[Cite as *State ex rel. Huntington Natl. Bank v. McCubbins*, 2010-Ohio-6173.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Huntington National Bank,	:	
Relator,	:	
v.	:	No. 09AP-1042
Steven T. McCubbins and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 16, 2010

Michael Soto, for relator.

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson*, for respondent Steven T. McCubbins.

Richard Cordray, Attorney General, *John R. Smart* and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

McGRATH, J.

{¶1} Relator, Huntington National Bank ("relator" or "Huntington"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("the commission") to vacate its order awarding temporary total disability ("TTD") compensation to respondent Steven T. McCubbins ("the claimant")

beginning August 20, 2008, and to enter an order denying him compensation based upon a finding that claimant voluntarily abandoned his employment at Huntington.

{¶2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate found: (1) Dr. Van Aman's C-84 certifying TTD from August 20 to November 18, 2008 was not some evidence upon which the commission could rely; and (2) the commission did not abuse its discretion in finding that claimant did not voluntarily abandon his employment at Huntington. Thus, the magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate that portion of the staff hearing officer's order dated January 5, 2009, that awarded TTD compensation from August 20 to November 18, 2008, based upon Dr. Van Aman's C-84 dated November 12, 2008, and to enter an amended order denying TTD compensation for that period.

{¶3} The parties filed objections to the magistrate's decision. Relator submits the following objection:

> THE MAGISTRATE ERRED IN FINDING THE COMMISSION ARTICULATED A REASONABLE BASIS, SUPPORTED BY SOME EVIDENCE, FOR FINDING RESPONDENT DID NOT VOLUNTARILY ABANDON HIS EMPLOYMENT.

{¶4} The commission submits the following objection:

> **Objection to Conclusion of Law #1:** The magistrate erred by raising an issue the parties had not specifically raised or addressed: Whether Dr. Van Adam's [sic] report does not constitute "some evidence" upon which the commission can rely in awarding TTD compensation.

Claimant does not delineate a specific objection, but voices a general objection which echoes that of the commission.

{¶5} This cause is now before the court for a full review. No party has filed objections to the magistrate's findings of fact, and upon an independent review of the same, we adopt them as our own.

{¶6} Relator argues in its sole objection that the magistrate erred in finding that the commission did not abuse its discretion in finding that the claimant did not voluntarily abandon his employment at Huntington. This objection essentially reargues the same points addressed in the magistrate's decision. Upon review, and for the reasons set forth in the magistrate's decision, we do not find relator's position to be well-taken.

{¶7} Accordingly, relator's objection to the magistrate's decision is overruled.

{¶8} The gravamen of the objection asserted by both the commission and the claimant is that the magistrate erred by raising the issue of whether Dr. Van Aman's C-84 was some evidence upon which the commission could rely because none of the parties had raised this issue before either the commission or the magistrate. The commission and claimant contend that review of a commission order is not de novo, and, as such, the magistrate was limited to the issues before the court. In its brief, the commission cites to several cases, which stand for the proposition that a party's failure to raise an issue before the commission or the magistrate effectively waives that issue. Based on the facts of this case, we find the position articulated by the commission and claimant to be well-taken. See, e.g., *State ex rel. Ohio State Univ. v. Indus. Comm.,* 10th Dist. No. 06AP-1028, 2007-Ohio-3733, ¶3 ("The failure to raise an issue before the commission or the magistrate waives the issue in a mandamus action."), citing *State ex rel. Bays v. Indus.*

Comm., 10th Dist. No. 03AP-424, 2004-Ohio-2944, ¶4. In so finding, we pass no judgment on whether the magistrate's analysis and ultimate conclusion regarding Dr. Van Aman's report is correct.

{¶9} Following an independent review of the matter, we find that the magistrate has properly determined the facts and applied the appropriate law, but erred in raising an issue regarding Dr. Van Aman's C-84 report. Therefore, relator's objection to the magistrate's decision is overruled, and the objections of the commission and the claimant are sustained. We adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, with exception of the following: (1) the magistrate's finding that Dr. Van Aman's C-84 certifying TTD from August 20 to November 18, 2008 was not some evidence upon which the commission could rely, and (2) the magistrate's direction to the commission that it enter an amended order denying TTD compensation for that period.

{¶10} Accordingly, we deny the requested writ of mandamus.

Relator's objection overruled; the commission's and claimant's objections sustained; writ of mandamus denied.

SADLER and CONNOR, JJ., concur.

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Huntington National Bank,	:	
Relator,	:	
v.	:	No. 09AP-1042
Steven T. McCubbins and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on July 19, 2010

Michael Soto, for relator.

Agee, Clymer, Mitchell & Laret, and *Robert M. Robinson*, for respondent Steven T. McCubbins.

Richard Cordray, Attorney General, *John R. Smart* and *Eric Tarbox*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, Huntington National Bank ("relator" or "Huntington"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding temporary total disability ("TTD")

compensation to respondent Steven T. McCubbins ("claimant") beginning August 20, 2008, and to enter an order denying him compensation based upon a finding that claimant voluntarily abandoned his employment at Huntington.

Findings of Fact:

{¶12} 1. On March 10, 2008, claimant sustained an industrial injury while employed as a "personal banker" by relator, a self-insured employer under Ohio's workers' compensation laws. On that date, claimant slipped and fell on ice while walking into work.

{¶13} 2. Relator certified the industrial claim (No. 08-814814) which has been allowed for "left lateral malleolus fracture; left pilon fracture; left ankle sprain."

{¶14} 3. Claimant underwent surgery and was off work from the date of injury until April 16, 2008 when he returned to work at Huntington as a personal banker, but on a reduced hourly schedule of four hours per day.

{¶15} 4. Earlier, on a "Physician's Report of Work Ability" form ("Medco-14"), treating physician Scott E. Van Aman, M.D., certified that claimant may return to work with restrictions on April 16, 2008. Dr. Van Aman explained the restrictions: "Sedentary job position; elevate [left] leg as needed; no lift/carry [over] 10 lbs., use crutches, do not get cast wet[,] limit walking/standing to/from desk; limit work week to 20 hours for now."

{¶16} 5. On May 12, 2008, claimant returned to an eight-hour day schedule, but with restrictions. On a Medco-14 dated May 15, 2008, Dr. Van Aman explained the restrictions: "Sedentary job position, elevate [left] leg as needed. No lifting/carrying [over] 10 lbs. Use crutches. Limit walking/standing 5-10 minutes [per] hour."

{¶17} 6. On a Medco-14 dated May 28, 2008, Dr. Van Aman wrote: "Continue same restrictions: sedentary/position job duties. Elevate limb prn; limit walk-stand 5-10 [minutes per] hr."

{¶18} 7. On a Medco-14 dated June 25, 2008, Dr. Van Aman wrote: "Avoid high-impact activities. No climbing, running, jumping."

{¶19} 8. On August 19, 2008, Huntington terminated claimant's employment. The record contains a document captioned: "Huntington Human Resources Involuntary Termination Checklist," stating: "Todd was terminated after not meeting his score card expectations of 90%. He also did not demonstrate the behaviors mentioned in the [Individual Improvement Plan] dated July 9th, 2008."

{¶20} 9. On a C-84 dated October 30, 2008, Dr. Van Aman certified TTD beginning November 18, 2008, the date of a scheduled surgery. On the C-84, Dr. Van Aman wrote: "Subsequent surgical hardware removal & arthroscopy [left] ankle, scheduled 11/18/2008."

{¶21} 10. On a C-84 dated November 12, 2008, Dr. Van Aman certified TTD from August 20 to November 18, 2008. For restrictions, Dr. Van Aman wrote: "Restrictions at work [limit] 25 lbs., avoid high activity."

{¶22} 11. On September 2, 2008, claimant moved for TTD compensation beginning August 20, 2008.

{¶23} 12. Earlier, in August 2008, claimant applied for unemployment compensation. The application prompted a letter, dated September 5, 2008, from Huntington's human resources department. Signed by Meenu Vengal, the letter states:

> Steven T[.] McCubbins was hired on 07/16/2007 as a Personal Banker at the North Arlington Banking Office. The Personal Banker position is a sales position. Personal Bankers are asked to build quality personal and corporate customer relationships through banking office service and sales transactions. Additionally, Personal Bankers are asked to sell bank products and make sales referrals to specialized areas. They are also responsible for expanding customer relationships by determining customers['] needs and cross selling all bank products and services. To meet these needs, the bank has established sales goals and minimum expectations that each personal banker is to achieve. The minimum scorecard expectation each banker is expected to meet is 90%.
>
> In order to accommodate the learning curve when Mr. McCubbins started at Huntington, he was given his full scorecard goals only from October 2007. From October 2007 to February of 2008, Mr. McCubbins['] scorecard was as follows:
>
> October 2007: 86.5
> November 2007: 45.3
> December 2007: 53.9
> January 2008: 120.9
> February 2008: 87
>
> Mr. McCubbins was away from work due to medical reasons from March 10th, 2008 to April 16th[,] 2008, when he returned on a reduced schedule working 4 hours a day. He returned full time effective May 12th.
>
> Mr. McCubbins was given a Final Written Warning on May 16, 2008 as he had opened an account for a family member on November 30, 2007 which is against Huntington Policy (*Cash Differences, Losses and Loss Prevention Incidents, Major Incidents* * * *). Mr. McCubbins['] explanation for having opened the account was that he was given the impression that he could sign up family and friends and was not aware that he could not open their accounts. This was discovered during an investigation during April/May 2008 into accounts that were opened at the North Arlington Banking Office.

Mr. McCubbins also had service issues, two of which occurred on June 16[,] 2008 and July 1, 2008 were documented in a coaching log.

Mr. McCubbins was given a Verbal Warning on May 16, 2008 as he had not been meeting his scorecard goals. During the verbal warning Mr. McCubbins said that he expected to meet the goal by the end of May 2008. His scorecard for May 2008 was 27.6%. Since he did not meet the scorecard requirement of 90%, he was given an Action Plan on June 5th, 2008. His scorecard for June was at 72.3% which once again did not meet the requirement. On July 9, 2008[,] Mr. McCubbins was placed on an Individual Improvement Plan (IIP) for not meeting his scorecard goals or demonstrating the expected behaviors required to meet the scorecard goals. The main expectations in the IIP were as follows:

• Achieve minimum 90% on his scorecard by end of July and consistently maintain a minimum scorecard of 90% thereafter.

• Develop an action plan in order to bring scorecard to 90%.

• Use ESS with every interaction to gather new and updated information.

• Have 10 kept appointments each week. A weekly report on the number of pre-set and the number of kept appointments was to be given to the Banking Office Manager every Monday.

• Mr. McCubbins was expected to continue meeting the cross sell goal of 3.5 on a monthly basis.

• Huntington's core values of teamwork, communication, accountability, service, diversity and passion are to be displayed in every interaction.

Mr. McCubbins did not meet the scorecard expectations and did not provide details of his weekly appointments in spite of his manager having reminded him via email on July 21, 2008 and August 11, 2008. Mr. McCubbins did not submit an Action Plan till he was reminded about it on July 21st. His scorecard results from April 2008 to August 2008 were as follows:

> April 2008: 2.2
> May 2008: 27.6 (Goals had been lowered because of reduced schedule)
> June 2008: 72.3
> July 2008: 48.8
> Until August 16, 2008: 23% against pace of 47%
>
> Based on the fact that Mr. McCubbins was not meeting his scorecard goals or some of the behavior expectations listed in the IIP, his employment with Huntington was terminated on August 19, 2008.

{¶24} 13. Ultimately, claimant's application for unemployment compensation was administratively denied. In a written decision mailed December 8, 2008, a hearing officer of the unemployment compensation review commission found:

> Claimant admitted that he had monthly sales goals, and that he knew that he could be discharged if he fell below 85-90% of those goals. He admitted that he did not meet his sales goals in April, May, and June of 2008, and admitted that he received three warnings for poor work performance. He admitted that the individual improvement plan specifically warned that he was at risk of discharge if he did not reach 90% of his monthly goal in July of 2008, and specifically required him to prepare a report for his supervisor each Monday regarding the previous week's sales appointments. Nevertheless, he admitted that he was below 50% of his sales goal in July, was on pace to be below 50% of his sales goal for August, and admitted that he did not prepare the required report for his supervisor each Monday. Indeed, claimant admitted that that [sic] he did not put forth 100% effort on his job because he felt Huntington had mistreated him following an on-the-job injury. Based upon the evidence presented in this matter, the Hearing Officer finds that claimant committed sufficient misconduct to justify his discharge. Under these circumstances, the Hearing Officer finds that claimant was discharged by Huntington for just cause in connection with work.

{¶25} 14. Earlier, on November 14, 2008, a district hearing officer ("DHO") heard claimant's September 2, 2008 motion for TTD compensation. Following the hearing, the DHO issued an order awarding TTD compensation beginning August 20, 2008.

{¶26} 15. Relator administratively appealed the DHO's order of November 14, 2008.

{¶27} 16. On January 5, 2009, a staff hearing officer ("SHO") heard the administrative appeal. The hearing was recorded and transcribed for the record.

{¶28} 17. At the hearing, Ms. Vengal testified on direct examination by relator's counsel:

> HEARING OFFICER MILLER: I'm sorry.
>
> THE WITNESS: His reduced work schedule was factored into his goals.
>
> HEARING OFFICER MILLER: What was the reduced work schedule?
>
> THE WITNESS: If he had a goal of, say, 100 checking accounts a month -- and these figures are not factual. I'm just giving an example.
>
> HEARING OFFICER MILLER: I understand.
>
> THE WITNESS: He would come back for two weeks at half of that schedule. That means he's only at a quarter of his goals, which would make his goals 25 checking accounts.
>
> Q. (By Mr. Soto) So it's sort of prorated?
>
> A. Yes.
>
> Q. Based on his presence at Huntington; is that correct?
>
> A. Yes.
>
> Q. And then once he returns to full duty hours-wise, was he back on the expectation that he would meet 100 percent of the performance goals expected of him?
>
> A. 90 percent of the performance goals.
>
> Q. Did he, Mr. McCubbins, ever mention to you that physical restrictions related to his injury were affecting the exercise of his duties as a personal banker?

A. No.

* * *

Q. Again, as a personal banker, are his duties mostly sedentary in nature?

A. Mostly.

Q. Did Mr. McCubbins ever at any time ask you for accommodations --

A. No.

Q. -- to assist him in the performance of his duties?

A. No.

Q. Did he ever complain to you about problems with his industrial injury at all in the sense that he was in a lot of pain, that he couldn't do this duty or that duty?

A. No.

{¶29} 18. At the hearing, Haris Pratsinakis testified on direct examination by relator's counsel. Mr. Pratsinakis was the manager of the branch office where claimant was employed:

Q. Now, two more questions I have for you. Did he ever tell you from the time you were his manager from April 23 until the date of his termination of August 19 of '08, did he ever tell that you [sic] his industrial injury was affecting his performance or affecting his being able to engage in his duties as a personal banker?

A. Never.

Q. Would he have had an opportunity to come to you to report problems of that type?

A. Absolutely.

Q. For example, when you met with him to go over the individual improvement plan?

A. Certainly.

Q. And did that topic ever come up then?

A. No.

Q. And had he asked for accommodations of any type, is that something you would have been able to address?

A. Absolutely.

{¶30} 19. At the hearing, claimant testified on direct examination by claimant's counsel:

Q. Todd, when you returned to work to light duty, do you remember the restrictions you were under at that point?

A. As far as physical?

Q. Yes.

A. Keeping my foot up in the air as much as possible, limited walking around as much as possible. I was on crutches and a cast. I was still moving around going to the teller's desk to do customer transactions, moving to the printer. There was a lot of up and down. There wasn't jumping or anything like that, but I was mobile.

Q. What I'm getting at is: Back to that first surgery you had, the fact that you had surgery was pretty visible. You were in a boot. You were in a cast. You were on crutches. There was no question that you were returning to work light duty --

A. Right.

Q. -- as a result of the work injury you had?

A. Correct.

Q. When you returned to work full duty, that was ahead of your own doctor's advice, was it not?

A. Correct.

* * *

Q. * * * When you did return to work full duty, how was your job affected by your injury?

A. Again, I just had gotten in a boot. Again, there was a lot of walking around.

HEARING OFFICER MILLER: How long were you in a boot?

THE WITNESS: Until the end of June, I believe.

HEARING OFFICER MILLER: Okay.

Q. (By Mr. Cameron) How would you say your job was affected by your recovery from the surgery?

A. Again, there's a lot of pain. I mean, there was a lot of joint-on-joint pain, swelling. The fact of the matter is, you know, I was still at work taking Percocet to dull the pain. It just basically is a nagging injury. So it is constantly 100 percent on your mind.

I am not a whiner. I did the best I could. You know, at the end of the day, especially when I was forced to come back early, it was just exhausting. There was times when it, even to this day still after my second surgery, the pain is so nagging at times that it will be 3, 4 o'clock in the morning till I get to sleep. There were other people in the office that I discussed that fact with me that I was tired.

* * *

Q. Do you remember the first time you were called in to talk about your numbers?

A. May 2.

Q. Okay. And in that meeting, did you have any sort of discussion about how this injury had affected your ability to do your job?

A. Yes, I did. The discussion was -- first of all, I would like to get to this. The discussion that I had was we have what we call a pipeline. And to build that pipeline, you have to be there to build loans and mortgages and things like that. Checking accounts, I can't really build a pipeline, referral customer, referrals to the licensed bankers.

Upon my returning, basically things that I had in the works as far as pipeline and closing, they had to close.

Q. While you were out of the office?

A. While I was out of the office, yes. Upon the mass firing or termination of the other employees, one of the banking office assistants had printed out -- basically I sent all my hot leads for appointment, to call out customers.

Well, with me not there and after two weeks they start falling off, she started printing them out so when I came back I could re-enter them into the computer. They fall off. You can't find them.

So upon returning, you know, everyone was terminated. I was looking for my files. And the old banking office assistant, Keith, was also trying and helping me try to find the files. I never found the files.

So basically I came back to a zero pipeline. And for anybody coming off an injury or a new personal banker or anything like that, there is a build-up period.

* * *

A. I basically came back to no pipeline. * * *

Q. So how long does it take to build back up a pipeline on average?

A. Usually two or three months. * * *

* * *

Direct Examination by [claimant's counsel]:

Q. Okay. Let me ask you this: Is there any question in your mind that your inability to meet your performance goals was related to your recovery from this injury?

A. Yes.

Q. There is a question in your mind?

A. No, no, no. There's no question. I think a lot of it has to do with the way they structured things. A lot of it has to do with

> the pain that I was in. A lot of it has to do with, you know, if you take when I started physical therapy in June, if you take that, you know, they were accommodating me for having my lunch hour. By the time I go there, do my physical therapy, basically shower to come back to work and get in, I'm basically out two and a half hours a couple days a week.
>
> HEARING OFFICER MILLER: How long were you in physical therapy?
>
> THE WITNESS: I'm still in physical therapy.
>
> HEARING OFFICER MILLER: No. Before.
>
> THE WITNESS: June to up to my termination basically.
>
> Q. (By Mr. Cameron) And just to be clear, these pains that you were having after your first surgery they, in fact, had to go back in and remove the hardware?
>
> A. Correct.
>
> Q. And that's why you're still in physical therapy still at this time?
>
> A. Yes.

{¶31} 20. At the hearing, Mr. Pratsinakis again testified under questioning by the hearing officer:

> Q. So what happened when Mr. McCubbins was off duty or was not working? What happened to his accounts at that time?
>
> A. You know, Todd mentioned that they were distributed. I'm not aware of that.
>
> Q. Okay. You weren't aware of that, but normally what would happen?
>
> A. Normally somebody, another personal banker, would take those and ensure that the customer service didn't drop off with an absence.

Q. And during this time that you had all these people who left the bank or whatever, who was -- I mean, you eliminated eight people?

A. Nine.

Q. Nine people. Okay. Nine. What type of service was going on during that period of time with the nine people gone?

A. It was fairly chaotic. We had multiple managers. I was from a nearby branch, the Kingsdale office on Northwest.

Q. Okay.

A. I was brought over as the acting manager. * * *

* * *

Q. Okay. Now, if someone was coming in new, just hypothetically, how long does it take to build up a pipeline?

A. For any personal banker we hire, they have to go through our banker's school and our lending class. Now, the first month that you've completed those classes, you get a third of your goal. The second month you get two-thirds of your goal. That third month you get your full goals.

So we do not offer those classes all the time. It would be very common for a banker to come in, maybe sit, maybe shadow a banker for a month, sometimes six weeks before they've even gone to that first class.

In Todd's situation I wasn't at that branch when he started, but it would be very common for you to be at a branch; you kind of begin the learning process. Then you go to banking school. Then you go to lending. And then your third -- you can have five, six months of relatively low goals physical not any before you really at work your full goals [sic].

Q. All right. So when Mr. McCubbins came back, his goals were reduced or compacted --

A. Yes.

Q. -- to give him time to build back up his pipeline or no?

> A. No. They were prorated based on the amount of time he was there. Again, especially in our market, his goals in April were reduced to $75,000 in consumer loans. The normal goal is $300,000. With one loan over a two-week period, it should not be difficult for him to really be in a 100-percent goal position. There's service that comes with the position also; but, again, we preach service to sales. That's proactive in the culture.
>
> * * *
>
> Q. You said 90 percent?
>
> A. 90 percent has always been a corporate percentage that we have always looked to. We want a banker to get 100 percent of their goals; but the minimum actions, to avoid any further action plan or improvement plan, you have to be at 90. That hasn't changed.
>
> Q. If it's at 90, what happens if a person comes back, in his case in a boot and he's going to physical therapy and you know that he's taking medication? Is it 90 percent or not?
>
> A. It would still be 90 percent. I would also point out, now, I could have assumed there was medication; but at no time did I know he was taking it.
>
> Q. Let me ask you a question. You knew he was in a boot?
>
> A. Yes, I did.
>
> Q. What was his goal when he was in the boot?
>
> A. He still had sales goals. It's a 100-percent sales position.

{¶32} 21. Following the January 5, 2009 hearing, the SHO issued an order stating that the DHO's order was being "modified." The SHO's order states:

> After reviewing all of the evidence pertaining to the issue, considering the testimony of the Injured Worker and Mr. Pratsinakis, and the arguments of counsel, it is the order of the Staff Hearing Officer that the Injured Worker's C-86 motion, filed 09/02/2008, is granted to the extent of this order.

> It is the order of the Staff Hearing Officer that temporary total disability is ordered paid from 08/20/2008 to 01/21/2009 and continued upon the submission of medical proof of disability.
>
> It is the finding of the Staff Hearing Officer that the Injured Worker has presented sufficient evidence to establish that he is disabled due to the allowed conditions in the claim.
>
> A review of the file reveals that the Injured Worker returned to work to part[-]time employment on 04/16/2008 and full[-] time employment with restrictions on 05/12/2008. The Injured Worker testified that he had a boot on his foot until sometime in June, 2008 and that he had physical therapy two times a week. He indicated that he had ongoing pain as [a] result of his injury, that he mentioned to co-workers that his foot swells.
>
> The Staff Hearing Officer relies upon the C-84, dated 10/30/2008, the 11/12/2008 report from Dr. Van Aman, M.D[.], wherein he opines that the Injured Worker is disabled and that he cannot return to his former position of employment, that the Injured Worker had surgery to remove hardware.
>
> At hearing[,] the counsel for the Employer argued pursuant to [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153] that the Injured Worker is not entitled to temporary total disability because he voluntarily abandoned his employment. The Employer terminated the Injured Worker on 08/19/2008 because the Injured Worker was not meeting his goals as a personal banker.
>
> The Staff Hearing Officer rejects this argument and finds that the Injured Worker did not voluntarily abandon his employment for the reason set forth. In Louisiana Pacific, the court "recognized that a justifiable discharge for misconduct can constitute a voluntary abandonment of the claimant's former position of employment so as to bar subsequent temporary total disability compensation. We found that although not generally consented or initiated by the employee, firing can take on a voluntary character when it is a consequence of wrongful or prohibited behavior that the claimant willingly undertook and should have expected to result in discharge. Thus, we characterized as voluntary a policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the Employer as a dis-

> chargeable offense[,] and (3) was known or should have been known to [the] employee."
>
> The Staff Hearing Officer finds but for the injury the Injured Worker would have made his goals as personal banker. The Injured Worker returned to his employment after surgery on a part[-]time basis. While he was gone[,] all of his accounts were not maintained, in fact he had no files when he returned. He had to start his accounts from scratch. In fact, nine employees in the branch office where he was assigned, were terminated.
>
> Mr. Pratsinakis testified that employees from various branches were assigned to that office. He also testified that Injured Worker was required to continue at 100 percent even when the Injured Worker was in a boot in June, 2008. He was aware that the Injured Worker had physical therapy twice a week, which took him away from his duties for at least six hours a week. The Injured Worker still was not given any consideration for his time away from work due to the injury or that he was physical[ly] impaired for the month of June.
>
> The Staff Hearing Officer finds that the Injured Worker did not engage in wrongful or prohibited behavior. Therefore, the Injured Worker did not abandon his employment.

{¶33} 22. On February 21, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 5, 2009.

{¶34} 23. On March 10, 2009, relator moved for reconsideration.

{¶35} 24. On April 3, 2009, on a split vote, the three-member commission issued an interlocutory order vacating the February 21, 2009 refusal order and directing that the motion for reconsideration be set for hearing before the commission.

{¶36} 25. Following a June 9, 2009 hearing, the three-member commission, on a split vote, issued an order denying relator's request for reconsideration and reinstating the SHO's refusal order mailed February 21, 2009.

{¶37} 26. On November 6, 2009, relator, Huntington National Bank, filed this mandamus action.

Conclusions of Law:

{¶38} Two issues are presented: (1) whether Dr. Van Aman's C-84 certifying TTD from August 20 to November 18, 2008 is some evidence upon which the commission can rely to support the award of TTD compensation from August 20 to November 18, 2008, and (2) whether the commission abused its discretion in finding that claimant did not voluntarily abandon his employment at Huntington.

{¶39} The magistrate finds: (1) Dr. Van Aman's C-84 certifying TTD from August 20 to November 18, 2008 is not some evidence upon which the commission can rely, and (2) the commission did not abuse its discretion in finding that claimant did not voluntarily abandon his employment at Huntington.

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

{¶41} *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St.3d 18, 2003-Ohio-2449, is dispositive of the first issue.

{¶42} In *Ohio Treatment*, the claimant, Eric Paasewe, was industrially injured on May 11, 2000 while employed at a residential treatment facility. In early July, treating physician, Dr. Samson, released Paasewe to return to his former job with some restrictions on July 10, 2000. Paasewe returned on July 13, 2000, and worked without any reported medical problems on July 13, 14 and 15, 2000. On the morning of July 14, 2000, a co-worker entered a client's apartment to distribute medication and discovered

Paasewe asleep under a blanket on the client's sofa. He was fired two days later for the offense.

{¶43} Thereafter, a commission SHO awarded TTD compensation based upon a C-84 from Dr. Samson certifying a continuous period of disability from May 11 through October 11, 2000, despite the doctor's prior return-to-work release. The employer then brought a mandamus action challenging the TTD award.

{¶44} Allowing the writ and ordering the commission to vacate the award, the court reasoned:

> Cognizant of the medical implications involved, we have carefully scrutinized—and will continue to carefully scrutinize—claims for TTC that are close in time to a claimant's termination, particularly where the claimant either had been released or had actually returned to the former position of employment. See *State ex rel. McClain v. Indus. Comm.* (2000), 89 Ohio St.3d 407, 732 N.E.2d 383. A determination of temporary total disability inherently declares that a claimant is medically unable to return to his or her former job. Where a claimant works that job on Wednesday morning, is fired on Wednesday afternoon, and alleges on Thursday morning that he or she is now temporarily and totally disabled, a single question emerges: what happened in 12 hours to transform a nondisabling condition into a disabling one? It is a situation that is—and will remain—inherently suspicious. As we observed in upholding denial of TTC in *McClain*:
>
> "[C]laimant reported for his regular shift on September 4, 1997, and did not complain of any work-prohibitive problems at that time. It was only after claimant tested positive for alcohol consumption that his condition suddenly became work-prohibitive." Id. at 409, 732 N.E.2d 383.
>
> Medical evidence will, therefore, be pivotal in determining eligibility for TTC when a claimant is fired near the time of a claimed disability. If documentation can, for example, indeed establish coincidental injury-related circumstances or demonstrate that the claimant's return to work was not without continuing medical problems, then the claimant may be able

> to sustain his or her burden of proof. Many claimants, however, will have difficulty establishing that a sudden onset of "disability" that coincides with termination of employment is truly related to the industrial injury.
>
> The present claimant is no exception. Dr. Sampson on July 6, 2000, released claimant to return to work on July 10, and claimant returned to work on July 13. He worked without any reported problems on July 13, 14, and 15. On July 14, he was caught sleeping in a client's room and was formally terminated on July 16 as a result. He now claims a new period of disability that coincidentally arose on the date of his discharge—a claimed disability for which claimant failed to seek treatment for a month.
>
> Claimant's medical evidence mentions nothing of a corresponding relapse or reaggravation. To the contrary, Dr. Sampson's subsequent C84s in effect repudiate his earlier release to work without explanation and, in fact, ignore claimant's actual return.
>
> Within the space of a few hours, claimant asserts, his nondisabling condition deteriorated into a disabling one, on a date that coincided with his firing. His medical evidence is silent on this, consisting instead of an unexplained repudiation of an earlier release and a failure even to acknowledge claimant's actual return. * * *

Id. at ¶7-12.

{¶45} Here, claimant was terminated on August 19, 2008 for what relator viewed as poor work performance. Later, Dr. Van Aman certified a period of TTD beginning the day after the termination. While the other C-84, dated October 30, 2008, certifies TTD beginning November 18, 2008 based upon a surgery scheduled for that date, the C-84 dated November 12, 2008 certifies TTD beginning August 20, 2008 based upon restrictions that were essentially in effect after claimant returned to full-time work and was further evaluated on June 25, 2008.

{¶46} In other words, there is no medical evidence in the record to support a coincidental change of medical condition the day following the termination.

{¶47} Moreover, during the January 5, 2009 hearing, claimant testified on cross-examination:

> * * * My records reflect, Mr. McCubbins, that Huntington terminated your employment effective August 19, 2008. Does that meet with your recollection?
>
> A. Yes.
>
> Q. Thank you.
>
> * * * And that was a Tuesday just so the record is clear. I also asked you this question: If you had not been terminated on August 19, 2008, would you have reported for work on August 20?
>
> A. Yes.
>
> Q. And performed duties expected of you as a personal banker?
>
> A. Yes.

{¶48} In effect, claimant testified that he was not temporarily and totally disabled on August 20, 2008, the date he has sought to start a TTD award.

{¶49} Under *Ohio Treatment*, the claim that TTD arose on August 20, 2008, the date following the termination of employment, is inherently suspicious. Careful scrutiny is required of this court when a claim for starting TTD is so close in time to the employer termination.

{¶50} Based upon *Ohio Treatment*, the magistrate finds that Dr. Van Aman's November 12, 2008 C-84 cannot constitute some evidence of TTD upon which the

commission can rely. Accordingly, the commission must be ordered to vacate that portion of its TTD award from August 20 to November 18, 2008.

{¶51} As previously noted, the second issue is whether the commission abused its discretion in finding that claimant did not voluntarily abandon his employment at Huntington.

{¶52} A voluntary departure from employment precludes receipt of TTD compensation. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145; *State ex rel. Ashcraft v. Indus. Comm*. (1987), 34 Ohio St.3d 42. An involuntary departure, such as one that is injury induced, cannot bar TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44.

{¶53} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153, the claimant was fired for violating the employer's policy prohibiting three consecutive unexcused absences. The court held that the claimant's discharge was voluntary, stating:

> * * * [W]e find it difficult to characterize as "involuntary" a termination 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. Defining such an employment separation as voluntary comports with *Ashcraft* and [*State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118]—*i.e.,* that an employee must be presumed to intend the consequences of his or her voluntary acts.

Id. at 403.

{¶54} In *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559, 561, the court held that the rule or policy supporting an employer's voluntary abandonment claim must be written. The court explained:

> Now at issue is *Louisiana-Pacific*'s reference to a *written* rule or policy. Claimant considers a written policy to be an absolute prerequisite to precluding TTC. The commission disagrees, characterizing *Louisiana-Pacific*'s language as merely illustrative of a TTC-preclusive firing. We favor claimant's position.
>
> The commission believes that there are common-sense infractions that need not be reduced to writing in order to foreclose TTC if violation triggers termination. This argument, however, contemplates only some of the considerations. Written rules do more than just define prohibited conduct. They set froth a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are particularly important when dealing with employment terminations that may block eligibility for certain benefits.

(Emphasis sic.)

{¶55} In *State ex rel. Luther v. Ford Motor Co.*, 113 Ohio St.3d 144, 2007-Ohio-1250, ¶17-18, the court had occasion to review its decision in *State ex rel. Pretty Prods, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132.

{¶56} In *Luther*, the court states:

> *Pretty Prods.* incorporates two important principles. First, it reaffirmed that if a claimant was already disabled when employment separation occurred, temporary total disability compensation was not foreclosed. 77 Ohio St.3d at 7, 670 N.E.2d 466. See, also, *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 623 N.E.2d 55. Second, it observed that not all cases falling within the parameters of *Louisiana-Pacific* are the same. Where the infraction that precipitated discharge is potentially due to industrial injury, further inquiry is necessary. 77 Ohio St.3d at 7-8, 670 N.E.2d 466.

> Luther raises both of these issues in his cross-appeal. He asserts that he was already disabled when fired. He also contends that, as alleged in *Pretty Prods.*, he was fired for absenteeism that was induced by his industrial injury. The commission did not address either of these matters in its orders, and in returning the cause to the commission, we give it the opportunity to do so.

{¶57} Given the above case law, the issue before the commission was whether claimant's alleged failure to meet his performance goals, the basis for Huntington's decision to terminate, was induced by the industrial injury.

{¶58} The commission or its SHO, like any fact finder in any administrative, civil or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69.

{¶59} At the commission, relator had the burden of proving by a preponderance of the evidence the affirmative defense of voluntary abandonment of employment. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84,1997-Ohio-71; *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 78 Ohio St.3d 409, 411, 1997-Ohio-9.

{¶60} The commission alone is responsible for evaluating the weight and credibility of the evidence, and this court may not reweigh the evidence, but must instead uphold the commission's decision so long as it is supported by "some evidence." *Supreme Bumpers* at ¶71.

{¶61} In support of its position that the commission abused its discretion on the voluntary abandonment issue, relator points to evidence, and to its own inferences drawn from the evidence, that arguably would support a finding that the industrial injury was not a

factor or did not induce claimant's failure to meet the performance goals that Huntington set for claimant to meet.

{¶62} In its merit brief, relator lists seven items allegedly supporting its position:

> 1. McCubbins had not met his performance goals four of the five months **before the industrial injury**. * * *
>
> 2. When McCubbins returned to work on April 16, 2008, Huntington factored in McCubbins' reduced hourly schedule in establishing his expected performance goals. McCubbins continued to miss his performance goals, leading Huntington to give him a verbal warning on May 16, 2008. * * *
>
> 3. On June 5, 2008, Huntington provided McCubbins an Action Plan, which identified performance deficiencies and ways in which to assist him meet goal expectations. McCubbins' poor performance continued. * * *
>
> 4. On July 9, 2008, Huntington placed McCubbins on an Individual Improvement Plan, which once again identified performance deficiencies and detailed specific actions expected of him to assist him meet goal expectations. The Plan warned McCubbins he was subject to discharge if he failed to meet expectations. McCubbins failed to address the performance deficiencies and made little or no effort to engage in the actions detailed in the Individual Improvement Plan. * * *
>
> 5. McCubbins admitted under oath he was aware of his performance deficiencies and understood the Action Plan and Individual Improvement Plan Huntington developed for him. He also admitted to not following the Individual Improvement Plan. * * *
>
> 6. In affirming the denial of McCubbins' application for unemployment compensation, the Unemployment Compensation Review Commission made the following findings: "Claimant admitted that he had monthly sales goals, and that he knew that he could be discharged if he fell below 85%-90% of those goals. He admitted that he did not meet his sales goals in April, May, and June of 2008 and admitted that he received three warnings for poor work performance. He admitted that that [sic] the individual improvement plan specifically warned that he was at risk for discharge if he did

> not reach 90% of his monthly goal in July 2008, and specifically required him to prepare a report for his supervisor each Monday regarding the previous week's sales appointments. Nevertheless, he admitted that he was below 50% of his sales goal in July and was on pace to be below 50% of his sales goal for August and admitted that he did not prepare the required report for his supervisor each Monday. Indeed, claimant admitted that he did not put forth 100% effort on his job because he felt Huntington had mistreated him." * * *
>
> 7. McCubbins testified under oath the physical restrictions imposed by his treating physician had no affect whatsoever on his ability to perform his job duties. Further, McCubbins never requested any job accommodations relative to the industrial injury and never even suggested the industrial injury was affecting his work performance. * * *

(Relator's brief, at 10-11. Emphases sic.)

{¶63} Following the listing of the above seven items, relator further states in his brief:

> The evidence further shows McCubbins believed he was immune from discharge irrespective of his performance because of his workers' compensation claim. When given a written warning and placed on the Individual Improvement Plan on July 9, 2008, he stated Huntington would not fire him since he was on workers' compensation. He added Huntington could not fire him until October when his workers' compensation came to and [sic] end. * * *

(Relator's brief, at 12.)

{¶64} In effect, relator is inviting this court to reweigh the evidence in order to reach the factual conclusion that relator wants this court to reach. This court must decline the invitation. *Supreme Bumpers*.

{¶65} The real issue here is whether the commission articulated a reasonable basis, supported by some evidence, for finding that relator did not voluntarily abandon his employment. See *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, syllabus.

{¶66} The magistrate finds that the commission did indeed articulate a reasonable basis supported by some evidence for its finding.

{¶67} The SHO's order of January 5, 2009, notes claimant's testimony that he had a boot on his foot until sometime in June 2008, and that he had physical therapy two times per week which took him away from his duties for at least six hours a week. He also testified that he had ongoing pain as a result of his injury. Those findings support the commission's conclusion that the industrial injury impaired claimant's ability to meet his performance goals set by Huntington.

{¶68} The SHO's order further found that claimant's accounts were not maintained at Huntington while he was gone, and that he had to start his accounts from scratch when he returned to work. This finding relates to the hearing testimony about the so-called "pipeline."

{¶69} Citing to the testimony of Mr. Pratsinakis, the SHO's order strongly suggests that Huntington's insistence that claimant's performance bar be set at 100 percent for the months prior to his termination failed to appropriately account for the industrial injury.

{¶70} In short, relator has failed to show in this mandamus action that the commission abused its discretion in finding that claimant did not voluntarily abandon his employment.

{¶71} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its SHO's order of January 5, 2009 that awards TTD compensation from August 20 to November 18, 2008,

based upon Dr. Van Aman's C-84 dated November 12, 2008, and to enter an amended order denying TTD compensation for the period August 20 to November 18, 2008.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

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