

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert Brown Sr.,	:	
Relator,	:	
v.	:	No. 14AP-722
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
The Goodyear Tire & Rubber Company,	:	
Respondents.	:	

D E C I S I O N

Rendered on July 21, 2015

Agee, Clymer, Mitchell & Laret, C. Russell Canestraro, Eric B. Cameron, Robert M. Robinson, Katherine E. Ivan and Douglas P. Koppel, for relator.

Reminger Co., L.P.A., Suzanne Belot Norton and Taylor C. Knight, for respondent The Goodyear Tire & Rubber Company.

Michael DeWine, Attorney General, and *Patsy A. Thomas*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

LUPER SCHUSTER, J.

{¶ 1} In this original action, relator, Robert Brown Sr., requests this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying relator's request for temporary total disability ("TTD") compensation, and to order the commission to find he is entitled to that compensation.

{¶ 2} This court referred the matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, appended hereto, and recommended this court deny Brown's request for a writ of mandamus. Brown filed objections to the magistrate's decision. For the following reasons, we overrule the objections and deny the requested writ.

I. Facts and Procedural History

{¶ 3} As more fully set forth in the magistrate's decision, in May 1997, Brown sustained an industrial injury in the course and scope of his employment with respondent Goodyear Tire & Rubber Company ("Goodyear"). Brown's workers' compensation claim was allowed for the following conditions: "strain right knee; medial meniscus tear right knee; degenerative arthritis right knee of the medial compartment; internal derangement left knee on a flow through basis; [and] medial meniscus tear left knee."

{¶ 4} In January 2000, Brown underwent a functional capacity evaluation and it was determined he could perform duties in a light category. In March 2000 Brown retired from his position with Goodyear. Following his retirement, Brown received retirement checks from Goodyear as well as Social Security benefits.

{¶ 5} In January 2012, Brown had right total knee replacement surgery. During both 2011 and 2012, Brown was compensated for occasionally singing in nursing homes and performing as Santa Claus at a Macy's department store.¹ According to the Internal Revenue Service Forms 1099 ("1099s") in the record, the nursing home company paid Brown \$1,830 in 2011, and \$2,515² in 2012.

{¶ 6} On August 14, 2013, Charles B. May, D.O., completed a "Physician's Report of Work Ability," which identified Goodyear as Brown's employer on the date of injury. Dr. May opined that Brown was temporarily not released to any work, including the former position of employment, from January 9 to December 19, 2012. The next day, Brown filed a request for TTD compensation for January 9 to December 19, 2012.

¹ The record contains an October 21, 2013 affidavit signed by Brown indicating he played Santa Claus at Macy's in 2010, 2011, and 2012, and that he worked as a singer in nursing homes for the five years prior to his knee surgery. But this affidavit does not detail Brown's frequency of work or the amount of his compensation.

² The magistrate's decision mistakenly states the Forms 1099 indicate Brown was paid \$2,545 in 2012.

{¶ 7} Brown's request for TTD compensation was heard before a district hearing officer ("DHO") on September 12, 2013.³ The DHO denied the request, finding that Brown voluntarily abandoned the workforce and was therefore precluded from receiving payment of TTD compensation. Brown appealed the DHO's decision, submitting the above-mentioned 1099s as part of the appeal process. A staff hearing officer ("SHO") heard the matter on November 18, 2013. The SHO denied the TTD compensation request on the additional basis that Brown had engaged in some work during the same time Dr. May opined that Brown was disabled and unable to perform any form of employment. Brown appealed the SHO's order, but the commission denied the appeal.

{¶ 8} After the commission denied Brown's request for further appeal, Brown filed this mandamus request. On February 26, 2015, the magistrate issued a decision recommending this court deny Brown's request for a writ of mandamus.

II. Objections to Magistrate's Decision

{¶ 9} While Brown does not separately set forth specific objections to the magistrate's decision, he argues the magistrate incorrectly recited the bases set forth by the commission for the denial of his request for TTD compensation. In particular, Brown argues the magistrate incorrectly stated the commission denied the requested TTD compensation because he had abandoned the workforce. Brown argues the SHO's determination that he was performing sustained remunerative employment negates any inference that he had abandoned the workforce. According to Brown, the SHO found that he had returned to the workforce. Thus, Brown contends the commission's denial of his TTD compensation request was only based on its finding that the report of Dr. May was not credible. Brown does not refute the incompatibility of his request for TTD compensation for nearly all of 2012 and the evidence that he had engaged in some work during that period. However, Brown asserts he should receive TTD compensation for at least the dates of his inpatient stay in the hospital relating to his knee replacement surgery in January 2012.

³ The magistrate's decision mistakenly states the matter was heard before the DHO on June 5, 2013.

III. Discussion

{¶ 10} In order for this court to issue a writ of mandamus, a relator must show a clear legal right to the requested relief, that the commission has a clear legal duty to provide such relief, and that there is a lack of an adequate remedy in the ordinary course of law. *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 117 Ohio St.3d 480, 2008-Ohio-1593.

{¶ 11} Brown fails to demonstrate that the magistrate's conclusion that he is not entitled to the requested writ was erroneous. Brown's challenge to the magistrate's decision is essentially based on his contention that the voluntary abandonment reasoning of the DHO was not, and should not have been, adopted by the SHO because that reasoning conflicted with the reasoning of the SHO. This contention, however, is not supported by the orders of the commission or applicable case law.

{¶ 12} In ruling on Brown's TTD compensation request, the DHO recognized Brown had involuntarily taken disability retirement in 2000 due to the allowed conditions in his claim. But the DHO further noted that Brown had made no attempt to return to the workforce subsequent to his disability retirement in 2000, and that there was no evidence indicating Brown was medically incapable of performing any type of work activity as a result of the allowed conditions in his claim. In view of these findings, the DHO determined Brown was not eligible to receive the requested TTD compensation because he had voluntarily abandoned the workforce.

{¶ 13} Brown appealed the DHO's decision, and he submitted multiple 1099s apparently in an attempt to demonstrate he had not voluntarily abandoned the workforce. The SHO acknowledged the 1099s demonstrated Brown "continued to perform some types of sporadic and intermittent employment since his retirement from the workforce in March of 2000." (Nov. 18, 2013, SHO Order.) The SHO reasoned that Brown's involvement in activities producing income, namely intermittently singing in nursing homes and playing Santa Claus at a department store, cast "significant doubt on the disability form of Dr. May" indicating Brown was totally disabled from January 9 to December 19, 2012. (Nov. 18, 2013, SHO Order.) Based on Brown's demonstrated ability to work, and for "those reasons stated within the District Hearing Officer's order," the SHO denied the requested TTD compensation. (Nov. 18, 2013, SHO Order.) Thus, the

SHO expressly adopted the reason for the denial of TTD compensation expressed by the DHO. The SHO further noted, "[t]he remainder of the District Hearing Officer's order, not in conflict with this order, remains in full force and effect." (Nov. 18, 2013, SHO Order.)

{¶ 14} Based on the DHO and SHO orders, the magistrate determined the commission denied Brown's requested TTD compensation for two reasons: (1) although Brown's retirement in 2000 was based on the allowed conditions and therefore involuntary, his failure to seek and obtain employment in the years that followed demonstrated his intent to abandon the workforce; and (2) to the extent Brown claimed he was disabled, there was evidence that he actually worked. Brown's objections center on the first of these two reasons because he acknowledges the evidence demonstrates he engaged in some work during the alleged period of disability.

{¶ 15} Brown does not allege that he searched for work in the years immediately following his retirement from Goodyear, even though he was capable of light-duty work. As observed by the magistrate, the failure to search for other employment following retirement when one is able to do so may constitute evidence that one has permanently abandoned the entire workforce. *See State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. However, Brown contends the commission could not rely on evidence that he engaged in some forms of sustained remunerative employment to discredit his expert's report concerning his disability, and at the same time find he voluntarily abandoned the workforce. But, as correctly observed by the magistrate, this contention fails to adequately consider the principles and requirements of TTD compensation.

{¶ 16} TTD compensation compensates claimants "for the loss of earnings which he [or she] incurs while the injury heals." *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 44 (1987). There "can be no lost earnings, however, or even a potential for lost earnings, if the claimant is no longer part of the active work force." *Pierron* at ¶ 9. Thus, "[w]hen the reason for this absence from the work force is unrelated to the industrial injury, temporary total disability compensation is foreclosed." *Id.* However, 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 TTD compensation, pursuant to R.C. 4123.56, if he or she reenters the workforce and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job. *State ex rel. McCoy v. Dedicated Transp., Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶ 39. The holding in *McCoy* "is limited to claimants who are gainfully employed at the time of their subsequent disabilities." *Id.* at ¶ 40. "[T]o qualify for [TTD] compensation, the claimant must show not only that he or she lacks the medical capability of returning to the former position of employment but that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings." *Id.* at ¶ 35.

{¶ 17} That a claimant engages in some type of remunerative employment after voluntarily abandoning the workforce does not preclude a finding that the claimant's loss of earnings was caused by the claimant's decision to leave the workforce. *See Pierron* at ¶ 4, 10-11 (a "brief part-time stint as a flower delivery person" did not preclude the commission from finding the claimant had demonstrated an intent to leave and stay out of the workforce so as to render the claimant ineligible for TTD compensation); *State ex rel. Dishman v. Indus. Comm.*, 10th Dist. No. 07AP-613, 2008-Ohio-3291 (finding that the claimant's sporadic work did not preclude the commission's finding that the claimant had not reentered the workforce by engaging in sustained gainful employment). The above reasoning set forth in *Pierron* and *Dishman* is consistent with the principle that "workers' compensation benefits were never intended to subsidize lost or diminished earnings attributable to lifestyle decisions." *Pierron* at ¶ 11, citing *State ex rel. Pepsi-Cola Bottling Co. v. Morse*, 72 Ohio St.3d 210, 216 (1995).

{¶ 18} Thus, we resolve the magistrate correctly reasoned that Brown's employment for a few thousand dollars in 2011 and 2012 did not preclude the commission from finding that he had not demonstrated an intent to reenter the workforce after he had abandoned it. As observed by the magistrate, considering the relatively small amount Brown earned in 2011 and 2012, as reflected on the 1099s, it was not the disability that followed Brown's surgery, "but his own decision to remove himself from the workforce, that caused his loss of earnings." (Magistrate's Decision, ¶ 45.) In sum, we find it was not an abuse of discretion for the commission to find Brown's sporadic and brief periods of employment not to be gainful employment so as to render him eligible for TTD

compensation after he had, years before, voluntarily abandoned the workforce. Based on this determination, it is unnecessary to address Brown's assertion that, even though he worked some during 2012, he is still entitled to TTD compensation for the few days he was in the hospital for his knee replacement surgery.

{¶ 19} Because we agree with the magistrate's determination that the commission did not abuse its discretion by finding that Brown was not entitled to the requested award of TTD compensation, we overrule Brown's objections.

IV. Disposition

{¶ 20} Following our independent review of the record, pursuant to Civ.R. 53, we find that the magistrate correctly determined that Brown is not entitled to the requested writ of mandamus as there is some evidence in the record to support the commission's denial of Brown's TTD compensation. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law, as corrected herein. We therefore overrule Brown's objections to the magistrate's decision and deny Brown's request for a writ of mandamus.

*Objections overruled;
writ of mandamus denied.*

BROWN, P.J., and HORTON, J., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Robert Brown Sr.,	:	
	:	
Relator,	:	
	:	
v.	:	No. 14AP-722
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
The Goodyear Tire & Rubber Company,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on February 26, 2015

Agee, Clymer, Mitchell & Laret, C. Russell Canestraro, Eric B. Cameron, Robert M. Robinson, Katherine E. Ivan and Douglas P. Koppel, for relator.

Reminger Co., L.P.A., Suzanne Belot Norton and Taylor C. Knight, for respondent The Goodyear Tire & Rubber Company.

Michael DeWine, Attorney General, and Patsy A. Thomas, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 21} Relator, Robert Brown, 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 relator's request for temporary total

disability ("TTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 22} 1. Relator sustained a work-related injury on May 13, 1997 and his workers' compensation claim was ultimately allowed for the following conditions:

Strain right knee; medial meniscus tear right knee;
degenerative arthritis right knee of the medial compartment;
internal derangement left knee on a flow through basis;
medial meniscus tear left knee.

{¶ 23} 2. According to the medical reports of Seth H. Vogelstein, D.O and Douglas C. Gula, D.O., who examined relator in 2002 and 2011 respectively, relator retired from his position with his employer, The Goodyear Tire & Rubber Company ("Goodyear") in March 2000. Relator had been employed by Goodyear since 1975.⁴ According to the report of Dr. Vogelstein, relator underwent a functional capacity evaluation ("FCE") in January 2000, before he retired, and it was determined that he could perform duties in a light category.

{¶ 24} 3. Following his retirement, relator began receiving a retirement check in the amount of \$1,451 per month, as well as Social Security Benefits of approximately \$1,800.⁵ There is no evidence in the record indicating that relator specifically sought out any employment after he retired in 2000, except that relator ultimately presented evidence that in 2011 and 2012 he sang in nursing homes on an occasional basis and performed as Santa Claus at a Macy's department store. According to the 1099s submitted by relator, he earned \$1,830 in 2011 and \$2,545 in 2012.

{¶ 25} 4. On January 9, 2012, relator underwent a total right knee replacement.

{¶ 26} 5. On August 14, 2013, Charles B. May, D.O., completed a Physician's Report of Work Ability and opined that relator was temporarily not released to any work, including the former position of employment, from January 9 to December 19, 2012.

⁴ There are no retirement records submitted by either relator or Goodyear.

⁵ This information comes from the February 23, 2001 report of S.M. Sethi, M.D.

{¶ 27} 6. Relator filed a request for TTD compensation ultimately indicating that he had not worked in any capacity during the period of alleged disability (January 9 to December 19, 2012) and was receiving Social Security Benefits.

{¶ 28} 7. The matter was heard before a district hearing officer ("DHO") on June 5, 2013. The DHO denied the request finding that relator made no attempts to return to the workforce following his disability retirement. Specifically, the DHO stated:

District Hearing Officer finds the requested period of temporary total disability compensation is contemporaneous to the Injured Worker's approved right total knee replacement which was performed on 01/09/2012. However, prior to this surgical intervention and requested period of temporary total disability compensation, District Hearing Officer finds the Injured Worker to have taken a disability retirement in March of 2000. From the Injured Worker's testimony, the District Hearing Officer finds this departure was involuntary and related to the allowed conditions in this claim. However, from the Injured Worker's testimony, the District Hearing Officer finds the Injured Worker has made no attempt to return to the job force, subsequent to his disability retirement. At hearing, the Injured Worker testified that his physician would not allow him to return to work, unless he was receiving wages, comparable to his prior position of employment. District Hearing Officer finds no evidence that the Injured Worker is medically incapable, of performing any type of work activity, as a result of the recognized conditions in this claim. Therefore, consistent with State ex rel. Corman v. Allied Holdings, Inc. (2012) 132 Ohio St.3d 202, District Hearing Officer finds the Injured Worker voluntarily abandoned the workforce and is precluded from receiving payment of temporary total disability compensation.

{¶ 29} 8. Relator appealed and ultimately submitted multiple 1099 forms.

{¶ 30} 9. The matter was heard before a staff hearing officer ("SHO") on November 18, 2013. The SHO denied relator's request for TTD compensation and modified the prior DHO order finding that the evidence relator presented showing that he worked during the time Dr. May indicated he was disabled and unable to perform any form of employment, was evidence that he was not temporarily and totally disabled. Specifically, the SHO stated:

There is no doubt that the Injured Worker has continued to perform some types of sporadic and intermittent employment since his retirement from the workforce in March of 2000. Clearly, related to allowed conditions within this claim the Injured Worker involuntarily left the workforce and took disability retirement.

The Injured Worker's affidavit and 1099 miscellaneous forms from 2011 and 2012 clearly show that he did perform some forms of sustained remunerative employment. The Lima Senior Living, LLC payment records to Mr. Brown clearly show intermittent earnings beginning in February of 2012 with last payment being made on 12/20/2012. The Injured Worker being involved in activities producing income during this time frame casts significant doubt on the disability form of Dr. May dated 08/14/2013 in which he indicated that the Injured Worker was totally disabled from 01/09/2012 through 12/19/2012. Further, as the Injured Worker produced income during the timeframe in question, temporary total disability compensation is not appropriately paid as he was able to work.

For the above reasons, along with those reasons stated within the District Hearing Officer's order, temporary total disability compensation is denied.

The remainder of the District Hearing Officer's order, not in conflict with this order, remains in full force and effect.

{¶ 31} 10. Relator's further appeal was refused by order of the commission mailed December 11, 2013.

{¶ 32} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 33} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 34} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought

and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, 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).

{¶ 35} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, 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 R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 36} In arguing that he is entitled to an award of TTD compensation, relator argues that the commission abused its discretion by denying him TTD compensation based entirely on the conclusion that he may not have qualified for TTD compensation for the entire duration. Relator cites *State ex rel. Bowman v. FYDA Freightliner, Inc.*, 10th Dist. No. 02AP-284, 2002-Ohio-6168, in support of his argument. For the reasons that follow, the magistrate finds that this court's decision in *Bowman* does not apply here and further that this court should deny relator's request for a writ of mandamus.

{¶ 37} Deborah K. Bowman sustained a work-related injury on December 27, 1998. She submitted a First Report of Injury form the next day. Eleven days later, Bowman's husband was notified that he was being transferred to Virginia, effective January 11, 1999, fifteen days after she sustained her work-related injury. Bowman notified her employer

that her husband was being transferred and that she was unable to perform her work duties at that time due to pain in her back.

{¶ 38} Bowman was examined by Dr. Mohamed Sadek on April 26, 1999, and, based on his findings, Bowman filed a motion for TTD compensation which was denied after the commission determined that Bowman had voluntarily abandoned her employment. The basis of this finding was that Bowman did not submit additional medical evidence until April 26, 1999. The SHO assumed that Bowman did not seek medical treatment for three and one half months because she did not need any treatment. Ultimately, this court issued a writ of mandamus ordering the commission to determine the application on the merits. This court, through its magistrate, stated:

[T]he SHO "assumed" that relator did not seek out medical treatment for three and one-half months because she did not need any treatment. After looking at the first page of the SHO's order, it is apparent to this magistrate that both relator and her counsel were present at the hearing before the SHO. Instead of inquiring of the relator and her counsel why she had not submitted any medical evidence after January 8, 1999, the SHO chose to "assume" that she had no problems and therefore was not entitled to TTD compensation. Given that the workers' compensation laws are to be construed in favor of injured workers, this magistrate finds it most distressing that the SHO denied relator's application for TTD compensation on an assumption that she had not had enough pain to warrant treatment. On appeal of the SHO order, claimant submitted an affidavit explaining her difficulties in setting up an appointment with a new doctor after she and her husband had been forced to relocate a mere 15 days after the date of her injury. Relator also explained the pain she had been suffering during that time period. Furthermore, as was stated previously, relator's claim was ultimately allowed for herniated nucleus pulposus L4-5, L5-S1 with the presence of extruded disc material, L5-S1 and relator needed surgery for these allowed conditions which were a direct result of the injury. Given that the SHO could have asked some questions to clarify the record and failed to do so, this magistrate finds that the SHO abused his discretion in denying relator TTD compensation based upon an assumption. Relator is entitled to have her application for TTD compensation determined on the merits and not based on an assumption made by a hearing officer which could have been clarified.

Id. at ¶ 45.

{¶ 39} Relator asserts that, just as Deborah Bowman was present at the hearing before the SHO and could have answered any questions the SHO had, he was likewise present at the hearing before the SHO and the SHO could have asked him to explain. Relator appears to concede that the evidence shows he did work during 2012, while Dr. May opined he would not perform any work, but was unable to work for a certain period of time following the surgery. Relator asserts that he is entitled to some period of TTD compensation following the January 9, 2012 surgery. On that basis, relator contends that he is entitled to a writ of mandamus ordering the commission to rehear the matter and, after inquiring of him, perhaps find that he was entitled to an award of TTD compensation for part of the period requested, when he was not working.

{¶ 40} In the present case, relator was denied TTD compensation for two reasons: (1) Although, his retirement in 2000 was based on the allowed conditions and, therefore, involuntarily, his failure to seek and obtain employment in the years that followed demonstrated his intent to abandon the workforce, and (2) to the extent he claimed he was disabled, there was evidence that he actually worked.

{¶ 41} Pursuant to R.C. 4123.56, an injured worker is entitled to an award of TTD compensation when the work-related injury prevents them from performing their former position of employment. *See State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000). Retirement from the former position of employment can bar an injured worker from receiving TTD compensation depending on whether or not the retirement was voluntary (not related to the allowed conditions in the claim) or involuntary (related to the allowed conditions in the claim). An injured worker who voluntarily retires for reasons unrelated to the allowed conditions may no longer be entitled to an award of TTD compensation to which he otherwise might be entitled if, by retiring, he has voluntarily removed himself permanently from the workforce. *See Baker* and *State ex rel. Floyd v. Formica Corp.*, 140 Ohio St.3d 260, 2014-Ohio-3614. If the departure is related to the work-related injury, it is not necessary that the worker first obtain other employment, but it is necessary that the injured worker has not foreclosed the possibility of engaging in other employment by abandoning the entire workforce if that injured worker wants to

remain eligible for TTD compensation. *See State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 2011-Ohio-3089.

{¶ 42} The failure to search for other employment following retirement when one is able to do so may constitute evidence that one has permanently abandoned the entire workforce. *See State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245. In that case, the Supreme Court of Ohio reasoned that Pierron's failure to search for employment in the years that followed his retirement was some evidence upon which the commission could rely that he intended to leave the entire workforce and, as such, could not allege any lack of income due to his industrial injury. Further, the Supreme Court of Ohio recently held that the receipt of Social Security Benefits constitutes some evidence of the intent to abandon the entire workforce.

{¶ 43} Relator retired from Goodyear in 2000. According to the FCE performed in January 2000, relator was capable of performing in a light-duty category. There is no evidence in the record that relator returned to work at that time or that he attempted to return to work at that time. Instead, relator applied for and began receiving Social Security Benefits. Eleven years later, relator returned to some work and earned approximately \$1,800 in 2011. Relator underwent surgery in January 2012. Then relator worked in 2012, while claiming he was unable to do so, and earned approximately \$2,500. The fact that relator performed minimal work activity in 2011 and 2012 does not constitute some evidence that relator attempted to return to the workforce. As such, whether his retirement was voluntary or involuntary, relator's failure to seek other sustained remunerative employment for the next ten years and his receipt of Social Security Benefits does constitute some evidence upon which the commission could rely to find that he had voluntarily abandoned the entire workforce, and was not experiencing a wage loss, and therefore was not entitled to an award of TTD compensation.

{¶ 44} Relator attempts to argue that the SHO specifically concluded that he had returned to some sustained remunerative employment and since he was hospitalized following surgery, he clearly is entitled to some period of TTD compensation, even if not for the entire period.

{¶ 45} To the extent that the SHO stated: "The Injured Worker's affidavit and 1099 miscellaneous forms from 2011 and 2012 clearly show that he did perform some

forms of sustained remunerative employment," the magistrate disagrees with relator's argument that the SHO found that he had not abandoned the workforce. Relator's activities singing in nursing homes and playing Santa Claus at Macy's may have constituted brief periods of sustained employment that, if he would have continued with those activities yearlong, may have constituted gainful employment. However, TTD compensation is designed to compensate an injured worker for a loss of earnings. TTD compensation is payable at $66 \frac{2}{3}$ of an injured worker's average weekly wage. Although there is no evidence in the record concerning his wages at Goodyear, he certainly earned more than the \$1,830 he earned in 2011 (\$35.19 per week) or the \$2,545 he earned in 2012 (\$48.94 per week). As such, it is not the disability that followed his surgery, but his own decision to remove himself from the workforce, that caused his loss of earnings, and the commission did not abuse its discretion when it determined he was not entitled to an award of TTD compensation.

{¶ 46} To the extent that relator asserts that the hearing officer could have asked him about his employment, relator does not offer any insight into what his testimony would have revealed. In *Bowman*, the commission's order was based on the assumption that her lack of treatment revealed a lack of problems and not the facts. Here, the order is based on facts: relator retired in 2000 when he was capable of light-duty work; relator did not seek any employment and elected to collect Social Security instead; relator did eventually work, however minimally in 2011 and 2012; and, relator actually worked in 2012 during a time he claimed he was unable to do so. The magistrate finds that the commission did not abuse its discretion.

{¶ 47} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by denying his application for TTD compensation and this court should deny his request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).