[Cite as *State ex rel. Cline v. Abke Trucking, Inc.*, 2012-Ohio-1914.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Fred D. Cline,	:	
Relator,	:	
v.	:	No. 10AP-888
Abke Trucking, Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 1, 2012

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

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Abke Trucking, Inc.

Michael DeWine, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Fred D. Cline, 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 denying him temporary total disability ("TTD") compensation and enter a new order granting him TTD compensation beginning July 1, 2009.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate. The magistrate has now issued a decision that includes findings of fact and conclusions of law and is appended to this decision of the court. The magistrate concludes that the commission abused its discretion in determining that relator is ineligible for TTD compensation. The magistrate further concludes that the commission incorrectly denied compensation based upon the circumstances of relator's separation from his employment with respondent Abke Trucking, Inc. ("Abke"). The magistrate accordingly recommends that this court issue a writ of mandamus ordering the commission to vacate its order denying TTD compensation and enter a new ordered that determines relator's TTD claim based upon medical evidence rather than the grounds relied on by the commission in the first instance.

{¶ 3} The commission has filed objections to the magistrate's decision, and the matter is now before the court for our independent review.

{¶ 4} Relator worked as a truck driver for respondent Abke. In 2008, he sustained an injury in the course of his employment and the Ohio Bureau of Workers' Compensation ("bureau") eventually allowed his claim for a left hip contusion. Still under medical restrictions that prevented his return to driving, relator entered into a "wage continuation agreement" with Abke under which relator would work light duty for the American Red Cross while Abke continued to pay his wages. Under the agreement, relator would submit time sheets substantiating this "off-site" employment with the Red Cross organization. The bureau subsequently allowed relator's additional claim for bursitis in his left hip.

{¶ 5} On March 23, 2009, relator was medically released to return to work as a driver with no restrictions. He underwent a medical examination to renew his commercial driver's license. As part of this process, relator filled out a medical form and questionnaire, marking "no" next to the box inquiring whether he was diabetic. (Pursuant to federal regulations, a driver cannot operate a commercial vehicle if he or she has diabetes and takes insulin to treat the condition.) It is undisputed that relator did, in fact, suffer from diabetes and take insulin for the condition.

{¶ 6} A few days after applying for his commercial driver's license, Abke sent relator a letter notifying him that he was terminated from his employment for two reasons: first, because relator was disqualified by his diabetic condition from operating as a commercial driver, and second, because Abke believed he had falsified his employment time sheets while working off-site for the Red Cross organization.

{¶ 7} Relator obtained other part-time employment the following month, followed by a full-time job as a truck driver with another company. After approximately one month employment with the new company, Hoekstra Transportation LLC ("Hoekstra"), relator was fired on June 25, 2009, apparently for insubordination and poor job performance.

{¶ 8} On July 1, 2009, relator received a medical examination resulting in the doctor furnishing a TTD form certifying TTD from July 1, 2009 to an estimated return-to-work date of July 20, 2009. A further medical examination at the bureau's request on August 5, 2009 resulted in a medical opinion finding continued total disability from the first of July through the time of examination and continuing beyond, as supported by the medical record and related to his allowed claim.

{¶ 9} A district hearing officer ("DHO") affirmed the bureau's order granting TTD, but upon rehearing a staff hearing officer ("SHO") issued an order vacating the DHO's order and denying relator's request for TTD. The SHO found that relator was ineligible for TTD compensation, both because as an insulin-dependent diabetic relator was prohibited from operating a commercial vehicle and because relator had falsified two time sheets while working under his "off-site" agreement with Abke.

{¶ 10} In his conclusions of law, this court's magistrate concludes that relator cannot be found ineligible for TTD compensation because his discharge from Abke was based upon his diabetic condition and therefore involuntary. The magistrate further concludes that the commission abused it discretion in finding that the discharge could also be based upon time sheet falsification, because there was nothing sufficient in the record to demonstrate that this issue was factually supported.

{¶ 11} We find that the magistrate correctly concluded that the time sheet issue could not form the basis for finding of voluntary abandonment of relator's position with

Abke. If Abke were to oppose the TTD award on the basis that relator had voluntarily abandoned his employment with Abke through a discharge for cause, it was Abke's burden to establish a prima facie case of breach of an explicit company work rule in relation to the alleged time sheet falsification. *See generally State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 402 (1995). The only evidence in the record is the Abke termination letter relating to the falsification claim. The commission could not rely upon this bare allegation alone as found in the discharge letter, since the SHO had not reviewed the purported falsified time sheets, which were never presented at the time of the hearing. We accordingly review the circumstances of relator's discharge without considering the impact of the alleged time sheet falsification.

{¶ 12} We also adopt the magistrate's conclusion that relator's inability to renew his commercial driver's license due to his diabetic condition, and his consequent discharge from his driving position with Abke, does not constitute a voluntary abandonment of his employment. While a voluntary departure from employment precludes receipt of TTD compensation, *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist.1985) and *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987), nonallowed medical conditions cannot be advanced to defeat a claim for such compensation. *State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Again, Abke bore the burden of proving by a preponderance of the evidence the affirmative defense of voluntary abandonment of employment in order to establish relator's ineligibility for TTD compensation. *Louisiana-Pacific*; *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84 (1997). An injury-induced involuntary departure, even if based on an unrelated medical condition, does not bar TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988).

{¶ 13} Abke has not bore its burden by proving by a preponderance of the evidence that relator voluntarily abandoned his employment with Abke. Relator was unable to resume his employment duties with Abke because he was barred by federal regulation from again qualifying for his commercial driver's license. Had Abke advanced the alternative grounds that relator was terminated for *falsifying* the

commercial driver's license medical questionnaire by omitting his known disqualifying condition, then Abke might present a stronger argument that the abandonment was voluntary; this grounds for discharge, however, was never advanced by Abke at any stage of the proceedings. We accordingly find that relator's termination from Abke was not voluntary, and does not render him ineligible for TTD compensation. We adopt this aspect of the magistrate's decision.

{¶ 14} Finally, the commission in the alternative argues that if relator's discharge from Abke does not disqualify him from TTD compensation, then relator's subsequent discharge by another employer (Hoekstra) constitutes a voluntary abandonment of employment that will relate back to his initial termination by Abke and accordingly render him ineligible for compensation. As a corollary, the commission proposes that lack of employment for any reason at the time a claimant attempts to renew his claim and obtain an additional period of TTD will preclude compensation. We find no support for either legal proposition, both of which amalgamate the distinct concepts of voluntary departure from the employer where the allowed claim arose and voluntary abandonment of the work force entirely.

{¶ 15} Aside from a claimant's voluntary departure from employment with an employer against whom the claim for TTD compensation was originally brought, "a claimant's complete abandonment of the entire work force will preclude TTD compensation altogether." *State ex rel. Pierron v. Indus. Comm.*, 172 Ohio App.3d 168, 2007-Ohio-3292, ¶ 12 (10th Dist.), citing *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000), affirmed 120 Ohio St.3d 40, 2008-Ohio-5245. A defense of voluntary abandonment of the entire work force, however, is distinct from a defense of ineligibility due to voluntary departure from the employment position in which the injury occurred, as is demonstrated by the different standards announced in cases addressing the respective issues, such as *Louisiana-Pacific* and *Baker*. None of the cases addressing complete abandonment of the work force by a claimant do so in terms of treating a voluntary departure from a subsequent employer as a preclusive event of the same order as a voluntary departure from the employer against whom the claim is brought. Likewise, the cases do not treat a subsequent firing for cause as relating back and

transforming an involuntary departure from the original employer into a voluntary departure.

{¶ 16} We find that in the present case relator has not abandoned the work force, as evidenced by his continued employment in truck driving and nondriving positions after leaving Abke. Unlike the claimant in *Pierron*, who accepted a buyout and made no attempt to return to employment in the ensuing five years, relator had repeatedly, if unsuccessfully, attempted to remain employed before pursuing renewed TTD. The fact that his termination from his subsequent employment with Hoekstra was potentially for cause, i.e., violation of Hoekstra's work rules, does not demonstrate abandonment of the work force; it would so affect, if such a claim were at issue, any subsequent claim that relator made for injuries sustained during his employment with Hoekstra, but that is not the case before us. Relator has not "evinced an intent to leave the work force." *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008-Ohio-5245, ¶ 10. In the necessarily fact-intensive inquiry into whether a claimant has abandoned the work force entirely, we do not conclude that *repeated and habitual* firings from subsequent employment might be taken into account, but again, that is not the case before us.

{¶ 17} In the same vein, the commission further argues that relator's lack of income at the time he renewed his claim for continuing injury of itself precludes allowance of TTD compensation. The commission cites *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587, for the proposition that no claim can be allowed if the claimant is unemployed at the time of the alleged disability. Read more carefully, however, *Eckerly* is a case that turns on alleged abandonment of the work force, rather than momentary unemployment of the claimant: "[I]t appears that claimant was almost entirely unemployed in the two years after his discharge * * * earning only approximately $800 during that period." *Id.* at ¶ 10. We do not agree with the broad interpretation of *Eckerly*, urged upon us by the commission, that any period of subsequent unemployment would prevent any possibility of a claim for TTD compensation involving the original employer.

{¶ 18} For these reasons we overrule the commission's objections, adopt the magistrate's findings of fact and conclusions of law as our own, and grant the requested writ.

Objections overruled;
writ of mandamus granted.

TYACK, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting

{¶ 19} I respectfully dissent. Because I conclude that the commission failed to meet the standards of *State ex rel. Noll v. Indus. Comm.*, 57 Ohio St.3d 203 (1991), I would grant a limited writ for the purpose of further consideration and explanation by the commission.

{¶ 20} First, I disagree with the majority's conclusion that the timesheet falsification issue could not have formed an independent basis for a finding of voluntary abandonment of relator's position with Abke without admission of the actual time cards. There appears to be no dispute that the falsification issue arose from relator's claim and compensation for work on two federal holidays when the office where he was working was closed. The staff hearing officer ("SHO") held a hearing at which witnesses appeared. Even absent the actual time cards, those witnesses could have testified as to their content, which appears to be undisputed, as well as the policies that applied to relator's compensation for work off-site and his submission of time records. While admission of the time cards certainly would have been helpful and preferable, their absence should not necessarily defeat the employer's assertion that relator was paid for time he did not work because he falsified the records.

{¶ 21} Nevertheless, the Supreme Court of Ohio has cautioned that "a postinjury firing must be carefully scrutinized." *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559, 562 (2001). The court also has noted the "great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation. We therefore find it imperative to carefully examine the totality of the circumstances when such a situation exists." *State ex rel. Smith v. Superior's Brand*

Meats, Inc., 76 Ohio St.3d 408, 411 (1996). Here, the SHO simply stated that relator "falsified his time cards for the dates of 01/19/2009 and 02/16/2009." In my view, the SHO's failure to explain the evidence or testimony relied on violates *Noll* under these circumstances, and further consideration by the commission is needed.

{¶ 22} Second, I disagree with the majority's discussion of the evidence relating to relator's dependence on insulin. As the magistrate explained, a nonallowed condition cannot form the sole basis for denying compensation. *See State ex rel. Waddle v. Indus. Comm.*, 67 Ohio St.3d 452 (1993). Here, however, it is unclear from the record or the SHO's order whether relator was terminated because he is insulin-dependent or because he failed to disclose his condition to Abke. The March 27, 2009 termination letter states only that he is ineligible under federal regulations. The district hearing officer's ("DHO") order states that he was terminated for "violation of a work rule regarding registration of medical conditions as a truck driver." The SHO order states only that he was terminated "based upon his violation of a written work rule." Again, in my view, the SHO's failure to explain the basis for the termination or the evidence supporting it violates *Noll* under these circumstances, and further consideration by the commission is needed.

{¶ 23} Finally, we have the additional question whether, even if relator voluntarily abandoned his employment with Abke, he re-entered the work force and regained eligibility for purposes of granting TTD thereafter. Citing *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587, the SHO concluded that relator was not eligible as of July 1, 2009, because he was not employed on that date. As the majority notes, however, the question is whether relator had abandoned the work force at that point. In *Eckerly*, there was evidence to support a finding that the claimant abandoned the work force entirely when he voluntarily abandoned his employment, he earned about $800 as a delivery person in the year following, he presented no other evidence of a return to the work force, and he was unemployed on the date he claimed temporary total compensation should commence. Here, the SHO's discussion of relator's termination from Hoekstra on June 25, 2009, implies a finding that relator abandoned the work force on that date and had not re-entered the work force by July 1,

2009. In the absence of such an explicit discussion by the SHO, however, I would, again, order the commission to consider and explain the matter further.

{¶ 24} For all these reasons, I would issue a limited writ ordering the commission to reconsider and explain its reasoning and conclusions regarding relator's termination on March 27, 2009, and, if necessary, his continued participation in the work force. Because the majority concludes otherwise, I respectfully dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Fred D. Cline,	:	
Relator,	:	
v.	:	No. 10AP-888
Abke Trucking, Inc. 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 May 31, 2011

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

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Abke Trucking, Inc.

Michael DeWine, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 25} In this original action, relator, Fred D. Cline, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation beginning July 1, 2009 on eligibility grounds and to enter an order granting him TTD compensation beginning July 1, 2009.

Findings of Fact:

{¶ 26} 1. On August 27, 2008, relator sustained an industrial injury while employed as a truck driver with respondent Abke Trucking, Inc. ("Abke"), a state-fund employer. On that date, while pinning down a rack on a trailer, relator slipped and fell to the ground. The next day, relator went to the Toledo Hospital Emergency Room where the injury was diagnosed as a left hip contusion. Relator sought follow-up care from orthopedist David C. Ervin, M.D.

{¶ 27} 2. In early September 2008, the Ohio Bureau of Workers' Compensation ("bureau") allowed the claim (No. 08-853226) for "contusion left hip."

{¶ 28} 3. Relator was under medical restrictions preventing his return to his former position of employment as a truck driver. Accordingly, on October 8, 2008, relator and Abke entered into a wage continuation agreement under which relator would be paid by Abke at the rate of $1,469.63 per week.

{¶ 29} 4. On October 8, 2008, relator signed an Abke document captioned "Modified Duty Off-Site Program Agreement," which states:

> "I, Frederick Cline", understand that I remain an employee of Abke Trucking Inc. while working for the off-site facility: American Red Cross of Greater Toledo Area[.] * * * I will be working 40 hours per week, from 8:30 a.m. to 4:45 p.m. This position will be "temporary" and will not result in a permanent position with the placement organization. While participating in the Modified Duty Off-Site program, I will continue to be covered under Abke Trucking Inc. State Fund Workers' Compensation program and HR policies. I will be expected to document and have the non-profit supervisor sign the weekly time record. The signed weekly attendance record needs to be received at Abke Trucking Inc. by the close of the business day on Friday of each week.

{¶ 30} 5. While performing light-duty work at American Red Cross, relator underwent physical therapy.

{¶ 31} 6. On January 12, 2009, relator moved that his claim be additionally allowed.

{¶ 32} 7. On January 22, 2009, the bureau mailed an order additionally allowing the claim for "trochanteric bursitis hip left."

{¶ 33} 8. On March 23, 2009, Dr. Ervin released relator to return to work on March 25, 2009 with no restrictions.

{¶ 34} 9. On March 25, 2009, relator underwent a medical examination for the purpose of renewing his commercial driver's license. The examination requires the examining physician and the driver to complete their respective portions of the federal form.

{¶ 35} The driver must complete the "health history" portion of the form by marking either a "Yes" box or "No" box aside a pre-printed description of an illness, disorder or disease. On the form, relator marked the "No" box aside the pre-printed description "[d]iabetes or elevated blood sugar controlled by." Had he marked the "Yes" box, relator would have been further required to mark one or more boxes aside the pre-printed words "diet," "pills" and "insulin."

{¶ 36} On March 25, 2009, relator signed the form below the pre-printed declaration:

> I certify that the above information is complete and true. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certificate.

{¶ 37} Under section 7 of the above-described form, the examining physician, by his signature, certified that relator "[m]eets standards in 49 CFR 391.41; qualifies for 2 year certificate."

{¶ 38} 10. By letter dated March 27, 2009, relator was informed by Abke's owner:

> It has come to our attention that you have been using a medication that would not allow you to operate a commercial vehicle. According to FMCSR regulations 391.41(b)(3) you cannot operate a commercial vehicle if you have diabetes currently requiring insulin for control. Records indicate that you are currently taking Lantus which is insulin for diabetes. Given this information you are no longer eligible to drive [a] truck for Abke Trucking Inc. In addition, concern of your knowingly reporting you worked on January 19 and February 16 while not actually working is a serious violation of falsifying a time card and is cause for immediate discharge

> on the first violation. Given this information you are considered terminated as of March 25, 2009.

{¶ 39} 11. In April 2009, relator secured a part-time position with McCloud Trucking.

{¶ 40} 12. In May 2009, relator accepted a full-time truck driver position with Hoekstra Transportation LLC.

{¶ 41} 13. On June 25, 2009, relator was terminated by Hoekstra Transportation LLC.

{¶ 42} 14. On July 1, 2009, relator was examined by Dr. Ervin. In his office note of that date, Dr. Ervin wrote:

> SUBJECTIVE – Fred comes in today for exam of his left hip. We have seen him in the past for a work injury. States that he fell several months ago and sustained an injury to his left hip. He has been through a significant workup including x-rays and MRI scan. He has had physical therapy, cortisone injection. He has had second opinion by Dr. Farrell and the diagnosis up to this point has been bone bruise to the trochanter with trochanteric bursitis. He did return to work and was unable to do it. He has problems squatting, kneeling, going up and down stairs. He states the pain now is in the lateral aspect of his left hip. It radiates into the thigh. It does not go below the knee. Denies any numbness or tingling or any neurovascular type symptoms. At this point, he states the pain is so bad, he cannot work.
>
> OBJECTIVE – On exam, he points to the proximal thigh into the lateral aspect of the trochanter and to the lateral aspect of the thigh to the source of his pain. It does increase in pain with range of hip through range of motion specifically internal rotation causes increased pain. There is no limb length discrepancy, can do a straight leg raise. His knee exam is normal. His straight leg raise test is negative. No knee effusion.
>
> ASSESSMENT – Hip contusion.
>
> PLAN – I discussed options with Fred, I am going to go ahead and keep him off work. At this time, work for 4-hour sitting limit. At this point, no standing work, no squatting, kneeling, etc. Regular bone scan to evaluate his left hip. If

> the bone scan is essentially negative, I would consider either referring him for hip arthroscopy versus second opinion from orthopedic doctors. I do not see any other obvious abnormalities going on with his left hip from x-ray or MRI or CT standpoint. See him back, I told him I will call him with results of his bone scan to discuss options at that time.

{¶ 43} 15. On July 1, 2009, Dr. Ervin completed a C-84 certifying TTD from July 1, 2009 to an estimated return-to-work date of July 20, 2009.

{¶ 44} 16. On August 5, 2009, at the bureau's request, relator was examined by orthopedic surgeon Frederick J. Shiple, III, M.D. In his three-page narrative report, Dr. Shiple opined:

> Conclusions: Mr. Cline continues to demonstrate symptoms due to the allowed conditions of hip enthesopathy left. The four hour sitting restriction as well as no standing, squatting or kneeling at work effectively precludes him from performing work activities. The medical record adequately supports a period of total disability beginning 1 July 2009 through present.
>
> The suggestion would be a treatment program directed by a physical medicine and rehabilitation specialist toward his left hip enthesopathy.
>
> In summary, a period of temporary total disability from 1 July 2009 through present and to continue is supported by the medical record.

{¶ 45} 17. Abke administratively appealed the bureau's August 12, 2009 order.

{¶ 46} 18. On September 15, 2009, relator was examined by Robert L. Kalb, M.D. In his three-page report, Dr. Kalb indicates that "Lantus" was one of several medications being prescribed for relator. Dr. Kalb lists several diagnoses, one of which is "[i]nsulin dependent diabetes mellitus-comorbidity."

{¶ 47} 19. Following a September 22, 2009 hearing, a district hearing officer ("DHO") issued an order affirming the bureau's order.

{¶ 48} 20. Abke administratively appealed the DHO's order of September 22, 2009.

{¶ 49} 21. Following a December 14, 2009 hearing, a staff hearing officer ("SHO") issued an order vacating the DHO's order of September 22, 2009. Denying relator's request for TTD compensation, the SHO's order explains:

> The order of the District Hearing Officer, from the hearing of 09/22/2009, published 09/24/2009, is hereby vacated. Therefore, the Injured Worker's C-84 request for temporary total disability compensation, filed 07/01/2009, is hereby denied.
>
> Following the Injured Worker's industrial injury, of 08/27/2008, the Injured Worker continued to receive salary continuation, until he was terminated, on 03/25/2009, based upon his violation of a written work rule. Federal regulations prohibit a driver from operating a commercial vehicle if the driver has diabetes which requires insulin for control. The records in file indicate that the Injured Worker was taking the prescription drug Lantus, which is a form of insulin prescribed for diabetes. Furthermore, the Injured Worker falsified his time cards for the dates of 01/19/2009 and 02/16/2009.
>
> Therefore, the Injured Worker was terminated, as of 03/25/2009, based upon his violation of written work rules that (1) clearly defined the prohibited conduct, (2) had previously been identified by the Employer as a dischargeable offense, and (3) was known, or should have been known, to the Injured Worker. Therefore, the payment of temporary total disability compensation would be barred, effective 03/25/2009, based upon the [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153] decision.
>
> However, the Injured Worker has sought further employment, after his termination from the employer of record, Abke Trucking, Inc. The Injured Worker obtained employment with Hoekstra Transportation Limited Liability Corporation. Therefore, it is the finding of this Staff Hearing Officer that the abandonment of employment which had barred the payment of temporary total disability compensation no longer applied, so long as the Injured Worker had re-entered the work force. Pursuant to the Ohio Supreme Court's decision in the case of State ex rel. McCoy v. Dedicated Transport, Incorporated (2002) 97 Ohio St. 3d 25, an Injured Worker who voluntarily abandoned his or her

> former position of employment, or who was fired under circumstances that amounts to a voluntary abandonment of the former position of employment, will, once again, be eligible to receive temporary total disability compensation, pursuant to Ohio Revised Code Section 4123.56, if he or she re-enters the work force and, due to the original industrial injury, once again becomes temporarily and totally disabled while working at his or her new job.
>
> The Ohio Supreme Court further clarified this issue, in the case of State ex rel. Eckerly v. Industrial Commission (2005) 105 Ohio St. 3d 428, where it stated that an Injured Worker who voluntarily abandoned his former position of employment was not entitled to temporary total disability compensation where the Injured Worker was not employed at the time of the reoccurrence of the disability.
> The facts in the instant claim indicated that the Injured Worker was terminated from his new Employer, Hoekstra Transportation Limited Liability Corporation on 06/25/2009, due to substandard performance. The basis for his termination was excessive service failures (such as over-sleeping when he was out of town and not being able to make the delivery to the customer) and insubordination to his Supervisors. Thus, it is the finding of this Staff Hearing Officer that the Injured Worker was not employed at the time of the onset of his alleged disability, on 07/01/2009. Therefore, it is the finding of this Staff Hearing Officer that the Eckerly case holding applies to the facts and circumstances in the instant claim. Therefore, it is the finding of this Staff Hearing Officer that the Injured Worker, who previously voluntarily abandoned his former position of employment, was not entitled to the payment of temporary total disability compensation for the period from 07/01/2009 through 12/14/2009.
>
> Therefore, it is the order of this Staff Hearing Officer that temporary total disability compensation is hereby denied, for the period from 07/01/2009 through 12/14/2009.

(Emphases sic.)

{¶ 50} 22. On January 9, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 14, 2009.

{¶ 51} 23. On January 25, 2010, relator moved for reconsideration of the SHO's order of December 14, 2009.

{¶ 52} 24. On April 8, 2010, the three-member commission issued an interlocutory order directing that relator's January 25, 2010 request for reconsideration be set for hearing before the commission to determine whether continuing jurisdiction exists to reopen the SHO's order.

{¶ 53} 25. June 24, 2010 is the date the commission set for its hearing on relator's January 25, 2010 motion for reconsideration.

{¶ 54} 26. Abke's counsel prepared a document captioned "Employer's Position Statement For Industrial Commission Hearing June 24, 2010" ("position statement"). On June 23, 2010, Abke's counsel faxed copies of the position statement to counsel for relator.

{¶ 55} 27. On June 24, 2010, Abke's counsel filed the position statement with the commission.

{¶ 56} 28. Also on June 24, 2010, Abke filed two documents captioned "Modified Duty Off-Site Time Report." One time report was signed by relator and his supervisor on January 23, 2009. The other time report was signed by relator and his supervisor on February 20, 2009.

{¶ 57} 29. Both time reports were completed on a form presumably prepared by Abke. The form permits the employee to report on a weekly basis his hours worked.

{¶ 58} 30. The time reports were first filed with the commission on June 24, 2010. Thus, the time reports were not submitted as evidence to the SHO who issued his order following the December 14, 2009 hearing.

{¶ 59} 31. It can be noted here, that the two dates, i.e., January 19 and February 16, 2009, that Mr. Abke identified for a falsification "concern" in the March 27, 2009 termination letter were federal and state holidays.

Conclusions of Law:

{¶ 60} The commission, through its SHO's order of December 14, 2009, found relator ineligible for TTD compensation based upon two grounds relating to his former position of employment with Abke: (1) that federal regulations prohibit relator from

operating a commercial vehicle because he has become an insulin dependent diabetic, and (2) that relator falsified two time reports.

{¶ 61} The commission, through its SHO, also found that relator had not re-established his eligibility through subsequent employment.

{¶ 62} Two issues are dispositive: (1) can relator be found ineligible for TTD compensation because he has become an insulin dependent diabetic—a medical condition that, according to Abke, prohibits relator from operating its commercial vehicles and thus preventing relator's return to his former position of employment, and (2) did the commission abuse its discretion in finding that relator falsified the two time reports?

{¶ 63} The magistrate finds: (1) relator cannot be found ineligible for TTD compensation based upon his becoming an insulin dependent diabetic—a condition preventing his return to his former position of employment, and (2) the commission abused its discretion in finding that relator falsified the two time reports.

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

{¶ 65} 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.

{¶ 66} 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 *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.

{¶ 67} 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.)

{¶ 68} At the commission, Abke 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.

{¶ 69} Moreover, it was the commission's duty to determine for itself whether relator actually violated the work rule that is the premise for the employer's termination of employment. *State ex rel. Pounds v. Whetstone Gardens & Care Ctr.*, 180 Ohio App.3d 478, 2009-Ohio-66, ¶40. That is, it is insufficient for the commission to simply determine that the employer terminated the claimant for violation of a work rule. Id.

{¶ 70} Turning to the first issue, the record contains a document captioned "Abke Trucking Driver Hiring Standards." The document provides:

> Abke Trucking Inc requires that all drivers of commercial motor vehicles meet the minimum qualifications specified in part 391 from the FMCSA.
>
> * * *
>
> [Five] Drivers must continuously comply with the standards set forth from the Federal Motor Carrier Safety Administration in order to remain employed with Abke Trucking Inc.

{¶ 71} The record also contains a document captioned "Medical Advisory Criteria for Evaluation Under 49CFR Part 391.41":

> **Note** Unlike regulations which are codified and have a statutory base, the recommendations in this advisory are simply guidance established to help the medical examiner determine a driver's medical qualifications pursuant to Section 391.41 of the Federal Motor Carrier Safety Regulations (FMCSRs). The Office of Motor Carrier Research and Standards routinely sends copies of these guidelines to medical examiners to assist them in making an evaluation. The medical examiner may, but is not required to, accept the recommendations. Section 390.3(d) of the FMCSRs allows employers to have more stringent medical requirements.
>
> * * *
>
> **391.41(b)(3)**
>
> A person is physically qualified to drive a commercial motor vehicle if that person:
>
> Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control.
>
> Diabetes mellitus is a disease which, on occasion, can result in a loss of consciousness or disorientation in time and space. Individuals who require insulin for control have conditions which can get out of control by the use of too much or too little insulin, or food intake not consistent with the insulin dosage. Incapacitation may occur from symptoms

> of hyperglycemic or hypoglycemic reactions (drowsiness, semiconsciousness, diabetic coma, or insulin shock).
>
> The administration of insulin is within itself, a complicated process requiring insulin, syringe, needle, alcohol sponge and a sterile technique. Factors related to long-haul commercial motor vehicle operations such as fatigue, lack of sleep, poor diet, emotional conditions, stress, and concomitant illness, compound the diabetic problem. Because of these inherent dangers, the FMCSA has consistently held that a diabetic who uses insulin for control does not meet the minimum physical requirements of the FMCSRs.
>
> Hypoglycemic drugs, taken orally, are sometimes prescribed for diabetic individuals to help stimulate natural body production of insulin. If the condition can be controlled by the use of oral medication and diet, then an individual may be qualified under the present rule.

{¶ 72} A claimant must always show the existence of a direct and proximate causal relationship between his or her industrial injury and the claimed disability. *State ex rel. Waddle v. Indus. Comm.* (1993), 67 Ohio St.3d 452. Nonallowed medical conditions cannot be used to advance or defeat a claim for compensation. Id.

{¶ 73} The mere presence of a nonallowed condition in a claim for TTD compensation does not in itself destroy the compensability of the claim, but the claimant must meet his burden of showing that an allowed condition independently caused the disability. *State ex rel. Bradley v. Indus. Comm.* (1997), 77 Ohio St.3d 239, 242.

{¶ 74} As earlier noted, the SHO's order of December 14, 2009 relies upon the three-prong test set forth in *Louisiana-Pacific* in holding that relator is ineligible for TTD compensation because his insulin dependent diabetes prevents him from driving a commercial vehicle for Abke.

{¶ 75} According to relator, because acquiring a disqualifying medical condition is not a voluntary or volitional act, *Louisiana-Pacific* is inapplicable and does not support the commission's ineligibility determination. The magistrate agrees.

{¶ 76} The three-part rule set forth in *Louisiana-Pacific* is premised upon the proposition as stated in that case, that "an employee must be presumed to intend the consequences of his or her voluntary acts." Id. at 403. Obviously, the consequences of acquiring diabetes are not the consequences of a voluntary act. Accordingly, the commission's reliance upon *Louisiana-Pacific* is misplaced.

{¶ 77} Moreover, relator's diabetes is undisputedly a nonallowed medical condition. Here, the commission's reliance upon relator's insulin dependent diabetes to declare him ineligible for compensation is impermissibly using a nonallowed medical condition to defeat a claim for compensation. While Abke can fire relator for becoming an insulin dependent diabetic, the commission cannot declare him ineligible for TTD compensation for that reason. Id.

{¶ 78} Turning to the second issue, the record does contain an Abke work rule, stating:

> The following rules are considered extremely serious infractions of Company policy. They are only examples, and should not be considered as being all-inclusive. Violation of any of these rules is considered cause for discharge on the first violation:
>
> [One] Attempting to and/or falsifying Company records, including, but not limited to, employment applications, or time cards.

{¶ 79} It was Abke's burden to present a prima facie case of falsification to the commission's SHO. Apparently, the March 27, 2009 Abke termination letter was the only documentary evidence relating to the falsification claim that was before the SHO at the December 14, 2009 hearing. That piece of evidence alone was insufficient for Abke to meets its burden of proof because it was the commission's duty to determine for itself whether relator actually violated Abke's work rule regarding falsification. *Pounds*. Obviously, the SHO could not legitimately determine whether the two time reports contain falsifications without actually reviewing the two documents.

{¶ 80} Moreover, the magistrate does not intend to infer that the SHO could have found falsification of company records by simply viewing the two time reports that were untimely submitted to the commission. That question is not before the magistrate in

this action. And, while the SHO's order of December 14, 2009 indicates that relator and Mr. Abke appeared, the hearing was not recorded, nor is there in the record any written statements or affidavits from anyone claiming to be a witness to the alleged falsification. See *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-71, 2004-Ohio-2991 (where falsification was undefined in the employee handbook, R.C. 2921.13 provided a workable definition; the employer failed to establish the scienter element of falsification), affirmed 106 Ohio St.3d 173, 2005-Ohio-4386

{¶ 81} The magistrate concludes that the commission abused its discretion in determining relator to be ineligible for TTD compensation based upon his termination or loss of employment at Abke. Given the magistrate's determination, it is unnecessary to determine whether or not relator re-established his eligibility through subsequent employment.

{¶ 82} 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 December 14, 2009, and to enter a new order that determines, based on the medical evidence, relator's request for TTD compensation beginning July 1, 2009 and absent Abke's claim of ineligibility.

/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).