[Cite as *State ex rel. Haid v. Indus. Comm.*, 2010-Ohio-5205.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald R. Haid,	:	
Relator,	:	
v.	:	No. 09AP-656
Industrial Commission of Ohio and Bowen Engineering Corp.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on October 26, 2010

Green Haines Sgambati Co., L.P.A., Ronald E. Slipski and *Shawn D. Scharf,* for relator.

Richard Cordray, Attorney General, and *John R. Smart,* for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko,* for respondent Bowen Engineering Corp.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Donald R. Haid, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order denying him temporary total disability compensation beginning June 9, 2008, on grounds that he voluntarily abandoned his employment with respondent Bowen Engineering Corp.

and then failed to re-establish his eligibility for compensation by re-entering the workforce, and to enter an order granting said compensation.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusion of law, which is appended to this decision. In his decision the magistrate concluded "(1) the commission did not abuse its discretion in determining that relator voluntarily abandoned his employment with Bowen, and (2) the commission did not abuse its discretion in determining that relator had not reestablished eligibility for [temporary total disability] compensation for the period of compensation requested." (Mag. Dec., ¶32.) Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶3} Relator filed objections to the magistrate's conclusions of law:

> 1. The Magistrate's Decision that an order of a district hearing officer morphs into evidence upon which a staff hearing officer can rely in a subsequent original jurisdiction *de novo* hearing is contrary to R.C. 4121.35 and *McDaniel.*
>
> 2. Assuming arguendo that an order of a Commission hearing officer becomes evidence upon which a subsequent hearing officer can rely in an original jurisdiction *de novo* hearing, the Magistrate's Decision nonetheless wrongly concludes that the Commission's decision here is supported by "some evidence."

A. <u>De novo hearing</u>

{¶4} Relator's first objection contends the magistrate wrongly concluded the staff hearing officer could rely on the order of the district hearing officer as evidence. Relator

asserts that because the hearing before the staff hearing officer must be de novo, the magistrate's conclusion is erroneous.

{¶5} The magistrate briefly addressed and rejected relator's argument. The magistrate pointed out that the district hearing officer's report of testimony taken in the hearing before the district hearing officer "is akin to a written witness statement taken by a bureau or commission investigator. Such unsigned written witness statements taken by bureau or commission investigators have been traditionally accepted as evidence in commission proceedings, even though they are indeed hearsay." (Mag. Dec., ¶46.) With that observation, the magistrate determined the witness's "hearing testimony before the [district hearing officer] presented evidence upon which the [staff hearing officer] could rely" even though the witness did not testify before the staff hearing officer. (Mag. Dec., ¶46.)

{¶6} In response to the magistrate's decision, relator contends both R.C. 4121.35 and the opinion in *State ex rel. McDaniel v. Indus. Comm.* (1984), 15 Ohio App.3d 55 dictate a different conclusion. Relator contends that, taken together, they require the evidence presented in the hearing before the district hearing officer be presented again in the hearing before the staff hearing officer. R.C. 4121.35 states that "staff hearing officers have original jurisdiction to hear and decide * * * [a]ppeals from an order of a district hearing officer * * *." Although R.C. 4121.35 does not include the term "de novo," relator notes this court in *McDaniel* stated that "[a] full de novo hearing is contemplated at each stage of the administrative process." Id. at 57.

{¶7} As the Industrial Commission points out, relator's objection not only fails to recognize the commission's order becomes part of the claims file, but his objection

misinterprets *McDaniel.* Citing *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St.3d 481, *McDaniel* noted that neither the regional board of review nor the commission "set forth any reasons for their respective decisions" or "set forth the evidence relied upon, which requires at a minimum an order requiring respondent Industrial Commission to specify the basis for its decision." Id. at 57. In addition, the court stated the decision of the district hearing officer and medical reports he relied on were not dispositive before the commission's staff hearing officers since an additional condition had been allowed in the interim following the order of the regional board of review but prior to the hearing before the staff hearing officers. In that context, the court noted a full de novo hearing is contemplated at each stage of the administrative process.

{¶8} *McDaniel* thus is not instructive here because (1) the additionally allowed condition was not considered, (2) the Industrial Commission failed to refer to the evidence on which it relied or give the reasons for its decision, and (3) the single statement concerning a de novo hearing was in the context of a newly allowed condition for which evidence had never been presented. Unlike *McDaniel,* no additional allowed conditions intervened between the decision of the district hearing officer and the staff hearing officer. Moreover, at each level of the administrative process, the evidence relied on was identified.

{¶9} Because *McDaniel* fails to support the contentions that underlie relator's first objection, and relator points to no subsequent case that suggests the procedure employed here, which mirrors the procedure routinely employed in administrative proceedings before the commission is improper, we cannot say the staff hearing officer wrongly relied on the district hearing officer's order. Similarly, we cannot conclude the

magistrate improperly resolved the issue adversely to relator. Relator's first objection is overruled.

B. Second Objection—Some Evidence

{¶10} Relator's second objection contends some evidence does not support the commission's decision finding relator voluntarily abandoned his employment. The magistrate specifically addressed each of relator's three contentions with respect to the voluntary abandonment issue: "(1) the existence of at least two witnesses, (2) objective evidence about relator's conduct in the workplace, and (3) demonstrated signs of alcohol impairment." The magistrate's analysis is thorough and accurate, identifying that evidence before the commission that supports the commission's determination. For the reasons set forth in the magistrate's decision, relator's second objection is overruled.

III. Disposition

{¶11} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

TYACK, P.J., and BROWN, J., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald R. Haid,	:	
Relator,	:	
v.	:	No. 09AP-656
Industrial Commission of Ohio and Bowen Engineering Corp.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on June 16, 2010

Green Haines Sgambati Co., L.P.A., Ronald E. Slipski and *Shawn D. Scharf*, for relator.

Richard Cordray, Attorney General, and *John R. Smart*, for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Bowen Engineering Corp.

IN MANDAMUS

{¶12} In this original action, relator, Donald R. Haid, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation beginning June 9, 2008, on grounds that he voluntarily abandoned his employment with respondent Bowen

Engineering Corp. ("Bowen") and then failed to reestablish his eligibility for compensation by reentering the workforce, and to enter an order granting said compensation.

Findings of Fact:

{¶13} 1. On September 7, 2007, relator injured his right knee while employed as a pipe fitter for Bowen, a state-fund employer.

{¶14} 2. The industrial claim (No. 07-383416) is allowed for "sprain of right knee; tear of lateral meniscus right knee; tear of medial meniscus right knee."

{¶15} 3. On a "Physician's Report of Work Ability" ("MEDCO-14") form dated September 13, 2007, attending physician John Columbus, M.D., released relator to return to work with no restrictions effective September 13, 2007.

{¶16} 4. On September 16, 2007, after arriving for work at Bowen, relator's supervisor, Mr. Wallen, asked relator to undergo breath alcohol screen testing. Relator tested positive for alcohol on two screen tests. Based upon the results of the breath alcohol screen test, Bowen terminated relator's employment effective September 16, 2007.

{¶17} 5. Bowen had a "Safety Policy Manual" ("safety manual") applicable to all signatory union employees. Under section 3.4.2, the safety manual provides:

> D. REASONABLE/PROBABLE CAUSE TESTING
>
> Substance testing may be implemented when there is probable cause. Probable cause shall be defined as those circumstances, based on objective evidence about the worker's conduct in the workplace, that would cause a reasonable person to believe that the worker is demonstrating signs of impairment due to alcohol or other drugs. The objective evidence giving rise to probable cause will be observed by at least two individuals, ideally two supervisors. During the process of establishing reasonable cause for testing, the employee has the right to request his on-site

> steward be present, if available. Any and all union agreement provisions will also be adhered to.

{¶18} Under section 3.4.3 captioned: "Discipline Policy," the safety manual provides:

> D. Employees who test above the measured amount of prohibited items or substances as provided for in 3.4.4 below, while on duty, will be terminated.

{¶19} Under section 3.4.4 captioned: "Testing Method," the safety manual provides:

> * * * Initial breath alcohol tests will be screened for .02 or higher. For results .02 or higher a confirmation test is required. Employees will be required to wait 15 – 20 minutes to be re-tested. A breath alcohol test result of .04 or higher will be considered a positive. Breath alcohol test results of .02 to .04 will be considered negative. * * *

{¶20} 6. On September 16, 2007, relator's supervisor, Mr. Wallen, completed a Bowen form captioned: "Fitness for Duty[,] Reasonable Cause/Observation Documentation." The form, along with Mr. Wallen's markings at the spaces provided, states:

> Because employees sometimes exhibit performance problems and behavior changes, we investigate these problems and changes as they may be cause for concern that an employee may be unfit to perform the employee's regular duties as a result of substance abuse. The checklist below is intended as an observation of possible behaviors which may indicate there is reasonable cause for such concern and possible substance testing.
>
> * * *
>
> The onset of one or more of the following observations may be cause for substance abuse testing:
>
> SPEECH AWAR[E]NESS
> _____ Incoherent _____ Confused

_____ Muddled	_____ Sleepy
_____ Slurred	_____ Erratic Behavior

BALANCE	PHYSICAL INDICATORS
_____ Swaying	_____ Pupils dilated/red eyes
_____ Staggering	_____ Cold sweats/tremors
_____ Falling	__X__ Alcohol/marijuana odor

When such behaviors are observed that may interfere with the employee's performance, the supervisor will note and document such observations. Any behavior and/or performance issues will be discussed with the employee, and any explanations volunteered or offered by the employee will be noted. Although work related performance or behavior problems might be cause for substance abuse testing, continued work-related performance and behavior problems may result in discipline up to and including termination of employment.

WORK OBSERVATIONS
__X__ Unexplained or excessive absenteeism or tardiness
_____ Unexplained or excessive absences from work area
_____ Frequent trips to water cooler, or restroom
_____ Difficulty in understanding/recalling instructions
_____ High frequency of accident occurrence

MOODS	PHYSICAL INDICATORS
___ Withdrawn/sad/morbid	____ Rapid breathing
___ Mood swings high and low	_____ Inappropriate wearing of sunglasses
___ Nervousness/agitation	____ Other _____
___ Other _____	

{¶21} 7. Earlier, on August 7, 2006, relator signed a Bowen form on which he acknowledged he had been furnished with and had read the Bowen safety policy.

{¶22} 8. On June 9, 2008, relator was initially seen and examined by John L. Dunne, D.O. In his office note, Dr. Dunne wrote:

> * * * His work history around the time of this injury and subsequent to that is somewhat complicated, but he has not worked since November of 2007. * * *
>
> * * *

> PLAN OF CARE: My recommendation is to proceed to definitive surgical management. Mr. Haid would like to see Dr. Stefko, as he has heard good things about him. We will set that referral up via C-9. We will also send a C-84 from today forward for 60 days. He is unable to work because of the knee injury and claim allowances. * * *
>
> In my opinion, I believe it is expedient and reasonable to authorize the surgery for the medial meniscal tears, as there is clearly no real conservative management, and this would allow Dr. Stefko to schedule the surgery at the earliest possible time, which will speed the recovery minimizing disability as much as possible.

{¶23} 9. On June 11, 2008, Dr. Dunne completed a C-84 on which he certified TTD beginning June 9, 2008, to an estimated return-to-work date of August 10, 2008, based upon the allowed knee conditions.

{¶24} 10. On July 29, 2008, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order awarding TTD compensation starting June 9, 2008. The bureau's order also states: "Temporary total compensation is not payable for 6/25/08, 7/5/08, 7/6/08, 7/7/08. The injured worker worked on those dates with a new employer."

{¶25} 11. Bowen administratively appealed the bureau's order.

{¶26} 12. Following an August 17, 2008 hearing, a district hearing officer ("DHO") issued an order denying the request for TTD compensation. The DHO's order indicates that Ms. Harris and Mr. Wallen appeared at the hearing on behalf of Bowen. The DHO's order explains:

> By way of history, this claim stems from a knee injury which occurred on 08/08/08. According to the 09/13/07 and 09/26/07 MEDCO-14 Forms completed by Dr. Columbus, the Injured Worker was capable of returning to work without any restrictions whatsoever. In fact, the file contains no medical evidence of disability until Dr. Dunne completed his

06/11/08 C-84 report, based upon an examination which took place on 06/09/08.

Subsequent to his return to work, the Injured Worker's employment was terminated effective 09/16/07, based upon the following sequence of events. According to the testimony presented at the hearing by Mr. Wallen, the Injured Worker's supervisor, the Injured Worker reported approximately 30 minutes late to work on 09/16/07. According to Mr. Wallen, he was approached by two employees who informed him that the Injured Worker's breath smelled of alcohol within minutes of his reporting to work. Mr. Wallen approached the Injured Worker and, upon confirming the odor of alcohol emanating from him, asked him to be drug tested. The Injured Worker complied with the request and was found to have .093 and .092 g/210 L of alcohol in his system, based upon two breath alcohol screen tests. Based upon this positive drug test, the Injured Worker's employment was terminated. Mr. Wallen and Ms. Harris both testified that, although the Employee Handbook did not contain a complete set of rules with regard to the issue of employees who were found to be under the influence of alcohol while at work, in contrast to the explicit statements in the Employee Handbook with regard to "controlled substances," the full policies of the Employer which were posted on a bulletin board at every job site, mandated immediate termination of employment for an employee whose breath alcohol test established he was under the influence of alcohol while at work.

The Injured Worker testified at the hearing that, although the Employee Handbook he had received had apprised him of the Employer's drug testing policy, he was unaware of the more complete policy documents noted by Mr. Wallen and Ms. Harris and of the fact that having alcohol in his system at the time he reported to work was a basis for the termination of his employment. Furthermore, the Injured Worker testified at the hearing that he had last drunk alcohol on the night prior to 09/16/07. The Injured Worker went on to testify that he had worked for two other employers, subsequent to the termination of his employment with the Employer of Record, but that he had not worked in any capacity since approximately November of 2007 and was receiving unemployment compensation at the time of the commencement of the period of alleged temporary total disability at issue in this hearing.

A review of the Employee Handbook that the Injured Worker admits to having received reveals that Section 2.13 lists "[b]eing under the influence of, or being engaged in the sale of controlled substances at the job site" as offenses which represent grounds for the immediate termination of employment. In contrast, the document entitled "SAFETY POLICY MANUAL" specifically provides for drug testing related to alcohol and termination of employment, in the case of a positive test, in Sections 3.4.3 and 3.3.4.

The Hearing Officer finds the testimony presented by Ms. Harris and Mr. Wallen with regard to the availability of the "SAFETY POLICY MANUAL" at all job sites to be credible. In contrast, the Injured Worker's testimony that he was unaware of the fact that coming to work under the influence of alcohol was a basis for termination of employment is not found to be credible. More specifically, given the stance displayed by the Employer in the Employee Handbook, which the Injured Worker admits to having received, dealing with the immediate termination of employment for employees who are found to be under the influence of controlled substances while at work, it is highly unlikely that the Injured Worker would think that being under the influence of alcohol at work would be tolerated any better than intoxication with controlled substances.

In order for a termination of employment, based upon the alleged violation of a work rule, to be classified as a voluntary abandonment of employment by an employee, it must be established that the rule which was violated clearly defined the prohibited conduct, that it was previously identified by the Employer as a dischargeable offense, and that it was known or should have been known to the employee that violating it would result in the termination of his employment. State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St.3d 401. However, an employee cannot abandon a job which he was incapable of performing, due to disabilities caused by the conditions recognized in his claim. State ex rel. OmniSource Corp. v. Indus. Comm. (2007), 113 Ohio St.3d 303. Furthermore, in cases in which the employee returned to the workforce by accepting a job with another employer and sustained an exacerbation of the conditions recognized in the claim which forced him to leave the second employment, the finding of a voluntary abandonment of his former position of employment

does not bar receipt of temporary total disability compensation benefits commencing on the date he was forced to leave the new job in which he was engaged when he sustained the exacerbation. State ex rel. McCoy V. Dedicated Transport, Inc. and Brandgard V. Indus. Comm. (2002), 97 Ohio St.3d 25. In order to re-establish his eligibility for payments of temporary total disability benefits, the employee must establish that he was employed at the time of the exacerbation which is the alleged basis of the temporary total disability, because the basis of payments of such compensation is the replacement of lost wages which cannot be established in the case of someone who was not employed at the time of the exacerbation. State ex rel. Jennings v. Indus. Comm. (2003), 98 Ohio St.3d 288.

In this case, the preponderance of the evidence serves to establish that the Employer had issued a written prohibition against its employees coming to work under the influence of alcohol, that the prohibition carried a penalty of immediate termination of employment as the cost for violation of the policy, and that the Injured Worker was or should reasonably have been aware that the violation of this policy would result in the termination of his employment. Furthermore, the file contains no medical evidence of disability at the time of the termination of the Injured Worker's employment. Accordingly, the issue of the role played by the conditions recognized in this claim at the time of the termination of the Injured Worker's employment is not raised under the facts of this case. Finally, despite the fact that the Injured Worker resumed employment with other employers, subsequent to the termination of his employment with the Employer of Record, his own testimony serves to establish that he was not employed at the time Dr. Dunne, the Physician of Record, opined that he could not work in any capacity as a consequence of the disability caused by the conditions recognized in this claim.

Based upon the foregoing analysis, the Injured Worker is found to have abandoned his former position of employment by violating the Employer's policy with regard to presenting to work while under the influence of alcohol. Furthermore, the Injured Worker did not re-establish his entitlement to payments of temporary total disability compensation benefits by returning to work with another employer, subsequent to the date of termination of his employment with the Employer of Record, because he was not working at the time the

> Physician of Record pronounced him as incapable of working. Accordingly, the request for payment of temporary total disability compensation benefits for the period from 06/09/08 through 08/30/08 is hereby denied.
>
> This decision is based upon the 09/13/07 and 09/26/07 MEDCO-14 Forms completed by Dr. Columbus; the testimony presented at the hearing by Ms. Harris and Mr. Wallen; the testimony presented at the hearing by the Injured Worker with regard to the last date he worked prior to certification of disability by the Physician of Record; the Employee Handbook, filed 07/11/08; the "SAFETY POLICY MANUAL" document, filed 07/08/08; and, the termination of employment document, filed 07/08/08. All evidence on file with regard to this matter was reviewed and considered.

{¶27} 13. Relator administratively appealed the DHO's order of August 17, 2008.

{¶28} 14. Following a November 24, 2008 hearing, a staff hearing officer ("SHO") issued an order stating that the decision of the DHO is modified. The SHO's order indicates that Ms. Harris appeared at the hearing for Bowen. However, Mr. Wallen did not appear at the November 24, 2008 hearing. The SHO's order explains:

> * * * The decision of the District Hearing Officer from the hearing held 8/27/2008 is modified. Therefore, the C-84 application for temporary total compensation filed 6/13/2008 is denied.
>
> By way of clarification, the Staff Hearing Officer finds that this claim pertains to a right knee injury which occurred on 9/7/2007 and that the injured worker was released to return to work without any restrictions thereafter pursuant to the 9/13/2007 and 9/26/2007 MEDCO-14 forms completed by Dr. Columbus. The injured worker has offered no medical evidence of disability until Dr. Dunne completed his 6/11/2008 C-84 report which is based upon an examination performed on 6/9/2008.
>
> The Staff Hearing Officer finds that the injured worker's employment was terminated effective 9/16/2007 based upon the injured worker's violation of a specific written company rule pertaining to reporting for work while under the influence of alcohol. The Staff Hearing Officer finds per the filed that

> on 9/16/2007 the injured worker reported for work a half hour late when two employees informed Mr. Wallen, the injured worker's supervisor that they had smelled alcohol on the breath of the injured worker within minutes of his reporting to work. Mr. Wallen subsequently approached the injured worker and confirmed the odor of alcohol and requested the injured worker to undergo a drug test. The injured worker complied with the request and was found to have .093 and .092 g\210L of alcohol in his system, based upon two breath alcohol screen tests. Based upon this positive drug screen, the injured worker's employment was terminated. The Staff Hearing Officer finds it is undisputed between the parties that the provision under which the employer of record terminated the injured worker's employment for arriving at work under the influence of alcohol, is contained in the employer's safety policy and disciplinary manual. However[,] what is disputed is whether or not the injured worker was provided a complete copy of the safety and policy manual and whether or not a complete copy of the safety and disciplinary manual was provided at the work site and posted in a conspicuous place i.e. the bulletin board in the break trailer, for the injured worker's review. The Staff Hearing Officer finds that on 8/7/2006 the injured worker signed an acknowledgement statement indicating that [he] has been furnished and has read the safety policy and affirmative action policy and disciplinary policy of Bowen Engineering Corporation and that he understands that the violation of the rules will result in disciplinary action up to and including termination.
>
> Based upon this signed acknowledgment, the Staff Hearing Officer concludes that the employer, given the facts as outlined above has demonstrated by a preponderance of the evidence that the injured worker's termination on/or about 9/16/2007 constituted a voluntary abandonment.
>
> Further, as was reflected in the prior decision, the injured worker had indicated that he had not worked in any capacity since approximately November 2007 and subsequently received unemployment compensation. However[,] at today's hearing, the injured worker testified that subsequent to his termination he had worked sporadically out of the union hall as follows: 6/25/2008 to 6/25/2008; 7/5/2008 through 7/7/2008 and 7/25/2008 through 7/31/2008.

> However, even accepting the injured worker's current testimony as to his work record subsequent to termination, the Staff Hearing Officer finds that the injured worker was not working at the time Dr. Dunne first opined that the injured worker was temporarily and totally disabled on 6/9/2008.
>
> Accordingly, based upon the foregoing, the injured worker is found to have abandoned his former position of employment by violating the employer's policy with regard to presenting to work while under the influence of alcohol. Furthermore, the injured worker has not re-established by a preponderance of the evidence his entitlement to payments of temporary total disability compensation benefits by returning to work with another employer subsequent to the date of termination as the injured worker was not working at the time the physician of record once again opined that he became temporarily and totally disabled from employment on 6/9/2008. Therefore, temporary total compensation for the period from 6/9/2008 through 8/30/2008 is hereby denied.
>
> In rendering this part of the decision[,] the Staff Hearing Officer has relied upon the records and opinion of Dr. Columbus; the testimony of Ms. Harris presented at this hearing indicating that the safety policy manual contains the section under which the injured worker was terminated.; the injured worker's testimony with regard to the last date he worked subsequent to his termination and prior to his physician opining that he was temporarily and totally disabled once again; the employee handbook filed 7/11/2008; the safety policy manual also filed 7/8/2008; the termination of employment document filed 7/8/2008 and the signed acknowledgement of the injured worker dated 8/7/2006 filed 11/20/2008.

{¶29} 15. On December 12, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of November 24, 2008.

{¶30} 16. On July 6, 2009, relator, Donald R. Haid, filed this mandamus action.

Conclusions of Law:

{¶31} Two main issues are presented: (1) whether the commission abused its discretion in determining that relator voluntarily abandoned his employment with Bowen,

and (2) whether the commission abused its discretion in determining that relator had not reestablished eligibility for TTD compensation for the period of compensation requested.

{¶32} The magistrate finds: (1) the commission did not abuse its discretion in determining that relator voluntarily abandoned his employment with Bowen, and (2) the commission did not abuse its discretion in determining that relator had not reestablished eligibility for TTD compensation for the period of compensation requested.

{¶33} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶34} Turning to the first issue, 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.

{¶35} 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.

{¶36} 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.)

{¶37} According to relator, under Bowen's own rule, it did not have "reasonable/probable cause" to conduct the breath alcohol testing that led to termination.

{¶38} According to relator, under Bowen's own rule, Bowen was required to show the commission that at least two individuals provided objective evidence about relator's conduct in the workplace that demonstrated signs of alcohol impairment.

{¶39} According to relator, there is no evidence in the record to show that Bowen satisfied three aspects of its own rule: (1) the existence of at least two witnesses, (2) objective evidence about relator's conduct in the workplace, and (3) demonstrated signs of alcohol impairment.

FIRST PREREQUISITE: AT LEAST TWO WITNESSES

The DHO's order states in part:

> * * * According to Mr. Wallen, he was approached by two employees who informed him that the Injured Worker's breath smelled of alcohol within minutes of his reporting to work. Mr. Wallen approached the Injured Worker and, upon confirming the odor of alcohol emanating from him, asked him to be drug tested. * * *

{¶40} According to relator, Mr. Wallen's hearing testimony does not provide some evidence that at least two employees smelled alcohol on relator's breath because the two employees were never identified by Bowen during the administrative proceedings. Relator points out that Mr. Wallen's testimony as to what the two employees told him about the smell of alcohol is hearsay. (It is undisputed here that Ms. Harris did not testify as to any observation regarding the smell of alcohol.)

{¶41} Moreover, because Mr. Wallen did not testify at the SHO's hearing, which by law, is a de novo review, relator further contends that the DHO's statement as to Mr. Wallen's testimony cannot be relied upon by the SHO as some evidence.

{¶42} The magistrate disagrees with relator's arguments.

{¶43} Analysis begins with the observation that nothing in Bowen's rule requires that the names of the two individuals who witnessed a sign of impairment be disclosed on the record of the administrative proceedings or even at the termination procedure at the company. Bowen's rule simply says nothing about written witness statements.

{¶44} Interestingly, relator does not claim that Mr. Wallen was cross-examined as to the identities of the two employees nor is it claimed that Mr. Wallen refused to provide the identities upon being questioned at the hearing. Relator does not claim here that he was in any way denied the right to cross-examine Mr. Wallen as to any aspect of the

termination. Given that scenario, it is difficult to see how relator can complain that he was denied any procedural right as to Mr. Wallen's testimony.

{¶45} Moreover, R.C. 4123.10 provides that the commission "shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rule of procedure." Thus, that the statements of two employees as to having smelled alcohol were submitted to the commission as hearsay evidence, through Mr. Wallen's testimony, does not automatically eliminate those statements as some evidence upon which the commission can rely.

{¶46} Again, relator argues that Mr. Wallen's failure to testify at the de novo SHO's hearing eliminates his testimony as reported in the DHO's order. Relator's argument lacks merit. The DHO's reporting of Mr. Wallen's testimony is akin to a written witness statement taken by a bureau or commission investigator. Such unsigned written witness statements taken by bureau or commission investigators have been traditionally accepted as evidence in commission proceedings, even though they are indeed hearsay. In short, Mr. Wallen's hearing testimony before the DHO presented evidence upon which the SHO could rely in the absence of Mr. Wallen's hearing testimony before the SHO.

SECOND PREREQUISITE: OBJECTIVE EVIDENCE ABOUT RELATOR'S CONDUCT IN THE WORKPLACE

{¶47} Relator seems to answer his own question when he points out that the SHO's order sums up the evidence provided by the two employees: "[T]he injured worker reported for work a half hour late when two employees informed Mr. Wallen, the injured worker's supervisor that they had smelled alcohol on the breath of the injured worker within minutes of his reporting to work."

{¶48} According to relator, the above-quoted portion of the SHO's order (which is actually taken by the SHO from the DHO's order) failed to provide "objective evidence" as presumably required by Bowen's work rule. (Reply brief at 12.) That the smell of alcohol was evidenced through the sense of smell of the two employees who reported their observations to Mr. Wallen does not, as relator seems to suggest, render the evidence less than objective. Moreover, that relator appeared in the workplace with the smell of alcohol on his breath can be viewed as the worker's conduct in the workplace.

{¶49} Accordingly, the commission's determination does not fail to meet the so-called second prerequisite that relator gleans from the Bowen rule.

THIRD PREREQUISITE: OBJECTIVE EVIDENCE THAT THE WORKER IS DEMONSTRATING SIGNS OF IMPAIRMENT DUE TO ALCOHOL

{¶50} As relator points out, on the "Fitness for Duty[,] Reasonable Cause/Observation" form, Mr. Wallen marked "[a]lcohol/marijuana odor," and "[u]nexplained or excessive absenteeism or tardiness." No other observations were marked on the form.

{¶51} According to relator, the observation that relator had the odor of alcohol on his breath is no evidence of impairment. According to relator, "[t]here is nothing, let alone objective evidence, that suggests that the odor resulted in an observable impairment and that the impairment was observed in the workplace." (Reply brief at 14.)

{¶52} While it is certainly conceivable that someone could have the odor of alcohol on his or her breath without being physically or mentally impaired, that conceivability does not detract from the normal or usual observation that some impairment is usually connected with alcohol ingestion and the resulting odor on the breath. Moreover, relator ignores that relator was unexplainedly tardy at the time of the

alcohol odor observation. Together, those observations can premise the conclusion that there was objective evidence of some impairment in the workplace.

{¶53} As earlier noted, the second issue is whether the commission abused its discretion in determining that relator had not reestablished his eligibility for TTD compensation for the period of compensation requested.

{¶54} The syllabus of *State ex rel. McCoy v. Dedicated Transport Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, states:

> A claimant who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.

{¶55} The *McCoy* holding was further explained by the court in *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587. In that case, the claimant, Shawn E. Eckerly, was fired from his job for unexcused absenteeism. Thereafter, the commission declared that the discharge constituted a voluntary abandonment of his employment under *Louisiana-Pacific*, and denied TTD compensation. Citing *McCoy*, the *Eckerly* court upheld the commission's denial of TTD compensation. The *Eckerly* court explains:

> The present claimant seemingly misunderstands *McCoy*. He appears to believe that so long as he establishes that he obtained another job—if even for a day—at some point after his departure from Tech II, TTC eligibility is forever after reestablished. Unfortunately, this belief overlooks the tenet that is key to *McCoy* and all other TTC cases before and after: that the industrial injury *must remove the claimant from his or her job*. This requirement obviously cannot be satisfied if claimant had no job *at the time of the alleged disability*.

Id. at ¶9. (Emphasis sic.)

{¶56} Again, in determining that relator did not reestablish his eligibility for the period of compensation requested, the commission, through its SHO, explained:

> * * * [A]s was reflected in the prior decision, the injured worker had indicated that he had not worked in any capacity since approximately November 2007 and subsequently received unemployment compensation. However[,] at today's hearing, the injured worker testified that subsequent to his termination he had worked sporadically out of the union hall as follows: 6/25/2008 to 6/25/2008; 7/5/2008 through 7/7/2008 and 7/25/2008 through 7/31/2008.
>
> However, even accepting the injured worker's current testimony as to his work record subsequent to termination, the Staff Hearing Officer finds that the injured worker was not working at the time Dr. Dunne first opined that the injured worker was temporarily and totally disabled on 6/9/2008.
>
> * * * [T]he injured worker has not re-established by a preponderance of the evidence his entitlement to payments of temporary total disability compensation benefits by returning to work with another employer subsequent to the date of termination as the injured worker was not working at the time the physician of record once again opined that he became temporarily and totally disabled from employment on 6/9/2008. * * *

{¶57} Clearly, the commission correctly applied the *McCoy* and *Eckerly* line of cases. Through Dr. Dunne, relator requested TTD compensation starting June 9, 2008. Undisputedly, relator was unemployed on June 9, 2008, and had been so since November 2007. Relator does not claim he was employed until June 25, 2008, when he worked that day out of his union hall.

{¶58} Given the above analysis, it is clear that the commission did not abuse its discretion in determining that relator had not reestablished eligibility for TTD compensation for the period of compensation requested.

{¶59} Accordingly, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/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).