

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Debbie L. Lucas,	:	
Relator,	:	
v.	:	No. 11AP-93
Industrial Commission of Ohio and Ohio Masonic Home,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

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D E C I S I O N

Rendered on April 26, 2012

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*Robert A. Muehleisen*, for relator.

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

*Martin, Browne, Hull & Harper, PLL, Randall M. Comer* and *Richard F. Heil, Jr.*, for respondent Ohio Masonic Home.

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} In this original action, relator, Debbie L. Lucas, requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying temporary total disability ("TTD") compensation for the closed period of August 17 to October 30, 2009 and to award compensation for that period.

Relator also requests that the commission be ordered to vacate its order denying TTD compensation beginning March 9, 2010 and to award compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(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 determined that the commission did not abuse its discretion in denying TTD compensation for the period of August 17 to October 30, 2009, but did find an abuse of discretion in the commission's denial of TTD compensation for the period beginning March 9, 2010. The magistrate consequently recommended that we issue a writ of mandamus ordering the commission to vacate its order following the September 29, 2010 hearing and to enter a new order that adjudicates relator's request for TTD compensation for the period beginning March 9, 2010.

{¶ 3} All parties—relator, the commission, and the Ohio Masonic Home ("OMH")—have filed objections to the magistrate's decision. For the following reasons, we adopt in part and reject in part the magistrate's decision and deny the requested writ of mandamus.

### **I. Background**

{¶ 4} Having independently reviewed the record along with the magistrate's decision, we adopt the magistrate's findings of fact as our own. In 2006, relator injured her lower back while working as a restorative aide/patient assistant for OMH. Her claim was initially allowed for "Sprain Lumbosacral, HNP L5-S1; Chronic Hematoma Lumbar." (Stip. R., 32.) Following a period of TTD, relator returned to light-duty work at OMH in November 2008.

{¶ 5} On April 16, 2009, Dr. James Lundeen issued a MEDCO-14 report concluding that relator could return to work with temporary restrictions estimated to last three months. Relator had follow-up appointments with Dr. Lundeen on April 23, July 16, and October 8, 2009. Dr. Lundeen's notes from those appointments indicate that there were no significant changes in relator's condition or light-duty restrictions. On August 10, 2009, Dr. Lundeen completed a disability certificate indicating that relator would be incapacitated from August 17 until October 31, 2009. Relator then stopped working on August 16, 2009, only to return for one hour on August 19, 2009.

{¶ 6} On September 14, 2009, OMH offered certain employees, including relator, the opportunity to participate in its Early Retirement Incentive Program ("ERIP"), which allowed eligible employees to elect early retirement in exchange for enhanced retirement benefits. Relator chose to participate in the ERIP on October 27, 2009, agreeing to terminate her employment and waive the right to future employment with OMH. On November 9, 2009, relator elected to take a lump sum payment of \$34,557.71.

{¶ 7} On November 20, 2009, relator requested TTD compensation and submitted a C-84 wherein Dr. Lundeen indicated that she was disabled from August 17 through October 31, 2009. The district hearing officer ("DHO") denied relator's request after a January 14, 2010 hearing. In the order, the DHO found that relator failed to establish that she was temporarily and totally disabled from September 1 through October 31, 2009. The DHO described the medical evidence as "sparse" and found Dr. Lundeen's disability certificate from August 10, 2009 to be unsupported by any "contemporaneous office records." (Stip. R., 32.) The DHO also found the November 18, 2009 C-84 report to be devoid of any objective and subjective findings as it merely referred to an "attached note" that did not address why relator was taken off work. (Stip. R., 33.) Relator appealed, and a staff hearing officer ("SHO") affirmed the DHO's decision on February 22, 2010. Relator's administrative appeal from the SHO's order was refused.

{¶ 8} On May 20, 2010, relator moved for an additional claim allowance, asking that her claim also be allowed for major depressive disorder, single episode, severe without psychotic features, and seeking TTD compensation to be paid beginning March 9, 2010. Relator submitted a medical report and C-84 from Dr. Stephen Halmi. Relator was also examined at OMH's request by Dr. Mark Reynolds, who similarly diagnosed relator with major depressive disorder.

{¶ 9} The DHO granted relator's request for additional allowance, but denied her request for TTD, reasoning that "she was not disabled at the time of her voluntary early retirement incentive plan with the employer." (Stip. R., 64.) The DHO further determined that, because relator did not seek employment after her voluntary retirement, she voluntarily removed herself from the workforce and was not entitled to TTD.

{¶ 10} Relator appealed, and an SHO conducted a hearing on September 29, 2010. At the hearing, relator admitted not seeking employment after her acceptance of the

retirement package. The SHO affirmed the DHO's denial of TTD compensation, reasoning that relator had not sought employment following her voluntary retirement and expressed no intention of returning to work. Further, the SHO found that relator did not claim her retirement was due to her allowed conditions. After the SHO refused relator's administrative appeal from the SHO's order, relator filed a mandamus action in this court.

## II. Relator's Objection

{¶ 11} We begin with relator's sole objection, which presents the following challenge to the magistrate's decision:

[1.] THE MAGISTRATE ERRED BY DETERMINING THAT THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION BY DENYING TEMPORARY TOTAL DISABILITY FROM AUGUST 17, 2009 TO OCTOBER 30, 2009.

{¶ 12} Relator's objection raises the same argument already presented to, and sufficiently addressed by, the magistrate, i.e., that Dr. Lundeen's C-84 contained uncontroverted medical evidence proving relator was temporarily and totally disabled from August 17 to October 30, 2009. After an independent review of the record, we agree with the magistrate's conclusion that the commission was not required to accept Dr. Lundeen's C-84. "[T]he commission is exclusively responsible for weighing and interpreting medical reports." *State ex rel. Pavis v. Gen. Motors Corp., B.O.C. Group*, 65 Ohio St.3d 30, 33 (1992), citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 20-21 (1987). "Where a key question is left unanswered, the commission is entitled to conclude that the medical report's persuasiveness is either diminished or negated." *Id.*

{¶ 13} The reports prepared by Dr. Lundeen created a key question as to why relator could no longer perform light-duty work. Dr. Lundeen's C-84 listed October 8, 2009 as the date of relator's last examination; however, the office notes from the October 8 visit indicate that relator's condition had not significantly changed since her visit in July 2009—when she was still performing light-duty work. Because relator's condition had not significantly changed since the time she was able to perform light-duty work, it is unclear why Dr. Lundeen ultimately concluded that relator could no longer perform such work. Relator failed to present any answer to this critical question, and,

therefore, the commission was within its discretion to find Dr. Lundeen's C-84 unpersuasive.

{¶ 14} Upon review of the magistrate's decision, an independent review of the record, and due consideration of relator's objection, we find the magistrate has properly determined the pertinent facts and applied the appropriate law when it concluded that the commission properly denied TTD compensation for the period of August 17 to October 30, 2009. Accordingly, relator's objection is overruled.

### **III. The Commission's Objections**

{¶ 15} We now turn to the objections filed by the commission, which challenge the following three portions of the magistrate's decision:

[1.] The magistrate's finding that the SHO's order of September 29, 2010, constitutes an abuse of discretion in failing to evaluate the medical evidence of record that might be viewed as causing an injury-induced retirement under *State ex rel. Rockwell International v. Industrial Commission* (1988), 40 Ohio St.3d 44, and its progeny.

[2.] The magistrate's finding that the commission abused its discretion in determining that relator voluntarily abandoned her employment and the workforce.

[3.] The magistrate's conclusion that the SHO held relator accountable for a failure to search for alternative employment while at the same time finding that she suffers from a debilitating psychiatric disorder.

{¶ 16} Essentially, all of the commission's objections challenge the magistrate's conclusion that the commission abused its discretion in denying TTD compensation for the period beginning March 9, 2010, and we will address them together.

{¶ 17} TTD compensation is intended to compensate an injured worker for the loss of earnings incurred while the industrial injury heals. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, ¶ 9, citing *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 44 (1987). However, there can be no loss of earnings, or even a potential for lost earnings, if the claimant is no longer part of the active workforce. *Id.* "When the reason for this absence from the work force is unrelated to the industrial

injury, temporary total disability compensation is foreclosed." *Id.*, citing *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988).

{¶ 18} Abandonment of employment is largely a question " 'of intent \* \* \* [that] may be inferred from words spoken, acts done, and other objective facts.' " *Pierron* at ¶ 10, quoting *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 383 (1989). To determine whether a claimant's retirement was voluntary or the product of an industrial injury, relevant factors include the claimant's failure to search for employment after retirement and the existence of medical records contemporaneous with the decision to retire. *See Pierron* at ¶ 10; *State ex rel. Lackey v. Indus. Comm.*, 10th Dist. No. 08AP-262, 2009-Ohio-4208, ¶ 54.

{¶ 19} The commission first challenges the magistrate's conclusion that the commission abused its discretion by determining that relator voluntarily abandoned her employment. The magistrate reasoned that the SHO failed to consider relator's testimony from the September 29, 2010 hearing, wherein she claimed to have accepted the buyout because she "was physically unable to work" and "had no income." (Stip. R., 76.) According to the commission, this assertion was incorrect because the SHO properly considered and rejected relator's testimony even though it was not referenced in the SHO's order. We agree.

{¶ 20} Contrary to the magistrate's assertion, we cannot assume the SHO failed to consider relator's testimony merely because it was not referenced in the SHO's order. While the commission must specify the evidence relied upon in *support* of its decision, "[t]he commission is not required to list or cite evidence that has been considered and rejected or explain why certain evidence was deemed unpersuasive." *State ex rel. Scouler v. Indus. Comm.*, 119 Ohio St.3d 276, 2008-Ohio-3915, ¶ 16, citing *State ex rel. DeMint v. Indus. Comm.*, 49 Ohio St.3d 19, 20 (1990). Because the SHO was not required to accept every portion of relator's hearing testimony, we cannot conclude that the SHO necessarily failed to consider that testimony merely because it was not referenced in the order following the September 29, 2010 hearing.

{¶ 21} We also disagree with the magistrate's conclusion that the commission erred in finding relator voluntarily abandoned the workforce. The magistrate determined that the SHO "failed to address the issue raised by the reports of Drs. Halmi and Reynolds

as to whether relator can be held accountable for failing to search for alternative employment when she may be mentally unable to do so or may be mentally unqualified for any employment." (Magistrate's Decision, ¶ 89.) However, this court's duty in mandamus actions is not to determine whether the record contains *any* evidence that potentially contradicts the commission's decision, but whether the record contains "some evidence" that supports the decision. *State ex rel. Fiber-Lite Corp. v. Indus. Comm.*, 36 Ohio St.3d 202 (1988), syllabus.

{¶ 22} At the September 29, 2010 hearing, relator admitted not seeking employment after her retirement and acknowledged that she had not taken any medications prescribed for her allowed conditions for "almost a year." (Stip. R., 80, 87-88.) Although Drs. Halmi and Reynolds diagnosed relator with a psychiatric disorder, their diagnoses were not given until several months after relator's retirement, and, as the commission correctly notes, neither report reveals a causal connection between an allowed condition and relator's decision to retire. Given relator's hearing testimony and the lack of contemporaneous medical evidence demonstrating a connection between her allowed claim and decision to retire, we find that "some evidence" supported the commission's determination that relator voluntarily abandoned her employment and the workforce. Accordingly, after an examination of the magistrate's decision and an independent review of the record, we sustain the commission's three objections.

#### **IV. OMH's Objections**

{¶ 23} Finally, we turn to the objections filed by OMH, which identify the following seven challenges to the magistrate's decision:

[1.] In his finding of fact number 21, the Magistrate erred by failing to include in his summary of psychologist Dr. Halmi's March 9, 2010 report that Relator has legal and physical custody of her three grandchildren ages 10, 9 and 2.

[2.] The Magistrate erred by failing to include in his findings of fact that the Relator testified at the SHO hearing on September 29, 2010 that she had not sought treatment from a medical provider nor taken any medications relative to her claim for almost a year following her retirement.

[3.] The Magistrate erred in finding that: "the SHO's order of September 29, 2010 constitutes an abuse of discretion in

failing to evaluate the medical evidence of record that might be viewed as causing an injury-induced retirement under *Rockwell* and its progeny."

[4.] The Magistrate erred in finding that: "the [C]ommission abused its discretion in determining that [R]elator voluntarily abandoned her employment with OMH."

[5.] The Magistrate erred in finding that: "the [C]ommission, through its SHO, abused its discretion in determining that [R]elator voluntarily abandoned the workforce."

[6.] The Magistrate erred in deciding that: "this [C]ourt issue a writ of mandamus ordering [R]espondent Industrial Commission of Ohio to vacate its SHO's order of September 29, 2010 and, in a manner consistent with this [M]agistrate's decision, enter a new order that adjudicates [R]elator's request for TTD compensation beginning March 9, 2010."

[7.] The Magistrate erred in weighing the evidence and applying the wrong standard for review to the Industrial Commission's decision.

{¶ 24} Based our resolution of the commission's objections, we sustain OMH's third, fourth, fifth, sixth, and seventh objections as they contain the same challenges to the magistrate's decision. However, we overrule OMH's first and second objections, which purport to challenge the magistrate's findings of fact, as they are rendered moot by our finding that some evidence supported the commission's denial of TTD for the period beginning March 9, 2010.

{¶ 25} We must also correct a typographical error contained in paragraphs 58 and 69 of the magistrate's decision, which states that the commission denied relator's request to award TTD for the period beginning on March 9, 2009. Upon review of the record, the requested period began on March 9, 2010.

## V. Conclusion

{¶ 26} In summary, we overrule relator's sole objection and, with the corrections noted above, adopt as modified that portion of the magistrate's decision finding that the commission did not abuse its discretion in denying TTD compensation for the period of August 17 to October 30, 2009. However, we sustain the commission's three objections

and OMH's third through seventh objections and decline to adopt the portion of the magistrate's decision finding an abuse of discretion in the commission's denial of TTD compensation for the period beginning March 9, 2010. Accordingly, relator's request for a writ of mandamus is denied.

*Objections overruled in part and sustained in part;  
writ of mandamus denied.*

KLATT, J., concurs.

TYACK, J., concurs in part, dissents in part.

TYACK, J., concurring in part and dissenting in part.

{¶ 27} Since I believe that Debbie L. Lucas's testimony that she was physically unable to work and took a check to encourage early retirement because she had no income at the time raised a significant issue about whether she voluntarily abandoned employment, I would adopt the magistrate's recommendation that we return the case to the commission for this issue to be addressed. Stated more succinctly, I would overrule all the objections to the magistrate's decision and grant a limited writ of mandamus. To the extent the majority of this panel grants no relief, I respectfully dissent.

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**A P P E N D I X**  
 IN THE COURT OF APPEALS OF OHIO  
 TENTH APPELLATE DISTRICT

State of Ohio ex rel. Debbie L. Lucas,	:	
	:	
Relator,	:	
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v.	:	No. 11AP-93
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Ohio Masonic Home,	:	
	:	
Respondents.	:	
	:	

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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 December 16, 2011

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*Robert A. Muehleisen*, for relator.

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

*Martin, Browne, Hull & Harper, PLL, Randall M. Comer* and *Richard F. Heil, Jr.*, for respondent Ohio Masonic Home.

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IN MANDAMUS

{¶ 28} In this original action, relator, Debbie L. Lucas, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the February 22, 2010 order of its staff hearing officer ("SHO") denying temporary total

disability ("TTD") compensation for the closed period August 17, 2009 to October 30, 2009, and to enter an order granting the compensation.

{¶ 29} Relator further requests that the writ order the commission to vacate the SHO's order of September 29, 2010 that denies TTD compensation beginning March 9, 2010 on grounds that relator voluntarily abandoned her employment and voluntarily abandoned the workforce, and to enter an order awarding TTD compensation beginning March 9, 2010 and finding that relator did not voluntarily abandon her employment or the workforce.

Findings of Fact:

{¶ 30} 1. On August 8, 2006, relator injured her lower back while trying to prevent a resident from falling. She was employed as a "restorative aide" for respondent Ohio Masonic Home ("OMH"), a self-insured employer under Ohio Workers' Compensation Laws. The industrial claim was initially allowed for "lumbosacral sprain; HNP L5-S1; chronic hematoma lumbar."

{¶ 31} 2. In January 2007, relator underwent lumbar spine surgery which included a fusion at the L5-S1 level. In April 2007, relator underwent a wound exploration with evacuation of hematoma. In July 2007, she underwent an aspiration of her post-surgical hematoma.

{¶ 32} 3. Following a period of TTD, relator returned to light-duty work at OMH in November 2008. As a result of her reduced hours on light-duty work, relator applied for and received working wage loss compensation.

{¶ 33} 4. On April 16, 2009, attending physician, James E. Lundeen, Sr., M.D. completed a Physician's Report of Workability ("MEDCO-14"). On the form, Dr. Lundeen

indicated that relator could return to work beginning April 16, 2009 with the following temporary restrictions:

Limit work to 2 days [per] week, 8 hrs. per day. No lift[ing] over 10 pounds, limit walking, bending, twisting. [Patient] is unable to walk stairs.

{¶ 34} The temporary restrictions were estimated to last three months on the MEDCO-14.

{¶ 35} 5. On April 17, 2009, at OMH's request, relator was examined by Gordon Zellers, M.D. In his four-page narrative report dated April 27, 2009, Dr. Zellers concluded that relator had permanent restrictions:

1. Sedentary to limited light duty labor activities only.
2. A 10 pound maximum lifting limit on an occasional, as tolerated basis only.
3. Part-time work activities only.
4. No prolonged sitting, standing or ambulating.
5. This patient must be permitted to change body positions on an intermittent basis.
6. Bending activities on an occasional, as tolerated basis.
7. No squatting activities.
8. No climbing activities.
9. No above groundwork should that environment pose a threat to the patient's safety.
10. No repetitive activities involving the lower extremities.
11. This patient should not be exposed to excessive laboratory stimuli.

12. This patient should not be permitted to perform safety sensitive work activities while under the influence of sedative type medications.

13. In addition to the above, the employer must be willing to accommodate this patient's history of frequent falls (approximately one per week), which unavoidably places this patient at risk for future injuries and/or exacerbations.

{¶ 36} 6. On May 6, 2009, Dr. Zellers issued an addendum to his April 27, 2009

report:

\* \* \* I have now been asked to provide a more specific timeframe for the patient's part-time work activities. In reference to this inquiry, please note that based upon the patient's claim allowances and related sequela, she is able to work a maximum of three nonconsecutive days per week, with workdays being less than or equal to eight hours per day maximum.

{¶ 37} 7. April 23, 2009, relator saw Dr. Lundeen. In his office note of that date,

Dr. Lundeen states:

**SUBJECTIVE:** Pain level today = 8. Activities impaired include: back, left leg, IBS-D, acquired lactose intolerance, bladder and bowel symptoms of L5-S1 disc. Office: Springfield. Pain is noted by patient in regions of injury. No other practitioner is currently prescribing pain medication(s) for this patient. The patient's medications from the prior Rx's is/are essentially depleted. The medications is/are usually effective. No adverse or intolerable side effects from medications. Employment status: 2 days per week. \* \* \*

**OBJECTIVE:** Seated straight leg raising, SLR R 10 degrees, SLR L 5 degrees. [S]pasms present in lower back. Gait: list to right. Stronger lower extremity right leg. Flexion 35 degrees, extension 5 degrees, right lateral flexion 15 degrees and left lateral flexion 5 degrees. \* \* \*

**ASSESSMENT:** Vicodin for pain. Tofranil for bladder, bowel and pain. \* \* \*

**PLAN:** The next scheduled appointment with this examiner is in 12 weeks. Medications from this physician include one or more scheduled narcotic medications in the moderate DEA classification group 3. Patient to minimize use of such narcotic medication(s), to take only for uncontrolled pain symptoms. \* \* \*

{¶ 38} 8. On July 16, 2009, relator again saw Dr. Lundeen who wrote:

**SUBJECTIVE:** Since the last visit, the patient's condition continues without significant change. Pain level today = 9. Activities impaired include: back, left leg, b/b control, ALI, IBS-D. Office: SP. Pain is noted by patient in regions of injury. No other practitioner is currently prescribing pain medication(s) for this patient. The patient's medications from the prior Rx's is/are essentially depleted. The medications is/are usually effective. No adverse or intolerable side effects from medications. Employment status: 2 days per week, great difficulty. \* \* \*

**OBJECTIVE:** Seated straight leg raising, SLR, R 25 degrees, SLR L 15 degrees, spasms present in lower back. Gait: slower. Stronger lower extremity right leg. Flexion 25 degrees, extension 5 degrees, right lateral flexion 20 degrees and left lateral flexion 10 degrees. \* \* \*

**ASSESSMENT:** No major change in medications prescribed. \* \* \*

**PLAN:** The next scheduled appointment with this examiner is in 12 weeks. Medications from this physician include one or more scheduled narcotic medications in the moderate DEA classification group 3. Patient to minimize use of such narcotic medication(s), to take only for uncontrolled pain symptoms. \* \* \*

{¶ 39} 9. On August 10, 2009, Dr. Lundeen issued on his own letterhead what is captioned as a "Disability Certificate." The Disability Certificate states, without explanation, that relator "has been under my care and was initially incapacitated from 8-17-09 to 10-31-09."

{¶ 40} 10. Relator did not work at OMH beyond August 16, 2009, except for an in-service day for OMH on August 19, 2009.

{¶ 41} 11. On October 8, 2009, relator again saw Dr. Lundeen who wrote:

**SUBJECTIVE:** Since the last visit, the patient's condition continues without significant change. Pain level today = 8. Activities impaired include: back, left leg, b/b control, ALI, IBS-D. Office: SP. Pain is noted by patient in regions of injury. No other practitioner is currently prescribing pain medication(s) for this patient. The patient's medications from the prior Rx's is/are essentially depleted. The medications is/are usually effective. No adverse or intolerable side effects from medications. Employment status: none. Income: none.  
\* \* \*

**OBJECTIVE:** Seated straight leg raising, SLR, R 15 degrees, SLR L 15 degrees, spasms present in lower back. Gait: slower. Stronger lower extremity right leg. Flexion 25 degrees, extension 5 degrees, right lateral flexion 15 degrees and left lateral flexion 10 degrees. \* \* \*

**ASSESSMENT:** No major change in medications prescribed. \* \* \*

**PLAN:** The next scheduled appointment with this examiner is in 12 weeks. Medications from this physician include one or more scheduled narcotic medications in the moderate DEA classification group 3. Patient to minimize use of such narcotic medication(s), to take only for uncontrolled pain symptoms. \* \* \*

{¶ 42} 12. By letter dated September 14, 2009, OMH offered its employees the opportunity to participate in its Early Retirement Incentive Program ("ERIP"). The letter states in part:

\* \* \* Your decision whether to retire under the ERIP is completely up to you. Benefits provided by the pension plan for those electing to retire under the ERIP will be enhanced, meaning they will be larger than the plan would otherwise provide. In order to qualify for these enhanced benefits, you must notify the plan administrator of your intent to retire by

October 30, 2009 and your last date of employment must be between September 14, 2009 and November 30, 2009.

{¶ 43} 13. On October 27, 2009, relator signed a written severance agreement with OMH.

{¶ 44} 14. On November 9, 2009, relator elected to take a lump sum payment of \$34,557.71.

{¶ 45} 15. On November 18, 2009, Dr. Lundeen completed a C-84 on which he certified TTD beginning August 17, 2009 to an estimated return-to-work date of October 31, 2009. On November 20, 2009, relator signed the C-84 request for TTD compensation.

{¶ 46} 16. October 8, 2008 is listed on the C-84 as the date of "last" examination. The C-84 form asks the physician to state the "objective" and "subjective" clinical findings that are the basis of the physician's recommendation. In response, Dr. Lundeen wrote "[s]ee attached note."

{¶ 47} 17. Following a January 14, 2010 hearing, a district hearing officer ("DHO") issued an order denying the request for TTD compensation. 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 11/20/2009 is denied.

The Injured Worker testified that she last worked on 8/31/2009. Mr. Hughes did not have the necessary paperwork with him to confirm this date. As such, the Injured Worker modified her request for temporary total disability compensation to begin on 9/1/2009 and to continue. There is only one C-84 Report on file from Dr. Lundeen and it gives and [sic] estimated return to work date of 10/31/2009. This is also the Injured Worker's last date of employment, as she did accept the Employer's Early Retirement Incentive Plan. Given the lack of medical evidence to support on-going

temporary total disability compensation, the District Hearing Officer addresses the issue of temporary total disability compensation for only the closed period of 9/1/2009 to 10/30/2009. As such, the issue of whether the Injured Worker's retirement was voluntary or related to the work injury is not pertinent.

The medical evidence on file is sparse. The Injured Worker began treating with Dr. Lundeen in January, 2009. The only office records on file are dated 4/23/2009, 7/16/2009, and 10/8/2009. Per the parties the Injured Worker was working in a light duty capacity and received working wage loss compensation up through 8/8/2009. The Injured Worker filed a disability slip from Dr. Lundeen dated 8/10/2009. Per Ms. Ash, this was faxed to the Self-Insuring Employer. This disability slip, while dated 8/10/2009 does not certify disability until beginning 8/17/2009. There are no contemporaneous office records on file from Dr. Lundeen. Per the office record of 4/23/2009, the Injured Worker was due to be seen again in 12 weeks, which would indicate that 7/16/2009 was the next scheduled office visit. The Injured Worker testified that she did see Dr. Lundeen in August. However, that record is not in file. It is unclear the reason why Dr. Lundeen took the Injured Worker off her light duty work assignment.

The C-84 Report is dated 11/18/2009 and it is devoid of any objective and subjective findings. He refers the reader to the attached note. The 10/8/2009 office note really does not address why the Injured Worker was taken off work.

Given the foregoing, the District Hearing Officer finds that the Injured Worker has not sufficient[ly] established that she was temporarily and totally disabled for the period 9/1/2009 to 10/30/2009. Therefore, the District Hearing Officer orders that temporary total disability compensation for this period be denied.

{¶ 48} 18. Relator administratively appealed the DHO's order of January 14, 2010.

{¶ 49} 19. Following a February 22, 2010 hearing, an SHO issued an order that

effectively affirms the DHO's order. The SHO's order explains:

It is the order of the Staff Hearing Officer that the C-84 Request for Temporary Total Disability Compensation filed 11/20/2009 be denied.

The Staff Hearing Officer finds that the Injured Worker testified today that she last worked a full day on 08/16/2009, but did work at an in-service day for one hour on 08/19/2009. Mr. Hughes confirmed these dates on behalf of the Employer. Therefore, the Injured Worker's request for temporary total disability compensation encompasses the period from 08/17/2009 through 10/30/2009. The Staff Hearing Officer bases this finding upon the Injured Worker's testimony, the Employer's confirmation of the Injured Worker's last date worked, and the C-84 report on file from Dr. Lundeen providing an estimated return to work date of 10/31/2009. The Staff Hearing Officer finds that the injured Worker accepted the Employer's Early Retirement Incentive Plan on 10/31/2009.

Given the lack of medical evidence to support ongoing temporary total disability compensation, the Staff Hearing Officer addresses the issue of temporary total disability compensation for only the closed period from 08/17/2009 to 10/30/2009. As such, the issue of whether the Injured Worker's retirement was voluntary or related to the work injury is not relevant to the period of temporary total disability compensation at issue today.

The Staff Hearing Officer finds that the Injured Worker began to be treated by Dr. Lundeen in January 2009. The only office records on file from Dr. Lundeen are dated 04/23/2009, 07/16/2009, and 10/08/2009.

According to the parties, the Injured Worker worked in a light-duty capacity and received working wage loss compensation from the Employer through 08/16/2009.

The Injured Worker filed a disability slip from Dr. Lundeen dated 08/10/2009 which states that the Injured Worker "has been under my care and was totally incapacitated from 08/17/2009 to 10/31/2009. Further there are no contemporaneous office records on file from Dr. Lundeen during the period of the Injured Worker's work absence from 08/17/2009 through 10/07/2009.

The Staff Hearing Officer further finds that the C-84 report from Dr. Lundeen dated 11/18/2009 is devoid of any objective and subjective findings. He refers the reader to an attached note that was not attached. The Staff Hearing Officer finds that the 10/08/2009 office record of Dr. Lundeen does not address why the Injured Worker, or if the Injured Worker was taken off work by Dr. Lundeen. The office record of 10/08/2009 states "since the last visit, the patient's condition continues without significant change."

Given the foregoing, the Staff Hearing Officer finds that the Injured Worker has not sufficiently established that she was temporarily and totally disabled for the period 08/17/2009 to 10/30/2009. Therefore, the Staff Hearing Officer orders that temporary total disability compensation for this period be denied.

{¶ 50} 20. On March 17, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of February 22, 2010.

{¶ 51} 21. Earlier, on March 9, 2010, at relator's own request, she was examined by psychologist Stephen W. Halmi, Psy.D. In his 11-page narrative report, Dr. Halmi opines:

Based on her appearance, self report, records, and performance on the mental status examination, I opine that I have sufficient evidence to diagnose Ms. Lucas with Major Depressive Disorder, Single Episode, Severe Without Psychotic Features. I also opine that the negative consequences of the 2006 industrial accident have directly caused her Major Depressive Disorder. \* \* \*

\* \* \*

I opine that Ms. Lucas' depression is severe and temporarily and totally disables her from working. I opine that her concentration problems, emotional lability, and indecisiveness would prevent her from working at this time.

{¶ 52} 22. On June 14, 2010, at OMH's request, relator was examined by psychiatrist Mark E. Reynolds, M.D. In his seven-page narrative report, among the several questions answered, Dr. Reynolds opines:

**4. If the alleged psychological condition is present, please state within the realm of reasonable medical probability if this condition is related to the industrial injury by direct causation or by way of aggravation or if there are other unrelated non-work related issues causing the requested condition? Please explain.**

Yes, available evidence supports Major Depressive Disorder, single episode, severe without psychotic features to be a direct and proximate result of the industrial injury in question.

**5. Please state within the realm of reasonable medical probability if this claimant is temporarily and totally disabled (beginning 03/09/2010) due to the *alleged* condition of the claim? Please explain.**

Yes, available evidence supports Major Depressive Disorder, single episode, severe without psychotic features to result in a period of temporary total disability beginning 03/09/2010. The severity of the depressive symptoms presented by the claimant and consistent with the record would preclude the disability [sic] to maintain employment at this time.

{¶ 53} 23. Following a June 22, 2010 examination, Dr. Halmi completed a C-84 on which he certified a period of TTD beginning March 9, 2010 to an estimated return-to-work date of September 2, 2010. Apparently, this C-84 was filed June 25, 2010.

{¶ 54} 24. Earlier, on May 20, 2010, citing Dr. Halmi's March 9, 2010 report, relator moved for an additional claim allowance.

{¶ 55} 25. Following an August 5, 2010 hearing, a DHO issued an order additionally allowing the claim, but denying the request for TTD compensation beginning March 9, 2010. The DHO's order explains:

It is the order of the District Hearing Officer that the C-86 Motion, filed by Injured Worker on 05/20/2010, is granted in part and denied in part.

The District Hearing Officer orders that this claim is additionally **ALLOWED** for **MAJOR DEPRESSIVE DISORDER, SINGLE EPISODE, SEVERE WITHOUT PSYCHOTIC FEATURES.**

This decision is based on the 03/09/2010 report by Dr. Halmi as well as the 06/14/2010 report by Dr. Reynolds.

The District Hearing Officer notes that there is no contrary medical evidence in the file at this time pertaining to this condition.

It is the order of the District Hearing Officer that the Injured Worker's request for temporary total disability compensation from 03/09/2010 through 08/05/2010, the date of this hearing, and continuing, is denied.

The District Hearing Officer finds that the Injured Worker did not sustain her burden in establishing that she was eligible for receiving temporary total disability compensation benefits as she was not disabled at the time of her voluntary early retirement incentive plan with the employer of record.

The District Hearing Officer notes that the Injured Worker did accept the employer's early retirement incentive plan as of 10/31/2009. The District Hearing Officer also notes that the Injured Worker requested temporary total disability compensation from 08/17/2009 through 10/30/2009 however that was denied by the Staff Hearing Officer order issued on 02/25/2010.

The Injured Worker did not look for employment since that time however it was argued that the Injured Worker was under restrictions at the time of the early retirement. The District Hearing Officer finds that the Injured Worker did

remove herself from the work force and was not disabled at the time of the retirement effective 10/31/2009.

Therefore, the Injured Worker did not establish continued eligibility for temporary total disability compensation subsequent to 10/31/2009 as there is no indication that the Injured Worker obtained further employment after that date.

At the hearing, the Injured Worker's representative submitted a C-84 form certifying that the Injured Worker was disabled from 10/30/2009 through 01/19/2010. The District Hearing Officer notes that this issue was never adjudicated. Therefore, the District Hearing Officer cannot utilize this form as some evidence in the adjudication of this matter as the Injured Worker was not disabled at the time of the early retirement.

It is further the order of the District Hearing Officer that the C-84 request for temporary total compensation, filed by the Injured Worker on 06/25/2010, is denied.

{¶ 56} 26. Relator administratively appealed the DHO's order of August 5, 2010.

{¶ 57} 27. Following a September 29, 2010 hearing, an SHO issued an order that, without so stating, affirms the DHO's order. The SHO's order explains:

It is the finding and order of the Staff Hearing Officer that the Injured Worker's C-86 Motion filed 05/20/2010, requesting allowance of the additional condition MAJOR DEPRESSIVE DISORDER, SINGLE EPISODE, SEVERE WITHOUT PSYCHOTIC FEATURES, is granted. It is the Staff Hearing Officer's finding that the requested condition is causally related to the industrial injury of 08/08/2006. It is further the finding and order of the Staff Hearing Officer that the Injured Worker's request for the payment of temporary total disability compensation benefits, by the C-86 Motion filed 05/20/2010, and the C-84 filed 06/25/2010, for the period 03/09/2010 through 08/05/2010, is denied. It is the Staff Hearing Officer's finding that the Injured Worker took a voluntary retirement/buy-out as of 10/31/2009. The Staff Hearing Officer finds that the Injured Worker at the time of her buy-out and voluntary retirement and subsequent to those events, has not sought employment with any other Employer and has, at this hearing, expressed no intention to return to

employment. The Staff Hearing Officer also finds that the Injured Worker at the time of her voluntary retirement/buy-out did not express her position of accepting that buy-out as a result of the allowed conditions in this claim and her inability to perform her job as a result of those conditions. This order is based upon the medical of Dr. Halmi dated 03/09/2010, the medical of Dr. Reynolds dated 06/14/2010, the voluntary retirement buy-out on file and the Injured Worker's testimony at hearing.

{¶ 58} 28. On October 27, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 29, 2010.

{¶ 59} 29. On January 28, 2011, relator, Debbie L. Lucas, filed this mandamus action.

#### Conclusions of Law:

{¶ 60} Two main issues are presented: (1) did the commission abuse its discretion in denying TTD compensation for the closed period August 17, 2009 to October 30, 2009, and (2) did the commission abuse its discretion in denying TTD compensation beginning March 9, 2009.

{¶ 61} The first issue requires an analysis of the SHO's order of February 22, 2010 that denied TTD compensation for the closed period August 17, 2009 to October 30, 2009.

{¶ 62} On a C-84 dated November 18, 2009, Dr. Lundeen certified a period of TTD beginning August 17, 2009 to an estimated return-to-work date of October 31, 2009. The C-84 listed October 8, 2009 as the date of "last" examination.

{¶ 63} It was the duty of the SHO to adjudicate whether the C-84 should be accepted as persuasive evidence that relator was temporary totally disabled during the closed period. Before the SHO were additional medical records from Dr. Lundeen to be

considered. There was no clinical evidence from any other doctor to contradict or question Dr. Lundeen's C-84 and there was only one C-84 from Dr. Lundeen to be adjudicated.

{¶ 64} The SHO rejected Dr. Lundeen's C-84 based upon an analysis of Dr. Lundeen's other medical records. Key to the SHO's analysis was Dr. Lundeen's October 8, 2008 office note stating "since the last visit, patient's condition continues without significant change." Notably, the last office visit prior to October 8, 2009 occurred July 16, 2009, some three months earlier. Undisputedly, during July 2009, relator worked the light-duty job under the restrictions set forth in Dr. Zeller's report and apparently, under the similar restrictions set forth in Dr. Lundeen's April 16, 2009 MEDCO-14. Relator continued to work the light-duty job until August 16, 2009, the day prior to Dr. Lundeen's certification that relator would be "incapacitated" beginning August 17, 2009.

{¶ 65} In short, during July and up to August 16, relator worked the light-duty job, albeit with alleged difficulty. If, as Dr. Lundeen states in his October 8, 2009 office note "since the last visit, the patient's condition continues without significant change," then, what has changed with respect to relator's medical condition or job duties that she can no longer perform the light-duty job? Dr. Lundeen's medical records do not answer this question. What has changed to justify Dr. Lundeen's opinion that relator can no longer perform the light-duty job that he had earlier indicated she could perform?

{¶ 66} The commission is exclusively responsible for weighing and interpreting medical reports. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18.

{¶ 67} Though ordinarily the commission cites affirmative evidence to support its order, it may deny a claim based upon a lack of probative or credible evidence in the

record because relator has the burden of proof. *State ex rel. Thomas v. Indus. Comm.* (1989), 42 Ohio St.3d 31.

{¶ 68} Where a key question is left unanswered, the commission is entitled to conclude that a medical report's persuasiveness is either diminished or rejected. *State ex rel. Pavis v. Gen. Motors Corp., B.O.C. Group*, 65 Ohio St.3d 30, 1992-Ohio-114.

{¶ 69} Here, relator argues that the SHO's order of February 22, 2010 cannot reject Dr. Lundeen's C-84 "when no contrary medical evidence was present." (Relator's brief, 9.) Relator is incorrect. The SHO had the duty to determine the probative value of Dr. Lundeen's C-84 certification of disability even in the absence of a medical opinion from another doctor that might contradict or question the persuasiveness of Dr. Lundeen's C-84. *Pavis*.

{¶ 70} Accordingly, as to the first main issue, the commission did not abuse its discretion in denying TTD compensation for the closed period August 17, 2009 through October 30, 2009.

{¶ 71} As earlier noted, the second main issue is whether the commission abused its discretion in denying TTD compensation beginning March 9, 2009. The second main issue requires analysis of the SHO's order of September 29, 2010.

{¶ 72} Analysis begins with the observation that the SHO's order of September 29, 2010 determines that relator voluntarily abandoned her former position of employment, and that she voluntarily abandoned the workforce.

{¶ 73} In determining that relator voluntarily abandoned her former position of employment, the SHO relies primarily upon relator's acceptance of the buyout. In determining that relator voluntarily abandoned the workforce, the SHO relies upon

relator's failure to search for employment following her acceptance of the buyout, and the SHO's observation that, at the hearing, she "expressed no intention to return to employment."

{¶ 74} Historically, this court first held that, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued TTD benefits since it is his own action, rather than the industrial injury, which prevents his returning to his former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. The *Jones & Laughlin* rationale was adopted by the Supreme Court of Ohio in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, wherein the court recognized a "two-part test" to determine whether an injury qualified for TTD compensation. *Ashcraft* at 44. The first part of the test focuses upon the disabling aspects of the injury whereas the latter part determines if there are any other factors, other than the injury, which prevent the claimant from returning to his former position of employment. *Id.*

{¶ 75} In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary.

{¶ 76} In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.* (1989), 45 Ohio St.3d 381, the court held that a claimant's acceptance of a light-duty job did not constitute an abandonment of his former position of employment. The *Diversitech Gen.* court stated at 383:

\* \* \* The question of abandonment is "primarily \* \* \* [one] of intent \* \* \* [that] may be inferred from words spoken, acts done, and other objective facts. \* \* \* All relevant circumstances existing at the time of the alleged abandonment should be considered." \* \* \*

{¶ 77} An injured worker who has voluntarily abandoned his employment may thereafter reinstate his TTD entitlement. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. The syllabus of *McCoy* states:

A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶ 78} In *State ex rel. Jennings v. Indus. Comm.*, 98 Ohio St.3d 288, 2003-Ohio-737, the court clarified its holding in *McCoy*. In *Jennings*, the court reemphasized that a claimant who has abandoned his or her former job does not reestablish TTD eligibility unless the claimant secures another job and was removed from subsequent employment by the industrial injury.

{¶ 79} Some three years ago, the Supreme Court of Ohio decided *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, a case that is instructive here.

{¶ 80} 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.

{¶ 81} 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.

{¶ 82} 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.

*Pierron* at ¶6.

{¶ 83} 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. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*

(1989), 45 Ohio St.3d 381, 383, 544 N.E.2d 677, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 414 N.E.2d 1044. 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 N.E.2d 827, 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.

{¶ 84} The magistrate finds that the SHO's order of September 29, 2010 constitutes an abuse of discretion in failing to evaluate the medical evidence of record that might be viewed as causing an injury-induced retirement under *Rockwell* and its progeny.

{¶ 85} During the September 29, 2010 hearing, on direct examination by her counsel, relator testified:

[Relator's counsel] Okay. Could you—let me ask you this. Dr. Lundeen had taken you off work in August. Would it have been possible for you to return to work at that point until he released you?

A. No, no.

Q. Okay. You received the buyout in, you said, October and you had until when to make up your mind on that?

A. I believe the end of October was the deadline.

Q. Okay.

A. I'm not sure about the dates.

Q. Okay. Did you accept the buyout?

A. Yes.

Q. Why did you accept the buyout?

A. I was off of work, I was physically unable to work, I had no income.

(Tr. 8.)

{¶ 86} In *State ex rel. Mid-Ohio Wood Prods., Inc., v. Indus. Comm.*, 10th Dist. No. 07AP-478, 2008-Ohio-2453, this court held that an injury-induced job abandonment under *Rockwell* can be supported by the claimant's hearing testimony:

We have carefully reviewed the cases that the magistrate cites in his decision, and we find nothing in them that holds that there must be objective medical evidence corroborating a claimant's testimony regarding his motivation for abandonment of his employment. On the contrary, as noted hereinabove, the commission must make a factual determination, based upon all of the surrounding circumstances, whether the motivation for the claimant's departure was, in whole or in part, the allowed conditions for which the claimant has already discharged his burden of proof. Here, the commission did so, and did not abuse its discretion in crediting the claimant's testimony, particularly in light of the office notes from Drs. Bennington, Ellis, and Dyer, which indicate that the claimant reported suffering severe, constant back pain since the date of injury. \* \* \*

Id. at ¶18.

{¶ 87} Oddly, relator's hearing testimony as to her alleged injury-induced retirement is not mentioned in the SHO's order. Nor is the medical evidence that could be viewed as contemporaneous to the issue of an injury-induced retirement discussed or even mentioned in the order. Rather, the SHO places significance upon the observation that, at the time of the buyout, relator "did not express her position of accepting that buyout as a result of the alleged conditions in the claim \* \* \*." The SHO, however, fails to state with any precision when it should have been expected that relator would state this position and to whom such expression should have been made.

{¶ 88} Based upon the above analysis, the magistrate finds that the commission abused its discretion in determining that relator voluntarily abandoned her employment with OMH.

{¶ 89} The SHO's determination that relator voluntarily abandoned the workforce also constitutes an abuse of discretion.

{¶ 90} The SHO in effect held relator accountable for a failure to search for alternative employment while at the same time finding that she suffers from a debilitating psychiatric disorder. As earlier noted, Dr. Halmi opined in his March 9, 2010 report, that the psychiatric condition "disables her from working." Also, in his June 14, 2010 report, Dr. Reynolds, who examined for the employer, opined that the "severity of the depressive symptoms" precludes "employment at this time."

{¶ 91} In holding relator accountable under *Pierron* for her failure to seek employment following her acceptance of the buyout, the SHO failed to address the issue raised by the reports of Drs. Halmi and Reynolds as to whether relator can be held

accountable for failing to search for alternative employment when she may be mentally unable to do so or may be mentally unqualified for any employment.

{¶ 92} Based upon the above analysis, the magistrate finds that the commission, through its SHO, abused its discretion in determining that relator voluntarily abandoned the workforce.

{¶ 93} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio to vacate its SHO's order of September 29, 2010 and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's request for TTD compensation beginning March 9, 2010.

*/s/ Kenneth W. Macke*

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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).