

compensation on grounds that relator voluntarily abandoned his employment with respondent Delphi Packard Electric Sys-Warren ("Delphi") under Delphi's "Special Attrition Program," and ordering the commission to reinstate his TTD 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 grant relator's request for a writ of mandamus. Delphi has filed objections to the magistrate's decision.

{¶3} Delphi's objections raise no new arguments not already argued before the magistrate. The gist of Delphi's argument is that the magistrate erred in applying the analysis in *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, to the present circumstances. Delphi contends that the magistrate's order, in effect, concludes that a claimant can never voluntarily abandon his employment, thereby terminating his right to receive TTD benefits, as long as the claimant is receiving TTD benefits at the time he retires or otherwise abandons his employment, even if his reasons for doing so are completely unrelated to his disability.

{¶4} After reviewing the relevant case law and the circumstances in the present case, including this court's decision in *State ex rel. Jorza v. Indus. Comm.*, 10th Dist. No. 08AP-393, 2009-Ohio-1183, we cannot find the magistrate erred in granting relator's writ of mandamus, and, therefore, we overrule Delphi's objections. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law. In accordance with the magistrate's decision, we grant the requested writ of mandamus and

remand this matter back to the commission for proceedings consistent with the above findings and the magistrate's decision.

Objections overruled; writ granted.

BROWN and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Gary L. Scott,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-25
	:	
The Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Delphi Packard Electric Sys-Warren,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on September 3, 2009

Boyd, Rummell, Carach & Curry Co., LPA, and Randall W. Rummell, for relator.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Letson, Griffith, Woodall, Lavelle & Rosenberg Co., LPA, Mark E. Bumstead and Lynn B. Griffith, III, for respondent Delphi Packard Electric Sys-Warren.

IN MANDAMUS

{¶5} Relator, Gary L. Scott, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio

("commission") to vacate its orders terminating relator's temporary total disability ("TTD") compensation on grounds that relator voluntarily abandoned his employment with respondent Delphi Packard Electric Sys-Warren ("Delphi") under Delphi's "Special Attrition Program," and ordering the commission to reinstate his TTD compensation.

Findings of Fact:

{¶6} 1. Relator sustained a work-related injury on June 9, 2005, and his workers' compensation claim has been allowed for "peroneal nerve entrapment of the left foot and tarsal tunnel syndrome, bilaterally."

{¶7} 2. On July 11, 2006, relator executed forms A and B relating to Delphi's Special Attrition Program.

{¶8} On form A, relator selected one of three options. The option relator selected states:

Retire effective the first of the month following the month my services are no longer required but no later than January 1, 2007 under the mutually satisfactory retirement provisions of The Delphi Hourly-Rate Employee Pension Plan [Article II, Section 2 (b)] at the age of 50 but less than age 65 with 10 or more years of credited service. I understand that I must meet all necessary requirements, execute all applicable forms, and my eligibility to retire is subject to approval.

{¶9} Relator also selected the following box:

I elect to transition to GM for the purposes of retirement. In so choosing, I (i) understand that all of my pension benefit will be payable from The Delphi Hourly-Rate Employees Pension Plan and (ii) in exchange for eligibility to receive post-retirement health care and life insurance benefits from GM, waive any and all rights I might otherwise have to post-retirement health care and life insurance benefits from Delphi, including but not limited to any and all rights to COBRA continuation through Delphi.

{¶10} That same day, relator executed form B which provides in part: "I am able to work and suffer from no disability that would preclude me from doing my regularly assigned job. As such, I acknowledge that I am not entitled to disability pay or benefits. * * * The release does not include workers' compensation claims."

{¶11} 3. In November 2006, relator filed a motion requesting the payment of TTD compensation beginning September 18, 2006 and continuing.

{¶12} 4. In a letter dated December 4, 2006, Delphi granted relator's motion for TTD compensation.

{¶13} 5. Thereafter, on January 9, 2007, Delphi filed a motion seeking to terminate relator's TTD compensation on grounds that relator had voluntarily abandoned his employment as of January 1, 2007 by signing the "Special Attrition Program" documents and retiring.

{¶14} 6. Delphi's motion was heard before a district hearing officer ("DHO") on February 1, 2007. The DHO granted Delphi's motion after finding that relator voluntarily retired from his employment.

{¶15} 7. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on March 6, 2007. The SHO affirmed the prior DHO's order granting Delphi's motion to terminate relator's TTD compensation.

{¶16} 8. In an order mailed March 21, 2007, relator's further appeal was refused by order of the commission.

{¶17} 9. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

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

{¶19} This court recently addressed this issue in *State ex rel. Jorza v. Indus. Comm.*, 10th Dist. No. 08AP-393, 2009-Ohio-1183. In that case, the claimant sustained an industrial injury in January 2005 while employed with respondent herein, Delphi. In June 2006, the claimant sought the allowance of additional conditions and moved for TTD compensation. Both motions were granted.

{¶20} Thereafter, in August 2006, Delphi moved to terminate the claimant's TTD compensation on grounds that she had voluntarily abandoned her employment when she accepted a "Special Attrition Program" for retirement from Delphi. The commission agreed with Delphi and concluded that the claimant was not entitled to TTD compensation.

{¶21} The claimant sought a writ of mandamus in this court. This court concluded that the Supreme Court of Ohio's decision in *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499 controlled. In *Reitter Stucco*, the claimant, Tony A. Mayle, injured his back in 2003 while working for Reitter Stucco. In July 2004, Mayle underwent surgery. Afterwards, he undertook physical therapy and work conditioning. His vocational team was unsure whether Mayle would ever be capable of performing the heavy physical demands of his job on a sustained basis.

{¶22} On April 15, 2005, Mayle was fired for comments he made about the company's president. Prior to that, Reitter Stucco had been paying Mayle wages in lieu of TTD compensation. Reitter Stucco stopped these payments after the termination, prompting Mayle to file a motion seeking the payment of TTD compensation. A DHO

denied the motion on grounds of voluntary abandonment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401. An SHO reversed, finding that Mayle was temporarily totally disabled when he was fired, finding *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, and not *Louisiana-Pacific*, controlling.

{¶23} In the mandamus action, the Supreme Court of Ohio upheld the commission's order. Specifically, the *Reitter Stucco* court stated:

Pretty Prods. was decided shortly after *Louisiana-Pacific*. In *Pretty Prods.*, we 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. In *Pretty Prods.*, we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled. *Id.*, 77 Ohio St.3d at 7, 670 N.E.2d 466; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, ¶ 10. Thus, even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the discharge occurred.

The present litigants treat the two cases as mutually exclusive, with the company urging that *Louisiana-Pacific* is dispositive and Mayle and the commission citing *Pretty Prods.* Yet *Louisiana-Pacific* and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. If the *Louisiana-Pacific* three-part test is satisfied, however, suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination. We thus take this opportunity to reiterate that *Louisiana-Pacific* and *Pretty Prods.* are not mutually exclusive and that they may both factor into the eligibility analysis.

Id. at ¶10-11.

{¶24} This court applied that reasoning to the claimant in the *Jorza* case. Specifically, this court found that while the case did not involve a firing under *Louisiana-Pacific*, the result was the same. Claimant's medical inability to return to her former position of employment at the time she accepted Delphi's "Special Attrition Program" retirement rendered her eligible for TTD compensation notwithstanding her acceptance of the "Special Attrition Program."

{¶25} Based on the Supreme Court of Ohio's decision in *Reitter Stucco*, and this court's decision in *Jorza*, the magistrate finds that, inasmuch as relator was medically unable to return to his former position of employment at the time he accepted Delphi's "Special Attrition Program," he remains eligible for TTD compensation. As such, the commission abused its discretion when it determined that relator was not entitled to TTD compensation based solely upon the commission's finding that he had voluntarily retired without considering the medical evidence presented.

{¶26} Based on the foregoing, it is this magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its prior orders denying relator TTD compensation based solely on grounds that he had voluntarily abandoned his employment and the commission should adjudicate the issue and determine whether or not the medical evidence supports the finding that relator is entitled to TTD compensation.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

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