[Cite as *State ex rel. Rhenium Alloys, Inc. v. Indus. Comm.*, 2010-Ohio-1379.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rhenium Alloys, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-326
Industrial Commission of Ohio and Billy E. James, Jr.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 31, 2010

Mansour, Gavin, Gerlack & Manos Co., LPA, Tracey S. McGurk, and *Amy L. Kullik*, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Sammon & Bolmeyer Co., L.P.A., and *Frank G. Bolmeyer*, for respondent Billy E. James, Jr.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, J.

{¶1} Relator, Rhenium Alloys, Inc. ("Rhenium"), 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 that awarded temporary total disability ("TTD") compensation to Billy E. James, Jr. ("claimant"), for the closed period of April 2, 2008 through September 7, 2008, and to enter a new order denying said compensation.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law which is appended to this decision, and recommended that this court issue a writ of mandamus ordering the commission to vacate its order of February 18, 2009, only to the extent that it awards TTD compensation, and to enter a new order that determines claimant's eligibility for TTD compensation beginning April 2, 2008. The commission has filed objections to the magistrate's decision.

{¶3} We will address the commission's arguments together, as they are related. The commission argues in its first objection that the magistrate erred by omitting any fact related to claimant's industrial injury/incident at Whirlaway on September 28, 2007. The commission contends that claimant's September 28, 2007 industrial injury, disability therefrom, drug results, and the timing of his discharge were all necessarily relevant to determining whether claimant was eligible for TTD. Relatedly, the commission argues in its second objection that the magistrate erred when he failed to consider whether the timing of a claimant's discharge from a subsequent employer severs the causal relationship between an allowed prior occupational disease and a closed period of disability while the claimant recovers from surgery related to that occupational disease.

{¶4} Here, the magistrate found that claimant's discharge from Whirlaway could have constituted a voluntary abandonment, thereby disqualifying him from subsequent TTD absent a return to employment. The commission counters that claimant's discharge from Whirlaway could not have severed the causal relationship between the prior occupational disease and the closed period of TTD because claimant was medically incapable of working at the time of his discharge from Whirlaway due to the September 28, 2007 injury at Whirlaway. The commission, citing *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, asserts that a claimant can abandon the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal.

{¶5} A voluntary departure from employment precludes receipt of TTD compensation. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. An involuntary departure, such as one that is injury induced, cannot bar TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. A termination generated by the claimant's violation of a written work rule or policy is voluntary if that rule: (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 403, 1995-Ohio-153. In *Pretty Products*, the Supreme Court of Ohio held that the character of the employee's departure – i.e., voluntary versus involuntary – is not the only relevant element and that the timing of the termination may be equally germane. A claimant whose departure is deemed voluntary does not surrender eligibility for TTD compensation if, at the time of departure, the claimant is still

temporarily and totally disabled. Id. at 7. Thus, even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for TTD compensation remains if the claimant was still disabled at the time the discharge occurred.

{¶6} Here, a timing analysis involving claimant's September 28, 2007 industrial injury at Whirlaway was not necessary to the TTD analysis. Initially, there was no evidence before the commission that claimant was medically incapable of working at the time of his discharge from Whirlaway. There is also no evidence that the September 28, 2007 workplace injury was related to the injury forming the basis of the TTD request. The injury forming the basis of the TTD request was claimant's injury at Rhenium. Furthermore, claimant's discharge from Whirlaway was due to a violation of its drug policy and not due to either the Whirlaway injury/incident or the Rhenium injury. With these points in mind, the question that remains for the commission upon reconsideration is whether claimant's discharge was a voluntary or involuntary termination for TTD purposes.

{¶7} However, the commission argues the staff hearing officer ("SHO") already made the determination that claimant's discharge was involuntary, and the magistrate erred when he found the SHO failed to address the voluntary abandonment issue. The commission points out that the SHO adopted the findings of the district hearing officer ("DHO"), which included the finding that Rhenium failed to show that there was a voluntary abandonment of employment that would preclude TTD while claimant worked at Whirlaway. However, as noted by the magistrate, the DHO did not have the Whirlaway employment records before it when it decided the matter. It was not until the SHO hearing

that the commission had the Whirlaway records available. Thus, it was incumbent upon the SHO to address the voluntary abandonment issue anew because the record contained new evidence related thereto. It failed to do so, and the commission's current argument that the SHO implicitly adopted the DHO's finding on this issue is insufficient to demonstrate the SHO appreciated that voluntary abandonment had to be re-addressed based upon the new evidence. Therefore, the commission's objections are without merit.

{¶8} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of the commission's objections, we overrule the objections. Accordingly, we adopt the magistrate's decision as our own with regard to the findings of fact and conclusions of law, and we grant Rhenium's request for a writ of mandamus to the extent indicated by the magistrate.

Objections overruled; writ of mandamus granted.

BRYANT and KLATT, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Rhenium Alloys, Inc.,	:	
Relator,	:	
v.	:	No. 09AP-326
Industrial Commission of Ohio and Billy E. James, Jr.,	:	(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 11, 2009

Mansour, Gavin, Gerlack & Manos Co., LPA, Tracey S. McGurk and *Amy L. Phillips*, for relator.

Richard Cordray, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

Sammon & Bolmeyer Co., L.P.A., and *Frank G. Bolmeyer*, for respondent Billy E. James, Jr.

IN MANDAMUS

{¶9} In this original action, relator, Rhenium Alloys, Inc. ("Rhenium" 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 Billy E. James, Jr. ("claimant"), for the closed period April 2 through September 7, 2008, and to enter an order denying said compensation.

Findings of Fact:

{¶10} 1. In November 2003, claimant began his employment with Rhenium as a laborer. His job required him to feed a long metal bar into a "swagging" machine. Apparently, the bar would vibrate as it was fed into the machine.

{¶11} 2. On September 19, 2005, several Rhenium employees reported that claimant had been verbally abusive with his coworkers. Consequently, Rhenium terminated claimant's employment effective September 21, 2005.

{¶12} 3. On November 21, 2005, claimant underwent an electromyogram ("EMG") study performed by Darshan Mahajan, M.D., following a referral from attending physician Domingo Gonzalez, M.D.

{¶13} 4. In his November 21, 2005 report, Dr. Mahajan assessed: "Moderately severe bilateral median nerve compression neuropathy at the wrists consistent with the diagnosis of carpal tunnel syndrome, being worse on the left side."

{¶14} 5. In a report from Dr. Gonzalez dated December 14, 2005, "[b]ilateral carpal tunnel syndrome" was listed as an "Impression."

{¶15} 6. On January 16, 2006, claimant began employment with Whirlaway Corporation ("Whirlaway"). Whirlaway has a written post-accident drug and alcohol testing policy.

{¶16} 7. On September 28, 2007, pursuant to Whirlaway's policy, claimant provided a specimen for a controlled substance drug screen. Claimant tested positive for opiates and marijuana.

{¶17} 8. By letter dated October 10, 2007, Whirlaway terminated claimant's employment:

> We regret to inform you that your employment with Whirlaway Corporation is being terminated effective immediately. You have violated Policy 702 Drug and Alcohol Use with positive drug test results on the September 28, 2007 post accident drug screening related to your alleged injury on September 27, 2007.

{¶18} 9. Earlier, in late September 2007, claimant filed an occupational disease claim against Rhenium. The industrial claim (No. 05-900205) is allowed for "carpal tunnel syndrome, bilateral." November 21, 2005 is the commission's official injury date.

{¶19} 10. In March 2008, neurosurgeon Gale A. Hazen, M.D., completed a C-9 request for authorization of left carpal tunnel release.

{¶20} 11. Following authorization of the surgery, a left carpal tunnel release was performed on April 2, 2008.

{¶21} 12. In May 2008, Dr. Hazen completed a C-9 request for authorization of right carpal tunnel release.

{¶22} 13. Following authorization of the surgery, a right carpal tunnel release was perfomed on June 18, 2008.

{¶23} 14. On October 29, 2008, Dr. Hazen completed a C-84 certifying a period of TTD beginning April 2, 2008 through an estimated return-to-work date of September 8, 2008.

{¶24} 15. Earlier, on May 27, 2008, the Ohio Bureau of Workers' Compensation ("bureau") issued an order awarding TTD compensation beginning April 2, 2008 based

upon an operative report from Dr. Hazen. The bureau's order also set the average weekly wage ("AWW") at $591.38.

{¶25} 16. Rhenium administratively appealed the bureau's order of May 27, 2008.

{¶26} 17. Following an October 31, 2008 hearing, a district hearing officer ("DHO") issued an order that vacates the bureau's order but resets AWW at $592.86 and awards TTD compensation from April 2 through September 8, 2008 (closed period). The DHO's order explains:

> It is the order of the District Hearing Officer that the injured worker's Average Weekly Wage (A.W.W.) be set at $592.86 in accordance with O.R.C. 4123.61. The District Hearing Officer finds that special circumstances prevent the setting of the injured worker's Average Weekly Wage using the ordinary application of O.R.C. 4123.61.
>
> The District Hearing Officer notes that this claim is an occupational disease claim with a date of diagnosis of 11/21/2005, while the first date of disability is 04/02/2008. Ohio Revised Code 4123.61 does require that the "average weekly wage of an injured employee…at time disability due to the occupational disease begins is the basis upon which to compute benefits." While credible wages are available for 2004 and 2005, the wages from 2007 and 2008 are not available to the hearing officer that properly reflect the injured worker's average weekly wage.
>
> Therefore, in order to achieve a fair and equitable result based on the above-mentioned special circumstances, the Average Weekly Wage is ordered set at $592.86. This figure has been determined by adding the injured worker's wages in 2004 and 2005 ($61,657) and dividing by the number of weeks for these two years (104).
>
> The Bureau of Worker's Compensation is to recalculate past compensation, if applicable.
>
> It is the order of the District Hearing Officer that temporary total disability compensation is GRANTED from 04/02/2008 through 09/08/2008 (closed period). The injured worker had two surgeries to the bilateral carpal tunnel syndrome during

> this period – on 04/02/2008 and then on 06/18/2008. There is sufficient medical evidence from Dr. Hazen that supports this period of disability independent of any other medical conditions the injured worker may have. The allowed condition of bilateral carpal tunnel syndrome rendered the injured worker disabled during this period.
>
> The District Hearing Officer does note that the injured worker has already been paid temporary total disability benefits from 04/02/2008 through 05/24/2008. Temporary total disability compensation is to be granted consistent with Ohio Revised Code 4123.55.
>
> The employer has failed to show that there has been a voluntary abandonment of employment which would pre-clude temporary total disability compensation while he worked at Whirlaway after his employment with the employer of record. Therefore, the District Hearing Officer finds that the injured worker is not barred from receiving these benefits over the requested period.
>
> The District Hearing Officer has reviewed the evidence in file prior to rendering this decision. This order is based on Ohio Revised Code 4123.61, the wage information in file, Dr. Hazen dated 10/29/2008, 7/31/2008, 05/12/2008, the operative notes in file, and office notes in file, and the injured worker's testimony.

(Emphasis sic.)

{¶27} 18. Rhenium administratively appealed the DHO's order of October 31, 2008.

{¶28} 19. Rhenium also requested that the commission issue a subpoena for Whirlaway employment records relating to claimant's employment. On November 14, 2008, the Cleveland hearing administrator issued the subpoena to Whirlaway.

{¶29} 20. On January 23, 2009, pursuant to the subpoena, Whirlaway filed its employment records with the commission.

{¶30} 21. Following a February 18, 2009 hearing, a staff hearing officer ("SHO") issued an order stating:

> The order of the District Hearing Officer, from the hearing dated 10/31/2008, is modified.
>
> Staff Hearing Officer recalculates the average weekly wage at $591.38 per week, based on the Injured Worker's gross income, for the year 2005, of $30,752.00. A recalculation of prior awards is ordered, if applicable.
>
> Temporary total disability compensation is granted from 04/02/2008-09/07/2008, closed period. The Injured Worker had bilateral carpal tunnel syndrome surgeries on 04/02/2008 and 06/18/2008. This part of the order is made based on the 10/29/2008 C-84 Request for Temporary Total Compensation of Dr. Gale Hazen.

{¶31} 22. On March 11, 2009, another SHO mailed an order refusing relator's administrative appeal.

{¶32} 23. On April 1, 2009, relator, Rhenium Alloys, Inc., filed this mandamus action.

Conclusions of Law:

{¶33} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶34} The syllabus of *State ex rel. McCoy v. Dedicated Transport Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 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.

{¶35} The *McCoy* holding was further explained by the court in *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587. In that case, the claimant, Shawn E. Eckerly, was fired from his job for unexcused absenteeism. Thereafter, the commission declared that the discharge constituted a voluntary abandonment of his employment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and denied TTD compensation. Citing *McCoy*, the *Eckerly* court upheld the commission's denial of TTD compensation. The *Eckerly* court explains:

> The present claimant seemingly misunderstands *McCoy*. He appears to believe that so long as he establishes that he obtained another job—if even for a day—at some point after his departure from Tech II, TTC eligibility is forever after reestablished. Unfortunately, this belief overlooks the tenet that is key to *McCoy* and all other TTC cases before and after: that the industrial injury *must remove the claimant from his or her job*. This requirement obviously cannot be satisfied if claimant had no job *at the time of the alleged disability*.
>
> In the case at bar, there is no evidence that claimant was employed in February 2003 when the requested period of TTC was alleged to have begun. To the contrary, it appears that claimant was almost entirely unemployed in the two years after his discharge from Tech II, earning only approximately $800 during that period.

Id. at ¶9-10. (Emphases sic.)

{¶36} Here, no one disputes that claimant voluntarily abandoned his former position of employment as a laborer with Rhenium based upon his termination from that employment effective September 21, 2005. Also, no one disputes that claimant reentered the workforce during his employment with Whirlaway. Under *McCoy*, the claimant reestablished his eligibility for TTD compensation during the period of his employment at

Whirlaway notwithstanding that he had voluntarily abandoned his employment at Rhenium.

{¶37} However, as the record indicates, claimant was terminated from his employment at Whirlway effective October 10, 2007 on grounds that he had violated Whirlaway's written policy regarding use of illegal drugs.

{¶38} If the commission were to determine that the Whirlaway employment termination constitutes a voluntary abandonment of employment under *Louisiana-Pacific* and its progeny, then claimant has lost his TTD eligibility as of the discharge date until he can show that he has once again reentered the workforce.

{¶39} Moreover, even if the commission were to determine that the Whirlaway employment does not constitute a voluntary abandonment of employment under *Louisiana-Pacific* and its progeny, a failure to seek other employment following the Whirlaway termination can constitute a voluntary abandonment of the workforce under *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. See *State ex rel. Wilson v. Indus. Comm.*, 10th Dist. No. 08AP-444, 2009-Ohio-1378.

{¶40} Here, the DHO's order of October 31, 2008 determined that Rhenium "has failed to show that there has been a voluntary abandonment of employment which would preclude temporary total disability compensation while he worked at Whirlaway after his employment with the employer of record." As earlier noted, the DHO's order was said to be "modified" by the SHO's order, but the SHO's order does not address the voluntary abandonment issue.

{¶41} The DHO's order fails to explain how it was determined that Rhenium failed to prove that claimant voluntarily abandoned his employment at Whirlaway, so we do not

know how the DHO made that determination. Moreover, claimant requested TTD compensation to begin April 2, 2008, the date of his left carpal tunnel release. Thus, the DHO's order incorrectly suggests that claimant requested TTD compensation for a period during his employment with Whirlaway.

{¶42} As earlier noted, Rhenium administratively appealed the DHO's order and also obtained a commission subpoena for Whirlaway employment records. Those records were filed with the commission on January 23, 2009, several weeks prior to the September 18, 2009 hearing before the SHO.

{¶43} The filing of the Whirlaway employment records presented to the SHO a critical issue—did claimant voluntarily abandoned his employment at Whirlaway? The SHO's order fails to address this critical issue and, therefore, constitutes an abuse of discretion on the part of the commission. *State ex rel. Gen. Am. Transp. Corp. v. Indus. Comm.* (1990), 49 Ohio St.3d 91; *State ex rel. Peabody Coal Co. v. Indus. Comm.* (1993), 66 Ohio St.3d 639.

{¶44} Again, if claimant voluntarily abandoned his employment at Whirlaway, he is not eligible for TTD compensation beginning April 2, 2008 because there is no evidence in the record that he reentered the workforce following the October 10, 2007 discharge at Whirlaway. If, on the other hand, claimant did not voluntarily abandon his employment at Whirlaway, a failure to seek further employment during the nearly six month period following his termination could also be viewed as a voluntary abandonment of the workforce under *Pierron*.

{¶45} The record before this court shows that claimant appeared with his counsel at both hearings. Because neither hearing was recorded, we do not know whether

claimant might have testified about a job search following his October 10, 2007 termination. Moreover, given the failure of the SHO to address the critical issue, we do not know whether claimant even had the opportunity to testify about any post-termination job search efforts.

{¶46} Accordingly, based upon the above analysis, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of February 18, 2009 and, in a manner consistent with this magistrate's decision, enter a new order that determines claimant's eligibility for TTD compensation beginning April 2, 2008.

{¶47} Relator further contends that the commission abused its discretion in setting AWW based upon claimant's gross income for the year 2005 when he was first diagnosed as having carpal tunnel syndrome rather than upon his earnings during the year prior to the claimed onset of total disability, i.e., April 2, 2008. In the magistrate's view, this issue is premature and need not be answered in this action. *State ex rel. Park Poultry, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-1122, 2004-Ohio-6831 (this court applied the ripeness doctrine set forth in *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89).

{¶48} R.C. 4123.61 states:

> The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits.
>
> In cases of temporary total disability the compensation for the first twelve weeks for which compensation is payable shall be based on the full weekly wage of the claimant at the time of the injury or at the time of the disability due to occupational disease begins[.] * * *

> Compensation for all further temporary total disability shall be based as provided for permanent disability claims.
>
> In death, permanent total disability claims, permanent partial disability claims, and impairment of earnings claims, the claimant's or the decedent's average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the weekly wage upon which compensation shall be based. * * *
>
> In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable the admin-istrator to do substantial justice to the claimants[.] * * *

{¶49} As earlier noted, the commission abused its discretion in awarding TTD compensation which is apparently the only compensation that has been awarded in this industrial claim. That award is subject to this court's writ of mandamus to be issued here. If, upon remand, the commission were to determine that claimant is ineligible for TTD compensation, there would be no need to enter a determination of AWW.

{¶50} Relator seems to agree with this magistrate's conclusion that the AWW issue is premature when it argues:

> * * * James is not eligible to receive TTD benefits for the closed period of April 2, 2008 to September 7, 2008. Assuming arguendo, James is found eligible to receive TTD benefits, his AWW should be based on his earnings for the year 2007 which is the year prior to his disability onset due to his occupational disease.
>
> The Commission abused its discretion when it granted Respondent James' request for TTD benefits and proceeded to calculate his AWW based on the date of injury without the support of any evidence. Based on the foregoing, Relator Rhenium asks this court to issue a writ of mandamus directing the Commission to vacate its order and to issue an order denying temporary total disability benefits to Re-spondent James.

(Relator's brief, at 14.)

{¶51} Based upon the above analysis, the magistrate finds that the issue regarding AWW is not before this court and, thus, the issue need not be addressed in this action.

{¶52} Again, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of February 18, 2009 only to the extent that it awards TTD compensation and, in a manner consistent with this magistrate's decision, enter a new order that determines claimant's eligibility for TTD compensation beginning April 2, 2008.

/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).