

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Nancy Salyers,	:	
Relator,	:	
v.	:	No. 03AP-173
Techneglas, Inc.,	:	(REGULAR CALENDAR)
and	:	
The Industrial Commission of Ohio,	:	
Respondents.	:	

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D E C I S I O N

Rendered on February 5, 2004

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*Robert Robinson*, for relator.

*Vorys, Sater, Seymour and Pease LLP, Robin R. Obetz and Randall W. Mikes*, for respondent Techneglas, Inc.

*Jim Petro*, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

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ON OBJECTIONS TO THE MAGISTRATE'S DECISION  
IN MANDAMUS

BOWMAN, J.

{¶1} Relator, Nancy Salyers, has filed an original action in mandamus requesting this court to issue a writ of mandamus to order respondent, Industrial Commission of Ohio, to vacate its denial of her application for temporary total disability compensation based on abandonment of employment and to reconsider her request for temporary total disability compensation based on the medical evidence.

{¶2} This court referred the matter to a magistrate, pursuant to Civ.R. 53(C) and Section (M), Loc.R. 12 of the Tenth District Court of Appeals, who rendered a decision including findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate decided that this court should issue a writ of mandamus to order the commission to determine whether relator's departure from employment with respondent-employer, Techneglas, Inc., was voluntary in accordance with *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and whether her lack of employment for the four years preceding her request for temporary total disability compensation was related to her injury. Respondents have filed objections to the magistrate's decision.

{¶3} Respondents argue that whether relator's employment with Techneglas was voluntarily abandoned was not an issue raised by relator and the magistrate erred in addressing it, and, pursuant to *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, relator failed to demonstrate she was employed at the time of her request for temporary total disability compensation and that her four-year absence from the work force was causally related to the allowed conditions of her claim. We agree.

{¶4} In 1993, relator sustained an industrial accident while employed by Techneglas and returned to work. In 1996, she was discharged from Techneglas when she tested positive for marijuana and cocaine metabolites. Apparently relator worked at other jobs until July 1998, when she stopped working. On July 9, 2002, relator had surgery related to the allowed conditions of her claim, and filed an application for temporary total disability compensation beginning on that date.

{¶5} A staff hearing officer determined that relator had voluntarily abandoned her employment when terminated by Techneglas and, although she worked at other jobs until 1998, she ceased all work at that time and was unemployed in 2002. Based on *McCoy*, the staff hearing officer denied her application for temporary total disability compensation.

{¶6} Relator argues that, because she continued to work for some time after her termination by Techneglas, she is entitled to temporary total disability compensation. Relator construes *McCoy* to hold that any period of employment at any time following a voluntary termination of employment entitles the claimant to receive temporary total disability compensation.

{¶7} In *McCoy*, the Ohio Supreme Court held, at ¶35, 39-40:

\* \* \* [I]n order to qualify for TTD compensation, the claimant must show not only that he or she lacks the medical capability of returning to the former position of employment but that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings. In other words, it must appear that, but for the industrial injury, the claimant would be gainfully employed.

\* \* \*

\* \* \* [W]e hold that 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.

It is important to note that this holding is limited to claimants who are gainfully employed at the time of their subsequent disabilities. \* \* \*

{¶8} Thus, in order to receive temporary total disability compensation, it was incumbent upon relator to show she was employed at the time of her surgery or that, but for the allowed conditions of her claim, she would have been so employed. The burden remains on a claimant to show entitlement to workers' compensation and relator failed to do so.

{¶9} The magistrate also erred in determining the commission abused its discretion by failing to address whether relator voluntarily abandoned her employment when terminated by Techneglas. This issue was not raised by relator and she appears to concede the voluntary nature of her departure from Techneglas. She was not working at the time she claims to be temporarily totally disabled and, pursuant to *McCoy*, is not entitled to compensation.

{¶10} Upon a review of the magistrate's decision and an independent review of the record, this court adopts the magistrate's findings of fact but rejects the conclusions of law. Respondents' objections to the magistrate's decision are sustained, and the requested writ of mandamus is denied.

Objections sustained,  
writ of mandamus denied.

LAZARUS, P.J., and SADLER, J., concur.

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**A P P E N D I X A**

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Techneglas, Inc. and The Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
	:	
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 July 28, 2003

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*Robert M. Robinson*, for relator.

*Vorys, Sater, Seymour and Pease LLP, Robin R. Obetz and  
Randall W. Mikes*, for respondent Techneglas, Inc.

*Jim Petro*, Attorney General, and *Stephen D. Plymale*, for  
respondent Industrial Commission of Ohio.

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**I N M A N D A M U S**

{¶11} In this original action in mandamus, relator, Nancy Salyers, asks the court to issue a writ compelling respondent Industrial Commission of Ohio ("commission") to vacate its denial of compensation for temporary total disability ("TTD") based on

abandonment of employment and to consider her request for TTD on the medical evidence.

Findings of Fact

{¶12} 1. In January 1993, Nancy Salyers ("claimant") sustained an industrial injury while employed by Techneglas, Inc. Her workers' compensation claim was allowed for a rotator cuff tear and strain, right brachial plexus injury, aggravation of preexisting degenerative joint disease, and depressive disorder.

{¶13} 2. Claimant returned to work. On October 2, 1996, she visited the company's nurse due to swelling and significant pain in her shoulder. The nurse treated the matter as a new accident and required claimant to submit to a urine test for drug screening.

{¶14} 3. The test showed positive for cannabinoid and cocaine metabolites as well as prescription medications.

{¶15} 4. The employer suspended claimant and later terminated her employment as of October 25, 1996, "[d]ue to the violation of Plant Rule #2."

{¶16} 5. Plant rule 2 provided that an employee would be subject to disciplinary action, including termination, for "[r]eporting to work under the influence of intoxicating liquor or narcotics or the use of intoxicating liquors or narcotics on Company property or bringing intoxicating liquors or narcotics into the plant."

{¶17} 6. Claimant filed a grievance contending that the testing procedure violated the "just cause" provision of the drug/alcohol policy. She stated that, on previous occasions, she had stopped to get ice for her shoulder at the end of her shift without being tested. The grievance was denied at the second step, and claimant appealed.

{¶18} 7. At the third step, the determination was made that, "consistent with our policy [claimant] was required to submit to a drug/alcohol test" and that her "termination for violation of Plant Rule #2 was warranted."

{¶19} 8. According to claimant's testimony, she obtained another job and worked at various jobs until July 16, 1998, when she ceased working.

{¶20} 9. Claimant was later awarded federal disability benefits through the Social Security Administration.

{¶21} 10. On July 9, 2002, claimant underwent surgery to remove a spinal cord stimulator that had been implanted to treat the allowed conditions of the right upper extremity. Claimant's physician planned to remove the device, allow time for healing, and implant a new one. Claimant filed a request for TTD compensation commencing on the date of surgery.

{¶22} 11. In October 2002, a district hearing officer awarded TTD, finding in part that the employer had not shown that the termination of employment for a positive drug test was pursuant to a written work rule.

{¶23} 12. In November 2002, a staff hearing officer vacated the award, ruling as follows:

{¶24} "Claimant is found to have voluntarily abandoned her former position of employment when she was terminated on 10/25/1996 for violation of company work rule #2, i.e. testing positive for illegal substances. The Staff Hearing Officer finds that, pursuant to State ex rel. Louisiana-Pacific Corp. v. I.C. (1995), 72 Ohio St.3d 401, 1) the prohibited conduct was clearly defined in plant rule #2, 2) that it was clearly indicated to be a dischargeable offense and 3) that the claimant knew of the work rule and its potential consequences. This is based on the rule itself, the grievance/termination documents (which do not reference any lack of knowledge) and the testimony of Ms. Finnie who indicated the policy was already in place when she began there in 1978.

{¶25} "Additionally, claimant testified that she then obtained numerous other employment positions, but last worked on or about 07/16/1998. She began receiving Social Security Disability approximately 3 months ago. Therefore, as temporary total compensation was requested on 08/26/2002, to begin 07/09/2002 (the date of her surgery), the Staff Hearing Officer finds, pursuant to the decision in State ex rel. McCoy v. Dedicated Transport, Inc. (2002), 97 Ohio State 3d 25, that the claimant had, in fact, retired/abandoned the entire labor market as of the date of her request of potential entitlement to temporary total compensation and no longer suffered any loss in wages as she was not working at the time (or for some 4 years). Therefore, her request for temporary total compensation is denied beginning 07/09/2002 and any temporary total compensation paid beginning that date and continuing is found to be overpaid and is ordered recouped pursuant to R.C. 4123.511(J)."



{¶26} 13. The commission refused further appeal.

Conclusions of Law

{¶27} In this mandamus action, claimant argues that the commission abused its discretion in denying TTD compensation for the period of time during which she was unable to work following surgery for her allowed condition.

{¶28} It is well established that, when a loss of wages is caused by a claimant's voluntarily actions rather than the industrial injury, the claimant is not eligible for TTD compensation. E.g., *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42 (stating that, where an employee's own actions, for reasons unrelated to the injury, preclude him from returning to his employment, he is not entitled to TTD benefits, since it is the employee's own actions rather than the injury that causes the loss of wages); *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376. Therefore, when an employee relinquishes work and wages voluntarily—whether due to a voluntary resignation or a "voluntary" discharge under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401—the loss of wages is caused by the voluntary conduct rather than the industrial injury and the claimant is not entitled to disability compensation. E.g., *Baker, State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5 (noting that a violation is not voluntary when causally related to the industrial injury).

{¶29} However, after a voluntary departure from a job, the worker is again eligible for TTD compensation after beginning a new job, where the allowed conditions cause him to lose wages at the new job. *Baker, State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. The court held in *McCoy* that 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" may again receive TTD compensation if he or she "reenters the workforce and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job." *Id.* at syllabus. The court made clear that a claimant "who voluntarily left his or her former position of employment" again becomes eligible for TTD compensation after reentering the work force *if* the claimant becomes temporarily and totally disabled "while working at the new job." *Id.* at ¶28.

{¶30} In the present action, regardless of whether the discharge was properly found to be a voluntary abandonment of employment, claimant regained her eligibility to receive TTD compensation upon reentering the workforce following her discharge from Techneglas. If her allowed conditions then caused her to lose wages while working at one of those jobs, TTD was not barred by the discharge.

{¶31} However, claimant did not remain in the workforce. According to her testimony, she ceased working on or about July 16, 1998, and has not worked since that time. Therefore, as of the surgery in July 2002, claimant had not earned wages for about four years.

{¶32} The commission was within its discretion to conclude that claimant left the labor market in July 1998. However, the commission did not address whether that departure was voluntary or involuntary. The commission did not state whether claimant's lack of employment during the period prior to the surgery was causally related to the allowed conditions. This omission warrants the issuance of a limited writ because the Ohio Supreme Court has made clear that it is not enough to find that the injured worker abandoned the workplace; the commission must find that the abandonment of employment was *voluntary* in order to deny disability compensation.

{¶33} In her brief, claimant indicates that her absence from the workforce after July 1998 was causally related to her allowed conditions. In contrast, the employer indicates that an unrelated auto accident was the cause of her unemployment. Neither argument is supported by the record in mandamus, however, and, more importantly, the commission did not address the issue.

{¶34} The magistrate concludes that the court should return this matter to the commission to address the crucial question of whether the absence from the labor market in early 2002 was voluntary. Although the commission explicitly found that the 1996 departure from Techneglas was voluntary, it did not address the voluntariness of the 1998 departure from employment. Claimant testified that she continued to work for a variety of employers until July 1998, and it was her lack of employment before the surgery in 2002 that was relevant to the issue of TTD for the post-surgical recovery.

{¶35} Accordingly, the subject order is deficient under *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203. The commission was obliged to make an explicit

finding as to whether the abandonment of the labor market in 1998 was voluntary or involuntary and to cite some evidence in support of the finding. *Id.*

{¶36} In summary, although the commission was within its discretion to find that claimant was not working for several years before her surgery, it did not address the question of *why* she was not working. Claimant was eligible for TTD compensation if she was earning wages at the time of her disabling surgery *or* if her unemployment prior to the surgery was caused by the allowed conditions. The magistrate recognizes that claimant had not sought TTD compensation for the pre-surgical period, which might be viewed as supporting a finding that she was not then disabled by the allowed conditions. However, the *McCoy* decision was not issued until 2002, and an injured worker might reasonably have believed that a request for TTD after a discharge would have been futile under *Louisiana-Pacific*. In other words, the lack of TTD compensation between 1998 and 2002 is not an absolutely conclusive factor, and the question of voluntariness is for the commission to determine based on all the evidence.

{¶37} Last, the magistrate acknowledges that it is questionable whether the discharge in 1996 met the criteria for deeming it to be a voluntary relinquishment of employment. Before a voluntary termination of employment may be inferred, the commission must find that the rule clearly delineated the prohibited conduct and the consequences in writing. See *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559. In the record herein, the magistrate did not find a written policy informing employees that they would be required to undergo a drug screening upon reporting to the nurse with a work-related complaint. Nor did the magistrate find a written rule stating that employees would be subject to discharge if a drug screen yielded a positive result for any illegal drug. Rather, the written rule states that an employee who reports to work "under the influence" of "intoxicating liquor" or "narcotics" is subject to discharge. The rule also provides for the discharge of an employee who brings those substances into the workplace or uses them in the workplace.

{¶38} Based on the wording of the rule, it is questionable whether the claimant knew or should have known that she was prohibited from reporting to work with cocaine or marijuana metabolites in her system. Further, it is questionable whether claimant knew or should have known that the word "narcotics" would be viewed as including cocaine and

marijuana, which are not generally classified as narcotics. See, e.g., Taber's Cyclopedic Medical Dictionary (18 Ed.1997) 1267 (stating that a narcotic drug is one that relieves pain and produces sleep such as opium, morphine, codeine, papaverine, and heroin), page 404 (stating that cocaine causes stimulation, excitement, restlessness, etc.), page 1162 (stating that marijuana affects mood, perception and coordination and has been used as an anti-emetic treatment, but noting no analgesic or sleep-inducing effects).

{¶39} Therefore, it is questionable whether the discharge was voluntary under *Louisiana-Pacific*. See, generally, *State ex rel. Springfield v. Indus. Comm.*, Franklin App. No. 01AP-1084, 2002-Ohio-3357; *McKnabb*, supra. The magistrate does not question whether employers may discharge employees who test positive for illegal drugs, nor does the magistrate address whether the discharge was a contract violation, which was determined in the grievance process. The magistrate questions only whether the commission adequately explained why claimant's departure from Techneglas was a voluntary choice by claimant, tantamount to quitting her job voluntarily, for purposes of eligibility for workers' compensation benefits.

{¶40} The magistrate concludes that the commission's findings and conclusions as to the voluntariness of the 1996 discharge were insufficient as a matter of law for the following reasons: (1) the commission failed to identify which specific rule was violated (whether claimant violated the prohibition against reporting to work under the influence or the prohibition against using narcotics in the workplace, etc.); (2) the commission failed to identify exactly what conduct of the worker served to violate the rule; (3) the commission stated that claimant violated the rule prohibiting employees from "testing positive for illegal substances," but that is not what the rule specifically prohibits, and the commission did not explain further; and (4) the record does not include the part of the written policy that tells employees that they must undergo a drug screening upon reporting to the nurse with a complaint of industrial injury. Therefore, because the commission's decision as to the departure from Techneglas in 1996 does not comply with the requirements set forth in decisions such as *Louisiana-Pacific* and *McKnabb*, a limited writ is also warranted to permit the commission to provide an adequate order. See, generally, *Noll; Springfield*, supra. For example, if the level of cocaine metabolite in claimant's urine was sufficient to prove that she was "under the influence" upon reporting to work or was sufficient to prove that she

must have used the drug in the workplace, then the commission must cite some evidence to support its conclusion. Similarly, if the commission finds that the work rule was adequate to inform claimant that she was prohibited from testing positive for any illegal substance upon a drug screening, it must cite the supporting evidence and provide a brief explanation.

{¶41} Nonetheless, the magistrate believes that the crucial issue with respect to TTD is whether claimant was voluntarily absent from the workforce in 2002. If claimant was voluntarily not working in 2002, then her post-surgical recovery did not cause any loss of wages, regardless of why she left Techneglas in 1996. Because the commission did not address whether the lack of wage-earning activity in 2002 was voluntary, a limited writ is warranted, directing the commission to address this crucial issue.

{¶42} In sum, the magistrate recommends that the court grant a limited writ returning this matter to the commission to vacate its denial of TTD compensation and to issue a new order, granting or denying the requested compensation in compliance with the above-cited authorities.

/s/ P.A. Davidson

P. A. DAVIDSON  
MAGISTRATE