[Cite as *State of Ohio ex rel. Brown v. Indus. Comm.*, 2010-Ohio-6174.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. LaRon Brown,	:	
Relator,	:	
v.	:	No. 10AP-21
Hoover Universal Inc. d/b/a Johnson Controls and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on December 16, 2010

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Bugbee & Conkle, LLP, Gregory B. Denny and *Mark S. Barnes*, for respondent Hoover Universal Inc. d/b/a Johnson Controls.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, LaRon Brown, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate that portion of its order denying him temporary total disability ("TTD") compensation beginning April 9, 2008 on grounds that he voluntarily abandoned his employment, and to enter an order finding that he did not voluntarily abandon his

employment. Relator further requests that we order the commission to adjudicate the merits of his motion for TTD compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate noted that the commission based its finding that relator abandoned his employment on relator's alleged violation of Hoover's written attendance policy. Relator challenged Hoover's calculation of his attendance under the written policy. Therefore, the accuracy of Hoover's calculation of relator's attendance was a key issue before the commission. The magistrate found that because the commission failed to address this key issue in its decision, the commission abused its discretion. The magistrate also concluded that the commission's order violated *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203 because it failed to address this key issue and failed to provide reasoning supported by cited evidence in the record. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus, vacate the commission's order to the extent that it determines that relator voluntarily abandoned his employment, and order the commission to "enter an amended order that complies with *Noll* as to the key issues presented by the parties at the administrative proceeding."

{¶3} Hoover filed objections to the magistrate's decision. Hoover contends that "the magistrate's decision is based on an incorrect application of Ohio law and usurps the commission's fact finding role in rendering decisions on workers' compensation matters." Essentially, Hoover argues that the "key issue" administratively was not the correct calculation of relator's attendance under the policy. Rather, Hoover asserts that "[t]he salient issue before the Commission was whether there was record evidence supporting

the determination that relator's discharge for violation of the attendance policy constituted a voluntary abandonment under" *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 402-03, 1995-Ohio-153. According to Hoover, the magistrate "has second guessed" the commission's resolution of this issue. Hoover's argument is fundamentally flawed.

{¶4} As relator points out, in order to determine if relator violated Hoover's written attendance policy, it is necessary to determine if Hoover correctly calculated relator's attendance under the policy. An incorrect calculation might demonstrate that relator did not violate the policy, and therefore, did not voluntarily abandon his employment.

{¶5} Hoover acknowledges that whether or not it correctly calculated relator's absences under the attendance policy is a question of fact reserved for the commission. Hoover also acknowledges that relator challenged Hoover's calculation of his attendance before the commission. An accurate calculation of relator's attendance was essential in determining whether relator violated the policy. Yet, the commission's decision does not address the calculation of relator's attendance other than to state in conclusory fashion that relator violated the attendance policy. Nor does the commission provide any reasoning for reaching this conclusion or cite to any specific evidence in the record.

{¶6} We agree with the magistrate that the commission had a duty to determine whether Hoover correctly calculated relator's attendance under Hoover's attendance policy. Unless that issue is addressed, it is not possible to determine whether relator violated the policy. Because the commission failed to address this issue, it abused its discretion. *State ex rel. Peabody Coal Co. v. Indus. Comm.*, 66 Ohio St.3d 639, 1993-

Ohio-82, citing *State ex rel. Gen. Am. Transp. Corp. v. Indus. Comm.* (1990), 49 Ohio St.3d 91.

{¶7} Hoover also objects to the magistrate's finding that the commission's order failed to comply with *Noll*. Again, we find Hoover's objection unpersuasive.

{¶8} As previously noted, the commission's decision presents no explanation for how or why it concluded that relator violated Hoover's attendance policy. Nor does the commission cite to any specific evidence in the record that relates to the calculation of relator's attendance under that policy. Without knowing how the commission resolved this issue and what evidence it relied upon, we cannot properly review its decision. Therefore, we agree with the magistrate that the commission's order does not comply with *Noll*.

{¶9} For these reasons, we overrule Hoover's objections.

{¶10} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus to the extent indicated in the magistrate's decision.

Objections overruled; writ of mandamus granted.

FRENCH and HARSHA, JJ., concur.

HARSHA, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. LaRon Brown,	:	
Relator,	:	
v.	:	No. 10AP-21
Hoover Universal Inc. d/b/a Johnson Controls 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 August 18, 2010

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman*, for relator.

Bugbee & Conkle, LLP, Gregory B. Denny and *Mark S. Barnes*, for respondent Hoover Universal Inc. d/b/a Johnson Controls.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, LaRon Brown, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate that portion of its order denying him temporary total disability ("TTD") compensation beginning April 9, 2008 on grounds that he voluntarily abandoned his employment, and to enter an order

finding that he did not voluntarily abandon his employment and that adjudicates the merits of his motion for TTD compensation.

Findings of Fact:

{¶12} 1. On January 21, 2003, relator sustained an industrial injury in the course of his employment with respondent Hoover Universal Inc. d/b/a Johnson Controls ("respondent" or "Johnson Controls"). The industrial claim (No. 03-885833) is allowed for "right trapezius and shoulder strain; rotator cuff tear, right shoulder; impingement syndrome, right shoulder."

{¶13} 2. Relator has had three surgeries on his right shoulder. The most recent surgery occurred in April 2007. Relator returned to work after each surgery when released by his attending physician.

{¶14} 3. Following his third shoulder surgery, relator returned to light-duty work in August 2007.

{¶15} 4. In November 2007, relator moved to amend his claim to include psychiatric conditions.

{¶16} 5. Apparently, relator was off work for awhile, but then returned to work at a plant operated by Johnson Controls in late January 2008. Relator's return to work in late January 2008 followed an employer-sponsored psychiatric examination in early January 2008 by Kelly Daniels, M.D., who indicated that relator could return to work.

{¶17} 6. On February 14, 2008, when relator went to respondent's main facility to pick up his check, he was given a copy of Johnson Control's new attendance policy and was asked to sign a form acknowledging his receipt of the new attendance policy.

{¶18} 7. The new attendance policy states in part:

BANK HOURS

> This is the allotted time that a Team Member may be absent during the calendar year. The Team Member **will receive a credit of sixteen (16) unpaid hours on the first day of each quarter (January thru March, April thru June, July thru September and October thru December) for a maximum** of 64 unpaid hours per year each year after successful completion of their probation. Employees who miss work will be charged hours equivalent to the amount of missed work, rounded up to the nearest hour.
>
> To utilize bank hours once the employee has reported to work, employees who wish to leave early must obtain permission from their supervisor within the first hour of their scheduled shift. Permission will be granted where the employee has a good reason for leaving, and the appropriate number of hours will be assessed. However, employees who leave without requesting permission or who leave after permission is denied will be subject to disciplinary action.
>
> If at any time an employee exceeds the number of bank hours credited, they will be terminated.

(Emphasis sic.)

{¶19} 8. By letter dated April 2, 2008, relator was informed by Johnson Controls that his employment was being terminated:

> A thorough evaluation of your attendance record indicates that your absence on March 11, 2008 resulted in an exhaustion of your Emergency Vacation and Bank Hours causing your absenteeism to be unexcused. Consequently, the unexcused absence on March 11, 2008 has brought your attendance level to a termination status in violation of the Attendance Policy governed by the UAW Local 12 contract.
>
> Therefore, effective April 2, 2008 your employment with Johnson Controls is terminated.

{¶20} 9. On June 11, 2009, relator moved for TTD compensation beginning April 9, 2008 based upon C-84s from his attending physician, Nabil Ebraheim, M.D.

{¶21} 10. On June 22, 2009, relator moved for authorization of another shoulder surgery.

{¶22} 11. Relator's motions were heard by a district hearing officer ("DHO") on July 29, 2009. At the hearing, relator testified as to why he believed respondent improperly calculated his attendance under its new attendance policy.

{¶23} Also at the hearing, Yvonne Hambright and Brenda Leggett, two of Johnson Controls' human resources employees, testified as to how relator's attendance was calculated under the policy.

{¶24} 12. Following the July 29, 2009 hearing, the DHO issued an order authorizing surgery and finding that relator had voluntarily abandoned his employment at Johnson Controls. The DHO's order explains the voluntary abandonment determination:

> It is the order of the District Hearing Officer that the request for temporary total disability compensation commencing 04/09/2008 and continuing, is denied.
>
> The District Hearing Officer finds that the Injured Worker was terminated with the employer of record due to his violation of a written attendance policy.
>
> The District Hearing Officer finds that pursuant to [*State ex rel.*] Louisiana-Pacific [*Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153], voluntary departure from employment precludes temporary total disability compensation. Termination from employment is considered voluntary when it is generated by the Injured Worker's violation of a written work rule 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 instant claim, there is a written work rule regarding the attendance policy for the Employer of record. Violation of this attendance policy has been identified as a dischargeable offense within the policy language and the policy was known or should have been known by the Injured Worker.
>
> The District Hearing Officer finds there is an Acknowledgement of Receipt form signed by the Injured Worker on 02/14/2008. The form clearly states that the Injured Worker's signature verifies that he has been made aware and understands the provisions of the attendance

> policy and that he received a copy to read and reference. Although the Injured Worker states he was not aware of the policy and he did not receive a copy of the said policy, he testified at the hearing that he was aware the policy had changed from the previous policy. The District Hearing Officer further finds that the Injured Worker's signature on the Acknowledgement of Receipt form strongly rebuts his assertion that he didn't know about the policy changes.
>
> The District Hearing Officer finds there is evidence on file that the Injured Worker was terminated according to the Employer of record's written attendance policy. Therefore, receipt of temporary total disability compensation is barred.
>
> * * *
>
> All evidence in the file was reviewed and considered prior to rendering this decision. This decision is based on the Employer of record's attendance policy, the Injured Worker's signature on the Acknowledgement of Receipt form, Louisiana-Pacific, and Dr. Ebraheim's office notes regarding the requested surgery.

{¶25} 13. Relator administratively appealed the DHO's order of July 29, 2009 with respect to the denial of TTD compensation. Johnson Controls also appealed regarding the authorization of surgery.

{¶26} 14. On September 16, 2009, a staff hearing officer ("SHO") heard the administrative appeals. The hearing was recorded and transcribed for the record.

{¶27} At the hearing, relator again testified as to why he believes that Johnson Controls improperly calculated his attendance under its new attendance policy.

{¶28} Also at the hearing, Yvonne Hambright and another human resources employee, Peggy Cramer, testified as to how relator's attendance was calculated under Johnson Controls' new attendance policy.

{¶29} 15. Following the September 16, 2009 hearing, the SHO issued an order stating:

The order of the District Hearing Officer, from the hearing dated 07/29/2009, is modified to the following extent. Therefore, the C-86 motion filed on 06/11/2009 is denied and the C-86 filed 06/22/2009 is granted.

* * *

The Staff Hearing Officer finds that the Injured Worker was terminated by this Employer of record for violation of a written work rule.

The Staff Hearing Officer finds this is a LouisianaPacific volunteered departure from employment which precludes temporary total disability compensation. The Staff Hearing Officer finds that the Injured Worker violated a written work rule which was known or should have been known to the Injured Worker. He clearly admits that he signed the new absence policy or use of emergency vacation policy and did have a copy of it, read it and have it to take home. However, the Injured Worker did not follow that policy and as a result of time off within that policy for which he did not have time available, the Injured Worker was terminated. This is clearly defined as a overuse of this time as clearly defined as a terminable offense and the prohibited conduct was clearly defined in the new policy.

Again, the Injured Worker acknowledges there is a signed acknowledgement form of this policy dated and signed by the Injured Worker on 02/14/2008. The form clearly states that the Injured Worker signature verifies that he has been aware of and understands the provisions of the attendance policy and that he received a copy to read and reference. The Injured Worker states he was not aware of the policy, however, he testified at the Staff Level Hearing that he did in fact receive a copy of the policy and had in fact read the policy. He was aware of the policy but was mistaken as to one of the provisions. The Staff Hearing Officer finds the Injured Worker received the apology, signed the policy acknowledging his understanding and receipt of same.

There is evidence in file to indicate that the Injured Worker was terminated according the the employer records written attendance policy. Therefore, the receipt of temporary total disability compensation is barred on the basis of the volunteer abandonment.

* * *

> This order is based upon the Employer's records of the attendance policy, the Injured Worker's signature on the acknowledgement and receipt form, LouisianaPacific, and Dr. Ebraheim's office notes regarding this surgery.

(Sic passim.)

{¶30} 16. On October 15, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 16, 2009. Johnson Controls' administrative appeal regarding the surgery authorization was also refused by another SHO.

{¶31} 17. On January 11, 2010, relator, LaRon Brown, filed this mandamus action.

Conclusions of Law:

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

{¶33} A voluntary departure from employment precludes receipt of TTD compensation. An involuntary departure does not. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44.

{¶34} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 403, 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 [*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42] 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.

{¶35} 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 forth 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.)

{¶36} It was the duty of the commission, through its hearing officers, to determine whether Johnson Controls correctly calculated relator's attendance under respondent's attendance policy. See *State ex rel. Pounds v. Whetstone Gardens & Care Cntr.*, 180 Ohio App.3d 478, 2009-Ohio-66 at ¶40. The commission has failed to address the issues administratively raised by relator as to respondent's calculation of his attendance.

{¶37} The syllabus of *State ex rel. Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203, states:

> In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision.

{¶38} Here, the commission's decision is focused largely on whether relator was aware and understood respondent's new attendance policy.

{¶39} Thereafter, in conclusory fashion, the SHO's order of September 16, 2009 pronounces:

> There is evidence in file to indicate that the Injured Worker was terminated according the the employer records written attendance policy. Therefore, the receipt of temporary total disability compensation is barred on the basis of the volunteer abandonment.

(Sic passim.)

{¶40} Clearly, the SHO's order fails to address key issues that were litigated by the parties at the administrative proceedings. The commission abuses its discretion when it fails to address key issues presented to it. *State ex rel. Peabody Coal Co. v. Indus. Comm.* (1993), 66 Ohio St.3d 639, citing *State ex rel. Gen. Am. Transp. Corp. v. Indus. Comm.* (1990), 49 Ohio St.3d 91. Those issues cannot be addressed by a simple statement that the order is based upon "the Employer's records of the attendance policy" and relator's acknowledgement on the form.

{¶41} It was the duty of the commission, through its SHO, to address the key issues litigated by the parties during the administrative proceedings, and to provide reasoning supported by cited evidence in the record. The commission has failed to do this. Accordingly, the commission's order violates *Noll*.

{¶42} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of September 16, 2009 to the extent that it determines that relator voluntarily abandoned his employment and, in a

manner consistent with this magistrate's decision, enter an amended order that complies with *Noll* as to the key issues presented by the parties at the administrative proceedings.

/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).