[Cite as *State ex rel. Floyd v. Formica Corp.*, 2012-Ohio-5769.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Darwin Floyd,	:	
Relator,	:	
v.	:	No. 11AP-928
Formica Corporation and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 6, 2012

Casper & Casper, and *Douglas W. Casper*, for relator.

Dinsmore & Shohl, LLP, and *Joan M. Verchot*, for respondent Formica Corporation.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION.

SADLER, J.

{¶ 1} In this original action, relator, Darwin Floyd, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying his request for temporary total disability ("TTD") compensation beginning November 26, 2010, the date of his right total shoulder revision, on grounds that he had voluntarily abandoned the workforce by that date, and to enter an order granting TTD compensation beginning November 26, 2010.

{¶ 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's analysis regarding whether relator voluntarily abandoned the workforce is incomplete. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to reconsider relator's eligibility for TTD compensation, and if he is found to be eligible, to adjudicate the merits of his request for TTD compensation beginning November 26, 2010.

{¶ 3} No objections have been raised regarding the findings of fact set forth in the magistrate's decision. Following an independent review of the record, we adopt those findings of fact as our own. Though adopting the magistrate's findings of fact, for ease of discussion, we include a brief summarization here.

I. BACKGROUND

{¶ 4} Relator's industrial claim was initially allowed in March 2000. Following a left shoulder surgery in August of that year, relator returned to light-duty work at respondent Formica Corporation ("Formica"). In January 2001, relator was informed light-duty work was no longer available, and after termination of the light-duty work, Formica began payments of TTD compensation. In April 2001, at age 63, relator began receiving Social Security retirement benefits.

{¶ 5} Relator's TTD compensation continued until his injury was determined to be at maximum medical improvement ("MMI") in June 2006. In August 2007, relator applied for permanent total disability ("PTD") compensation but withdrew said application the following November. In April 2008, relator's physician completed a C-84 indicating he was planning a total shoulder replacement. Based upon the planned surgery, Formica agreed to restart TTD compensation effective February 8, 2008. This continued until relator was determined to be at MMI effective May 26, 2009.

{¶ 6} In August 2010, relator's physician completed a C-9 request for authorization of right total shoulder revision and said procedure was performed in November of that year. Also in November 2010, relator's physician completed a C-84 certifying TTD compensation beginning that month. A district hearing officer ("DHO") denied the request finding that as of the requested date of compensation, relator was no

longer in the workforce. The DHO recognized relator left Formica in 2001 because light-duty work was no longer available, but nonetheless, concluded that as of November 26, 2010, he was no longer in the workforce because his intent was to not re-enter the workforce at the time he left Formica. A staff hearing officer ("SHO") affirmed. The SHO also recognized relator's departure from Formica was not voluntary, and also concluded relator's intent was to not re-enter the workforce.

II. THE COMMISSION'S OBJECTIONS

{¶ 7} The commission has filed the following two objections to the magistrate's conclusions of law:

> 1. The Magistrate erred in improperly reweighing the evidence to reach a factual conclusion different from that of the commission in contravention to well-settled Ohio law.
>
> 2. The Magistrate erred in finding the commission's analysis of work force abandonment under [*State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245] incomplete.

III. RESPONDENT FORMICA CORPORATION'S OBJECTIONS

{¶ 8} Formica has filed the following four objections to the magistrate's conclusions of law:

> 1. The Magistrate's decision violates *State ex rel. Mitchell v. Indus. Comm.*, [83 Ohio St.3d 399 (1998)] and *State ex rel. Noll v. Indus. Comm.*, [57 Ohio St.3d 203 (1991)] in that he finds that the order of the Industrial Commission was an abuse of discretion based upon conclusions not set forth in the Industrial Commission order.
>
> 2. The Magistrate erred by finding that the Industrial Commission's analysis of workforce abandonment under [*State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245] is incomplete.
>
> 3. The Magistrate erred in applying *State ex rel. Hootman v. Replex Mirror Co.*, [10th Dist. No. 10AP-649, 2011-Ohio-3788] to the captioned case and underlying workers' compensation claim.
>
> 4. The Magistrate erred in applying *State ex rel. Ganu v. Willow Brook Christian Communities*, [108 Ohio St.3d 296,

> 2006-Ohio-907] in his analysis of work search during periods of Temporary Total Disability.

IV. DISCUSSION

{¶ 9} 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).

{¶ 10} Because they are dispositive and interrelated, we first address the commission's objections and Formica's second objection to the magistrate's decision. In these objections, it is argued the magistrate improperly reweighed the evidence and erred in finding the commission's analysis was incomplete. We agree. Because light-duty work was no longer available as of January 2001, relator was unable to return to his former position of employment at the time he retired. As noted, this fact was recognized by the commission. However, because of the facts presented here, i.e., receipt of retirement benefits in 2001 by a 63 year old who seeks TTD compensation in 2010 after not working during said timeframe, the commission properly recognized that an issue to be contemplated is whether or not relator voluntarily abandoned the entire job market at the time of retirement. *See State ex rel. Corman v. Allied Holdings, Inc.*, 10th Dist. No. 10AP-38, 2010-Ohio-5153, ¶ 60.

{¶ 11} In *Corman*, after suffering an industrial injury in January 2002, the injured worker was unable to return to his former position of employment and began receiving TTD compensation. Relator's TTD compensation continued until July 14, 2003 when his injury was determined to have reached MMI. In April 2003, the injured worker, at age 56, applied for and began receiving retirement benefits effective April 1, 2003. Following a surgery in March 2009, the claimant sought TTD compensation from the date of surgery and continuing. The commission denied the injured worker's request finding that at the time of his retirement his intent was to voluntarily abandon the workforce. A mandamus action followed.

{¶ 12} Because he was receiving TTD compensation and was unable to return to his former position of employment when he retired, the injured worker argued his

retirement was not voluntary and that he was therefore entitled to the requested compensation six years later. This court disagreed. Relying on *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, the court framed the issue as not whether he was entitled to retain TTD compensation after retirement, but rather, whether the injured worker was "entitled to TTD compensation six years later when there is some evidence that relator had retired from the entire work force." *Corman* at ¶ 10.

{¶ 13} Similar to the injured worker in *Corman*, relator was unable to return to his former position of employment and began receiving TTD compensation that continued until he was determined to have reached MMI. Here, the magistrate focuses on the time periods in which relator received TTD compensation after retirement, but disregards the time periods in which he did not. As *Corman* instructs, a determination of one's intent at the time of retirement may still be relevant even though one is receiving TTD compensation and is unable to return his former position of employment at the time of retirement.

{¶ 14} The voluntary nature of abandonment is a factual question within the commission's final jurisdiction. *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). This question is primarily one of intent which may be inferred from words spoken, acts done, and other objective facts. *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989). In a mandamus action, at issue is whether the evidentiary record legally supports the determination or whether a gross abuse of discretion occurred.

{¶ 15} Thus, the issue herein is whether this record contains some evidence to support the commission's determination that relator intended to voluntarily abandon the workforce in 2001 when his employment with Formica ended. In reaching its determination, the commission relied on relator's application for and receipt of Social Security retirement benefits beginning in 2001 and relator's testimony that he had not worked or sought work since his 2001 departure from Formica. We conclude this constitutes some evidence to support the commission's determination. *Pierron*; *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648 (1996).

{¶ 16} Accordingly, we sustain the commission's objections and Formica's second objection to the magistrate's decision. Formica's remaining objections to the magistrate's decision are rendered moot.

IV. CONCLUSION

{¶ 17} After review of the magistrate's decision, an independent review of the record, and due consideration of the presented objections, we sustain the commission's objections and Formica's second objection, rendering moot the remaining objections presented by Formica. We adopt the magistrate's findings of fact, but not the conclusions of law. Accordingly, we deny the requested writ of mandamus.

Objections sustained in part;
writ of mandamus denied.

BROWN, P.J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 18} Since I believe our magistrate correctly addressed the law and facts in this case, I respectfully dissent.

{¶ 19} Darwin Floyd attempted to work after suffering a serious shoulder injury. He performed light-duty work until his employer told him such work was no longer available. He then began receiving temporary total disability ("TTD") payments, but those stopped when he was found to have reached maximum medical improvement. While he was receiving TTD compensation, he filed with the Social Security Administration to begin receiving Social Security benefits. Those payments began being made in April 2001.

{¶ 20} Floyd's medical condition got worse, which resulted in a left shoulder prosthesis being implanted. This was his seventh surgery on his left shoulder.

{¶ 21} Formica Corporation, Floyd's former employer, resumed payment of TTD compensation, but filed a motion in April 2009 asking that the compensation be stopped

because Floyd was again at the medical plateau called maximum medical improvement. TTD compensation was again terminated.

{¶ 22} Floyd's right shoulder, which had had two surgeries earlier, then deteriorated. This led to a right shoulder revision and a request for TTD compensation to be resumed.

{¶ 23} Formica Corporation had Floyd examined and the physician it selected agreed that the surgery was appropriate. However, the company resisted paying TTD compensation.

{¶ 24} A district hearing officer ("DHO") found that TTD compensation was not to be paid because Floyd was "not in the workforce" on the date the surgery was performed. The DHO acknowledges that Floyd had worked at light duty for Formica Corporation as long as light-duty work was available, but found that Floyd's failure to look for work at another employer meant he had abandoned the workforce. A staff hearing officer ("SHO") reached the same conclusion for the same reasons.

{¶ 25} Clearly Floyd did not abandon his job with Formica Corporation. He worked until Formica Corporation told him no more work was available.

{¶ 26} As our magistrate noted, neither the SHO nor DHO found that Floyd was medically capable of sustained remunerative employment during the time after the light-duty work stopped. Our magistrate recommended that the case be returned to the commission for this issue to be addressed.

{¶ 27} An injured worker does not "voluntarily abandon" the workforce if his or her injuries make it so he or she cannot work. The SHO and DHO found voluntary abandonment based upon nothing more, really, than the fact that Floyd had not worked—without addressing the question of whether Floyd was medically capable of working.

{¶ 28} I would adopt our magistrate's decision and return this case to the Industrial Commission of Ohio to finish the necessary analysis. Because the majority of the panel does not do so, I respectfully dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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

Rendered on July 3, 2012

Casper & Casper, and *Douglas W. Casper*, for relator.

Dinsmore & Shohl, LLP, and *Joan M. Verchot*, for respondent Formica Corporation.

Michael DeWine, Attorney General, and *LaTawnda N. Moore*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 29} In this original action, relator, Darwin Floyd, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his request for temporary total disability ("TTD") compensation beginning November 26, 2010, the date of his right total shoulder revision, on grounds that he had

voluntarily abandoned the workforce by that date, and to enter an order granting TTD compensation beginning November 26, 2010.

Findings of Fact:

{¶ 30} 1. Relator has an industrial claim (No. 00-371680) that arises out of his employment as a laborer for respondent Formica Corporation ("Formica"), a self-insured employer under Ohio's workers' compensation laws.

{¶ 31} 2. The industrial claim has been allowed for:

> Tendonitis bilateral shoulder; sprain bilateral shoulder; rotator cuff dislocation bilateral shoulder; adhesive capsulitis bilateral shoulder; necrosis humeral head of the left shoulder; septic arthritis of the left shoulder.

{¶ 32} 3. March 11, 2000 is the date of diagnosis for the initial claim allowances.

{¶ 33} 4. In August 2000, relator underwent left shoulder surgery performed by Timothy E. Kremchek, M.D. This surgery is described as an "arthroscopic subacromial decompression, open Mumford procedure" in an operative report dated September 19, 2001 contained in the stipulated record.

{¶ 34} 5. Four weeks after the August 2000 left shoulder surgery, relator returned to light-duty work at Formica. However, relator experienced significant shoulder pain when he returned to work.

{¶ 35} 6. In January 2001, while still working light-duty, relator was informed by Formica that light-duty work was no longer available.

{¶ 36} 7. Soon after the termination of the light-duty job, Formica began payments of TTD compensation. The payments continued without interruption until June 21, 2006 when the commission found the industrial injury to be at maximum medical improvement ("MMI").

{¶ 37} 8. Beginning April 1, 2001, at age 63, relator began receiving social security retirement benefits.

{¶ 38} 9. On April 12, 2006, at Formica's request, relator was examined by Donald P. Carruthers, M.D. In his 17-page narrative report, Dr. Carruthers opined that relator "has met maximum medical improvement."

{¶ 39} 10. On April 26, 2006, Formica moved for termination of TTD compensation.

{¶ 40} 11. Following a June 21, 2006 hearing, a district hearing officer ("DHO") issued an order finding that the industrial injury had reached MMI based upon the report of Dr. Carruthers. Accordingly, the DHO terminated TTD compensation effective June 21, 2006.

{¶ 41} 12. Relator administratively appealed the DHO's order of June 21, 2006.

{¶ 42} 13. Following an August 8, 2006 hearing, a staff hearing officer ("SHO") issued an order stating that the DHO's order "is modified." Nevertheless, the SHO's order finds that relator has reached MMI based upon the report of Dr. Carruthers, and TTD is terminated effective June 21, 2006.

{¶ 43} 14. On July 11, 2007, treating physician Samer S. Hasan, M.D., Ph.D., wrote to relator's counsel:

> Mr. Floyd is a 59-year-old male who came to see me for persistent right shoulder pain stemming from an industrial accident back on March 11, 2007. He has undergone multiple shoulders by Doctor Timothy Kremcheck and Doctor John Turba. He developed posttraumatic and post surgical arthrosis. These required subsequent shoulder resurfacing, and partial shoulder replacements performed by Doctor Patrick Kirk. He is still experiencing pain in his shoulder[.]
>
> His physical examination was consistent with end stage glenohumeral arthritis[.] While he does retain the capacity to lift his arm up to shoulder height and a little bit beyond, this is quite painful. He has significant loss of rotation and significant grinding in his shoulder.
>
> X-rays reveal that the socket site or the glenoid has also become arthritic, so that there is metal on bone. We have concluded based on his evaluation on May 2, 2007, that Mr. Floyd is permanently and totally disabled following his industrial injuries. Moreover he will likely need revision shoulder replacements, beginning with the most symptomatic side and conversion to a total shoulder arthroplasty. While these are likely to be very helpful with pain relief, and may in fact improve his mobility somewhat, he will never be able to return back to any type of physical work, particularly overhead work.

{¶ 44} 15. In August 2007, relator filed an application for permanent total disability ("PTD") compensation. In support, relator submitted the July 11, 2007 report of Dr. Hasan.

{¶ 45} 16. On November 30, 2007, relator withdrew his application for PTD compensation.

{¶ 46} 17. In April 2008, Dr. Hasan completed a C-84 indicating that he was planning a "total shoulder replacement." On the C-84, Dr. Hasan certified a period of TTD beginning May 1, 2008. Earlier, Dr. Hasan had certified TTD beginning December 3, 2007.

{¶ 47} 18. Formica agreed to restart TTD compensation based upon the planned surgery. Accordingly, TTD compensation was reinstated effective February 8, 2008.

{¶ 48} 19. On July 18, 2008, Dr. Hasan performed left shoulder surgery. According to a March 27, 2009 report from Joseph Marino, M.D., during the surgery, Dr. Hasan removed the "antibiotic-impregnated cement prosthesis and replac[ed] it with a total left shoulder prosthesis."

{¶ 49} 20. On March 27, 2009, at Formica's request, relator was examined by Dr. Marino. In his 11-page narrative report, Dr. Marino opines:

> **Based on the current objective findings, documented objective findings, and allowed conditions, in your medical opinion, has Mr. Floyd reached maximum medical improvement?**
>
> The allowed conditions of this claim are bilateral shoulder tendinitis, adhesive capsulitis bilateral shoulders, bilateral rotator cuff disease, bilateral sprain shoulder/arm, gangrene left, and pyogen arthritis left shoulder. For these conditions, Mr. Floyd has been treated with medications, cortisone injections, multiple surgeries, and multiple courses of physical therapy. Surgery on Mr. Floyd's left shoulder has been complicated by a staph infection. Given that Mr. Floyd has had seven surgeries on his left shoulder, it is not surprising that progress following the revision total shoulder arthroplasty on July 18, 2008 was slow and that he has been left with substantial deficits in mobility and strength.
>
> Mr. Floyd has also twice had surgery on his right shoulder. The second surgery on October 10, 2005 by Dr. Kirk was a

hemiarthroplasty. Despite extensive physical therapy for his right shoulder in conjunction with post-operative therapy on his left shoulder, he continues to have pain, poor range of motion, and weakness in his right shoulder.

After careful review of the patient's history, documentation in the medical records and findings on physical examination, it is my opinion that Mr. Floyd has reached maximum medical improvement for the allowed conditions of this claim involving his left shoulder. He is now eight months status post revision total shoulder arthroplasty. Records by Dr. Hasan and physical therapy indicate he has plateaued, and even regressed in making progress in range of motion and strength in his left upper extremity. While there is talk of additional surgery to repair the subscapularis or put in a reverse ball and socket implant, the wiser choice at this point may be to leave well enough alone. There are no guarantees of improvement with additional surgical procedures, and additional risks of further infection or other complications with each successive procedure, especially given the degree of tissue trauma and scarring already experienced.

It is also my assessment that Mr. Floyd has reached maximum medical improvement for the allowed conditions affecting his right shoulder. His last surgery was four years ago, and he is not making significant progress in mobility or strength despite additional months of physical therapy. It appears the biggest active problem in Mr. Floyd's right shoulder is arthritic degradation of the glenoid and labrum. It should be noted that the claim is not allowed for glenohumeral joint arthritis on the right. In my opinion, for the allowed conditions of this claim involving the right shoulder, Mr. Floyd has reached a treatment plateau such that no further fundamental, functional, or physiologic change can reasonably be expected even with additional therapeutic or rehabilitative measures.

* * *

Based on the current objective findings, documented objective findings and allowed conditions, is the request for total temporary disability from February 8, 2008 to March 3, 2009, and to possibly continue, medically necessary and appropriate for the allowed conditions of this claim?

> In my opinion, a period of total temporary disability following Mr. Floyd's surgery on February 8, 2008 through about October 8, 2008 is medically necessary and appropriate. On February 8, 2008, an antibiotic-impregnated cement spacer was inserted in Mr. Floyd's left shoulder. He was then treated with intravenous antibiotics for nearly two months. The spacer remained in his shoulder until July 18, 2008, at which point the spacer was removed and a revision total shoulder arthroplasty was performed. Continued total temporary disability is then appropriate for a minimum of two to three months as Mr. Floyd recovered from his surgery.
>
> In my judgment, ongoing total temporary disability after October 8, 2008 cannot be supported. By this date, he was 2-1/2 months post total left shoulder arthroplasty. His more pronounced left shoulder chronic pain had by this point resolved. He had 110 degrees of active elevation of the left shoulder. X-rays had previously ascertained stability of the prosthesis. As Mr. Floyd has noted, he is quite able to do tasks at below chest level. In my opinion, Mr. Floyd has, since October 8, 2008, been capable of sitting or standing at a work station and doing light manual tasks at waist level. I therefore find that total temporary disability from October 8, 2008, and to continue, has not been medically necessary or appropriate.

(Emphasis sic.)

{¶ 50} 21. On April 17, 2009, Formica moved for termination of TTD compensation.

{¶ 51} 22. Following a May 26, 2009 hearing, a DHO issued an order terminating TTD compensation.

{¶ 52} 23. Relator administratively appealed the DHO's order of May 26, 2009.

{¶ 53} 24. Following a July 7, 2009 hearing, an SHO issued an order finding that the industrial injury had reached MMI based upon Dr. Marino's report. Accordingly, TTD compensation was terminated effective May 26, 2009.

{¶ 54} 25. On February 24, 2010, Dr. Hasan wrote:

> Impression: My impression is persistent glenoid arthrosis after humeral resurfacing.

> Plan: The recommendation here is to proceed with conversion of the resurfacing hemiarthroplasty through a total shoulder replacement. This is something that we do about five times a year and is certainly not an uncommon occurrence. I would have likely have done a total shoulder replacement as an index operation in order to prevent this. Both prior surgeries on his right side, that is to say the original instability surgery with Dr. Turba and resurfacing arthroplasty by Dr. Kirk were covered under the same Worker's [sic] Compensation claim. I see no reason why this proposed surgery should be any different. It all relates to arthritis that has resulted from his original surgery and work related injury.

{¶ 55} 26. On March 3, 2010, at Formica's request, relator was examined by Steven S. Wunder, M.D. In his seven-page narrative report, Dr. Wunder opines:

> It appears that the shoulder surgery done by Dr. Kirk on the right side was approved through this claim. He had a resurfacing partial arthroplasty. As a flow-through, however, I do believe he developed glenoid arthritis. Therefore, it appears that the requested condition was not a direct and proximate result of the 03/11/00 injury but rather a flow-through.
>
> There are no non-occupational activities or intervening injuries contributing to his condition.
>
> I do believe that the contested condition should be allowed as a work related injury by way of flow-through considering that the original surgery by Dr. Kirk was covered.

{¶ 56} 27. By letter dated April 14, 2010, Formica additionally allowed the claim for "glenoid arthrosis."

{¶ 57} 28. On May 5, 2010, Dr. Hasan wrote:

> Impression: My impression is glenoid arthrosis status post humeral head resurfacing performed earlier and for a compensable injury.
>
> Plan: He now needs a total shoulder replacement, this will involve removing the resurfacing implant and putting in a stemmed implant with glenoid resurfacing with a polyethylene component. That is what we ultimately did on the left. The only difference with the left is that he had a

> history of prior infection and was found to have a recurrent infection at the time that we set out to do this first. This prolonged his recovery.

{¶ 58} 29. On August 13, 2010, Dr. Hasan completed a C9 request for authorization of a right total shoulder revision.

{¶ 59} 30. On August 30, 2010, at Formica's request, relator was again examined by Dr. Wunder. In his five-page narrative report, Dr. Wunder opines:

> Based upon the recognized and allowed conditions and objective findings, the request for inpatient surgery with arthrotomy, deep implant removal, open biopsy and total shoulder revision, postoperative therapy, and three weeks of CPM and cold therapy through Aberdeen Medical would be considered reasonably necessary and appropriate for the allowed conditions in the claim. He has allowances for arthritis of the right shoulder and has failed the resurfacing procedure that has been done in the past and therefore would be a candidate for the surgery proposed by Dr. Hasan.

{¶ 60} 31. On November 26, 2010, Dr. Hasan performed the right total shoulder revision.

{¶ 61} 32. On November 26, 2010, Dr. Hasan completed a C-84 certifying TTD beginning November 26, 2010. Apparently, this C-84 was filed on December 17, 2010.

{¶ 62} 33. Following a January 26, 2011 hearing, a DHO issued an order denying relator's request for TTD compensation beginning November 26, 2010. The DHO's order explains:

> It is the order of the District Hearing Officer that the C-84 Request For Temporary Total Compensation filed by Injured Worker on 12/17/2010 is denied. The Injured Worker requested the payment of temporary total disability compensation beginning on 11/26/2010 to an estimated return to work date of 02/26/2010 [sic]. The Injured Worker testified that he had surgery for the recognized conditions in the claim on 11/26/2010.
>
> The Hearing Officer finds that the Injured Worker is not eligible for the payment of temporary total disability compensation because he was not in the workforce as of 11/26/2010.

> By way of history, this injury occurred in March of 2000. The Injured Worker has undergone several surgical procedures. In 2001, the Injured Worker was working for the Employer on a light duty basis when the Self-Insured Employer informed the Injured Worker that it no longer had light duty work available for him. The Injured Worker was found to have reached maximum medical improvement for the recognized conditions in the claim. The Injured Worker testified that he has not worked anywhere since he stopped working in 2001 when there was no light duty available. He applied for and began receiving social security retirement benefits in May of 2001. Although the Injured Worker testified at hearing that he would have kept working for the Employer if light duty had remained available, he acknowledged that he did not attempt to return to work anywhere else after 2001. He testified that he was told that he couldn't do physical work and that he could not do other types of work based upon a lack of education.
>
> The Hearing Officer finds that the Injured Worker was not in the workforce as of 11/26/2010 when he is requesting the payment of temporary total disability compensation begin. There is no evidence that the Injured Worker sought any viable work since 2001. The Hearing Officer finds that temporary total disability compensation is intended to compensate an Injured Worker for loss of earnings. However, when the Injured Worker is no longer a part of the workforce, there are no earnings to replace. Although the Injured Worker's departure from the Employer in 2001 was not voluntary, the Hearing Officer finds that the Injured Worker's failure to seek any other employment subsequent to that separation is evidence that he did not intend to re-enter the workforce. Pursuant to *State ex rel. Pierron v. Indus. Comm.* (2008), 120 Ohio St.3d 40, the Hearing Officer finds that the Injured Worker is not eligible for the payment of temporary total disability compensation based upon the factual finding made by the Hearing Officer today that the Injured Worker abandoned the workforce by his failure to work since 2001. Therefore, the Hearing Officer orders that the C-84 form is denied and the request for the payment of temporary total disability compensation beginning on 11/26/2010 is denied.
>
> This order is based upon the *Pierron* case, cited above and the Injured Worker's testimony at hearing.

{¶ 63} 34. Relator administratively appealed the DHO's order of January 26, 2011.

{¶ 64} 35. Following a March 3, 2011 hearing, an SHO issued an order affirming the DHO's order of January 26, 2011. The SHO's order, mailed April 2, 2011, explains:

> The Staff Hearing Officer denies the C-84 Request for Temporary Total filed by the Injured Worker on 12/17/2010. The Injured Worker requested the payment of temporary total disability compensation beginning on 11/26/2010 to an estimated return to work date of 02/26/2011. The Injured Worker indicated that he had surgery for the recognized conditions in the claim on 11/26/2010.
>
> Staff Hearing Officer finds that the Injured Worker is not eligible for the payment of temporary total disability compensation because he was not in the workforce as of 11/26/2010.
>
> The Staff Hearing Officer notes that this industrial injury occurred in March, 2000. The Injured Worker had undergone several surgical procedures. The Staff Hearing Officer notes that in 2001, the Injured Worker was working for the Employer on a light duty basis when the Self-Insuring Employer informed the Injured Worker they no longer had light duty work available for him. The Staff Hearing Officer finds that the Injured Worker was placed on temporary total disability and later was found to have reached maximum medical improvement for the recognized conditions in the claim. The Injured Worker testified that he had not worked anywhere since he had stopped working in 2001 when there was no light duty work available. He applied for and began receiving social security retirement benefits in May, 2001. Although the Injured Worker testified at the hearing he would have kept working for the Employer if light duty work had remained available, he acknowledged he did not attempt to return to work anywhere else after 2001.
>
> This Staff Hearing Officer finds that the Injured Worker was not in the workforce as of 11/26/2010 when he is requesting the payment of temporary total disability compensation begin.
>
> This Staff Hearing Officer finds there is no evidence that the Injured Worker sought any viable work since 2001. The Staff Hearing Officer finds that temporary total disability compensation is intended to compensate an Injured Worker

> for the loss of earnings. However, when the Injured Worker is no longer a part of the workforce, there are no earnings to replace. Although the Injured Worker's departure from the Employer in 2001 was not voluntary, the Staff Hearing Officer finds that the Injured Worker's failure to seek any other employment subsequent to that separation date is evidence that he did not intend to re-[e]nter the workforce.
>
> Pursuant to *State ex rel. Pierron v. Industrial Commission* (2008), 120 Ohio St.3d 40, the Hearing Officer finds that the Injured Worker [is] not eligible for the payment of temporary total disability compensation based upon the factual finding made by the Hearing Officer that the Injured Worker abandoned the workforce by his failure to work since 2001.
>
> Therefore, the Staff Hearing Officer orders that the C-84 request is denied and the request for the payment of temporary total disability compensation beginning 11/26/2010 is denied.
>
> This finding is based on the *Pierron v. Industrial Commission* case mentioned above and the Injured Worker's testimony at the hearing.

{¶ 65} 36. On March 12, 2011, Dr. Hasan wrote:

> At no point since his initial presentation has Mr. Floyd been able to do any type of gainful employment. He has had quite a bit of pain, marked restrictions in motion, has required intravenous antibiotics, and also has had extensive recoveries following each of his surgeries. He is currently 73-years-old and it is exceedingly unlikely that he is going to be able to get back to any type of work. Even activities of daily living and driving are difficult and there is also the possibility that if he continues to have persistent weakness in his right shoulder, and if the pain worsens, that he will require yet one more operation that will impose permanent restrictions on his ability to use his arm for any type of lifting or strenuous activities.

{¶ 66} 37. On April 21, 2011, another SHO issued an order refusing relator's administrative appeal from the SHO's order of March 3, 2011.

{¶ 67} 38. On April 26, 2011 relator moved for reconsideration.

{¶ 68} 39. Following an August 16, 2011 hearing, the three-member commission, on a two-to-one vote, denied reconsideration.

{¶ 69} 40. On October 28, 2011, relator, Darwin Floyd, filed this mandamus action.

Conclusions of Law:

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

{¶ 71} The commission, through its SHO's order of March 31, 2011, denied relator's request for TTD compensation beginning November 26, 2010 on eligibility grounds. That is, the commission found that relator had voluntarily abandoned the workforce by November 26, 2010. However, the commission made it clear that relator did not voluntarily abandon or depart from his employment at Formica in 2001.

{¶ 72} The commission's finding that relator had voluntarily abandoned the workforce before November 26, 2010 was premised in large part on relator's unrecorded hearing testimony as reported by the SHO in his March 31, 2011 order. That is, relator testified that he has not worked nor sought work since his 2001 departure from employment at Formica.

{¶ 73} The commission also noted in its order that relator began receiving social security disability benefits "in May, 2001."

{¶ 74} Citing *State ex rel Pierron v. Indus. Comm.*, 120 Ohio St.3d 40 (2008), the commission held that workforce abandonment rendered relator ineligible for TTD compensation.

{¶ 75} Because *Pierron* is key to understanding the issue here, analysis begins with a review of that case.

{¶ 76} Richard Pierron was seriously injured in 1973 while working as a telephone lineman for Sprint/United Telephone Company ("Sprint/United"). Thereafter, Sprint/United offered him a light-duty warehouse job consistent with his medical restrictions, and he continued to work in that position for the next 23 years.

{¶ 77} In 1997, Sprint/United informed Pierron that his light-duty position was being eliminated. Sprint/United did not offer him an alternative position, but gave him the option to retire or be laid off. Pierron chose retirement.

{¶ 78} In the years that followed, Pierron remained unemployed except for a brief part-time stint as a flower delivery person. In late 2003, he moved for TTD compensation beginning June 2001. The commission denied the motion finding that Pierron had voluntarily abandoned his former position of employment. In its decision, the commission wrote:

> [T]he injured worker voluntarily abandoned the work force when he retired in 1997. Despite the dissent's attempt to characterize the departure from the work force as involuntary, there is no evidence whatsoever that the injured worker sought any viable work during any period of time since he retired. The injured worker's choice to retire was his own. He could have accepted a lay-off and sought other work but he chose otherwise. It is not just the fact of the retirement that makes the abandonment voluntary in this claim, as the passage of time without the injured worker having worked speaks volumes. The key point * * * is that the injured worker's separation and departure from the work force is wholly unrelated to his work injury.

(Industrial Commission decision, quoted in *Pierron,* at ¶ 6.)

{¶ 79} Holding that the commission did not abuse its discretion in denying Pierron TTD compensation, the *Pierron* court explains:

> We are confronted with this situation in the case before us. The commission found that after Pierron's separation from Sprint/United, his actions-or more accurately inaction-in the months and years that followed evinced an intent to leave the work force. This determination was within the commission's discretion. Abandonment of employment is largely a question "of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts." *State ex rel. Diversitch Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, 383, 544, quoting *State ex rel. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 414. In this case, the lack of evidence of a search for employment in the years following Pierron's departure from Sprint/United supports the commission's decision.

> We recognize that Pierron did not initiate his departure from Sprint/United. We also recognize, however, that there was no causal relationship between his industrial injury and either his departure from Sprint/United or his voluntary decision to no longer be actively employed. When a departure from the entire work force is not motivated by injury, we presume it to be a lifestyle choice, and as we stated in *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 216, 648 workers' compensation benefits were never intended to subsidize lost or diminished earnings attributable to lifestyle decisions. In this case, the injured worker did not choose to leave his employer in 1997, but once that separation nevertheless occurred, Pierron had a choice: seek other employment or work no further. Pierron chose the latter. He cannot, therefore, credibly allege that his lack of income from 2001 and beyond is due to industrial injury. Accordingly, he is ineligible for temporary total disability compensation. *Id.* at ¶ 10–11.

{¶ 80} Thus, the Pierron case involved a job departure followed by years of failure to seek other employment. While the job departure was not of Pierron's choosing, he, nevertheless, abandoned the workforce by his inaction after the job departure.

{¶ 81} Turning to the instant case, conspicuously absent from the commission's order at issue is any stated reliance upon medical evidence to support the proposition that relator was capable of some type of employment at any period of time during the almost ten years between his January 2001 job departure at Formica and his November 26, 2010 surgery. Obviously, if relator was medically incapable of employment at any given period of time, it would be futile to search for work at that time and the failure to search could not be deemed a voluntary workforce abandonment.

{¶ 82} Relator's medical capacity for work during the periods when he was not receiving TTD compensation is in dispute. For example, on July 11, 2007, Dr. Hasan opined that relator "is permanently and totally disabled" and that "he will never be able to return back to any type of physical work, particularly overhead work." Dr. Hasan's July 11, 2007 report was authored about one year after the commission effectively terminated TTD compensation on MMI grounds as of June 21, 2006. The commission never determined the credibility of Dr. Hasan's July 11, 2007 report because relator withdrew his PTD application.

{¶ 83} Some 20 months after Dr. Hasan's July 11, 2007 report, Dr. Marino examined relator on March 27, 2009 at Formica's request. In his 11-page report, as previously noted, Dr. Marino opined:

> [H]e is quite able to do tasks at below chest level. In my opinion, Mr. Floyd has, since October 8, 2008, been capable of sitting or standing at a work station and doing light manual tasks at waist level.

{¶ 84} As earlier noted, the commission relied upon Dr. Marino's March 27, 2009 report for a finding of MMI upon which TTD was terminated effective May 26, 2009.

{¶ 85} In the magistrate's view, the commission's analysis of workforce abandonment under *Pierron* is incomplete. That is, it is insufficient for the commission to find that relator has not worked or searched for work since 2001 without reliance upon medical evidence that relator was medically capable of employment during a significant period of time during which he failed to work or search for work. *See State ex rel. Hootman v. Replex Mirror Co.* 10th District No. 10AP-649, 2011-Ohio-3788.

{¶ 86} Moreover, R.C. 4123.56(A) provides that TTD payments "shall not be made for the period * * * when work within the physical capabilities of the employee is made available by the employer or another employer." However, the statute does not require that the TTD recipient search for work during the period of total disability even if he is capable of alternative employment. *See State ex rel. Ganu v. Willow Brook Christian Communities*, 108 Ohio St.3d 296, 2006-Ohio-907.

{¶ 87} Here, relator received TTD compensation for two significant periods of time during the almost ten year period from the date of his job departure in 2001 and the date of his November 26, 2010 surgery. The SHO's order of March 31, 2011 seems to include the periods of TTD as periods during which relator was required to work or search for work in order to preserve his TTD eligibility. This was an abuse of discretion.

{¶ 88} Accordingly, for all of the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of March 31, 2011, and, in a manner consistent with this magistrate's decision, enter a new order that appropriately determines relator's eligibility for TTD compensation and, if

relator is determined to be eligible, adjudicates the merits of his request for TTD compensation beginning November 26, 2010.

/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).