v. Indus. Comm.* (1990), 49 Ohio St.3d 286, involved computation of average weekly wage. The other case, *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, involved the right to receive wage loss compensation. Neither case involved PTD compensation, but the Supreme Court of Ohio used the cases to determine an issue which is crucial to many PTD cases. Thus far, requests for either clarification or reconsideration of the issue has provided no additional insight from the Supreme Court of Ohio.

Until the Supreme Court of Ohio provides clarification about what *Toth* means or overrules *Toth*, we, as an inferior appellate court, cannot fault our magistrate for following the *Toth* opinion.

As a result of the foregoing, we have no choice but to follow *Toth* and tell Mr. Sinnott that even though he may not be physically able to work more than three to four hours a day, he is not entitled to receive PTD compensation.

The objections to the magistrate's decision are overruled. The magistrate's decision is adopted by this court and the request for a writ of mandamus is denied.

Objections overruled, writ denied.

LAZARUS, J., concurs.
DESHLER, J., concurs in judgment only.
