[Cite as *State ex rel. Crestview Manor Nursing Home, Inc. v. Whitcomb*, 2011-Ohio-5762.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Crestview Manor Nursing Home, Inc.,	:	
Relator,	:	No. 10AP-549
v.	:	(REGULAR CALENDAR)
Stephanie Whitcomb and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on November 8, 2011

Michael Soto, for relator.

Larrimer & Larrimer, and *Thomas L. Reitz*, for respondent Stephanie Whitcomb.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} In this original action, relator, Crestview Manor Nursing Home, Inc. ("Crestview" or "relator"), requests a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded temporary total

disability ("TTD") compensation beginning May 3, 2009, and to enter an order denying compensation to respondent Stephanie Whitcomb ("claimant") on eligibility grounds or, alternatively, on grounds that the award is not supported by the evidence upon which the commission relied.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate concluded that the commission abused its discretion by failing to determine whether claimant's early departures from her employment violated relator's rule regarding "[u]nauthorized absence from duty during regularly scheduled work hours" so as to constitute a voluntary abandonment of her employment. Therefore, the magistrate recommended that this court issue a writ of mandamus ordering the commission to amend its staff hearing officer's ("SHO") order of September 29, 2009, in accordance with the magistrate's decision.

{¶3} Prior to addressing the parties' objections, we first address claimant's motion to strike relator's objections. According to claimant, relator's objections are untimely under Loc.R. 12(M) and, therefore, should be stricken and not considered by this court. A review of the record, however, reveals that relator's objections are timely under Loc.R. 12(M). Accordingly, claimant's motion to strike is denied.

{¶4} We now turn to the objections filed by the parties. Claimant has filed objections to the magistrate's decision and, without delineating a specific objection, essentially contends that the commission addressed all of the arguments raised by relator and that the magistrate inappropriately addressed arguments that were not made at the

September 29, 2009 commission hearing. Contrary to claimant's assertion, the issue of whether claimant's early departures from her employment violated relator's rule regarding "[u]nauthorized absence from duty during regularly scheduled work hours," was before the commission at the September hearing and was raised in relator's motion for reconsideration filed subsequent to the commission's September 2009 order.

{¶5} Accordingly, we overrule claimant's objections to the magistrate's decision.

{¶6} In addition to the objections filed by claimant, relator has filed the following objections to the magistrate's decision:

> [1.] THE MAGISTRATE ERRED IN FINDING RESPONDENT INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT RESPONDENT STEPHANIE WHITCOMB DID NOT VIOLATE RELATOR'S RULE PROHIBITING INSUBORDINATION.
>
> [2.] THE MAGISTRATE ERRED IN FINDING RELATOR'S ATTENDANCE AND TARDINESS RULE WAS NOT CLEARLY DEFINED TO SUPPORT RELATOR'S VOLUNTARY JOB ABANDONMENT DEFENSE.

{¶7} Relator's objections challenge the magistrate's findings pertaining to relator's "Attendance and Tardiness" and "Insubordination" work rules. These objections, however, fail to raise any new issues and simply reargue the contentions that were presented to and addressed by the magistrate. For the reasons set forth in the magistrate's decision, we do not find relator's objections well-taken.

{¶8} Accordingly, we overrule relator's objections to the magistrate's decision.

{¶9} Upon review of the magistrate's decision, an independent review of the record, and due consideration of both claimant's and relator's objections, we find the magistrate has properly determined the pertinent facts and applied the appropriate law.

We, therefore, adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein.

{¶10} Accordingly, claimant's objections to the magistrate's decision are overruled, relator's objections to the magistrate's decision are overruled, and we order a writ of mandamus returning the matter to the commission for further consideration and amendment of its SHO's order of September 29, 2009 in a manner consistent with this decision.

Motion to strike denied;
objections overruled, and
writ of mandamus granted.

BRYANT, P.J., and KLATT, J., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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Relator,	:	
v.	:	No. 10AP-549
Stephanie Whitcomb and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on August 15, 2011

Michael Soto, for relator.

Larrimer & Larrimer, and *Thomas L. Reitz*, for respondent Stephanie Whitcomb.

Michael DeWine, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶11} In this original action, relator, Crestview Manor Nursing Home, Inc. ("Crestview" or "relator"), requests a writ of mandamus ordering respondent Industrial

Commission of Ohio ("commission") to vacate its order awarding temporary total disability ("TTD") compensation beginning May 3, 2009, and to enter an order denying compensation to respondent Stephanie Whitcomb ("claimant") on eligibility grounds or, alternatively, on grounds that the award is not supported by the evidence upon which the commission relied.

{¶12} Relator also requests that the writ order the commission to vacate an order that denied relator's February 18, 2010 motion for the exercise of continuing jurisdiction, and to enter an order finding that the Ohio Bureau of Workers' Compensation ("bureau") unlawfully began payments of TTD compensation beginning January 1, 2010 following relator's unilateral termination of payments under a salary continuation agreement.

Findings of Fact:

{¶13} 1. On May 2, 2009, claimant injured her back while employed with relator, a state-fund employer. On the date of injury, claimant sought medical treatment at the First Medical Urgent Family Care Center ("urgent care") where she was examined by Curtis M. McAnallen, M.D. Dr. McAnallen diagnosed a "thoracic lumbar strain." Later, a lumbosacral sprain was diagnosed at the urgent care.

{¶14} 2. On May 2, 2009, a Physician's Report of Work Ability ("MEDCO-14") form was completed. Claimant was released to return to work with restrictions from May 3 through May 6, 2009, when a follow-up appointment was scheduled.

{¶15} 3. On May 4, 2009 claimant entered into a "Transitional Work Program Participation Agreement" ("TWP")[1]. The TWP agreement provides:

> The Transitional Work Program (TWP) at Crestview Manor Nursing Home, Inc. Name is designed to provide you with suitable temporary work assignments while you recover from your work-related accident or illness. All parties agree that during your participation in the program, you will not be required to perform any task or duties that are not compatible with the temporary restrictions that your doctor has provided.
>
> Your temporary assignment begins on [5-4-09]. Your case will be staffed by TWP Committee every two weeks, or on an as needed basis, to determine you[r] progress and need for continuance or modification of assignment. The program will continue as long as there is a documented medical need up to a maximum of 60 calendar days. Your program may be terminated due to lack of medical necessity, lack of progress or other change in your medical condition. When you are ready to go back to full duty work, your physician of record will perform an examination and sign the release.
>
> You will be paid your regular rate of pay while participating in the program and will be expected to follow all established personnel policies and procedures. No overtime beyond normal scheduling working hours will be worked. If the therapy is needed, an occupational or physical therapist will come to the work-site to provide the services specified by your physician of record. All other appointment[s] need to be scheduled during non-working hours as much as possible. If you are unable to schedule an appointment during non-working hours, it must be scheduled for the first two or last two hours of your assigned shift. You may use available benefit time to cover your absence.
>
> Your restriction(s) is/are listed on the MEDCO-14 form from your attending physician.
>
> * * *

[1]The TWP agreement of record indicates that it was signed "5-4-08,"—an apparent error in writing the date.

Your working shift is: 11 AM – 7 PM

{¶16} 4. On May 6, 2009, claimant was again seen at the urgent care where a MEDCO-14 was completed. On the MEDCO-14, claimant was totally disabled for May 6, 2009, but released to return to restricted work from May 7 to May 20, 2009.

{¶17} 5. On May 13, 2009, claimant initially was examined by chiropractor Richard J. Maynard, Jr., D.C. Dr. Maynard's office note of that date states:

> Apparently she did fall while on the job which did indeed cause her injury.
>
> She was seen initially at urgent care, they did prescribe muscle relaxants and Ibuprofen. No x-rays were taken at that time. She was seen at the local hospital emergency room on May 11, 2009. She was given Vicodin, 5 mg. X-rays were taken which did show a grade-I to grade-II spondylolisthesis at L5-S1 with degenerative disc disease in the lumbar spine, more prominent at L4-L5 and L5-S1. There is also osteophyte formation.
>
> * * *
>
> At this time Mrs. Whitcomb is working with modified duty. I would like to keep her that way for a while if possible. We will start treating Mrs. Whitcomb tomorrow, May 14, with mild manipulative and physical therapy modalities intensively for approximately two weeks. We will utilize no rotational adjusting as I think it would be contraindicating the [sic] based on her spasm and swelling.
>
> If at the end of two weeks that [sic] she has not improved then I will strongly consider recommending an MRI of the lumbar spine.
>
> At the present time she has an alleged injury that is allowed of thoracic and lumbar spine sprain/strain. We will leave that diagnosis alone at this point and work on the premise that she will respond to care, if she does not then additional conditions will be considered.

> In conclusion, it is my opinion that the condition and symptoms for which Stephanie came to our office are a direct and proximate result of her work related injury and we will treat those areas accordingly.

{¶18} 6. On May 29, 2009, Dr. Maynard restricted claimant to working no more than four to five hours per day from June 1 through June 15, 2009, and then schedule for re-evaluation.

{¶19} 7. On June 2, 2009, claimant worked 4.75 hours; on June 3, 2009, claimant worked 3.50 hours; on June 4, 2009, claimant worked 3.50 hours; and on June 7, 2009, claimant worked 3.5 hours.

{¶20} 8. On June 11, 2009, claimant was terminated from her employment. Three Crestview documents were generated on that date.

{¶21} 9. First, a Crestview document captioned "Termination of Employment" was completed. It is purportedly signed by claimant, her supervisor, and two "witnesses," one of which is a "Rosemary Elder." The document contains the following handwritten remarks:

> Worker has failed to work with facility regarding her Transitional Work Program - Duties and hours have been changed to meet restrictions – Employee has failed to fulfill her Amended Schedule by leaving early on a daily basis – Without Notifying Management.

{¶22} 10. Second, a Crestview document captioned "Warning Notice" was completed. The document is purportedly signed by "Rosemary Elder" and contains the following handwritten statement:

> Failure to comply with Transitional Work Program[.] Employee was to work 5 hours per scheduled day – Has been non compliant leaving early – See Attached punch

> detail sheets. Employee left facility on 6/2, 6/3, 6/4, 6/7 Early Without Notification to Management Staff.

{¶23} 11. Third, another Crestview document captioned "Warning Notice" was completed. This document is also purportedly signed by "Rosemary Elder" and contains the following handwritten statement:

> Insubordination – Management Threats
>
> Management Staff met [with] Employee on 6-10-09 Discussed Transitional Work Program – Advised Meeting confidential in Nature Employee left meeting and went to [east wing] nursing station and told staff member management would be hearing from her attorney * * *
>
> Despite facilities good faith effort to comply with Employee's TWP, and changing restrictions she continues to be belligerent and threatening in nature.
>
> This behavior as well as failure to comply with your amended TWP has led to your termination.

{¶24} 12. Earlier, on May 19, 2009, Dr. Maynard completed a C-84 on which he certified a period of TTD beginning May 19, 2009 to an estimated return-to-work date of June 4, 2009. The C-84 form asks the examining physician to "[l]ist ICD-9 Codes with narrative diagnosis(es) for allowed conditions being treated which prevent return to work." In response, Dr. Maynard wrote: "847.1 [and] 847.2." Undisputedly, those ICD-9 codes describe respectively a sprain of the thoracic and a sprain of the lumbar regions.

{¶25} On the C-84 form, the physician is asked to state the objective clinical findings that are the basis for his recommendations. In response, Dr. Maynard wrote: "Restricted [range of motion], Inflammation."

{¶26} 13. On June 12, 2009, Dr. Maynard completed another C-84 on which he certified TTD from June 12, 2009 to an estimated return-to-work date of August 13,

2009. Dr. Maynard again listed "847.1 [and] 847.2" as the allowed conditions being treated that prevent a return to work. For his objective clinical findings, Dr. Maynard wrote: "X-ray – MRI." In response to another query, Dr. Maynard wrote: "Still acute – to be scheduled with a spine surgeon."

{¶27} 14. On June 22, 2009, claimant was examined by orthopedic surgeon Larry T. Todd, Jr., D.O., upon referral from Dr. Maynard. In his three-page narrative report, Dr. Todd states:

> RADIOLOGY: Today she presents with an MRI of her lumbar spine from ProScan Imaging of Pickerington dated June 8, 2009, which does reveal grade two spondylolisthesis at L5-S1 and bi-foraminal stenosis at the L5-S1 level. There is retrolisthesis and what appears to be an annular tear at the L4-L5 level.
>
> IMPRESSION:
>
> [One] Retrolisthesis of L4 on L5 with annular tear with grade two spondylolisthesis at L5-S1 with moderate severe bi-foraminal stenosis (ICD codes 756.12 and 724.02).
>
> [Two] Sprain, lumbar region (ICD code 847.2).
>
> RECOMMENDATIONS: At this time, I had a long discussion with Stephanie with the help of a spine model. I went over her pathophysiology of her spondylolisthesis, her stenosis, and her retrolisthesis. I went over her options of observation to physical therapy with chiropractic treatment to epidural injections to pain management all the way to surgery. The surgical option is a laminectomy and fusion with instrumentation from the L4 to S1 levels due to her instability of her spine. At this time, I have encouraged her down the initial nonoperative route for which I have outlined some physical therapy that I want her to perform right there in your office, Dr. Maynard. I have written that for three times per week for the next six weeks. I am going to check her back in six weeks' time and if she is not better with that, we will consider an epidural injection. If all else fails, then possible surgery. It is in hopes that we can save her a surgery. * * *

{¶28} 15. On July 29, 2009, Dr. Maynard completed yet another C-84 on which he extended the period of TTD to an estimated return-to-work date of October 12, 2009. He listed "847.2" as the only allowed condition being treated that prevents a return to work. For his objective clinical findings, Dr. Maynard wrote: "MRI – X-ray, clinical exam."

{¶29} 16. Earlier, on May 22, 2009, the bureau mailed an order allowing the claim for "sprain thoracic region" and "sprain lumbar region." The bureau order further states:

> The injured worker is paid full salary in lieu of receiving temporary total compensation (TT) payments from BWC. The injured worker can accept salary continuation from the employer without impacting any other BWC benefits, or the injured worker can receive TT payments from BWC at the rate included in this order. * * *

{¶30} 17. Relator administratively appealed the bureau's order of May 22, 2009.

{¶31} 18. Following an August 4, 2009 hearing, a district hearing officer ("DHO") issued an order affirming the bureau's order and awarding TTD compensation from May 3 through the August 4, 2009 hearing date and to continue upon submission of medical evidence showing disability.

{¶32} 19. Relator administratively appealed the DHO's order of August 4, 2009.

{¶33} 20. Following a September 29, 2009 hearing, a staff hearing officer ("SHO") issued an order stating:

> The order of the District Hearing Officer, from the hearing dated 08/04/2009, is affirmed with different reasoning.
>
> The application, filed 5/4/2009, remains granted and the claim remains allowed. The worker was leaning against a

heater guard. The guard broke and the worker fell onto an oxygen container. The claim remains ALLOWED for the conditions of SPRAIN THORACIC REGION AND SPRAIN LUMBAR REGION. Temporary total compensation is to be paid from 5/3/2009 through today, 9/29/2009 and to continue upon submission of medical evidence indicating temporary total disability.

The Employer asserts that the Injured Worker is not entitled to receive temporary total compensation due to the fact that she violated written work rules and, therefore, abandoned her position of employment per case law. The Staff Hearing Officer rejects this argument. The criteria for determining such abandonment and ineligibility to receive temporary total compensation was set out in State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St. 3d 401. One of the criteria is that the prohibited conduct must be clearly defined. The Employer has a written set of work rules. The alleged violations of these rules or policies were those of attendance and tardiness, and insubordination. These are included in a list of prohibited activities in "Section III Standards of Employee Conduct." The Injured Worker left work early on several occasions without permission. The Employer asserts this is a violation of attendance. The employee rules and regulations, however, are non specific as to what is meant by "attendance and tardiness." Whether leaving work early constitutes a violation of attendance, is not clear. The other alleged violation, that of insubordination, likewise, is simply listed as "insubordination." There is no definition of what constitutes insubordination. Per the testimony of Ms. Elder and the Injured Worker the incident involving alleged insubordination contained no profanity and the comments were directed mostly to a non supervisor. Neither alleged violation involves a clearly defined prohibited conduct.

* * *

This order is based on the 5/2/2009 report from First Medical Urgent and Family Care/Dr. McAnallen, the 5/13/2009 report from Dr. Maynard, the 6/22/2009 report from Dr. Todd, the 5/19/2009, 6/12/2009 and 7/29/2009 C-84 Requests for Temporary Total Compensation from Dr. Maynard, the testimony of Ms. Elder and the testimony of the Injured Worker Ms. Whitcomb.

(Emphasis sic.)

{¶34} 21. On October 30, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 29, 2009.

{¶35} 22. On December 22, 2009, on a two-to-one vote, the three-member commission denied relator's request for reconsideration of the SHO's order mailed October 30, 2009.

{¶36} 23. Earlier, on November 23, 2009, claimant moved for additional claim allowances. The bureau initially ruled on the motion and thereafter claimant administratively appealed.

{¶37} 24. Following a March 15, 2010 hearing, a DHO issued an order additionally allowing the claim for "lumbar disc displacement L4-5, L5-S1, L4-5 Pucci Retrolithesis with annular tear and substantial aggravation of pre-existing Grade II spondylolisthesis at L5-S1."

{¶38} 25. Apparently, the DHO's order of March 15, 2010 was administratively affirmed.

{¶39} 26. Earlier, by letter dated January 7, 2010, Crestview's administrative assistant, Rosemary Elder, informed claimant that salary continuation payments were being suspended due to claimant's failure to attend a medical examination as scheduled by Crestview. Apparently, salary continuation payments were stopped effective December 31, 2009.

{¶40} 27. By letter dated January 13, 2010 from claimant's counsel, the bureau was informed that relator had unilaterally terminated salary continuation payments. Also with the letter, counsel submitted a C-84 dated November 16, 2009 from Dr.

Maynard. On the C-84, Dr. Maynard certified TTD from June 12, 2009 to an estimated return-to-work date of February 20, 2010. On the C-84, Dr. Maynard listed "847.1 [and] 847.2" as the allowed conditions being treated that prevent a return to work. Also in response to the form's inquiry, Dr. Maynard wrote: "MRI – X-ray [and] clinical exam" for his objective clinical findings.

{¶41} 28. By letter dated February 18, 2010, relator's counsel objected to the bureau's decision to begin payments of TTD compensation effective January 1, 2010. Among the specific objections stated in the letter, relator's counsel argued that the January 13, 2010 letter from claimant's counsel constituted a "new request for TTD" that allegedly requires a bureau order. Also, relator argued that Dr. Maynard's November 16, 2009 C-84 does not support the payment of TTD compensation.

{¶42} 29. Also on February 18, 2010, relator filed a C-86 motion on which it requested the commission "to exercise its continuing jurisdiction and declare an overpayment of all temporary total compensation paid by the BWC beginning 1/1/10."

{¶43} 30. Following a March 31, 2010 hearing, an SHO issued an order denying relator's February 18, 2010 C-86 motion.

{¶44} 31. On June 10, 2010, relator, Crestview Manor Nursing Home, Inc., filed this mandamus action.

Conclusions of Law:

{¶45} The main issue is whether the commission, through its SHO, abused its discretion in determining that relator failed to show a voluntary abandonment of employment that would eliminate eligibility for TTD compensation.

{¶46} 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.

{¶47} 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.

{¶48} 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.)

{¶49} In *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, the court had occasion to clarify the distinction between the employer's defense of voluntary abandonment of employment and the defense of refusal of suitable alternative employment. The court observed that the latter presumes an injury-induced inability to return to the former position of employment. "There is no need to propose alternate employment if the claimant's inability to return to the former position is attributable to anything other than the injury." Id. at ¶9.

{¶50} In *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 7, the court states:

> The timing of a claimant's separation from employment can, in some cases, eliminate the need to investigate the character of departure. For this to occur, it must be shown that the claimant was already disabled when the separation occurred. "[A] claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal." *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 48, 623 N.E.2d 55[.] * * *

{¶51} In *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, ¶12, the court, citing *Pretty Products*, repeated the principle applicable

to the doctrine of voluntary abandonment "that a claimant can abandon a former position of employment only if the claimant was physically capable of doing that job at the time of the alleged abandonment."

{¶52} In *State ex rel. Adkins v. Indus. Comm*., 10th Dist. No. 07AP-975, 2008-Ohio-4260, ¶56, this court, speaking through its magistrate, states:

> Relator's reliance on *Pretty Products* is misplaced. While relator was medically unable to return to her former position of employment at the time that she was terminated from that employment, she was undisputedly medically capable of reporting to the light-duty job she had accepted. *Pretty Products* does not directly address the situation here where the rule violation involves accepted alternative employment rather than the former position of employment. Nevertheless, it is clear that relator can be presumed to intend the consequences of her voluntary act. That is, relator can be presumed to intend that her failure to report to her newly accepted light-duty job can lead to her loss of all employment at Spherion.

{¶53} At the outset, the magistrate rejects claimant's argument that the commission was prohibited from finding a voluntary abandonment of employment because, at the time of the job termination, claimant was undisputedly unable to return to her former position of employment. Claimant's reliance upon *Pretty Products* is misplaced. At the time of her termination, claimant was undisputedly medically capable of employment in relator's TWP. She was thus subject to her employer's work rules regarding her employment in the TWP. *Adkins*.

{¶54} Before the commission, relator alleged that termination was premised upon claimant's violation of its work rules as set forth in Section III of its employee handbook captioned "Standards of Employee Conduct." Section III of the handbook provides:

Standards of Employee Conduct and Corrective Action

The Company has established standards pertaining to employee conduct, performance, and responsibilities with the expectation that all employees will exhibit a high degree of personal integrity at all times. The standards outlined in this Policy apply to you whenever you are representing the Company. Conduct that interferes with the safe operation of our facility, brings discredit to the facility or its residents or staff, or any act that is offensive to a resident, family member, visitor or employee will be grounds for disciplinary action.

In each case, appropriate disciplinary or corrective actions will be determined by any one or more of the following: seriousness of the offense, your overall employment record, and/or previous corrective actions.

It is impossible to list all violations of Company policy or improper conduct; however, *THE FOLLOWING LIST SETS FORTH EXAMPLES OF VIOLATIONS WHICH ARE GROUNDS FOR IMMEDIATE DISCIPLINARY ACTION INCLUDING TERMINATION:*

- Violation of any of the following Policies:

  * * *

- Attendance and Tardiness

  * * *

- Unauthorized absence from duty during regularly scheduled work hours;

  * * *

- Insubordination[.]

(Emphasis sic.)

{¶55} As previously noted, on June 11, 2009, three documents were generated by Crestview. Two of the documents allege violations of the attendance policy while the third document alleges insubordination.

{¶56} The two documents allege that on four days in early June 2009, claimant left work early without notifying the management staff of the TWP. It is also noted that claimant was scheduled to work a five-hour workday for each workday scheduled.

{¶57} In the September 29, 2009 order, the SHO addresses only that portion of the handbook listing "Attendance and Tardiness" as a ground for disciplinary action, including termination. The SHO found that portion of the handbook to be "non specific." According to the SHO, "[w]hether leaving work early constitutes a violation of attendance, is not clear."

{¶58} As relator here strenuously points out, the SHO failed to mention that the handbook also lists as a ground for disciplinary action, including termination, an "[u]nauthorized absence from duty during regularly scheduled work hours." In fact, relator has pointed this out in both its opening brief and its reply brief, but respondents have ignored the point that relator makes.

{¶59} Under the circumstances, the magistrate must conclude that the SHO's order of September 29, 2009 is incomplete in its analysis of whether claimant's leaving early on four days in early June constitutes a violation of relator's work rules.

{¶60} While the magistrate can agree with the SHO that the words "Attendance and Tardiness," standing alone, do not clearly define the allegation at issue here

regarding unauthorized early departure from work, the same cannot be said for the handbook provision prohibiting "[u]nauthorized absence from duty during regularly scheduled work hours."

{¶61} Accordingly, the commission abused its discretion in failing to adjudicate the question of whether claimant's alleged early departures from work constituted a violation of relator's rule prohibiting "[u]nauthorized absence from duty during regularly scheduled work hours."

{¶62} As earlier noted, the third Crestview document generated on June 11, 2009 alleged insubordination. According to the SHO, because the handbook does not define "insubordination," that cannot be a ground for determining a voluntary abandonment. The magistrate disagrees.

{¶63} Among the several cases that have come before this court or the Supreme Court of Ohio in which insubordination was a factor in an employment termination and the voluntary abandonment doctrine was at issue, the magistrate has found one case in which the decision discloses that the employer defined insubordination in its employee handbook. That case is *State ex rel. Saunders v. Cornerstone Found. Sys., Inc.*, 123 Ohio St.3d 40, 2009-Ohio-4083.

{¶64} In *Saunders*, the employer's handbook defined insubordination as a "refusal to follow any order given by an employee's supervisor or management, or the refusal or failure to perform work assigned." Id. at ¶3.

{¶65} Of course, that one employer has chosen to define insubordination does not mandate that another employer define it.

{¶66} Webster's Third New International Dictionary (G. & C. Merriam Company 1966) defines insubordinate as "unwilling to submit to authority: disobedient." Webster's Dictionary comments *insubordinate* "applies to disobedience of orders, infraction of rules, or a generally disaffected attitude toward authority."

{¶67} Here, the SHO did point out that relator never defined insubordination. Nevertheless, the SHO went on to find that claimant's conduct was not insubordinate, pointing out that there was "no profanity and the comments were directed mostly to a non supervisor."

{¶68} Challenging the SHO's finding, relator here points out that profanity is not a necessary element of insubordination, and, on that basis, concludes that the SHO's finding constitutes an abuse of discretion. In the magistrate's view, relator misreads the SHO's order.

{¶69} The SHO's order need not be interpreted as stating that profanity is a necessary element of insubordination. Apparently, the lack of profanity was but a factor that the SHO relied upon in concluding that there was no insubordination.

{¶70} In determining that claimant did not violate the insubordination rule, the SHO was persuaded by the fact that claimant's "comments were directed mostly to a non supervisor." There is some evidence in the record to support the finding. In the June 11, 2009 Crestview "warning notice," it is written that, after the meeting with the "management staff" where claimant was informed that the meeting was "confidential in nature," she went to the nursing station and told a "staff member" that management would be hearing from her attorney.

{¶71} Given relator's failure to define what it means by "insubordination," the magistrate cannot find that the SHO's reasoning is an abuse of discretion under the circumstances here.

{¶72} In short, the commission did not abuse its discretion in determining that claimant did not violate relator's rule prohibiting insubordination. However, the commission did abuse its discretion by failing to determine whether claimant's early departures from her employment violated relator's rule regarding "[u]nauthorized absence from duty during regularly scheduled work hours."

{¶73} It should be further noted that relator also argues that, even if the job termination was involuntary, the commission's award of TTD compensation beginning May 3, 2009 is not supported by the medical evidence upon which the commission relied. Also, relator argues that the commission abused its discretion in denying relator's February 18, 2010 motion.

{¶74} Given that the commission abused its discretion in determining whether the job termination was a voluntary abandonment of employment, it would be premature for this court to address the other issues.

{¶75} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend its SHO's order of September 29, 2009 in a manner consistent with this magistrate's decision.

/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).