[Cite as *State ex rel. Schade v. Indus. Comm.*, 2012-Ohio-4366.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dennis D. Schade, III,	:	
Relator,	:	
v.	:	No. 11AP-136
Industrial Commission of Ohio and Vendors Exchange International, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 25, 2012

Salisbury & Salisbury, and *Richard L. Salisbury*, for relator.

Michael DeWine, Attorney General, *Colleen C. Erdman*, and *John Smart*, for respondent Industrial Commission of Ohio.

Andrews & Wyatt LLC, *Thomas R. Wyatt*, and *Jerry P. Cline*, for respondent Vendors Exchange International, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Dennis D. Schade, III ("relator"), filed an original action in mandamus, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that denied relator temporary total disability ("TTD") compensation, and to enter an order granting that compensation.

{¶ 2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court grant a writ.

{¶ 3} As detailed in the magistrate's decision, relator suffered a work-related injury in December 2009. Kimberly Togliatti-Trickett, M.D., thereafter certified that relator could return to work with restrictions, and relator did so.

{¶ 4} On July 6, 2010, relator's employer, Vendors Exchange International, Inc. ("employer") terminated relator's employment. On July 13, 2010, Dr. Togliatti-Trickett completed a C-84 on which she certified a period of TTD beginning July 7, 2010, to an estimated return-to-work date of August 11, 2010.

{¶ 5} Following a September 2010 hearing, a district hearing officer denied relator's request for TTD. Following a November 2010 hearing, a staff hearing officer ("SHO") affirmed, expressly finding that relator voluntarily abandoned his employment due to a violation of a written work rule. The magistrate determined that the commission abused its discretion by denying TTD because it failed to weigh the evidence showing a relationship between relator's injury and the absences that led to his termination.

{¶ 6} All parties have filed objections to the magistrate's decision. The commission contends the following:

> The magistrate erred in finding that the commission had not considered the medical evidence in the file in denying TTD.

{¶ 7} Employer submits the following objections:

> [1.] The Magistrate ignored the standard of review in mandamus matters and ruled contrary to law, as there was some evidence to support the Industrial Commission's Decision.
>
> [2.] [Employer] objects to the magistrate's Factual Finding No. 6 as that factual finding fails to include the specific work restrictions for the 13 Medco-14s.

> [3.] [Employer] objects to the Magistrate's factual findings in that they fail to include the Relator's work attendance records which clearly distinguish between excused and unexcused absences and further distinguish paid time off for workers' compensation related treatment.
>
> [4.] [Employer] objects to the Magistrate's factual findings in that they fail to include [Employer's] employee handbook attendance policy.
>
> [5.] The Magistrate erred when he determined that "the record contains abundant medical evidence which, if found persuasive, could support commission findings that some or all of the absences were related to the industrial injury."

{¶ 8} Relator objects to Findings of Fact 19 and 20, which he contends are incorrect. He also submits the following objections to the magistrate's legal conclusions:

> 1. The employee's handbook policy viewed in the context of the employer's written warning failed to clearly define the prohibited conduct for which the employee was discharged.
>
> 2. The SHO relied upon the "testimony" of a witness who wasn't present at the SHO hearing.

{¶ 9} We begin with the commission's objection and employer's fifth objection, both of which contend that the magistrate erred by determining that the commission failed to consider or weigh the evidence. We agree.

{¶ 10} In his decision, the SHO analyzed the factual evidence relating to relator's termination, including relator's attendance/tardiness issues and the fact that he had walked off the job. The SHO rejected relator's argument that employer had failed to follow the progressive warning system contained within the employee handbook and his argument that the handbook was unclear. The SHO also stated: "Though the Injured Worker stated his absences related to his injury, the file is void of medical evidence to support that allegation." The magistrate inferred from this statement that the SHO failed to consider the medical evidence in the record, evidence the magistrate concluded could support a finding that some or all of the absences were related to relator's injury.

{¶ 11} As the commission and employer contend, however, the SHO did not state that the record was void of medical evidence. Rather, the SHO stated that the record was void of evidence to support relator's contention that his absences related to his injury. During the relevant time period, relator had been certified to return to work, and had returned to work, with restrictions. To be sure, the office visit notes show that he had several visits with Dr. Togliatti-Trickett between April and June 2010. She did not, however, certify TTD in that timeframe. Rather, when she eventually did so, the C-84 indicated TTD beginning July 7, the day *after* relator was terminated. Therefore, some evidence supports the SHO's conclusion that the record lacked evidence to support relator's allegation that he missed work because of his injury, and the commission did not abuse its discretion by so concluding. Accordingly, we sustain the commission's objection and employer's fifth objection. Our doing so renders employer's remaining objections moot.

{¶ 12} We turn, then, to relator's objections. First, relator contends that the magistrate incorrectly found that the order of the Bureau of Workers' Compensation was not administratively appealed. As relator notes, the record indicates that employer appealed that order. Accordingly, we sustain relator's objection to Finding of Fact 19. We delete the last sentence of that paragraph and state the following: "The employer appealed the bureau's order." Nevertheless, we conclude that this correction has no impact on the final outcome of this matter.

{¶ 13} Relator also contends that the magistrate's Finding of Fact 20 is incorrect. That finding states: "On May 10, 2010, the MCO approved the March 9, 2010 C-9 which relator had updated following the additional claim allowance." As relator notes, this approval was later withdrawn. Accordingly, we sustain relator's objection to Finding of Fact 20. We add the following: "This approval was later withdrawn." Again, however, we conclude that this clarification has no bearing on the final outcome of this matter.

{¶ 14} In his objections to the magistrate's legal conclusions, relator contends, first, that the employee handbook failed to define the prohibited conduct for which relator was discharged. Presumably, relator objects to the magistrate's failure to reach such a conclusion in his decision. We disagree.

{¶ 15} The focus of relator's argument is employer's alleged failure to follow the progressive discipline process outlined in the handbook. He argues that he had no way of knowing that he would be discharged after only the first step of discipline. Part of his reasoning appears to be that, because he had had so many absences, he could not have known that one more would lead to termination without additional discipline. As the SHO found, however, relator received a memorandum warning him that any further absences could result in discipline, up to and including termination, with or without notice. The SHO expressly found that relator "had a clear understanding of the prohibitive behavior and as of 04/14/2010 had a clear understanding that unless his attendance improved he would be terminated." There is some evidence in the record to support the SHO's finding, and the commission did not abuse its discretion in this respect. Accordingly, we overrule the objection.

{¶ 16} In his second objection to the magistrate's legal conclusions, relator contends that the SHO relied upon the testimony of a witness who did not appear at the hearing. The SHO's order states that "Mr. Coombs" appeared at the hearing and also states that the SHO relied upon "the testimony of Mr. Coombs" in reaching his decision. Relator and employer appear to agree that no "Mr. Coombs" appeared at the hearing. Employer states that a Mr. Schofield appeared at the hearing. Because our record does not include a transcript of the hearing before the SHO, we have no way of confirming whether Mr. Coombs, Mr. Schofield or anyone else appeared at the hearing. Even assuming that Mr. Coombs did not appear at the hearing, however, we fail to see any negative impact upon the SHO's resolution of the issues before him. No party argues here that the SHO did not understand the issues or the evidence before him. Therefore, we have no basis upon which to conclude that this apparent mistake made any substantive difference in the final outcome or that it demonstrates an abuse of discretion by the commission. Accordingly, we overrule the objection.

{¶ 17} For all these reasons, and based on our independent review, we adopt the findings of fact contained in the magistrate's decision, subject to the corrections we have noted. We decline to adopt the magistrate's conclusions of law. We sustain the commission's objection, sustain employer's fifth objection, and render employer's

remaining objections moot. We sustain relator's objections to the magistrate's findings of fact, as noted, and we overrule relator's objections to the magistrate's conclusions of law. We deny the requested writ of mandamus.

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

KLATT and SADLER, JJ., concur.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Dennis D. Schade, III,	:	
Relator,	:	
v.	:	No. 11AP-136
Industrial Commission of Ohio and Vendors Exchange International, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on November 7, 2011

Salisbury & Salisbury, and *Richard L. Salisbury,* for relator.

Michael DeWine, Attorney General, *Colleen C. Erdman,* and *John Smart,* for respondent Industrial Commission of Ohio.

Andrews & Wyatt LLC, Thomas R. Wyatt, and *Jerry P. Cline,* for respondent Vendors Exchange International, Inc.

IN MANDAMUS

{¶ 18} In this original action, relator, Dennis D. Schade, III, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order that denies, on eligibility grounds, temporary total disability ("TTD")

compensation from July 7, 2010 through September 16, 2010 ("closed period"), and to enter an order that adjudicates on the merits relator's request for TTD compensation.

Findings of Fact:

{¶ 19} 1. On December 11, 2009, relator injured his lower back while employed as a laborer for respondent Vendors Exchange International, Inc. ("Vendors" or "employer"), a state fund employer. According to his application for workers' compensation benefits, on that date, relator "bent over to grab a box and felt a sharp pain in the lower back, [he] could not move."

{¶ 20} 2. On the date of injury, i.e., December 11, 2009, relator was transported to the emergency room of Parma Community General Hospital for examination and treatment. In his emergency room report, Samuel Pagano, M.D., wrote:

> HISTORY OF PRESENT ILLNESS: This is a 27-year-old male. He was bending over to lift up a box at work and he developed sudden pain to his lower back. He was actually not lifting during the time the pain started. He states he was just bending over. He had a previous twisting injury three or four years ago, but never has had any x-rays of his back. There have been no problems with bowel or bladder functions. He states when it happened his legs went numb, but that was short lived for less than one minute, but he still was not able to get up and move secondary to the pain. The patient was brought in here via ambulance for evaluation.
> * * *
>
> * * *
>
> TREATMENT AND DISPOSITION: The patient initially declined pain medication, but he agreed to after coming back from x-ray, he will like to try something for pain, so we will give him 30 mg of Toradol IV. He did not want anything stronger than this, but he is still having a lot of pain, so patient after reexamination I discussed with him we would try and get him more comfortable. He verbalized understanding,

> so he was given 1 mg of Dilaudid IV and 12.5 mg Phenergan IV. Our plan will be to discharge the patient home with a prescription for Percocet, Flexeril and Motrin and off work until he is rechecked by Employers' Health Source. * * *

{¶ 21} 3. On December 15, 2009, relator returned to light-duty work at Vendors. He remained at light-duty work until his job termination on July 6, 2010.

{¶ 22} 4. On December 23, 2009, Vendors certified the industrial claim (No. 09-369730) for "sprain lumbar region."

{¶ 23} 5. Earlier on December 15, 2009, attending physician Kimberly Togliatti-Trickett, M.D., completed a Physician's Report of Work Ability on a form (Medco-14) provided by the Ohio Bureau of Workers' Compensation ("bureau"). Dr. Togliatti-Trickett indicated that relator could return to work with restictions beginning December 15, 2009. On the form, Dr. Togliatti-Trickett wrote "sedentary duty only."

{¶ 24} 6. Thereafter, between the first Medco-14 completed December 15, 2009 and the date of the job termination, Dr. Togliatti-Trickett completed 13 additional Medco-14s that periodically certified that relator could return to work with restrictions.

{¶ 25} 7. The record contains multiple typewritten office notes documenting multiple office visits with Dr. Togliatti-Trickett beginning December 29, 2009 through June 21, 2010, which was the date of the last office visit prior to the July 6, 2010 job termination.

{¶ 26} 8. The April 20, 2010 office note states:

> **Subjective:**
> Chief Complaint: Low Back Pain.
> Present Illness: He is having an increase in pain in the low back and left leg. His pain has worsened over the weekend.

> He is not in therapy at this time. He is not taking any medications. He has naproxen and flexeril and they do nothing for his pain.
>
> He feels like he is getting stabbed and poked and burnt on the left lateral leg.
>
> Pain level 8/10. Better – nothing
> Worse – standing, walking, sitting.
>
> He is working with restrictions.
>
> * * *
>
> **Assessment:**
> **Diagnosis:**
> Lumbar Strain 847.2
>
> **Plan:**
> **Prescriptions:**
> elavil 10 mg 2 po qhs #60 rf x 1
> vicodin 5/500 1 – 2 po q 4-6 hrs prn #30 rf x 1
> Neurontin 100 mg 1 po qhs x 1 wk, then bid x 1 wk, then tid #90 rf x 0
>
> **Other Treatment:**
> Trial of elavil and neurontin for his pain. Awaiting decision of additional allowances to proceed with continued treatment.

{¶ 27} 9. The May 4, 2010 office note states:

> **Subjective:**
> Chief Complaint: Low Back Pain.
> Present Illness: He is overworked at work. HE is doing the same thing as everybody else all day. He is on his feet for 8 straight hours.
>
> He was set up for injections at Kaiser and it is on hold for BWC.
>
> We are awaiting for additional allowances for his back. His pain is in his back. He is having a burning

sensation in the left leg but the numbness is gone. HE is doing an extension program.

He is on the neurontin, vicodin and elavil qhs.
Review of Systems: Neurologic – numbness in both legs when he walks or stands in the same spot for too long. Sitting is ok with no numbness and then it is present when he stands.

* * *

Assessment:
Diagnosis:
Lumbar Strain 847.2

Plan:
Other Treatment:
Continue with work restrictions, medicaxtions [sic], HEP – extension program, and await decision for ESI's.

{¶ 28} 10. The May 11, 2010 office note states:

Subjective:
Chief Complaint: Low Back Pain.
Present Illness: He is on his feet all day long and the pain has increased. He is unable to sit all day long. He wants to stay working but can not [sic] be on his feet all day with bending and twisting.

8/10 pain.
Review of Systems: Neurologic – numbness in both legs when he walks or stands in the same spot for too long. Sitting is ok with no numbness and then it is present when he stands.

* * *

Assessment:
Diagnosis:
Lumbar Strain 847.2
Lumbar Disc Herniation 722.10

Plan:
Other Treatment:

C9 approved for consult with surgeon and ESI's. Work restrictions with less bending and standing. Continue with elavil and neurontin for pain management.

{¶ 29} 11. The May 24, 2010 office note states:

Subjective:

Chief Complaint: Low Back Pain.
Present Illness: He is going to have injections this week with Dr. Salewski. He also saw Dr. Fulop and is going to await the injections and see his response prior to work on injections.

* * *

Assessment:
Diagnosis:

Lumbar Strain 847.2

Plan:
Prescriptions:

Physical Therapy Dx lumbar strain, lumbar disc herniation Eval and Treat – neutral spine stabilization
elavil 10 mg 2 po qhs #60 rf x 1
Neurontin 100 mg 1 po tid #90 rf x 0

Other Treatment:

Await LESI's and continue with work restrictions. Start lumbar stabilization exercises.

{¶ 30} 12. The June 21, 2010 office note states:

Subjective:

Chief Complaint: Low Back Pain.
Present Illness: He did have the first injection and the 2nd two injections were denied.

He is awaiting on additional allowance of lumbar disc herniation.

The first injection was painful for the first couple of days and then the pain was better after that. He was having waxing and waining [sic] pain after that and it felt worse at that time.

> Pain level 5/10 pain in the lower lumbar spine wrapping around to his stomach. He is having no pain in the leg.
>
> He is still working light duty.
> Review of Systems: Neurologic – Occassional [sic] numbness in the legs, less than prior.
>
> * * *
>
> **Assessment:**
> **Diagnosis:**
> Lumbar Strain 847.2
>
> **Plan:**
> **Other Treatment:**
> Await approval for the LESI's and continue with work restrictions. Start lumbar stabilization exercises with therapy once therapy is reapproved. awaiting additional allowances for this claim.

{¶ 31} 13. Following the July 6, 2010 job termination, relator next visited Dr. Togliatti-Trickett on July 13, 2010. That office note states:

> **Subjective:**
> Chief Complaint: Low Back Pain.
> Present Illness: Since his last visit he was let go on 7/6/10. HE was working light duty and is unable to find employement [sic]. His back is sore. He will have leg pain here and there.
>
> Pain level 6/10 overall. He is taking elavil and neurontin 2 days ago.
>
> HE is await [sic] approval of the lumbar disc herniation and the 2nd injections to the LS spine.
>
> His legs will shake at night like he was having a seizure. He will get little shakes in his legs.
>
> HE did increase the elavil to 25 mg qhs and it is helping. The neurontin is also helping.

> He did see Dr. Fulop and ? of surgicval [sic] intervention.
> Review of Systems: Neurologic – Occasional numbness in the legs, less than prior.
>
> * * *
>
> **Assessment:**
> **Diagnosis:**
> Lumbar Strain 847.2
>
> **Plan:**
> **Prescriptions:**
> Physical Therapy lumbar strain – Eval and Treat – work on neutral spine stabilization exercises #2-3.
> **Other Treatment:**
> He is now off work and can not [sic] return to his regular job. Await approval for the LESI's and continue with work restrictions. Start lumbar stabilization exercises with therapy once therapy is reapproved. awaiting additional allowances for this claim. C9 for a physical therapy program.
>
> Waiting on additional allowance of lumbar disc herniation and continued LESI's.
>
> Motrin/Ibuprofen 400 mg po up to 4x a day as needed for pain.

{¶ 32} 14. On July 13, 2010, Dr. Togliatti-Trickett completed a C-84 on which she certified a period of TTD beginning July 7, 2010 to an estimated return to work date of August 11, 2010.

{¶ 33} 15. Earlier, on February 24, 2010, relator underwent an MRI of the lumbar spine. The MRI report states:

> **IMPRESSION:**
>
> 1. Central and left central disc herniation at L3/L4.
> 2. Left central disc herniation at L4/L5 which may impinge the left L5 nerve root.

{¶ 34} 16. On March 9, 2010, Dr. Togliatti-Trickett completed a C-9 requesting authorization for "lumbar epidural steroid injections" times three.

{¶ 35} 17. On March 12, 2010, the employer's Managed Care Organization ("MCO") denied the C-9 dated March 9, 2010 on grounds that the request cannot be supported by the claim allowance which was at that time allowed only for "sprain lumbar region."

{¶ 36} 18. On March 22, 2010, relator moved for an additional claim allowance. In support, relator submitted the report of the February 24, 2010 MRI.

{¶ 37} 19. On May 6, 2010, the bureau mailed an order additionally allowing the claim for lumbar disc displacement L3-4 and L4-5. [The employer appealed the bureau's order.]

{¶ 38} 20. On May 10, 2010, the MCO approved the March 9, 2010 C-9 which relator had updated following the additional claim allowance. [This approval was later withdrawn.]

{¶ 39} 21. The record indicates that relator received the three authorized lumbar epidural injections.

{¶ 40} 22. By written memorandum dated April 14, 2010 from plant manager Don Schofield, relator was informed:

> Effective today you are receiving this Written Warning regarding your overall dependability. I have looked at the first quarter of the [sic] 2010 and determined that many people in this department have abused the attendance policy.

> Although we understand you may have personal reasons to be out or tardy, it is that these incidents are excessive and our ability to service customers suffers when you are not in. You have been tardy on 4 occasions, clocked out early on 9 occasions, and used unplanned PTO on 7 occasions since January 1st. This is excessive and violates our policy.
>
> Please understand that if immediate, sustained and consistent improvement is not seen in your overall dependability, further corrective action up to and including your termination from employment may occur with our [sic] without notice.

{¶ 41} 23. Relator signed the written memorandum. Also, on April 16, 2010, upon signing the memorandum, Mr. Schofield wrote in his hand "Injury has played part in absence according to Dennis."

{¶ 42} 24. By letter dated July 6, 2010 from Mr. Schofield, relator was informed:

> It is with regret that I inform you of your release of employment effective your last day worked, today, July 6, 2010 for violation of company work rules including failure to inform a manager properly by telephone or other means when unable to report to work or other reasons as well as leaving the workplace during working hours without permission.
>
> On July 1st you did not call in to report your absence to any member of the management team and on July 2nd without communication to any member of the supervisor or management team, you left work without permission at 10:30 a.m.
>
> Additionally, your attendance and overall dependability has been a concern and addressed with you. These most recent incident [sic] indicates your lack of commitment to your position here at Vendors.

{¶ 43} 25. The record contains a memorandum dated July 6, 2010, authored by Mr. Schofield. Captioned "Meeting Recap," the memorandum states:

> I called a meeting with Dennis Shade II, and Robert Coombs today.
>
> I discussed the events of last week in which Dennis didn't call or show for work on Thursday, and then left the facility without notice very early on Friday after being assigned a task by Robert.
>
> Dennis said that he over slept and didn't think he needed to call in on Thursday. Dennis also felt that he didn't need to finish the day Friday due to a power outage.
>
> When I asked, Dennis admitted he was aware of the fact that company policy requires calling off and was unsure why he actually decided not to call. I then asked him if he had been assigned a job by Robert on Friday. Dennis acknowledged the job assignment, but was unable to justify walking off the job, other than saying he heard Theresa comment that if they didn't finish the day they would not be paid. That comment was made well before he was assigned the new task by Robert, and only after Robert came to check Dennis['] progress did he realize Dennis had left the building abandoning the job.
>
> I then terminated Dennis due to his failure to follow company policy.

{¶ 44} 26. Following a September 16, 2010 hearing, a district hearing officer ("DHO") issued an order denying the C-84 request for TTD compensation beginning July 7, 2010. The order indicates that "Ms. Hosey" and "Mr. Coombs" appeared before the employer.

{¶ 45} 27. Relator administratively appealed the DHO's order of September 16, 2010. Following a November 4, 2010 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order. The SHO's order of November 4, 2010 explains:

> The order of the District Hearing Officer, from the hearing dated 09/16/2010, is affirmed.

It is the order of the Staff Hearing Officer that the Injured Worker's C-84, filed 07/13/2010, is denied.

It is the order of the Staff Hearing Officer that temporary total disability is DENIED from 07/07/2010 through 09/16/2010 (closed period). The Staff Hearing Officer finds that the Injured Worker has voluntarily abandoned his employment due to a violation of a written work rule. Pursuant to the holding in State ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995) 72 Ohio St.3d 401, a justifiable discharge for misconduct can constitute a voluntary abandonment of the Injured Worker's former position of employment and acts as a bar to the receipt of temporary total disability compensation.

The Injured Worker was discharged for cause by the Employer of record on 07/06/2010. The Injured Worker's attendance/tardiness issues in 2010 caused him to be subject to termination pursuant to the Employee Handbook. Furthermore, the Injured Worker walked off of the job 07/05/2010. The Injured Worker testified that he knew such offenses could lead to termination. While the Injured Worker argued that the Employer of record did not follow the written progressive warning system found in the Employee Handbook, the Staff Hearing Officer finds that the termination was for cause and pursuant to the Employee Handbook. While the handbook indicates that various written warnings and suspensions may occur prior to termination, there is not specific requirement that the written warnings and/or suspension must be issued. The Injured Worker argues that the policy is thus not clear. The Staff Hearing Officer disagrees and finds that the Injured Worker had a clear understanding of the prohibitive behavior and as of 04/14/2010 had a clear understanding that unless his attendance improved he would be terminated. Though the Injured Worker stated his absences related to his injury, the file is void of medical evidence to support that allegation.

Pursuant to Louisiana-Pacific Corporation, termination from employment can disqualify one from receiving TTD compensation if the Injured Worker violated a written work rule that: Clearly defined the prohibited conduct; had been previously identified by the Employer as a dischargeable

offense; and was known or should have been known to the employee.

The clearly defined and prohibited conduct is the excessive unexcused absences. This conduct was previously identified as a dischargeable offense based upon the written handbook on page 35 and this was know[n] to the employee as evidenced by his testimony and most importantly by the Written Warning dated 04/14/2010 which stated:

"You have been tardy on 4 occasions, clocked out early on 9 occasions, and used unplanned PTO on 7 occasions since January 1st. This is excessive and violates our policy.

Please understand that if immediate, sustained and consistent improvement is not seen in your overall dependability, further corrective action up to and including your termination from employment may occur with or without notice."

The Staff Hearing Officer finds that the written policy was clear and unambiguous regarding both the dischargeable offense, unexcused absences, and the consequence, termination, and that the Injured Worker knew about the policy and its consequences by virtue of the 04/14/2010 written warning.

The Injured Worker argued that the policy was not clear as the policy states that the Employer "may" issue written warnings after the subsequent unexcused absences and that the Employer did not follow the written policy by its failure to provide a written warning after the absences subsequent to the 04/14/2010 written warning.

After this written warning on 04/14/2010, the Injured Worker had up to eight additional unexcused absences. The Injured Worker was then terminated on 07/06/2010 after the incident dated 07/05/2010.

The Staff Hearing Officer finds that these facts in this case meet the three elements of the Louisiana-Pacific Corporation case as explained above. Therefore, the Injured Worker's violation of a written work rule acts as a voluntary

> abandonment which bars the receipt of temporary total disability compensation.
>
> The Staff Hearing Officer has reviewed the evidence in file prior to rendering this decision. This order is based on State ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995) 72 Ohio St.3d 401, the Employee Handbook, the Injured Worker's testimony, the testimony of Ms. Hosey, the testimony of Mr. Coombs, the written warning dated 04/14/2010 and the termination letter dated 07/06/2010.

{¶ 46} 28. The SHO's order of November 4, 2010, indicates that "Ms. Hosey" and "Mr. Coombs" appeared for the employer. All parties to this action agree that Mr. Schofield appeared for the employer and not Mr. Coombs.

{¶ 47} 29. On December 8, 2010, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of November 4, 2010.

Conclusions of Law:

{¶ 48} The dispositive issue is whether the commission abused its discretion as to the question of whether the job termination was related to the industrial injury.

{¶ 49} Finding that the commission abused its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 50} 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.

{¶ 51} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.,* 72 Ohio St.3d 401, 403, 1995-Ohio-153, the claimant was fired for violating the employer's policy prohibiting three consecutive unexcused absences. The court held that the claimant's discharge was voluntary, stating:

> * * * [W]e find it difficult to characterize as "involuntary" a termination generated by the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been know to the employee. Defining such an employment separation as voluntary comports with *Ashcraft* and [*State ex rel. Watts v. Schottenstein Stores Corp.,* 68 Ohio St.3d 118, 1993-Ohio-133]—*i.e.,* that an employee must be presumed to intend the consequences of his or her voluntary acts.

{¶ 52} In *State ex rel. McKnabb v. Indus. Comm.,* 92 Ohio St.3d 559, 561, 2001-Ohio-1285, the Ohio Supreme Court held that the rule or policy supporting an employer's voluntary abandonment claim must be written. The Supreme Court explained:

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

> important when dealing with employment terminations that may block eligibility for certain benefits.

(Emphasis sic.)

{¶ 53} In *State ex rel. Leaders Moving & Storage Co. v. Indus. Comm.,* 10th Dist. No. 05AP-455, 2006-Ohio-1211, this court held that the employer's written warnings or reprimands regarding its employee's work absences must be considered along with the employee manual in determining whether the employer had clearly defined the prohibited conduct for which the employee was discharged.

{¶ 54} Here, besides Vendors' employee handbook setting forth Vendors' attendance and tardiness policy, relator was issued a written warning on April 14, 2010. Relator alleges here that the employee handbook fails to clearly define the prohibited conduct, and relator suggests that the April 14, 2010 written warning represents an impermissible change in Vendors' progressive disciplinary policy set forth in the handbook. But this court's decision in *Leaders* indicates that the employer's handbook policy must be viewed in the context of any written reprimands that precede the job termination.

{¶ 55} In *Leaders,* this court issued a writ of mandamus ordering the commission to address "whether claimant's absences and, therefore, his termination were related to his injury." Id. at ¶23.

{¶ 56} The magistrate finds here that the commission abused its discretion in addressing the question of whether the job termination was related to the industrial injury. In his order of November 4, 2010, the SHO states:

> * * * Though the Injured Worker stated his absences related to his injury, the file is void of medical evidence to support that allegation.

{¶ 57} Clearly, the SHO is incorrect in stating that the file is void of medical evidence to support relator's claim that his work absences were related to his industrial injury. Indeed, the record contains abundant medical evidence which, if found persuasive, could support commission findings that some or all of the absences were related to the industrial injury. Here, the SHO, in effect, improperly avoided the commission's duty to weigh the medical evidence by simply declaring that such evidence does not exist. In that regard, the commission abused its discretion.

{¶ 58} Accordingly, for all 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 October 4, 2010, and, in a manner consistent with this magistrate's decision, enter a new order that appropriately determines whether relator voluntarily abandoned his employment at Vendors.

/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).