[Cite as *State ex rel. Wilkes v. Indus. Comm. of Ohio & Warren Tube Co.*, 2010-Ohio-1648.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. William J. Wilkes,	:	
Relator,	:	
v.	:	No. 09AP-216
Industrial Commission of Ohio and Warren Tube Company/Bull Moose Tube Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on April 13, 2010

Urban Co., L.P.A., and *Anthony P. Christine*, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Law Office of George H. Rosin LLC, and *George H. Rosin*, for respondent Warren Tube Company/Bull Moose Tube Company.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, William J. Wilkes ("relator"), commenced this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial

Commission of Ohio ("commission"), to vacate its order denying him temporary total disability ("TTD") compensation beginning December 19, 2007, on grounds that he voluntarily abandoned his employment, and to enter a new order that adjudicates his request for TTD compensation without finding that he voluntarily abandoned his employment.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended hereto. Therein, the magistrate concluded that the commission did abuse its discretion and recommended that this court issue the requested writ of mandamus. Respondent, Warren Tube d/b/a Bull Moose Tube ("respondent"), filed objections to the magistrate's decision, and relator filed a memorandum contra those objections. This cause is now before the court for a full review.

{¶3} As the magistrate aptly explained, the issue before this court is "whether the employer's written rules regarding its post-accident drug screen policy clearly defined the conduct for which relator was discharged." Post, ¶ 54. See *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm*. (1995), 72 Ohio St.3d 401, 403. Relator was terminated for departing a local hospital emergency room, at which he had sought treatment approximately 36 hours after his injury, without providing a urine specimen to hospital personnel.

{¶4} In its termination letter to relator, respondent explained the reason for termination as follows: "[B]efore you could be fully diagnosed and treated for this alleged [work-related] injury, you left the hospital without taking the required Drug and Alcohol Test." Post, ¶ 20. Respondent went on to cite language from relator's union contract

stating that termination will result for "an employee who refuses to produce/provide a specimen or otherwise fully cooperate in the test process." Id., quoting Article 17 of the labor agreement. Respondent stated, "[u]nfortunately, you elected not to cooperate in the required testing process." Id.

{¶5} The magistrate concluded that the commission abused its discretion because: (1) there is no evidence that the hospital intended to use relator's urine specimen to test for the drugs listed in respondent's written drug-testing policy, and (2) there is no evidence that the hospital was acting on respondent's behalf or in accordance with respondent's written drug-testing policy.

{¶6} In its objections respondent argues that there is nothing in the applicable written policies that limits relator's obligation to provide a urine sample to requests made only by the employer or its agent. It further contended that it was not an abuse of discretion for the commission to infer that relator left the hospital because he knew he was going to be tested for drugs, whether or not the hospital was aware of respondent's drug-testing policy or communicated to relator that it was acting in accordance therewith. In his memorandum contra, relator argues that respondent is re-arguing the same points it argued before the magistrate, which is not the appropriate use of objections under Civ.R. 53. Relator also points out that while respondent's written drug-testing policies do state what circumstances will trigger the need for a test, they do not specify when testing is to be performed, who can request it or where it may take place. Relator also points out that nothing in the applicable policies states that employees must undergo testing on their own.

{¶7} Even if we assumed that the hospital's purpose for collecting a sample of relator's urine on December 2, 2007 was to test it for the same substances enumerated in respondent's written drug-testing policy, there is no evidence that relator was aware or should have been aware that if the hospital requested a urine sample from him, it would be used as part of the "test process" to which Article 17 of the labor agreement refers. None of the written policies upon which respondent relies sets forth the scope of the "test process" in such a way as would make it clear that lab work ordered at the Sharon Regional Health System's emergency department, well after relator's work-related injury, would be part of the "test process" with which relator was required to cooperate. Moreover, there is no evidence of record that the hospital ever actually requested a urine sample from relator before he left. The lab order (which is a checked box on a form) in the emergency room records is not evidence that a request for a urine sample was ever *communicated to relator*.

{¶8} Without evidence that a request was communicated to relator, or that any such request was part of "the test process" with which relator was required to cooperate pursuant to Article 17 of his labor contract, it is impossible to conclude that relator's departure from the hospital constituted a refusal to provide a sample or a similar manner of being uncooperative with "the test process." Accordingly, the commission's decision is not supported by "some evidence" and was an abuse of discretion.

{¶9} For this reason, we find respondent's objections not well-taken. Upon our thorough and independent review of the record and the arguments of the parties, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, we overrule respondent's objections, and we grant the

requested writ of mandamus and order the commission to vacate its order denying relator's request for TTD compensation beginning December 19, 2007, and to enter a new order that adjudicates relator's request for TTD compensation without finding that relator voluntarily abandoned his employment.

Objections overruled;
writ of mandamus granted.

TYACK, P.J., and McGRATH, J., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Relator,	:	
v.	:	No. 09AP-216
Industrial Commission of Ohio and Warren Tube Company/Bull Moose Tube Co.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on December 10, 2009

Urban Co., L.P.A., and *Anthony P. Christine*, for relator.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

Law Office of George H. Rosin LLC, and *George H. Rosin*, for respondent Warren Tube Company/Bull Moose Tube Company.

IN MANDAMUS

{¶10} In this original action, relator, William J. Wilkes, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation beginning

December 19, 2007 on grounds that he voluntarily abandoned his employment by being discharged for an alleged violation of his employer's written policy regarding post-accident testing for drugs and alcohol, and to enter an order that adjudicates his request for TTD compensation absent the finding that he voluntarily abandoned his employment.

Findings of Fact:

{¶11} 1. On December 1, 2007, relator injured his right shoulder when he tripped over a pry bar on a catwalk and landed on his outstretched right arm. On the date of injury, relator was employed as a "table man" at a mill operated by respondent Warren Tube Company dba Bull Moose Tube Company ("employer"). The "table man" job required heavy physical labor.

{¶12} 2. The December 1, 2007 injury occurred about 2:30 a.m. on a Saturday morning during a shift that began at 11:00 p.m. on Friday and ended at 7:00 a.m. on Saturday. Relator was able to finish his shift that Saturday morning.

{¶13} 3. On Sunday, December 2, 2007, relator presented on his own to the Emergency Room ("ER") at St. Joseph Health Center ("St. Joseph"). The ER records indicate 1435 hours as the triage time. At 1510 hours, an ER nurse wrote: "[Patient] not in room. Gown on bed. [Patient] eloped." An ER "lab order" indicates that relator was to give a urine specimen. That record indicates that relator was seen at 1455 hours. Under "diagnosis" is written: "[Patient] left AMA." Presumably, "AMA" means "against medical advice."

{¶14} On another ER record of December 2, 2007 signed by the ER physician and resident, it is written: "[Patient] left AMA before an evaluation could be done."

{¶15} 4. On Monday, December 3, 2007, relator called his employer and left a message that he would not be reporting for work that day. His message did not state that he had been injured at work on December 1, 2007. Relator similarly called in and left messages on December 3 and 4, 2007. On the afternoon of December 5, 2007, relator called in again and this time he informed the personnel coordinator that he had been injured at work on December 1, 2007. During that call, relator was told to bring in the paperwork from the hospital visit. Relator showed up on Friday, December 7, 2007 without the requested paperwork.

{¶16} 5. On Friday, December 7, 2007, plant manager David A. Thompson met with relator in the presence of Pete Kefalas. Thereafter, the meeting was memorialized with a three-page handwritten memorandum signed by Thompson. The memorandum states in part:

> I told Bill that everything from the get go was done wrong. That he has been here long enough to know how the policy goes. Told him first he needs to report to a supervisor, then you need to go to our covered hospital and a doctor for evaluation. I asked him did he have something to hide that day as to not to go and get a Drug or Alcohol test because he smelled like alcohol when he was talking to me and Pete. He said he didn't have a problem and he only had a beer in the morning.
>
> Told Bill he would have to go to our Doctor if he is considering this as a accident on duty and that he would be responsible for his own Doctors bill.
>
> * * *
>
> Also Gary Bell said he seen you at the gas station Saturday morning after work and you just waved at him.
>
> Told Bill that I would challenge this accident through the BWC when it came across my desk.

> Told Bill to go to our Doctor Monday and let them know we have transitional duty for him to perform and make sure they give us limitations for the duties.
>
> Told Bill I was very disappointed in his actions that he has been here long enough to know the process of a accident on duty.

(Sic passim.)

{¶17} 6. On Monday, December 10, 2007, relator presented to the Sharon Regional Health System. On that date, relator was evaluated by a physician who indicated that relator was released to "[r]eturn to modified duty effective 12-12-07 until 12-18-07." (Emphasis sic.) The physician restricted relator to lifting and carrying no more than 20 pounds. Climbing, crawling, squatting and reaching were restricted to "occasionally" rather than "frequently."

{¶18} 7. According to an e-mail from human resources director Debbie Pashia, relator worked through December 18, 2007.

{¶19} 8. According to a December 18, 2007 memorandum from Thompson:

> Bill Wilkes has violated Article 17 of the Labor Agreement and Violation of Plant Safety and Conduct Rules Number 41 under the Intolerable Offense and our Drug Free Workplace Policy and Procedures. Bill is suspended 5 days starting December 19th. Meeting will be scheduled at the Union's option on January 3rd or 4th, 2008 because of the holiday season.

{¶20} 9. By letter dated January 8, 2008, relator was discharged from his employment effective January 9, 2008. In that letter, Thompson stated:

> On Saturday December 1, 2007 you experienced an alleged work related injury which was not reported until Wednesday, December 5, 2007. On Sunday, December 2, 2007, you sought medical treatment at a local hospital emergency

> room for this alleged work related injury. However, before you could be fully diagnosed and treated for this alleged injury, you left the hospital without taking the required Drug and Alcohol Test. Under Article 17 of the labor agreement you are required to take this test and as stated in our Drug-Free Workplace Policy "*An employee attempting to adulterate a specimen or otherwise manipulate the testing process will be terminated, as will an employee who refuses to produce/provide a specimen or otherwise fully cooperate in the test process.*" Unfortunately, you elected not to cooperate in the required testing process.
>
> During the suspension period, the Company discussed and evaluated your situation with you and your Union Representatives of Local 1375-10, USWA. However, no compelling reason was offered for your refusal to take the required drug and alcohol test, therefore, it is with deep regret that as provided in the labor agreement and our policy, you will be terminated effective Wednesday, January 9, 2008.

(Emphasis sic.)

{¶21} 10. On January 10, 2008, relator filed an application for workers' compensation benefits. The employer refused to certify the industrial claim (No. 07-406879).

{¶22} 11. On January 28, 2008, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order allowing the claim for sprain right shoulder.

{¶23} 12. The employer administratively appealed the bureau's order.

{¶24} 13. On April 15, 2008, a district hearing officer ("DHO") heard the employer's appeal. The hearing was recorded and transcribed for the record.

{¶25} During cross-examination by employer's counsel, the following exchange was recorded:

> [Employer's counsel] You went in on Friday night and you were injured Saturday morning?

[Relator] Right. We finished up Saturday morning at 7:00.

Q. And then you went to St. Joseph's on Sunday?

A. Right.

Q. Okay. And what happened at St. Joseph's?

A. Well, when I went in, I was in pretty rough shape from the night before. I couldn't lay on my side. I couldn't really lay down to sleep. So when I went in, I explained the situation to them. There was a young doctor in there. And he took his fingers and went down my spine, because I was pretty well hunched up by that time.

And he said, "Well, we don't really do too much for this type of an injury." He said, "What are you taking for your legs?" Because I have a hip problem. And I was taking my own medication for that. He said, "Well, you might as well just go home and take your own medicine, because we don't do much for this type of an injury." And at that point, I left.

Q. Okay.

A. Actually, he was rude, to be honest with you.

Q. All right. So you left because you just didn't feel like they were going to do anything more for you?

A. Basically, yes. He told me, you know, to take what medicines you are on. And --

Q. They were not done with you when you left, were they?

A. No.

Q. And you are aware that you were to undergo a urine drug screen?

A. I wasn't asked to take a test.

Q. You were not asked to take a test?

A. I was not asked to take a test.

Q. Were you asked to provide identification as a precursor to that test?

A. Oh, yes. When you go into St. Joe's, you have to give your insurance card, your I.D. and all of that right at the desk. You know, you can't get by. That is the first thing they do.

Q. And you knew that company policy required that any time you sought medical attention for a work-related injury, that you were required to undergo a drug screen?
A. I understand the policy but, I mean, it wasn't on my mind at the time. You know, I have no reason to think about it, really. Do you know what I mean?

Q. But you did understand the policy?

A. Yes, I understand they have it. Sure.

Q. You knew about the policy?
A. Yes.

Q. In fact, you had hurt your arm in July --

A. Right.

Q. -- of 2007?

A. Sure.

Q. And you had a drug screen at that time, did you not?

A. Yes. Uh-hum.

Q. And in November of 2007, about a month before -- well, just a couple of weeks before this happened, you had a meeting in which the drug policy was reviewed?

A. Right. We have periodical [sic] safety meetings, yes.

Q. And during that meeting, you were told that you would be required to undergo a drug screening any time you sought medical attention for a work-related injury?

A. None of that has really ever changed at Bull Moose. That has been pretty much their policy from the beginning. You know, it is nothing new.

Q. All right. But that was gone over again at the meeting, was it not?

A. Yeah. Oh, yes.

Q. Okay.

A. That meeting is pretty much standard as far as safety meetings go. Not much changes in their procedures.

Q. So you left St. Joseph's Hospital before a drug screen could be completed?

A. Yeah. Yes.

{¶26} During direct examination by relator's counsel, the following exchange was recorded:

Q. How long were you employed with them?

A. That was my eighth year.

Q. Had you ever been disciplined?

A. When I first got hired down there, I had a little trouble getting back and forth to work for the first, you know, month to a couple of years. And then after that, no, I've never had my integrity questioned, my honesty, work ethic or nothing like that.

Q. Have you ever been disciplined for drinking on the job or coming in with beer on your breath?

A. Never. No.

Q. How about any illicit drugs in you? Have you ever been blood tested before and found that you had any illicit drugs in your system?

A. No, sir.

Q. Have you ever been suspected of having any illicit drugs or beer or any alcohol?

A. No. My honesty was never questioned.

Q. How about the day in question, did any -- you mentioned a supervisor, Mr. Bell?

A. Yes.

Q. Did you see anybody else that day or talk to anybody that day, the day that you were injured, in supervision before you were injured?

A. Not supervision. But all the coworkers knew that I fell and - -

Q. Did anybody report you as having any drugs or alcohol on your breath that day?

A. Oh, no.

Q. Okay. Did Mr. Bell suspect that you had any illicit drugs in you, or were you acting in any way that he may have suspected that you had any illicit drugs in you?

A. No, sir.

Q. Actually, you did notify the employer, did you not? Counsel asked you when was the first time you reported it to the employer. And you mentioned about three days or four days later? But you did report it to the employer?

A. I did report it to the employer.

Q. And what day did you report that to the employer? Was it to Mr. Bell?

A. Yes, that would have been Gary Bell.

Q. And was that the same day?

A. That was the same day. He came up to me later in the evening, or morning. And he said, "I heard you fell. Are you

> all right?" And I said, "Well, yeah." And we were on overtime, which is a really good money day there. And I said, "Yeah, I will be all right to finish my shift out," you know, which I did.
>
> * * *
>
> Q. * * * Did you ever refuse to take a drug test?
>
> A. No, sir.
>
> Q. Okay. When they asked you to take one, did you take one?
> A. Yes. Whenever that came up.
>
> Q. And where did you go for that?
>
> A. I went to the Corporate Care building facility, and that was in Hermitage. And that would have been on the 10th.
>
> Q. Did they find anything on you or in your system?
>
> A. No. No. Only the medications that I am prescribed.
>
> Q. And that medication, once again, is for your hip?
>
> A. Yes.

{¶27} During the April 15, 2008 hearing, employer's counsel stated:

> I have no direct evidence that he didn't fall. I mean, we have no contrary witness statements. So, you know, there are two or three witnesses even -- and those that were interviewed by management, nobody saw -- to my knowledge, nobody witnessed the fall, but there were several people who either heard about it or saw Mr. Wilkes on the floor. So I have nothing to dispute any of that.

{¶28} During the April 15, 2008 hearing, the following exchange between the hearing officer and relator was recorded:

> HEARING OFFICER: No one at the hospital indicated to you or a request to take a urine test?
>
> MR. WILKES: No.

> HEARING OFFICER: The first time you were asked to take a urine test or a drug sample was when?
>
> MR. WILKES: That would have been when I brought paperwork into the meeting with Dave Thompson, Pete Kefalas. And they said -- Denise Wrataric out there said, "Make an appointment as quick as you can with Corporate Care," which she did for me.
>
> HEARING OFFICER: What day was that?
>
> MR. WILKES: That would have been -- the day I took the drug test would have been on the 10th. * * *
>
> * * *
>
> MR. WILKES: * * * But I know on the 10th, that is when I took the screening and all. And that was at their own Corporate Care.
>
> HEARING OFFICER: And who asked you to take that test again?
>
> MR. WILKES: That would have been Dave Thompson.
>
> HEARING OFFICER: Dave Thompson?
> MR. WILKES: Yes. He wanted me to go take the drug test up there at Corporate Care.
>
> HEARING OFFICER: And he is -- what is his title?
>
> MR. WILKES: He would be the plant manager.

{¶29} 14. Following an April 15, 2008 hearing, a DHO issued an order allowing the claim for "sprain right shoulder." The DHO's order explains:

> It is the decision of the District Hearing Officer that the injured worker suffered an injury in the course of and arising out of his employment.
>
> There was no request for temporary total disability compensation at this time.

> The employer argued that the injured worker refused to take a drug test at St. Joseph's Emergency Room on 12/2/07 in violation of their written work rule. Therefore, there is a presumption of drug or alcohol intoxication as being the proximate cause of this accident pursuant to O.R.C. 4123.54. The employer asserted that their written work rule is posted on the bulletin board in public view of all employees.
>
> The District Hearing Officer relied [sic] on the testimony of the injured worker in which he stated that he was aware of the written work rule and that it is posted in public view on the bulletin board. However, the injured worker stated that he never refused a drug test. The injured worker stated that he left St. Joseph's Emergency Room, after 15 minutes at the hospital, because he felt that he was not receiving appropriate medical care. The injured worker stated that he was never asked to submit to a drug test until 12/6/07, and that he consented to that drug test and took the drug test on 12/10/07.
>
> It is the decision of the District Hearing Officer that the injured worker never refused a drug test and there is no presumption of intoxication as being the proximate cause of this injury under O.R.C. 4123.54.

{¶30} 15. The employer administratively appealed the DHO's order of April 15, 2008.

{¶31} 16. Following a June 13, 2008 hearing which was apparently not recorded, a staff hearing officer ("SHO") issued an order stating that the DHO's order is "modified." The SHO's order allows the claim for "right shoulder sprain/strain," and further explains:

> In issuing this order, the Staff Hearing Officer denies the employer's argument that this claim is not properly compensable pursuant to the language of Ohio Administrative Code Section 4123.54. Specifically, the employer argues that claimant refused a drug test following his injury of 12/1/2007 and as such, it can be presumed that his injuries were the result of an intoxication or use of

> controlled substances not prescribed by the employee's physician. The Staff Hearing Officer rejects this contention finding the absence of evidence to support reasonable cause for the justification for "post-accident testing." Specifically, no evidence of an observable phenomenon; pattern of abnormal conduct; repeated violations of safety rules; or the presence of a reliable or credible source supporting reasonable cause for the Administration of a drug screen test was presented. This evidentiary deficiency undermines the persuasiveness of the employer's argument at hearing.

{¶32} 17. On July 12, 2008, another SHO mailed an order refusing the employer's appeal.

{¶33} 18. Earlier, on June 30, 2008, attending physician Richard A. Hart, M.D., completed a C-84. On the form, Dr. Hart certified a period of TTD beginning December 18, 2007 to an estimated return-to-work date of August 30, 2008.

{¶34} 19. Apparently, on July 8, 2008, relator moved for TTD compensation.

{¶35} 20. On August 15, 2008, the bureau mailed an order awarding TTD compensation beginning December 19, 2007.

{¶36} 21. The employer administratively appealed the bureau's order of August 15, 2008.

{¶37} 22. Following a November 4, 2008 hearing, a DHO issued an order awarding TTD compensation for the closed period December 19, 2007 through November 4, 2008. The DHO determined that the industrial injury had reached maximum medical improvement effective November 4, 2008.

{¶38} 23. The employer administratively appealed the DHO's order of November 4, 2008.

{¶39} 24. Following a December 18, 2008 hearing, an SHO issued an order that vacates the DHO's award of TTD compensation beginning December 19, 2007. The SHO's order explains:

> The Injured Worker's Motion filed 7/8/2008 is adjudicated as follows.
>
> By way of clarification, the Staff Hearing Officer finds that the Injured Worker is requesting temporary total compensation to be paid for the period from 12/19/2007 through the present and continuing. The Injured Worker is also requesting that any unemployment compensation benefits received over the same period as temporary total compensation maybe [sic] awarded herein, be offset from said award, as required by statute.
>
> The Injured Worker's Motion as clarified above is denied. More specifically, the Staff Hearing Officer finds that the Injured Worker is not eligible for payment of temporary total compensation for the period from 12/19/2007 through 12/18/2008 for the reason that the Injured Worker voluntarily abandoned his employment with the employer of record on or about 1/9/2008 when he was terminated for violation of a published company policy.
>
> The Staff Hearing Officer finds that when the Injured Worker initially sought treatment for the injury upon which this claim is predicated, he was requested to undertake a drug screen test and for whatever reason, the Injured Worker left the hospital without taking said test. It is noted that while these events occurred on 12/2/2007, the Injured Worker did not report the injury until 12/5/2007 and the employer subsequently requested another drug screen testing on 12/9/2007, which the Injured Worker agreed to undergo. However, the employer of record suspended the Injured Worker for failure to complete the drug testing at the time of his initial treatment and subsequently upon review of the facts in this case, the employer elected to terminate the Injured Worker for violating its company policy regarding drug testing.
>
> The Injured Worker testified at this hearing that he was well aware that the employer was promoting a drug free

> workplace and that the company had a written policy regarding mandatory drug testing in the event of an injury and that failure to undergo said testing could result in various disciplines up to and including termination of employment. The Injured Worker testified further that he was aware of these policies by virtue of monthly safety meetings, the union contract and the employee handbook.
>
> Upon review of the company policy, the union contract section applicable to this policy and the 1/8/2008 termination letter from the employer of record, as well as the Injured Worker's testimony as reflected above, the Staff Hearing Officer concludes that the Injured Worker violated the employer's policy and was terminated as a result of such violation. Therefore, the Staff Hearing Officer concludes that the Injured Worker's termination on or about 1/8/2008 precludes upon [sic] the receipt of temporary total compensation thereafter on the basis of voluntary abandonment.
>
> The Staff Hearing Officer further finds that at the time of the Injured Worker's violation, there was no medical evidence of temporary total disability contained within the record. Further, the Staff Hearing Officer also finds that there is no evidence that the Injured Worker has ever returned to work for any employer subsequent to 1/8/2008.
>
> Therefore, in accordance with the holding in [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401], the Staff Hearing Officer concludes that the Injured Worker voluntarily abandoned his employment on 1/8/2008 when he was terminated from employment for violation of the company's drug free workplace policy.
>
> Accordingly, the Staff Hearing Officer concludes that the Injured Worker is not eligible for payment of temporary total compensation as requested and as delineated above.
>
> By way of clarification, this order does not address the Injured Worker's entitlement to temporary total compensation beyond 12/18/2008.

{¶40} 25. On January 31, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of December 18, 2008.

{¶41} 26. On March 2, 2009, relator, William J. Wilkes, filed this mandamus action.

Conclusions of Law:

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

{¶43} 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.

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

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

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

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

(Emphasis sic.)

{¶46} The January 8, 2008 letter provides the employer's stated grounds for relator's discharge. It cites to "Article 17 of the labor agreement" and to "our Drug-Free Workplace Policy." The letter then quotes the language setting forth the prohibited conduct. The quoted language can be found in the record among nine pages that apparently describe the employer's "Drug-Free Workplace Policy." The page from which the quoted language is taken states in its entirety:

> Drugs Tested
>
> Testing is intended to detect problems, deter usage and allow appropriate corrective and/or disciplinary action. In addition to alcohol, the drugs that we're testing for are:
>
> - Amphetamines (speed, uppers)

- Cocaine (including Crack)
- Marijuana
- Opiates (Codeine, Morphine)
- Phencyclidine (PCP, "angel dust")

An employee attempting to adulterate a specimen or otherwise manipulate the testing process will be terminated, as will a refusal to produce/provide a specimen or otherwise co-operate in the test process.

{¶47} Article 17 of the "Agreement between Bull Moose Tube Company (Company) and United Steel Workers (Local Union 1375-10)" effective December 19, 2006 through December 18, 2010, states in its entirety:

ARTICLE 17 – DRUG TESTING

Employees will be tested for drugs and/or alcohol where it is required by law, where the employee has a work related injury requiring professional medical treatment, or where there is reasonable cause to believe the employee is impaired by the use of drugs and/or alcohol on Company property and/or on Company business.

{¶48} The record contains the employer's "Plant Safety and Conduct Rules" ("safety rules") with a revised date of April 26, 1999. On October 20, 2000, relator signed a written acknowledgement that he had received a copy of those rules.

{¶49} The safety rules provide for three categories of offenses with different discipline for each offense. The three types of offenses are: (1) minor offense; (2) major offense; and (3) intolerable offense. An intolerable offense requires "termination" on the "First Offense."

{¶50} The safety rules further provide:

Violation of the following rules will be classified as an INTOLERABLE OFFENSE.

* * *

> 41. (S) Entering or working in the plant under the influence of intoxicants or illicit drugs, or possession of or bringing illicit drugs or alcohol on company property. Employees will be tested for drugs under certain circumstances, i.e., where it is required by law or where there is a work-related injury requiring professional medical treatment or an accident involving company equipment or company property. In addition[,] employees will be tested for drugs where there is probable cause to believe an employee is under the influence of drugs or alcohol while working on company property or company equipment. Where there is probable cause to believe that an employee is under the influence of drugs or alcohol while working on company property or company equipment or where there is a work-related injury requiring professional medical treatment or an accident involving company equipment or company property[,] [s]uch employee must sign a consent form authorizing the clinic or hospital to collect a specimen of urine and blood for laboratory testing. Any employee refusing to sign a consent form and refusing to promptly provide the specimens will be subject to termination. Any employee whose test results show that the employee was under the influence of drugs or alcohol while working on company property or company equipment will be subject to termination.

(Emphasis sic.)

{¶51} The magistrate notes that safety rule number 41, quoted in part above, was cited by Thompson in his December 18, 2007 memorandum as the basis for the five-day suspension starting December 19, 2007. However, safety rule number 41 is not cited in Thompson's discharge letter of January 8, 2008.

{¶52} The record also contains a one-page document captioned: "Policy Summary." (Emphasis sic.) This policy summary states in part:

> Who will be tested? All employees and applicants for employment.
>
> What will be tested? Employees will be tested for the presence of illicit or illegally used drugs and alcohol. Drugs

> to be tested shall include amphetamines, cocaine, marijuana, opiates and PCP.
>
> Where will testing be conducted? Only DHHS/SAMHSA-certified laboratories and qualified service professionals shall conduct urine specimen analysis under this policy. Alcohol testing shall be done at a qualified health care facility using federally approved testing equipment.
>
> When will tests be performed? Testing will be conducted as follows:
> 1. Pre-employment (drug test only).
> 2. Where it is required by law.
> 3. Where the employee has a work related injury requiring professional medical treatment, or
> 4. Where there is reasonable cause to believe the employee is impaired by the use of drugs and/or alcohol on Company property and/or on Company business.
>
> How will tests be conducted? Unless otherwise required or permitted by law, all tests will be conducted in accordance with federal guidelines (49 CFR Part 40 as amended), which conform with the Ohio Bureau of Workers' Compensation's drug-free testing requirements.
>
> * * *
>
> Consequences: Any violation of this policy could result in discipline up to and including termination.
>
> Any refusal to submit to testing or any attempt to adulterate a sample will result in termination.

(Emphases omitted.)

{¶53} The magistrate further notes that the above-described "Policy Summary" is not cited in Thompson's December 18, 2007 memorandum as a basis for the five-day suspension, nor is it cited in Thompson's January 8, 2008 discharge letter as a basis for the discharge.

{¶54} The main issue here is whether the employer's written rules regarding its post-accident drug screen policy clearly defined the conduct for which relator was discharged. As earlier noted, the three-pronged test of *Louisiana-Pacific* requires that the written rule or policy clearly define the prohibited conduct.

{¶55} The magistrate finds that the employer's written rules fail to clearly define the conduct for which relator was discharged. Accordingly, the commission cannot hold that relator voluntarily abandoned his employment. *State ex rel. Naylor v. Indus. Comm.*, 10th Dist. No. 04AP-715, 2005-Ohio-2712 (this court determined that the employer failed to identify a written policy that clearly defined the conduct for which the employee was discharged); *State ex rel. Wal-Mart Stores, Inc. v. Riley*, 159 Ohio App.3d 598, 2005-Ohio-521.

{¶56} The magistrate's analysis will involve all of the employer's written documents describing its post-accident drug screen policy even though some of those documents were not referenced in Thompson's December 18, 2007 memorandum regarding the five-day suspension or his January 8, 2008 discharge letter.

{¶57} Analysis must begin with what is undisputed about relator's December 2, 2007 hospital visit. As earlier noted, a St. Joseph's ER "lab order" indicates that relator was to give a urine specimen. Relator left the hospital without giving the urine specimen. There is no evidence in the record indicating the hospital's purpose for obtaining a urine specimen. There is no evidence in the record that the hospital intended to use the urine specimen to test for alcohol or any of the illicit drugs listed in the employer's policy.

{¶58} Moreover, there is no evidence in the record indicating that the hospital was acting on behalf of the employer or its post-accident drug screen policy when it scheduled relator for a urine specimen on December 2, 2007. The employer simply invited the commission to infer that the purpose of the urine specimen to be given at St. Joseph's on December 2, 2007 was somehow related to its post-accident drug screen policy. There is no evidence in the record that the ER staff at St. Joseph's were even aware that the employer had such a policy.

{¶59} Given the above scenario, there is no evidence in the record that relator was in fact asked by his employer to give a urine sample on December 2, 2007 that would be used to test for alcohol or illicit drugs. Given this conclusion, the employer's position incorrectly suggests that relator was required under its written rules to himself ask the St. Joseph ER staff to test his urine for alcohol and illicit drugs in order to satisfy the employer's policy. But, the employer's rules did not clearly prohibit relator from refusing the third-party's request for a urine specimen. The employer's written rules do not clearly define relator's conduct on December 2, 2007 as a "refusal to produce/provide a specimen or otherwise co-operate in the test process."

{¶60} The magistrate concludes that the employer's written rules fail to clearly define the conduct for which relator was discharged. Thus, the commission abused its discretion in holding that relator had voluntarily abandoned his employment.

{¶61} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of December 18, 2008 to the extent that it holds that relator voluntarily abandoned his employment, and to enter

an amended order that adjudicates on the merits relator's request for TTD compensation.

/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).