[Cite as *State ex rel. Viking Forge Corp. v. Perry*, 2012-Ohio-2738.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Viking Forge Corporation,	:	
Relator,	:	
v.	:	No. 11AP-226
Kelly Perry and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on June 19, 2012

Christopher J. Shaw, for relator.

Gibson & Lowry, and *Mark S. Weinberger*, for respondent Kelly Perry.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶ 1} Relator, Viking Forge Corporation, filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order awarding temporary total disability ("TTD") compensation to respondent,

Kelly Perry ("claimant"), beginning April 7, 2009 and to enter an order denying said compensation.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found relator failed to demonstrate the commission abused its discretion in concluding that claimant did not voluntarily abandon his employment with relator. However, the magistrate went on to find that because Dr. Rodgers' C-84 and corresponding office notes do not constitute some evidence upon which the commission can rely, the commission abused its discretion in awarding TTD compensation to claimant. Accordingly, the magistrate recommended that this court grant the requested writ of mandamus. Relator, claimant, and the commission have filed objections to the magistrate's decision.

I. BACKGROUND

{¶ 3} On September 26, 2008, claimant suffered a work-related injury requiring immediate surgery to both thumbs. Claimant was off of work and receiving TTD compensation until December 1, 2008, at which time he returned to restricted-duty work. Effective February 4, 2009, claimant's surgeon, Dr. Engles, released claimant to return to work without restrictions. Claimant was terminated from his employment effective March 2, 2009. Thereafter, based on the medical opinion of Dr. Rodgers, claimant sought TTD compensation beginning April 7, 2009. The commission ultimately granted the requested compensation through May 9, 2009 and to continue upon submission of medical proof of disability for the allowed conditions in the claim. This mandamus action followed.

II. RELATOR'S OBJECTION

{¶ 4} We begin with relator's single objection challenging the magistrate's finding that the commission did not abuse its discretion in concluding that claimant did not voluntarily abandon his employment with relator. Specifically, relator's objection states:

> The magistrate erred by finding that the Staff Hearing Officer Record of Proceedings dated June 19, 2009 * * * constituted some evidence supporting the commission's finding that Respondent, Kelly Perry, did not voluntarily abandon his employment with Relator, Viking Forge Corp.

{¶ 5} This objection, however, essentially raises the same issues and reargues the same contentions that were both presented to and addressed by the magistrate. For the reasons stated in the magistrate's decision, we do not find relator's objection well-taken. Contrary to relator's position, we agree with the magistrate's conclusion that the June 19, 2009 order of the Staff Hearing Officer adequately explains and articulates some evidence in support of the finding that claimant did not voluntarily abandon his employment.

{¶ 6} Accordingly, we overrule relator's objection to the magistrate's decision.

III. CLAIMANT'S AND THE COMMISSION'S OBJECTIONS

{¶ 7} We turn now to the objections filed by claimant and the commission in which the magistrate's findings with respect to Dr. Rodgers' C-84 and office notes are challenged. The objections filed by claimant incorporate the objections and supporting memorandum filed by the commission. Said objections state:

> 1. The magistrate failed to include certain pertinent findings of fact.
>
> 2. Contrary to the magistrate's decision, Dr. Engles' opinion that, after he returned to full duty, Perry experienced phantom symptomology and had a functional shortening of his left thumb that would benefit from a prosthesis supports the commission's award of a subsequent period of temporary total disability following Perry's return to work.
>
> 3. Contrary to the magistrate's decision, Dr. Rodgers' finding that Perry had increased pain and loss of sensation on right thumb and hypersensitivity of the left thumb along with the doctor's intended actions for treatment supports the commission's award of a new period of temporary total disability following Perry's return to work.

{¶ 8} With respect to the findings of fact, the claimant and the commission argue the magistrate erred by failing to include the following factual findings: (1) Dr. Engles requested Pillet prosthesis for claimant's left thumb on February 13, 2009; (2) on a request for additional information regarding the request for a prosthesis, Dr. Engles responded, on March 2, 2009, that claimant has a "functional shortening of his left thumb [making him] a candidate for a prosthesis"; and (3) the prosthetic was initially denied because claimant's employer was challenging his additional allowances. Relator withdrew

its objections on the same day that claimant violated the rule that supported his termination. The left thumb prosthesis was ultimately approved on October 8, 2009.

{¶ 9} We find the objections to the magistrate's findings of fact to be without merit. Many of the findings which claimant and the commission claim the magistrate omitted are referenced in the magistrate's decision, albeit in slightly different language than that advanced by claimant and the commission. Others are simply not relevant to the pertinent issues here.

{¶ 10} For example, while not specifying the precise date and reasoning, when read as a whole, the magistrate's decision conveys that Dr. Engles was supportive of claimant's efforts to receive a prosthesis. Also, the fact that relator withdrew its objections to the claimant's request for a prosthesis, and the fact that the left thumb prosthesis was ultimately approved on October 8, 2009, is not determinative of the outcome in this case.

{¶ 11} We believe the magistrate properly determined the relevant factual issues and noted the relevant facts in his findings of fact. Thus, we overrule claimant's and the commission's first objection and adopt the magistrate's findings of fact as our own.

{¶ 12} Because it is dispositive, we next address claimant's and the commission's third objection in which they contend Dr. Rodgers' findings of increased pain, loss of sensation, and hypersensitivity, coupled with Dr. Rodgers' intended action for treatment, constitute some evidence upon which the commission could rely to award TTD compensation.

{¶ 13} To determine Dr. Rodgers' C-84 and office notes do not constitute some evidence upon which the commission can rely to award claimant TTD compensation, the magistrate relied on *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St.3d 18, 2003-Ohio-2449. In that case, the Supreme Court of Ohio granted a writ of mandamus ordering the commission to vacate an award of TTD compensation because that claimant's medical evidence presented an unexplained repudiation of an earlier release and failure to acknowledge the claimant's return to work.

{¶ 14} The claimant in *Paasewe* was treated on June 7, 2000 by Dr. Sampson for a work-related injury. Dr. Sampson certified TTD for the claimant effective May 11, 2000, the date of injury. On July 6, 2000, the claimant was released to return to work with some restrictions. The claimant returned to work on July 13, 2000. After he was caught

sleeping on the job, the claimant was terminated from employment. At a hearing on October 2, 2000, the claimant presented a new C-84 from Dr. Sampson. Notwithstanding Dr. Sampson's prior release to work and the claimant's actual return to work, in the new C-84, Dr. Sampson, without any explanation, certified a continuous period of disability from May 1 through October 11, 2000. The *Paasewe* court stated, it "carefully scrutinized--and will continue to carefully scrutinize--claims for [TTD] 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." *Id*. at ¶ 7, citing *State ex rel. McClain v. Indus. Comm*., 89 Ohio St.3d 407 (2000).

{¶ 15} Though this case presents a certification of TTD compensation following a termination of employment, we conclude the medical evidence, and the commission's credibility determination regarding the same, passes the scrutiny required under *Paasewe*. Here, claimant's surgeon, Dr. Engles, released claimant to return to work without restrictions effective February 4, 2009. Claimant was terminated from his employment effective March 2, 2009. Claimant was examined by Dr. Engles on February 18 and March 18, 2009. While Dr. Engles opined work restrictions and additional therapy were not prudent, Dr. Engles indicated he would "refer [claimant] to Crystal Works the occupational medicine arm of the Crystal Clinic so that they can assist him with these issues and any other ongoing care." (Magistrate's Decision, 13.) Thereafter, claimant was examined by Dr. Rodgers, who is employed by Crystal Works. Dr. Rodgers completed a C-84 certifying TTD beginning April 7, 2009. Claimant was then examined by Dr. Jewell, who opined the requested disability period was not medically necessary.

{¶ 16} Thus, unlike *Paasewe*, which presented the same doctor, who without explanation certified TTD for the same period in which he previously released the claimant to work, this case presents conflicting medical evidence regarding a request for TTD compensation for a new period. "The commission is exclusively responsible for assessing the weight and credibility of evidence." *State ex rel. George v. Indus. Comm*., 130 Ohio St.3d 405, 2011-Ohio-6036, ¶ 11, citing *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18 (1987). In the within matter, the commission found the medical evidence of Dr. Rodgers credible. Such finding does not constitute an abuse of discretion.

{¶ 17} Because Dr. Rodgers' C-84 and corresponding office notes constitute some evidence upon which the commission can rely to grant claimant's request for TTD compensation, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Cherryhill Mgt., Inc. v. Indus. Comm.*, 10th Dist. No. 05AP-953, 2006-Ohio-4628, ¶ 21, citing *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987).

{¶ 18} Accordingly, claimant's and the commission's third objection is sustained.

{¶ 19} Our disposition of claimant's and the commission's third objection renders their second objection moot.

IV. CONCLUSION

{¶ 20} In summary, we overrule claimant's and the commission's first objection to the magistrate's decision and adopt the magistrate's findings of fact. Additionally, we overrule relator's sole objection and adopt that portion of the magistrate's decision finding the commission did not abuse its discretion in concluding claimant did not voluntarily abandon his employment. However, we sustain claimant's and the commission's third objection, their second objection is rendered moot, and we decline to adopt that portion of the magistrate's decision finding an abuse of discretion in the commission's award of TTD compensation for the period beginning April 7, 2009. Accordingly, relator's request for a writ of mandamus is denied.

Objections overruled in part and sustained in part;
writ of mandamus denied.

FRENCH and DORRIAN, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Viking Forge Corporation,	:	
Relator,	:	No. 11AP-226
v.	:	(REGULAR CALENDAR)
Kelly Perry and Industrial Commission of Ohio,	:	
Respondents.	:	

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

Rendered on February 29, 2012

Christopher J. Shaw, for relator.

Michael DeWine, Attorney General, and *Sandra E. Pinkerton*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 21} In this original action relator, Viking Forge Corporation, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding temporary total disability ("TTD") compensation to respondent Kelly Perry beginning April 7, 2009, and to enter an order denying the compensation.

Findings of Fact:

{¶ 22} 1. On September 26, 2008, Kelly Perry ("claimant") severely injured his left and right thumbs while employed as a forge press operator for relator, a state-fund employer. The injury occurred when claimant attempted to move an industrial fan that had not been turned off.

{¶ 23} 2. On September 26, 2008, the date of injury, claimant underwent surgery to repair his thumbs. The surgery was performed by Drew R. Engles, M.D. In his operative report, the operation is described:

> [One] Irrigation and debridement of the right thumb.
> [Two] Repair of 3 cm laceration of the right thumb.
> [Three] Revision amputation of the left thumb at the IP joint level.
> [Four] Open reduction, internal fixation of the left thumb proximal phalanx fracture.
> [Five] Bilateral digital neurectomy to the thumb.

{¶ 24} 3. The industrial claim (No. 08-371732) is allowed for:

> Amputation distal, left thumb; amputation tip, right thumb; fracture middle/proximal phalanx, hand-open, left thumb; open wound finger-complicated, left thumb.

{¶ 25} 4. Claimant remained off work and received TTD compensation until December 1, 2008. On that date, claimant returned to restricted duty work at Viking Forge. Dr. Engles prohibited the use of the left hand and he limited lifting for the right hand to ten pounds.

{¶ 26} 5. On January 21, 2009, claimant was examined by Dr. Engles for follow-up. Dr. Engles wrote:

> S: Mr. Perry returns for follow-up. He believes he is doing better but would like to have another two weeks before he returns to full duty.
>
> The patient still has some slight numbness to his right thumb. He denies any numbness to the left thumb but does have some occasional discomfort if he strikes it firmly in just the right position. Otherwise, he seems to be fairly comfortable at both thumbs. He does not report any problems at work.

> * * *
>
> A: [One] Satisfactory convalescence status post repair of flap laceration right distal thumb.
>
> [Two] Continued satisfactory convalescence status post revision amputation left thumb with ORIF of proximal phalanx fracture.
>
> P: I discussed with the patient that he appears to be doing quite well at this juncture. I do not believe he requires any further intervention from my standpoint. We will increase his work activities over the next two weeks and then allow him to go back to full work activities in two weeks time. I have asked that he contact me should there be any problems, questions, or concerns. Otherwise, I believe he may be discharged from active care at this juncture.

{¶ 27} 6. Effective February 4, 2009, Dr. Engles released claimant to return to work with no restrictions. On or about that date, claimant did return to his former position of employment as a forge press operator.

{¶ 28} 7. On February 18, 2009, claimant was again examined by Dr. Engles:

> S: Mr. Kelly Perry had called into the office concerned about some skin underneath his right thumbnail. He was originally concerned that this may have been some infection but apparently it was just a rim of dried keratinized skin which actually had become displaced and fallen off. He still has some thickening and hardening of the skin in his right thumb pulp and some occasional discomfort. On the left thumb he seems to be healing nicely and is much more comfortable over time.
>
> He currently rates his pain as a level of 4/10.
>
> * * *
>
> P: I discussed at length with the patient that he appears to be doing well and that his concerns about possible infection underneath his right thumbnail have already resolved when the keratinized tissue sloughed off.
>
> Apparently there has been some issue with his employer regarding approval of additional ICD 9 codes. The patient currently is only approved for 885.0 (amputation). This

> would be correct for the left thumb but incomplete and 816.11 (open fracture proximal phalanx) should be added for accuracy. With respect to the patient's right thumb, the code 885.0 (amputation) is incorrect and the code 883.1 (complicated wound of finger) should be utilized instead for accuracy.
>
> With this in mind, I believe the patient is doing well enough that he may be discharged from active care and no further intervention is anticipated from my standpoint. The patient is currently looking into a possible prosthesis and this can be handled through the occupational therapist who typically assists patients with these arrangements.

{¶ 29} 8. Effective March 2, 2009, claimant was terminated from his employment with Viking Forge. In a faxed letter dated April 29, 2009, from Viking Forge's Human Resources Manager, Helen Tauscher, the third-party administrator was informed of the job termination:

> [P]lease be advised the IW was separated from employment on March 2, 2009 for inadequate job performance. The essential duties of the job, Forge Line Technician, follow this cover. The written incident reports documenting the inadequate job performance follow this cover. In summary, the incident reports are:
>
> a. 9/17/08: Personal Protective Equipment (written warning)
> b. 12/05/08: Inadequate job performance (written warning)
> c. 12/10/08: Failure to sustain production standards (written warning)
> d. 2/01/09: Failure to sustain production standards and/or inadequate job performance (written warning)
> e. 2/04/09: Failure to sustain production standards and/or inadequate job performance (3-day suspension)
> f. 2/15/09: Special schedule created and given to IW itemizing appropriate job duties and whereabouts during work shifts
> g. 2/27/09: (Management Review for Termination) Failure to sustain production standards and Inadequate job performance.

{¶ 30} 9. On March 18, 2009, claimant was again examined by Dr. Engles who wrote:

> S: Mr. Kelly Perry returns for follow-up. He states he has been informed that his request for a prosthesis for his left thumb has been denied. The patient also states that he has been l[e]t go from his place of employment and wonders if he can be put back on work restrictions and continue his therapy.
>
> The patient currently rates discomfort in his right hand as a level of 4/10. He does not report any fevers, chills or signs of infection. He still has a hard area of scar in his right thumb pulp. He also states that he has phantom type symptomatology in his left thumb where he feels like he is grabbing for something and he does not have sufficient length to do the task.
>
> * * *
>
> P: I discussed with the patient that I am uncertain as to why his request has been denied for the thumb prosthesis. I will ask the therapist to submit their notes regarding this. With respect to the patient's request to go back onto work restrictions and for additional therapy, I do not believe this would be prudent. I believe that the patient has maximized the benefit of therapy. I do not believe he is a candidate for additional surgical intervention.
>
> As there are multiple issues regarding the patient's BWC claim and especially his recent denial, I will refer him to Crystal Works the occupational medicine arm of the Crystal Clinic so that they can assist him with these issues and any other ongoing care. We will have him complete a change of physician form for this.

{¶ 31} 10. On April 7, 2009, claimant completed form C-23 "Notice to Change Physician of Record." On the form, claimant indicated that he was changing his physician of record from Dr. Engles to Dr. Rodgers. In the space provided, claimant wrote the reason for the change: "No surgery issues any longer necessary."

{¶ 32} 11. On April 7, 2009, claimant was initially examined by Steven R. Rodgers, M.D., who is apparently employed by CrystalWorks. Dr. Rodgers wrote:

> Patient is a 40-year-old male who was working as a forge press operator at the time of injury. He was attempting to straighten a fan when both hands slipped through a gap and the blade struck both thumbs. There was a significant

> amputation of the left thumb and a right thumb tip amputation. He was seen that day at St. Thomas emergency room. Surgery was performed that night. A flap was reattached to the right thumb and the left thumb was amputated at the distal portion of the proximal phalanx. Since that time he has been followed by Dr. Engles. He has had 8 to 10 occupational therapy visits with some improvement. He is not sure if additional therapy would be helpful at this point. He has not been working. Pain level is 7 to 8 out of 10 and primarily on the right thumb distal phalanx. The left thumb essentially is not painful unless it is bumped. If that happens, he has severe pain with hypersensitivity. There is loss of sensation at the tip of the right thumb and he feels like there is decreased strength there. A left thumb prosthesis was requested, but apparently denied so far. He is hoping to retrain either working in the trucking industry or possibly as a writer.
>
> * * *
>
> [One] Patient is functioning reasonably well without pain medications. He may take over-the-counter pain medications as instructed.
> [Two] We will check with Dr. Engles' office regarding the request for a left thumb prosthesis and pursue this as necessary.
> [Three] We will formally request [an] occupational therapy FCE for the bilateral upper extremities to establish his current work ability.
> [Four] We will request vocational rehabilitation to help in possible job retraining.
> [Five] Switch POR status to us.
> [Six] Follow-up in one month.
> [Seven] Copy to Dr. Engles-consultation appreciated.

{¶ 33} 12. On April 7, 2009, Dr. Rodgers completed a C-84 on which he certified TTD beginning April 7, 2009, to an estimated return-to-work date of May 9, 2009. On the C-84, Dr. Rodgers indicated by marking the appropriate boxes that claimant is unable to return to his former position of employment but is able to return to other employment.

{¶ 34} 13. Dr. Rodgers' C-84 prompted the Ohio Bureau of Workers' Compensation ("bureau") to request a file review from Gregory Jewell, M.D. In his seven-page narrative report, dated April 15, 2009, Dr. Jewell wrote:

> The records document the injury and treatment with release to work on December 1, 2008 with restrictions of no use of the left hand and limited grip in the right hand. He was released to full duty work in early February 2009. The record of January 21, 2009 stated he reported no problems at work. The record of March 18, 2009 indicated that he had been let go from his place of employment. Therefore, Mr. Perry had no job for which to return. The hand surgeon did not believe additional therapy was necessary and released him from care. He was referred to occupational medicine for management if his claim though the occupational medicine record also documents Mr. Perry as doing reasonably well without pain medications and no sign of infection. He was referred for functional capacity evaluation and vocational rehabilitation which have been approved. From a medical perspective, the records do not reflect any significant change in circumstances that would support a period of temporary total disability from April 7, 2009 through May 8, 2009. It appears that he was functioning reasonably well and his examination shows no sign of infection or other complication that would necessitate absence away from work. The records reflect that he was let go from work for whatever reason and that he had no job to return to. In fact the "Request for Temporary Total Disability" form of April 7, 2009 stated he could return to another job with restrictions or restricted duty. Therefore, it is my opinion with a reasonable degree of medical certainty that the medical records fail to support any change in Mr. Perry's status which would require temporary total disability from a medical perspective. At this time it appears he does not have a job to return to though he could be provided restrictions and he has been released from the care of his hand surgeon (implying maximum medical improvement) and no additional treatment was recommended by the hand surgeon. Therefore, this becomes an administrative issue with regard to what benefits are available to Mr. Perry particularly considering his being let go from his prior employment, his need for vocational rehabilitation, and what benefits are available given his injury. However, from a medical perspective there does not appear to be any medical condition or medical procedure requiring significant restrictions or absence away from work. Therefore, it does not appear that from a medical perspective the requested period of disability is supported as medically necessary.

{¶ 35} 14. The record contains six documents captioned "Viking Forge Incident Report."

{¶ 36} The incident report of September 17, 2008 states:

> Tim Musil found Kelly Perry to be in the forge manufacturing facility without hearing protection. John Koontz also has witnessed Kelly on the forge line without his hearing protection. Further, Kelly was insubordinate with John Koontz when this particular matter was addressed in the production office. Kelly was also insubordinate with Tim Musil when Tim requested that he: "go and get earplugs now, regardless as to whether you had them on before."

(Emphasis deleted.)

{¶ 37} The incident report of December 5, 2008 states:

> Infraction: Inadequate job performance (Written Warning)
> (Page 27 of Viking Forge's policy and procedures manual)
>
> Summary: At 6:20pm on 12/05/08 Kelly was in the men's locker room cleaning up and changing his uniform. Note: Kelly is scheduled 7:00 am to 7:00 pm; clean up time is after 7:00 pm. This was an attempt to defraud Viking Forge out of man hours.
>
> Additional Comments: Note; Kelly has had several infractions from safety to quality if Kelly has another incident, he will be terminated immediately.

{¶ 38} The incident report of December 10, 2008 states:

> Infraction: Failure to sustain production standards (Written Warning)
> (Page 27 of Viking Forge's policy and procedures manual)
>
> Summary: (John Koontz) I noticed Kelly sitting in the break room at 9:00 AM and at 9:20 AM, Kelly exited the break room. Kelly knows breaks are 15 minutes, from the time you leave your job till the time you return to your job.
>
> Additional Comments: Kelly has been informed of this several times (verbally).

{¶ 39} The incident report of February 1, 2009 states:

> Infraction: Failure to sustain production standards and or inadequate job performance.
>
> Summary: Written warning, chopped hand luber this has been an ongoing problem with Kelly.
>
> Next infraction 3-day suspension...

{¶ 40} The incident report of February 4, 2009 states:

> Infraction: Failure to sustain production standards and or inadequate job performance.
>
> Summary: 3 day suspension, chopped hand luber this is an ongoing problem with Kelly. Starting 02/05/2009 Kelly can return to work on 02/13/2009.
>
> Next infraction review for termination...

{¶ 41} 15. On February 15, 2009, indicating his acceptance, claimant signed the following written instructions from his supervisor, Matthew C. Freiley:

> Due to it being so difficult to track your whereabouts throughout the day I have chosen to create a personal schedule for you to follow. You are to f[o]llow this schedule throughout the entire day. Any deviation of this schedule will result in an immediate write-up. It is only fair to you, your crew members, and Viking Forge Corp. that you perform your job duties and tasks in an efficient and timely manner. You have not displayed timely work habits or efficiency regardless of how often both myself and John Koontz have spoken with you.
>
> Criteria:
>
> Follow the schedule
> If the line goes down for any reason you are to immediately become involved in getting it up and running again.
> If a restroom break is needed you are to come to ME and I will relieve you.
> If you are unsure of anything else regarding these instructions you are to come to ME.
> Failure to do so will result in a write-up.

{¶ 42} 16. On February 15, 2009, Mr. Freiley sent the following e-mail to Ms. Tauscher:

> Just wanted to quickly explain the Kelly Perry letter and schedule in your in box. More often than not I will walk over to the 2500 National press line and find the crew wondering where Kelly went. I often find him in the break room, restroom or another department altogether talking to anyone who will listen. When asked why he is not on his press line it is always a different excuse. Since I can not be everywhere at once I decided to create a schedule for Kelly to follow. I gave a copy to Rob Roberts, who is the acting crew leader over there until Jeff Foster gets back from vacation, to help regulate this when I can't be there.

{¶ 43} 17. The (6th) incident report dated February 27, 2009 states:

> Infraction: (Management Review for Termination) Failure to sustain production standards an[d] Inadequate job performance. Kelly will be reviewed for termination on 03/02/2009.
> Page 27 of Viking Forge's policy and procedures manual
> Summary: While operating the 2500 Erie, Kelly miss-spotted in the blocker station, this is a difficult part to miss-spot.
> Additional Comments: This has been an ongoing problem with Kelly. On 02/04/2009 Kelly was suspended for three days without pay. Kelly has had numerous infractions over the last several months and has shown no signs of improvement. It is my recommendation that Kelly be terminated.

{¶ 44} 18. Following a May 12, 2009 hearing, a district hearing officer ("DHO") issued an order denying the C-84 request for TTD compensation beginning April 7, 2009. The DHO's order explains:

> It is the order of the District Hearing Officer that the C-84 Request For Temporary Total Compensation, filed by Injured Worker on 04/09/2009, is denied.
>
> It is the order of the District Hearing Officer that the request for temporary total disability compensation commencing 04/07/2009 to an estimated return to work date of 05/09/2009, and to continue upon submission of proof of disability based on the allowed for conditions in this claim is denied.

The District Hearing Officer does not find that the present evidence is persuasive that the Injured Worker has been rendered temporarily and totally disabled based on the allowed for conditions in this claim.

The District Hearing Officer finds that at the time of injury, the Injured Worker was employed in the capacity of a forge press operator.

The District Hearing Officer further finds that at the time of the Injured Worker's termination of his employment on 03/02/2009, he was continuing to perform his same job duties as a forge press operator.

The District Hearing Officer notes that the issue of voluntary abandonment was not presently an argument that was before the District Hearing Officer at this time.

The District Hearing Office[r] relies on the review of Dr. Jewell, who opined that the requested period of disability was not substantiated.

To the contrary, the District Hearing Officer notes that the Injured Worker last underwent physical therapy on 12/22/2008.

The Injured Worker was returned to work on 12/28/2008 [*sic*], with restrictions of no use of the left hand and no lifting greater than 10 pounds with the right hand. The Injured Worker testified, however, that he was working outside of this restriction.

The District Hearing Officer finds that on 01/21/2009, the Injured Worker was released from treatment and was to increase his work activities over the next two weeks and then released to full-duty work after two weeks time. The District Hearing Officer finds that on 02/18/2009, the Injured Worker was discharged from active care and that on 03/18/2009, the hand surgeon did not find it prudent to place the Injured Worker back on work restrictions and continued therapy based on his assessment that the Injured Worker had maximized the benefit of therapy. The District Hearing Officer finds the Injured Worker presented for treatment with Dr. Rodgers on 04/07/2009 and that the record stated that he could return to his position of employment.

> The District Hearing Officer does not find the evidence to substantiate that the Injured Worker was unable to perform his former position of employment as a forge press operator other than the fact that he had been terminated from this job effective 03/02/2009. To the contrary, the District Hearing Officer finds the manifest weight of evidence to substantiate that he was able to perform this position.
>
> Dr. Jewell opined that from a medical perspective, the medical records did not reflect any significant change in circumstances which would support a period of temporary total disability compensation commencing 04/07/2009 forward and that the Injured Worker was functioning reasonably well and his examination showed no signs of infection or other complication that would necessitate absence away from work. However, Dr. Jewell noted that the Injured Worker had no job in which to return with the Employer of Record based on his termination status.
>
> Accordingly, based on the totality of evidence in file, the District Hearing Officer does not find the present evidence persuasive in which to support the requested period of disability.
>
> Therefore, the C-84 is denied in its entirety.
>
> The District Hearing Officer has reviewed and considered all evidence prior to rendering this decision. This order is based on 04/15/2009 review of Dr. Jewell, office notes dated 01/21/2009, 02/18/2009, 03/18/2009 and evidence and arguments adduced at today's hearing.

{¶ 45} 19. Claimant administratively appealed the DHO's order of May 12, 2009.

{¶ 46} 20. Following a June 19, 2009 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of May 12, 2009 and grants the C-84 request for TTD compensation. The SHO's order explains:

> The Hearing Officer finds that the Claimant is to be paid temporary total compensation 04/07/2009 through 05/09/2009 inclusive and to continue upon submission of medical proof of disability for the allowed conditions in this claim.
>
> The Hearing Officer finds as did the District Hearing Officer that at the time that the Claimant was injured he was a ford

> [*sic*] press operator. At [the] hearing he testified that there were three positions on this press and that at the time of the injury as far as light duty was concerned he was working within his restrictions.
>
> The Hearing Officer finds that the Claimant at the time that he was terminated on 03/02/2009 was working on the second position when he indicated that a coworker came up and prohibited him from moving a piece of equipment out of the way which was destroyed by the press that he was operating. The Hearing Officer finds that the Claimant testified at [the] hearing that it was not his fault. The Employer has indicated at [the] hearing that based on the facts that the Claimant voluntarily abandoned his position with the instant employer. The Hearing Officer finds that position is not well taken.
>
> The Staff Hearing Officer finds that the District Hearing Officer's order is vacated and that the Claimant is to be paid temporary total compensation as indicated above.
>
> This order is based on the medical documentation in file from Dr. Rodgers and the Claimant's testimony at hearing.
>
> It must be noted that Dr. Engle[s] released the Claimant on 04/02/2009 and due to the fact that Dr. Engle[s] could no longer provide any services for the Claimant the Claimant at that time went to see Dr. Rodgers who indicated in a C-84 dated 04/07/2009 that the Claimant was still temporarily and totally disabled. This order is also based on the Claimant's testimony at hearing.

{¶ 47} 21. On July 11, 2009, another SHO mailed an order refusing claimant's administrative appeal from the SHO's order of June 19, 2009.

{¶ 48} 22. On August 21, 2009, the three-member commission, on two-to-one vote, mailed an order denying claimant's request for reconsideration.

{¶ 49} 23. The stipulated record contains three items that were first submitted by relator to the commission in support of its request for reconsideration. Those items are: (1) a two-page letter dated July 22, 2009 from Ms. Tauscher to the commission; (2) several pages copied from the Viking Forge Policy and Procedures Manual effective July

2007; and (3) an "Associate Acknowledgement Form" signed by claimant on August 18, 2008.

{¶ 50} 24. The July 22, 2009 Tauscher letter states in part:

> Background
>
> Viking Forge is a steel forging plant located in Streetsboro, Ohio. The plant manufactures various shaped parts for the trucking, automotive, motorcycle, and oil field pipeline industries. The parts are forged on presses capable of applying up to 4000 tons of pressure. The presses are operated by forge press operators who work in front of the press using a foot pedal to activate it and tongs to position the heated steel into the press.
>
> On September 8, 2008, after a six-month period of employment through a staffing agency, Kelly Perry was hired by Viking Forge to continue his duties as a forge press operator. A Policy & Procedure Manual outlining the policies of Viking Forge was issued to Mr. Perry, the injured worker. The signed acknowledgement form is included for your reference.
>
> In addition to other work[-]related policies, the Policy & Procedure Manual includes sections covering safety requirements and use of personal protective equipment. The Manual also includes a progressive discipline policy. These sections of the manual are shown on page 11 and pages 14-16 and are included for your reference.
>
> Facts
>
> A summary of the injured worker's history while employed by Viking is provided below and the referenced incident reports are available in the BWC file on this claim.
>
> On September 26, 2008, the IW sustained his injury by trying to move a 500-pound industrial fan without turning it off. The Policy & Procedures Manual states "each Associate is INDIVIDUALLY responsible for turning off the equipment" (page 15). The IW did not comply with this necessary duty. Instead, the IW's thumbs were struck by the spinning fan blade causing amputation of the distal phalanx of the left thumb and lacerating the tip of his right thumb. In addition to the medical treatment, payments and care, the

IW has received 30 weeks of permanent partial disability pay through the Bureau of Workers Compensation, amounting to $22,530.

The Policy & Procedure Manual states, "A vital part of your success at Viking Forge is adherence to all safety rules...If you violate Viking Forge safety standards, you may be subject to disciplinary action, up to and including termination of employment. Violations include causing a hazardous or dangerous situation..." (Page 14) Leniently, Viking Forge did not terminate the IW for his dangerous action and safety violation. Instead, the IW was paid Salary Continuation by Viking Forge while he was receiving medical care and until his physician allowed [him to] return to work with temporary restrictions on December 1, 2008.

Viking Forge honored the temporary restrictions set forth by the IW's physician, Dr. Engles. Viking Forge placed the IW on modified light duty, limiting his regular work duties to operation of the hand luber. (A hand luber is a wand used to apply lubrication to the die mounted in the forge press.) The luber is lightweight and can be operated easily with one hand. No accommodation was needed for the IW to perform this task as it was within the temporary restrictions set forth by Dr. Engles. The IW continued to perform these modified job duties through February 4, 2009.

On February 4, 2009, the IW's doctor released him to full duty. He had no further restrictions of any kind. From February 4, 2009 forward, the IW was physically able to perform all functions of the press operator job.

On February 27, 2009, the IW failed to pay attention to what he was doing while operating a 2500 ton forge press causing destruction to Company equipment and unnecessary down time. Specifically, the IW was responsible for placing a cylindrical piece of heated steel into a round die. The cylinder fits into the die only one way. The IW failed to pay attention to what he was doing and placed the cylindrical part under the forge press but not inside the die. The press then descended on the misplaced part, crushing the part and the die.

Several times previously, the IW had also failed to pay attention to what he was doing at work causing damage to Company equipment. The IW had also been disciplined

> previously for abandoning his work station. Due to the IW's repeated failure to sustain production standards and repeated inadequate job performance, the Company terminated his employment.
>
> At all times after February 4, 2009, when his doctor released him to full duty, the IW demonstrated that he was physically able to perform all of his essential work duties. His termination was unrelated to his physical abilities. It was only after his termination that the IW sought additional medical care. Even then, the IW's original treating physician provided no further care and never contradicted his February 4, 2009 pronouncement that the IW was fully capable of performing all essential functions of his job.

(Emphasis *sic*.)

{¶ 51} 25. On page 11 under "Discipline," the Viking Forge Manual states:

> A progressive discipline system is utilized to assure Associates that disciplinary actions are prompt, consistent, and impartial. The major actions of a disciplinary action is to correct an errant behavior, prevent it from happening again, and prepare the Associate for satisfactory performance in the future.
>
> Viking Forge reserves the right to go to step three or four of the progressive discipline plan in the event of a serious violation or extreme situations.
>
> * * *
>
> Violated work or plant rules will be handled on an anniversary year basis as follows:
> [One] The first offense will be a verbal warning which is documented in writing.
> [Two] The second offense will be given a written warning.
> [Three] The third offense will be given a written warning and three days off without pay.
> [Four] The fourth offense will result in a review for termination.

{¶ 52} 26. On page 15, under "General," the Viking Forge Manual states:

> Personal Protective Equipment, PPE, to be worn by all Associates while in the forge manufacturing facility (excluding office areas and rest rooms) includes: safety

> glasses, hard hat, hearing protection, and steel toe shoes. (Associates assigned to work in the Die Set Up department must have metatarsal protection in addition to steel toe.)
>
> Personal Protective Equipment, PPE, to be worn by all Associates while in the Tool & Die facility includes: safety glasses and steel toe shoes.

{¶ 53} 27. At Appendix II, Page 1, under "Inappropriate Conduct," the Manual states:

> The following are examples of conduct which generally will subject an employee to progressive discipline as outlined under Discipline and could result in immediate termination. It is understood that situations may arise that are not specifically covered and that Viking Forge retains the right to take disciplinary action as it deems appropriate in all situations. These are representative rather than all-inclusive of conduct for which disciplinary action will be taken.
>
> The following will subject an Associate to disciplinary action up to and including immediate termination.
>
> * * *
>
> Failure to sustain production standards and / or inadequate job performance.

{¶ 54} 28. At Appendix II, Page 2, the Manual states:

> The following are examples of conduct which will generally subject an Associate to progressive discipline.
>
> * * *
>
> Stopping work before the shift ends or deliberately restricting work output (stretching breaks, wasting time).

{¶ 55} 29. On March 8, 2011, relator, Viking Forge Corporation, filed this mandamus action.

Conclusions of Law:

{¶ 56} Two issues are presented: (1) does claimant's hearing testimony, as reported in the SHO's order, constitute some evidence upon which the commission can

and did rely to support its finding that claimant did not voluntarily abandon his employment at Viking Forge; and (2) is the C-84 of Dr. Rodgers and his corresponding office note of April 7, 2009 some evidence upon which the commission can and did rely to support the award of TTD compensation beginning April 7, 2009.

{¶ 57} The magistrate finds: (1) claimant's hearing testimony, as reported by the SHO, constitutes some evidence supporting the commission's finding that claimant did not voluntarily abandon his employment at Viking Forge; and (2) the C-84 of Dr. Rodgers and his corresponding office note of April 7, 2009 do not constitute some evidence supporting the award of TTD compensation.

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

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

{¶ 60} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), 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:

> We 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., 34 Ohio St.3d 42 (1987)] and [State ex rel. Watts v. Schottenstein Stores Corp., 68 Ohio St.3d 118 (1993)]— i.e., that an employee must be presumed to intend the consequences of his or her voluntary acts.

{¶ 61} In *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559, 561 (2001), 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.

{¶ 62} 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); *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 78 Ohio St.3d 409, 411 (1997).

{¶ 63} While there were a series of workplace incidents that allegedly led to claimant's job termination effective March 2, 2009, the last incident prior to termination occurred February 27, 2009. Prior to the February 27, 2009 incident, claimant had received a three-day suspension for an incident that occurred February 4, 2009, and he had been warned that another infraction could result in job termination.

{¶ 64} The February 27, 2009 incident is described in the incident report "[w]hile operating the 2500 Erie, Kelly miss-spotted in the blocker station, this is a difficult part to miss-spot."

{¶ 65} The record indicates that, had the February 27, 2009 incident not occurred, relator would not have been terminated effective March 2, 2009.

{¶ 66} Thus, it was the duty of the commission, through its SHO, to determine whether Viking Forge was justified in holding claimant accountable for miss-spotting the part on February 27, 2009. *State ex rel. Pounds v. Whetstone Gardens & Care Ctr.*, 180 Ohio App.3d 478, 2009-Ohio-66, ¶ 40 (10th Dist.).

{¶ 67} Relying on claimant's hearing testimony, the SHO, in effect, determined that Viking Forge was not justified in holding claimant accountable for the February 27, 2009 incident. The SHO sufficiently summarized the testimony of the claimant which was relied upon to support the determination that claimant was not at fault. As reported by the SHO, claimant testified that "a co-worker came up and prohibited him from moving a piece of equipment out of the way which was destroyed by the press that he was operating."

{¶ 68} 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.

{¶ 69} At the June 19, 2009 hearing, it was the duty of the SHO to determine the credibility of claimant's hearing testimony. Apparently, the SHO found claimant's testimony to be reliable and worthy of reliance. Thus, the SHO articulated some evidence supporting the finding that claimant did not voluntarily abandon his employment.

{¶ 70} Turning to the second issue, relator relies upon *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St.3d 18, 2003-Ohio-2449.

{¶ 71} In *Ohio Treatment Alliance*, the court issued a writ of mandamus ordering the commission to vacate its TTD award which was based upon reports from Dr. Sampson. Following his being fired on July 16, 2000, claimant, Eric Paasewe, obtained a C-84 from Dr. Sampson that certified TTD from May 11 through October 11, 2000, despite the doctor's prior release of the claimant to work and the claimant's actual return to work. The court found that Dr. Sampson's C-84's in effect repudiate his earlier release to work without explanation and, in fact, ignore claimant's actual return.

{¶ 72} In *Ohio Treatment Alliance*, the Supreme Court of Ohio states:

> "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.*, 89 Ohio St.3d 407 (2001). 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.
>
> 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.

Id. at 19-20.

{¶ 73} Here, claimant's orthopedic surgeon, Dr. Engles, released him to return to work with no restrictions on February 4, 2009. Claimant returned to his former position of employment as a press operator on or about February 4, 2009, and he continued to work with no restrictions up to the February 27, 2009 incident that got him fired. Just nine days prior to the February 27, 2009 incident, claimant was examined by Dr. Engles during a February 18, 2009 office visit which prompted Dr. Engles to write: "I believe the patient is doing well enough that he may be discharged from active care and no further intervention is anticipated from my standpoint."

{¶ 74} Just 19 days after the February 27, 2009 incident, claimant was again examined by Dr. Engles at his office. At that visit, on March 18, 2009, Dr. Engles wrote:

"The patient also states that he has been l[e]t go from his place of employment and wonders if he can be put back on restriction." As for claimant's request for restrictions, Dr. Engles wrote: "I do not believe this would be prudent."

{¶ 75} Claimant changed his physician of record to Dr. Rodgers who initially examined claimant on April 7, 2009 and completed a C-84 certifying TTD.

{¶ 76} The question before the SHO at the June 19, 2009 hearing was what had medically changed following claimant's employment termination at Viking Forge to support the credibility of Dr. Rodgers' C-84 certification of TTD.

{¶ 77} The commission here endeavors to answer the question by noting that claimant's medical status was not worry-free while he worked without restrictions as a forge press operator. As the February 18, 2009 office note indicates, claimant had to see Dr. Engles regarding "some thickening and hardening of the skin in his right thumb pulp and some occasional discomfort." Also, prior to his termination and while working without medical restrictions, claimant was trying to obtain a thumb prosthesis.

{¶ 78} In the magistrate's view, in order to pass the scrutiny presumably mandated by the *Ohio Treatment Alliance* case, this court must be able to point to something in the medical record that the SHO could have relied upon to indicate that something had changed since the job termination to support the credibility of Dr. Rodgers' C-84 certification. *See State ex rel. Extendicare Health Servs., Inc. v. Indus. Comm.* 10th Dist. No. 03AP-1201, 2004-Ohio-5255; *State ex rel. Honey Baked Ham of Ohio, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-503, 2004-Ohio-2496. If that evidence exists, it can only be found in the April 7, 2009 office note of Dr. Rodgers.

{¶ 79} But, in his April 7, 2009 office note, Dr. Rodgers wrote: "patient is functioning reasonably well without pain medications. He may take over-the-counter pain medications as instructed." While noting that "pain level is 7 to 8 out of 10 and primarily on the right thumb distal phalanx," Dr. Rodgers gives no indication that pain prohibits claimant from returning to his former position of employment or any other type of employment.

{¶ 80} Given the above analysis, the magistrate concludes that Dr. Rodgers' C-84 does not pass the scrutiny that is presumably mandated by the *Ohio Treatment Alliance* case.

{¶ 81} Accordingly, for all of the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of June 19, 2009 to the extent that it awards TTD compensation beginning April 7, 2009, and, in a manner consistent with this magistrate's decision, to enter an amended order that denies the request for TTD compensation beginning April 7, 2009.

/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).