[Cite as *State ex rel. Adkins v. Indus. Comm.*, 2009-Ohio-5777.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Shawn M. Adkins,	:	
Relator,	:	
v.	:	No. 08AP-979
Industrial Commission of Ohio and Akron Paint and Varnish, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on November 3, 2009

Stocker Pitts Co., L.P.A., and *Thomas R. Pitts*, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Richard L. Williger Co., LPA, and *Richard L. Williger*, for respondent Akron Paint and Varnish, Inc.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Shawn M. Adkins filed this action in mandamus, seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation based upon the commission's finding that

Adkins voluntarily abandoned his employment with Akron Paint and Varnish, Inc. ("Akron Paint").

{¶2} In accord with Loc.R. 12, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated the pertinent evidence and filed briefs. The magistrate then issued a magistrate's decision which contains detailed findings of fact and conclusions of law, which is appended to this decision. The magistrate's decision includes a recommendation that we refuse to grant the requested relief.

{¶3} Counsel for Adkins has filed objections to the magistrate's decision. Counsel for Akron Paint has filed a "brief" in response. Counsel for the commission has filed a memorandum in response to the objections. The case is now before the court for a full, independent review.

{¶4} Adkins suffered multiple injuries to his right hand on November 6, 2007. Three months later, he applied for TTD compensation. A district hearing officer for the commission granted the compensation after Adkins testified that he had in fact informed his supervisor that he (Adkins) would not be at work on Monday or Tuesday of the next week.

{¶5} Akron Paint appealed and a staff hearing officer ("SHO") found that the requirements for finding voluntary abandonment of employment had been met and that Adkins should not receive TTD compensation as a result.

{¶6} Voluntary abandonment of employment is a doctrine which allows an employer to prevent an injured worker from receiving workers' compensation benefits for which the worker would otherwise qualify if the injured worker engaged in conduct which

was so egregious that the injured worker knew or should have known that he or she would lose his or her job as a result of the conduct. The doctrine originally developed under circumstance such as when a worker showed up at the job while under the influence of alcohol or a drug of abuse and was injured as a result. This particular situation has now been addressed by changes in the statutes governing workers' compensation so that a person who is under the influence and who is injured on the job as a result cannot pursue a workers' compensation claim.

{¶7} A second theory of voluntary abandonment of employment developed for workers who just refused or failed to return to work after an injury, even though that worker had been cleared by their physician to return to work. The doctrine was supported by the common sense idea that if a person simply fails to return to work for an extended time, the person could be considered as having quit the job.

{¶8} From these reasonable fact situations, some employers have pushed the doctrine in ways which seem to ask: "How little can an employee do wrong so we can fire him or her and save ourselves the cost of paying temporary total disability benefits while claiming our injured employee voluntarily abandoned employment?" The responses to that question from the courts have not always been a model of consistency, although some consistent legal theories have developed.

{¶9} First, the misconduct must, in most circumstances, be clearly defined in writing, usually in an employee handbook. Second, the handbook must have actually been received by the employee so the employee is on notice of what will get him or her

fired. See for instance, the recent case of *State ex rel. Saunders v. Cornerstone Foundation Sys., Inc.*, 123 Ohio St.3d 40, 2009-Ohio-4083.

{¶10} The *Saunders* case specifically cited *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401 in its holding that a firing could constitute a voluntary abandonment of the claimant's former job if the claimant broke a written work rule that: (1) clearly defined the prohibited conduct; (2) had been previously identified by the employers as a dischargeable offense; and (3) was known or should have been known to the employee.

{¶11} To state the matter briefly, the employee should know that the conduct or misconduct will, in all likelihood, cost the employee the job. This requires that the employer's rule be consistently applied, not that it only be applied when the employer can attempt to avoid paying TTD compensation by firing an injured employee who violates a rule, especially a vague rule.

{¶12} Applying this legal backdrop to the facts of Adkins' case, we find that the commission, through its SHO, incorrectly denied Adkins TTD compensation. After the injury to his hand, Adkins was cleared for light-duty work with Akron Paint. He claims he notified his supervisor that he would miss work on a Monday and Tuesday. The supervisor, Mike Phillips, denied this.

{¶13} Eight days before he was fired, Adkins came to the attention of Phillips on the issue of how Adkins notified Akron Paint that he would be absent from work. Phillips was unhappy that Adkins was leaving messages on voicemail to notify the company of his absence. Phillips promised to give Adkins his first written warning apparently on or

after February 5, 2008. Approximately one week later, Adkins was fired. The answers of supervisors at Akron Paint to questions as to why Akron Paint fired Adkins approximately one week after giving him his first written warning give the impression that policies regarding the duty to call in were inconsistently applied by Akron Paint and were used in Adkins' situation as a convenient way to rid the company of a person the supervisor felt had become a problem.

{¶14} The firing occurred after Adkins had missed two days and reported late on the third day. On the second day, he received medical treatment. Adkins appeared for work on the third day, but not on time. The employee handbook provision used as basis for firing him and alleging that he voluntarily abandoned his employment reads: "Failure to report to work for three consecutive days without notice will be treated as a voluntary resignation." This provision does not literally apply, since Adkins did, in fact, report to work on the third day.

{¶15} Under the precise words of the employee handbook, Adkins did not resign his employment because he did not fail to report for three consecutive days.

{¶16} In light of our findings with respect to the policy from the manual, the commission was wrong to find a voluntary abandonment of employment.

{¶17} We, therefore, sustain the second objection to the magistrate's decision. We do not address the due process objection filed on behalf of Adkins. We adopt the findings of fact in the magistrate's decision, but not the conclusions of law. We, therefore, issue a writ of mandamus to compel the commission to vacate its finding that Adkins

voluntarily abandoned his employment with Akron Paint and to compel the commission to determine if Adkins is or was otherwise entitled to TTD compensation.

Second objection sustained;
writ granted.

CONNOR, J., concurs.
BRYANT, J., concurs separately.

BRYANT, J., concurring separately.

Because I agree with the majority's conclusion, but do so for different reasons, I write separately.

The employer's handbook addressed an employee's responsibility for reporting off from work. According to the policy, "[e]xcessive absenteeism or tardiness, as well as failure to report your absences, will lead to corrective action, up to and including termination." The manual specified that "unexcused tardiness or absenteeism is excessive when it *exceeds* three days of absenteeism or three instances of tardiness in any thirty-day period." (Emphasis added.) The manual further provides that "[f]or non-exempt employees, if your are late reporting to work or returning to work after your scheduled meal period, your pay will be docked for the period of tardiness."

The staff hearing officer found relator had three unexcused absences, but did not make any factual finding to support a conclusion that relator's unexcused absences or tardiness exceeded three days. Although the manual also specified that "[f]ailure to report to work for three consecutive days without notice will be treated as a voluntary resignation," relator did not fail to report to work on the third day. Moreover, to construe relator's late attendance on the third day as a failure to report for work

contradicts the manual's above-noted language that indicates tardiness results in reduced pay, not a "failure to report" violation.

Accordingly, for the reasons stated in this concurrence, I also would sustain relator's second objection.

_____

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Shawn M. Adkins,	:	
Relator,	:	
v.	:	No. 08AP-979
Industrial Commission of Ohio and Akron Paint and Varnish, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on May 15, 2009

Stocker Pitts Co., LPA, and *Thomas R. Pitts*, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Richard L. Williger Co., LPA, and *Richard L. Williger*, for respondent Akron Paint and Varnish, Inc.

IN MANDAMUS

Relator, Shawn M. Adkins, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator temporary total disability ("TTD")

compensation after finding that relator had voluntarily abandoned his employment with respondent Akron Paint and Varnish, Inc. ("employer").

Findings of Fact:

1. Relator sustained a work-related injury on November 6, 2007, and his claim has been allowed for:

> Open wound right fifth finger; open wound right fourth finger; open wound right third finger; dislocation PIP joint right second finger; tear collateral ligament PIP joint right second finger; tear collateral ligament PIP joint right third finger; tear collateral ligament PIP joint right fourth finger; tear collateral ligament PIP joint right fifth finger; dislocation PIP joint right third finger; dislocation PIP joint right fourth finger; dislocation PIP joint right fifth finger.

2. In February 2008, relator submitted a C-84 form requesting the payment of TTD compensation beginning March 4, 2008 and continuing.

3. At a hearing before the Ohio Bureau of Workers' Compensation ("BWC"), the employer argued that relator had voluntarily abandoned his employment when he failed to report or call off for three consecutive days after he had been released to return to light-duty work with the employer. As such, the BWC referred the matter to the commission for determination.

4. The matter was heard before a district hearing officer ("DHO") on April 30, 2008. The DHO noted that the employer was not represented by counsel to set forth the legal argument establishing voluntary abandonment, the third-party representative read from notes, and found that the documents alone did not support the employer's position. Thereafter, the DHO relied on the medical evidence in the record

and relator's testimony that, on Friday, he told his supervisor he would not be at work on Monday or Tuesday, and concluded that relator was entitled to the requested period of TTD compensation.

5. The employer appealed and the matter was heard before a staff hearing officer ("SHO") on June 13, 2008. At that time, relator's supervisor, Mike Phillips, appeared and testified on behalf of the employer. Following the hearing, the SHO determined that the employer had met the requirements of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, and found that relator had voluntarily abandoned his employment. The SHO summarized the testimony given at hearing and explained the rationale for finding that relator had voluntarily abandoned his employment:

> The Hearing Officer finds at hearing the claimant testified that on February 8, 2008 he told his supervisor, Mr. Phillips, that due to the injury upon which this claim is predicated that he would not be working on on [sic] the 11th and 12th which is the following Monday and Tuesday after Friday when he informed his supervisor Mike Phillips. The Hearing Officer finds that Mr. Phillips was at this hearing but not at the District Officer hearing and Mr. Phillips testified that the claimant did not tell him that he would be absent on the Monday and Tuesday after the 8th of February. Mr. Vernage who is Mr. Phillip's supervisor testified at hearing that on the 13th when the claimant was confronted that he did not explain to either his supervisor, Mike Phillips, nor his supervisor's supervisor Mr. Vernage that the reason for him not calling in was due to storm damage to his house and the loss of a phone line.
>
> The Hearing Officer finds that the claimant as indicated did not appear for work on the 11th and 12th and did not appear for work until approximately 11:05 a.m. on the 13th of February.

> Documentation in file from the employer and signed by the claimant which is a employee handbook indicates that it is the employer's policy that if an employee has to call off he must do it prior to his starting time. As indicated above the claimant did not appear for work on the 11th and 12th of February and did not call on the 13th, but did show at 11:05 a.m. on the 13th of February.
>
> The Hearing Officer finds that according to Louisiana Pacific in order to find that a person voluntarily abandoned his employment it must be shown that there was a clearly defined prohibition to the conduct involved, that there has been previously identified by the employer as a dischargeable offense and should have been known to the employee. The Hearing Officer finds that pursuant to the policy of the employer which has been submitted, there was a clearly defined prohibited conduct which is a no-call and a no-show the employer has indicated in the policy that it was a dischargeable offense and was known by the employee due to the fact that he signed off on the policy when he was hired.
>
> The Staff Hearing Officer finds that based on the testimony of the claimant's supervisor, Mr. Phillips, and Mr. Phillips supervisor, Mr. Vernage, that the claimant did not inform the employer that he would be absent on the 11th and 12th of February and due to the fact that he did not call-in prior to his shift on the 13th but did appear at 11:05 a.m. that morning. The 13th is to be considered a no-call, no-show also. The Staff Hearing Officer finds that the 13th is to be considered the third consecutive day of no-call, no-show, and that the employer justifiably was of the opinion that the claimant had quit his position due to the no-call, no-show policy.

6. Relator's appeal was refused by order of the commission mailed July 2, 2008.

7. Relator's request for reconsideration was denied by order of the commission mailed August 8, 2008.

8. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

It is undisputed that voluntary abandonment of the former position of employment can preclude payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. In *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 121, the court stated, in pertinent part:

> [F]iring can constitute a voluntary abandonment of the former position of employment. Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character.

In *Louisiana-Pacific*, the court characterized a firing as "voluntary" when that firing is generated by the employee's violation of a written work rule or policy that: (1) clearly defined the prohibited conduct; (2) had been previously identified by the employer as a dischargeable offense; and (3) was known or should have been known to the employee.

In the present case, the commission relied on *Louisiana-Pacific* and determined that the employer had established that relator voluntarily abandoned his employment. In *Louisiana-Pacific*, the Supreme Court of Ohio was asked to determine whether an employee's violation of work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from employment. However, the court found it difficult to characterize as "involuntary" a termination which was generated by the claimant's violation of a written work rule or policy that: (1) clearly defined the prohibited conduct; (2) had been previously identified by the employer as a dischargeable offense; and (3) was known or should have been known to the employee.

In the present case, the employer presented its written work rules pertaining to attendance and absenteeism. That policy provides:

> Your attendance record is a critical factor in our total team effort. On occasion, sickness or another reason may prevent you from being at work or cause you to be late for work. It is your responsibility to report your absence or tardiness to your supervisor and to give as much notice as possible (no later than your starting time) so that plans can be made for coverage.
>
> Excessive absenteeism or tardiness, as well as failure to report your absences, will lead to corrective action, up to and including termination. Unexcused tardiness or absenteeism is excessive when it exceeds three days of absenteeism or three instances of tardiness in any thirty-day period. Your supervisor and the plant manager will determine whether lateness or absenteeism is excused or not. Permission must be obtained from your immediate supervisor for excused absences or if you need to leave the premises during your scheduled shift. For the latter, you must ring out.
>
> For nonexempt employees, if you are late reporting to work or returning to work after your scheduled meal period, your pay will be docked for the period of tardiness.
>
> Failure to report to work for three consecutive days without notice will be treated as a voluntary resignation.

(Emphasis sic.)

Relator testified that he received a copy of the handbook and further that he understood that three days of unexcused absences would result in termination. Relator admitted that he understood that notice was to be made to a supervisor and was to be provided no later than his starting time. Further, relator admitted that he had been warned in the past when he would call in and leave a voicemail message. When asked why he did not call anyone on either Monday, Tuesday, or Wednesday, relator testified that he simply did not think about it. Further, relator acknowledged that his Monday, February 11, 2008 doctor's appointment had been canceled and rescheduled for Wednesday, February 13, 2008; however, relator acknowledged that he did not, thereafter, report for work. Relator also testified that, on February 13, 2008, he informed his superiors that the reason he had not called in to work was because a tree fell on his telephone line and his reception was poor.

Mike Phillips, relator's supervisor, testified that relator did not tell him on Friday, February 8, 2008, that he would not be in to work on Monday and Tuesday, February 11 and 12, 2008. Phillips testified further that, on February 13, 2008, relator said nothing about having told Phillips he would not be at work on February 11 or 12, 2008; instead, relator simply indicated that a tree fell on his telephone line.

Questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *Teece*. In the present case, the SHO found Phillips' testimony to be credible. Having found that relator understood the employer's policy, the commission found that the employer did have a policy which clearly defined the prohibited conduct which relator knew constituted a dischargeable offense.

On that basis, the commission found that relator did voluntarily abandon his employment with his employer when he failed to call in on three consecutive days. As such, the commission found that relator was not entitled to TTD compensation as his voluntary abandonment broke the causal connection between his injury and loss of wages.

The SHO's order determining that relator was not entitled to TTD compensation because he voluntarily abandoned his employment is supported by some evidence. As such, this portion of relator's argument is not well-taken.

Relator filed an appeal from the SHO's order denying him TTD compensation. Relator explained his reason for his appeal:

> The DHO order should be reinstated as the SHO improperly applied State ex rel. Louisiana Pacific Corp. v. Indus. Comm. The SHO specifically found that "the employer's policy is not air tight as it could be" yet still found a voluntary abandonment, which is completely contrary to the Louisiana Pacific holding. Injured Worker states that no decision on granting or denying a third level hearing can be made until the employer files the court reporter's transcript of the SHO hearing, which will show that the employer admitted under oath that it arbitrarily applied a "three day no call-no show" policy as it saw fit in any particular case. The employer further admitted under oath that on the third day in question, the injured worker was not a "no show" but was simply tardy, his lateness being due to attending a medical examination to treat the allowed conditions in the claim. Notice was given to employer's representative or employer by U.S. Mail on 06/26/2008.

The commission refused relator's appeal before the transcript was submitted.

Relator asserts that the commission's failure to wait until it could review the transcript from the SHO's hearing before the commission denied his appeal violates his constitutional right to due process pursuant to *State ex rel. Ormet Corp. v. Indus. Comm.*

(1990), 54 Ohio St.3d 102. Relator states that the commission's failure to wait and review the transcript caused an irregularity in the proceedings. This magistrate disagrees.

In *Ormet*, the claimant's application for compensation for permanent total disability was heard before four commissioners of the five-member Industrial Commission of Ohio. No transcript or other record of the proceeding was made. After the hearing, claimant's application was held in abeyance for review and discussion with all members and for an order without further hearing.

Thereafter, one of those four commissioners was replaced by another and that other commissioner ultimately voted to grant the claimant's application. His vote broke a two-to-two deadlock.

The employer filed a complaint in mandamus asserting that its due process rights were violated when a commissioner who had not been present at the hearing and who had not reviewed the transcript or summary of the proceedings voted on the claimant's application for permanent total disability benefits. The court agreed with the employer specifically noting that it is important that the decision maker must, in some meaningful manner, consider evidence obtained at a hearing.

In the present case, the SHO was the decision maker. The SHO heard the evidence, considered the evidence, weighed the evidence, determined the credibility of the evidence, and concluded that relator had voluntarily abandoned his employment and was not entitled to TTD compensation. As such, there was no due process violation at this level.

Relator appealed the SHO's order to the commission. Relator did indicate that, in his opinion, it was important for the commission to wait until the transcript from the hearing before the SHO was transcribed. In relator's opinion, the commission could not perform its duties without the transcript. Before the transcript was provided, the commission refused relator's appeal.

Relator is unable to cite any statute, rule, or case law that requires the commission wait until a transcript from a hearing before an SHO is provided before the commission decides whether to permit an appeal from that order. As such, there was no violation of law when the commission refused relator's appeal before the transcript was provided. Furthermore, as indicated in the body of this decision, the SHO was required to determine the weight and credibility of the evidence in order to make a decision in this case. As noted previously, the evidence is clear that relator failed to call in on three consecutive days. Relator offered three different explanations for his failure to call in to work before he was absent. Further, relator admitted that he knew the policy and the consequences for his failure to call off properly. This evidence alone supports the commission's finding of voluntary abandonment.

Relator appears to be referencing a portion of the transcript where, on cross-examination, the following exchange took place:

> [Relator's counsel] Q. It also says that excessive absenteeism or tardiness as well as the failure to report your absences will lead to correction up to and including termination.
>
> [Phillips] A. Correct.
>
> Q. Correct?

So, in fact, it's not clear what that is. I mean, it could be termination or maybe it could be a written warning or maybe a verbal warning, whatever the company thinks is appropriate; isn't that right?

A. Correct.

Q. Exactly.

A. If we have an employee that has absolutely no absenteeism and, you know, their parent dies and they leave town for three days, that's different than an employee that has habitual absenteeism.

Q. So let me ask you this question based on what you just said. Let's say that happened. You had an employee who had a family member die, and they just left town for three days. And they didn't show up for work, and you learned that that was because there was a death in the family.

What would you do?

A. That would be on a case by case.

Q. So this rule - -

A. That's why it says up to and including termination.

Q. This rule that says failure to report for work for three consecutive days without notice will be treated as a voluntary resignation wouldn't apply to that guy whose family member died. Because you have charity in your heart, and you would say, well, gee, we'll waive the rule for you.

A. We don't waive the rule. That person still would have been written up, whether or not he retains employment.

Q. He'd be taken into the office and told that he quit?

A. Absolutely.

Q. Before he was written up?

A. "Where have you been? Supply documentation." If they can supply documentation that they were gone and they were

> excused - - for an excused absence, then that would be the case.

Relator asserts that the above testimony clearly establishes that the employer's policy was not strictly enforced and, if the commission would have reviewed the transcript, they would have agreed and overturned the SHO's decision. Further, as part of his "proof" that the commission would have awarded him TTD compensation if the transcript was reviewed, relator asserts that the DHO had previously reached the proper result. This is not "proof." At the DHO's hearing, no one testified on behalf of the employer and the DHO determined that, standing alone, the documents did not support a finding of voluntary abandonment when the SHO actually had evidence from all sides, the SHO found the employer, and not relator, credible.

Contrary to relator's assertion, the testimony to which he directs this court's attention addresses a situation clearly distinguishable from the facts in the present case. Here, claimant provided several different accounts for his failure to call in: (1) he told Phillips on Friday that he would not be in on Monday and Tuesday; (2) a tree knocked over his phone wires and he was not able to call in on Wednesday; (3) his doctor's appointment for Monday was canceled but he did not report to work; and (4) he doesn't know why he didn't call. Relator's situation is clearly distinguishable from the situation where an employee's family member dies suddenly and that employee leaves the state on personal family business and fails to timely call in to work. This hypothetical employee is not similarly situated to relator and the employer's policy is not invalidated because the employer would treat this hypothetical employee differently. As such, the magistrate finds

that, even if the commission would have reviewed the transcript, a different outcome would not have occurred.

Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion and this court should deny relator's request for a writ of mandamus.

/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).