

TENTH APPELLATE DISTRICT

State of Ohio ex rel. :
Restaurant Management Incorporated, :
 :
Relator, :
 : No. 09AP-1121
v. :
 : (REGULAR CALENDAR)
Industrial Commission of Ohio et al., :
 :
Respondents. :
 :

D E C I S I O N

Rendered on November 18, 2010

Dinsmore & Shohl, LLP, and *George B. Wilkinson*, for relator.

Richard Cordray, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

McKenzie & Snyder LLP, *Kyle B. McKenzie*, and *Andrew R. Tobergte*, for respondent Tammy L. Dreyer.

IN MANDAMUS

FRENCH, J.

{¶1} Relator, Restaurant Management Incorporated ("RMI"), filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order, which granted

temporary total disability compensation to respondent, Tammy L. Dreyer, and ordering the commission to find that Dreyer is not entitled to that compensation.

{¶2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ. No objections to that decision have been filed.

{¶3} Finding no error of law or other defect on the face of the magistrate's decision, 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, the requested writ is denied.

Writ of mandamus denied.

KLATT and DELANEY, JJ., concur.

DELANEY, J., of the Fifth Appellate District, sitting by
assignment in the Tenth Appellate District.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Restaurant Management Incorporated,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1121
	:	
Industrial Commission of Ohio and Tammy L. Dreyer,	:	(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 30, 2010

Dinsmore & Shohl, LLP, and George B. Wilkinson, for relator.

Richard Cordray, Attorney General, and Andrew J. Alatis, for respondent Industrial Commission of Ohio.

McKenzie & Snyder LLP, Kyle B. McKenzie and Andrew R. Tobergte, for respondent Tammy L. Dreyer.

IN MANDAMUS

{¶4} Relator, Restaurant Management Incorporated ("RMI"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which granted temporary total disability ("TTD") compensation to respondent Tammy L. Dreyer

("claimant") and ordering the commission to find that claimant is not entitled to that compensation because she voluntarily abandoned her employment with RMI when she was terminated for violating a written work rule.

Findings of Fact:

{¶5} 1. Claimant sustained a work-related injury on May 15, 2008 and her workers' compensation claim was originally allowed for "closed fracture medial malleolus, left."

{¶6} 2. At the time she was injured, claimant was a manager at Arby's and was a salaried employee.

{¶7} 3. While off work, RMI elected to pay claimant her regular salary.

{¶8} 4. On August 15, 2008, claimant's treating physician, Forest T. Heis, M.D., completed a work status report indicating that claimant could return to modified duty working no more than six hours per day, with frequent breaks and that she not use ladders.

{¶9} 5. Both claimant and RMI interpreted Dr. Heis' restrictions as indicating that claimant could work 30 hours a week.

{¶10} 6. It is at this point that the parties disagree concerning the facts. Claimant and RMI each presented different interpretations of intervening events. The following summary of the testimony follows at findings of fact seven through ten.

Claimant's Interpretation/Testimony

{¶11} 7. According to claimant's testimony before the district hearing officer ("DHO") on April 28, 2009, she had been working for Arby's for 12 years. As a manager, claimant reported directly to Karen Rogers, her supervisor.

{¶12} 8. According to claimant's testimony, a few weeks after she returned to modified work at a new Arby's, Jim Endicott, area manager for RMI, and Greg O'Connor visited the Arby's managed by claimant and found that the restaurant was not being kept up properly. At this time, claimant had a conversation with her supervisor, Rogers, in an effort to solve the problem. Claimant had been clocking into the restaurant at 5 a.m. and leaving at 11 a.m. After 11 a.m., there were times when a manager was not present, and claimant and Rogers attempted to rectify the situation. According to claimant, she needed to work more than six hours a day on some days in order to ensure that the restaurant was being managed properly. Claimant indicated that, when she worked more than 30 hours per week, she would carry that time over to the next day or week in order that the time records would reflect that she was working 30 hours per week. Instead of indicating that she worked until 1 or 2 p.m., claimant would indicate on her records that she arrived early the following day. It is undisputed that claimant continued to be paid her full salary. According to claimant, RMI's handbook states that "time can be edited or changed by supervisor approval only." (Tr. 12.) According to claimant, she and Rogers arrived at this solution and Rogers was aware that claimant was editing her time records all along.

RMI's Interpretation/Testimony

{¶13} 9. Karen Rogers, claimant's supervisor, also testified. Rogers testified that she never agreed to permit claimant to alter her time records. Rogers testified that she found out what claimant was doing when claimant telephoned her in November and indicated that she was "out of hours for that week." (Tr. 23.) According to Rogers, at this time RMI began looking into claimant's time records and discovered that claimant

had been adjusting her time to reflect that she was arriving at the restaurant before the alarm system was turned off. According to Rogers, she never had an agreement with claimant and never authorized claimant to edit her time records.

{¶14} 10. Jim Endicott, area manager for RMI, also testified. According to Endicott's testimony, "[t]ime editing is allowed." (Tr. 28.) However, Endicott also testified that the editing was generally for a small period of time and usually no more than 15 minutes. Endicott also testified that when he called claimant to discuss the matter, she offered no explanation. The following discussion took place:

Q. So, what action did you take then?

A. I called Tammy - - after discussing it with Greg, called Tammy, asked her to come to the office, which, in fact, she did. She arrived at the office. We sat down. I told her that I had some questions concerning some time edits on her time[.] * * *

* * *

A. And then I proceeded to say, "Tammy, you're editing your time and adding hours, aren't you?" And she said, "Yes."

Q. Was there any discussion of, "I had an agreement with Karen"?

A. No discussion whatsoever.

Q. Was there any excuse whatsoever beyond that?

A. None at all. There was no excuse given.

(Tr. 29-31.)

{¶15} Thereafter, Endicott indicated that claimant was terminated and that four or five other managers had been terminated at the same time for the same offense.

End of Parties' Interpretations

{¶16} 11. RMI's records indicate that claimant was terminated on December 5, 2008 for the following reasons:

NATURE OF VIOLATION Falsification of time work records.

DESCRIBE THE INCIDENT OF CIRCUMSTANCES SURROUNDING THE VIOLATION Changing clock in times to reflect being at store before alarm being turned off.

{¶17} 12. On December 19, 2008, Dr. Heis completed a new work status report taking claimant off work entirely.

{¶18} 13. On January 6, 2009, Dr. Heis completed a C-84 form certifying that claimant was temporarily and totally disabled beginning December 19, 2008 through an estimated return-to-work date of March 16, 2009.

{¶19} 14. In January 2009, claimant sought authorization of specific treatment and asked that her claim be amended to include the following conditions: "reflex sympathetic dystrophy/CPRS left lower lower [sic] limb and left knee sprain."

{¶20} 15. RMI objected to claimant's request and the matter was heard before a DHO on April 28, 2009. The DHO granted claimant's motion and her claim was additionally allowed for "reflex sympathetic dystrophy/CPRS left lower lower [sic] limb and left knee sprain." The DHO also granted claimant's request for treatment as well as the payment of TTD compensation. RMI argued that claimant was not entitled to TTD compensation because she voluntarily abandoned her employment. In response, the DHO found as follows:

The District Hearing Officer finds that although the Injured Worker was terminated from employment on 12/05/2008, the Injured Worker was not able to return to or perform the duties of her former position of employment at the time of

her termination. The District [Hearing Officer] finds that at the time that the Injured Worker was terminated she was not able to return to work in her former position of employment. Therefore, the Injured Worker is entitled to the payment of temporary total disability compensation in spite of the termination.

{¶21} 16. RMI appealed and the matter was heard before a staff hearing officer ("SHO") on July 20, 2009. The SHO affirmed the prior DHO's order. As such, the requested treatment was allowed and the additional conditions were added to claimant's claim. RMI again argued that TTD compensation was not payable because claimant had abandoned her former position of employment when she falsified her time records. The SHO denied that argument, explaining:

At hearing, the employer argued that temporary total disability compensation should be precluded pursuant to State, ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995), 72 Ohio St.3rd 401. Specifically, the employer argued that the Injured Worker was terminated effective 12/05/2008 for the violation of [a] written work rule that clearly defined a prohibited conducted, was previously identified by the employer as a dischargeable offense and which was known or should have been known to the employee.

The Staff Hearing Officer rejects this argument.

The Staff Hearing Officer finds that the employer has failed to satisfy the three prong test set forth in Louisiana-Pacific.

The Injured Worker was terminated effective 12/05/2008 for editing her time sheet. Expressly, the Injured Worker was terminated for altering her time sheet to reflect that she arrived at work approximately one hour before she actually reported to work. This practice is known to the parties as editing.

At hearing, the employer's representative, Mr. Endicott, testified that editing a time sheet is permissible with a supervisor's permission. At the time of the incident in question, the Injured Worker was employed as a manager.

The employer's policy, as explained by Mr. Endicott, states that a manager can edit a time sheet with a supervisor's approval. At hearing, the Injured Worker testified that she had her supervisor's approval.

The Staff Hearing Officer finds the Injured Worker's testimony credible on this issue.

Therefore, the Staff Hearing Officer finds that the Injured Worker did not violate the employer's policy on editing a time sheet as explained by Mr. Endicott.

Further, the employer failed to provide a copy of a written policy which explains the practice of editing and when editing is acceptable.

Instead of producing the policy which addresses the editing of time sheets, the employer supplied a policy which prohibits falsifying documents.

The Staff Hearing Officer finds this policy inapplicable to the Injured Worker's conduct because the employer testified at hearing that the practice of editing a time sheet was allowed in certain circumstances and the policy submitted by the employer simply does not address the practicing of editing time sheets in any manner.

Accordingly, the Staff Hearing Officer finds that the employer has failed to meet their burden of proof in establishing that the Injured Worker was terminated for the violation of a written work rule.

{¶22} 17. RMI's appeal was refused by order of the commission mailed August 15, 2009.

{¶23} 18. Thereafter, RMI filed the instant mandamus action in this court.

Conclusions of Law:

{¶24} In this mandamus action, RMI argues that the commission abused its discretion when it granted TTD compensation to claimant after RMI terminated her for violating a written work rule. RMI argues that the record is clear that claimant falsified

her time records and that her explanation now, that she had Rogers' approval, is pretextual. Specifically, RMI points out that, when first confronted, claimant did not explain; instead, claimant claimed that managers never arrived at the store by 11 a.m. to relieve her when time records show otherwise; claimant's explanation does not make sense—why not clock out later instead of clocking in earlier the next day; and claimant's supervisor, Rogers, denies that she ever gave claimant permission to edit her time records in this fashion.

{¶25} As more fully explained below, it is this magistrate's decision that RMI has not demonstrated that the commission abused its discretion. The commission found claimant's testimony to be credible and that, because RMI did permit editing, and RMI failed to produce a written work rule explaining editing, RMI failed to demonstrate that claimant violated a written work rule which was known to claimant and failed to meet its burden of proof under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153.

{¶26} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28.

{¶27} R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630. Where an employee's own actions, for reasons unrelated to the injury, preclude him or her from returning to their

former position of employment, he or she is not entitled to TTD benefits, since it is the employee's own actions, rather than the injury, that precludes return to the former position of employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. When demonstrating whether an injury qualifies for TTD compensation, a two-part test is used. The first part of the test focuses on the disabling aspects of the injury. The second part of the test determines if there are any factors, other than the injury, which would prevent claimant from returning to his or her former position of employment. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42. However, only a voluntary abandonment precludes the payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. As such, voluntary abandonment of a former position of employment can, in some instances, bar eligibility for TTD compensation.

{¶28} A firing can constitute a voluntary abandonment of the former position of employment when the firing is a consequence of behavior which the claimant willingly undertook. *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118. The rationale for this is that a person is deemed to tacitly accept the consequence(s) of their voluntary acts.

{¶29} In the present case, RMI argues that the commission abused its discretion by failing to find that claimant had voluntarily abandoned her employment with RMI and that she is not entitled to TTD compensation. RMI argues that it presented sufficient evidence to satisfy its burden of proof.

{¶30} In *Louisiana-Pacific*, the court characterized a firing as "voluntary" where that firing is generated by the employee'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.

{¶31} RMI submitted a portion of its policies and procedures. Under "Major Offenses," RMI's procedure provides, in pertinent part:

Major offenses are serious violations of company policy, which are considered grounds for immediate discharge. Examples of such major offenses are:
[One] Deliberately giving false information on employment applications or other job related forms.

{¶32} RMI argues that the evidence is clear that claimant deliberately provided false information on her time records, that her conduct violated the principles of *Louisiana-Pacific*, and that claimant's termination constitutes a voluntary abandonment of her former position of employment.

{¶33} RMI's first argument is that the DHO applied the incorrect standard when determining that claimant had not voluntarily abandoned her employment. It is the following portion of the DHO's order which RMI argues is incorrect:

The District Hearing Officer finds that although the Injured Worker was terminated from employment on 12/05/2008, the Injured Worker was not able to return to or perform the duties of her former position of employment at the time of her termination. The District [Hearing Officer] finds that at the time that the Injured Worker was terminated she was not able to return to work in her former position of employment. Therefore, the Injured Worker is entitled to the payment of temporary total disability compensation in spite of the termination.

{¶34} RMI is correct to argue that the DHO appears to have applied the wrong standard. As RMI states, pursuant to this court's decision in *State ex rel. Apostolic Christian Home, Inc. v. King*, 10th Dist. No. 08AP-1078, 2009-Ohio-5670, wherein this

court cited *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, reiterated that where an injured worker is capable of performing a light-duty position, the injured worker can abandon that position of employment. The commission focuses on the injured worker's light-duty position and not the position the injured worker held at the time of the injury.

{¶35} However, the fact that the DHO appears to have misstated the correct legal standard does not require the granting of a writ of mandamus. First, the statement is not actually incorrect, but incomplete. TTD may be granted or denied to an injured worker who has returned to restricted employment. The DHO did not follow up with a discussion of whether RMI established that claimant violated a written work rule that resulted in her termination and that barred the receipt of TTD compensation. Second, it is the SHO's order which is before the court at this time and not the DHO's order. Third, because the SHO properly applied the relevant law, an error in the DHO's order does not affect the commission's ultimate determination. Where the commission provides an alternative rationale for its determination which withstands the scrutiny of mandamus review and provides an independent basis for the commission's decision, the fact that the commission incorrectly applied the law in a separate portion of the order does not constitute grounds for the granting of a writ of mandamus. See *State ex rel. Crown Cork & Seal, Co., Inc. v. Indus. Comm.*, 10th Dist. No. 04AP-909, 2005-Ohio-3788; and *State ex rel. Kinzer v. Sencorp/Senco*, 10th Dist. No. 02AP-1054, 2003-Ohio-4178.

{¶36} RMI's second argument is that the facts of the instant case are virtually identical to the facts in *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, and that the application of *Smith* to these facts requires the commission

to find that claimant voluntarily abandoned her employment and is not entitled to TTD compensation.

{¶37} In *Superior's Brand Meats*, Cornelius W. Smith sustained a work-related injury in the course of and arising out of his employment. In 1983, Smith was suspected of falsifying his time cards and, when he "could not explain the irregularities," Smith was given the option of being fired or resigning. *Id.* Smith resigned his employment. Thereafter, Smith secured other work and later sought a period of TTD compensation. The commission found that Smith's departure from employment was for reasons totally unrelated to his work-related injury, that there was no evidence of disability affecting his ability to perform his former position of employment other than Smith's statement he was working light-duty at the time of his departure, and denied Smith's request for TTD compensation on grounds that he had voluntarily abandoned his employment when he violated a written work rule and was terminated. Smith argued that his departure was employer-induced and, therefore, involuntary. Smith also argued that his employer failed to prove the misconduct giving rise to his departure.

{¶38} In denying his request for a writ of mandamus, the Supreme Court of Ohio explained that there was "a documented pattern of irregularity in [Smith's] time cards," and that he "never denied that his cards had been falsified." *Id.* at 411. The court noted further that Smith did not assert a union grievance and never seriously challenged the grounds for his termination.

{¶39} RMI argues that the real focus in *Superior's Brand Meats* is on the fact that Smith (like claimant herein) was unable to explain the irregularities. RMI points to Endicott's testimony that claimant never tried to explain why she was editing her time

records. RMI asserts that claimant's later self-serving statements should have been rejected.

{¶40} RMI's argument could succeed if the commission would have found that claimant voluntarily abandoned her employment. In the present case, the commission did not find that claimant violated a written work rule and that her termination therefore barred TTD compensation. Instead, the commission found that RMI did not meet its burden of proving that claimant violated a written work rule and found that TTD compensation was payable. RMI's argument in this regard can only succeed if this court concludes that the commission abused its discretion by finding that RMI did not meet its burden of proving that claimant voluntarily abandoned her employment. This is an evidentiary issue, not a legal one.

{¶41} As set forth in the findings of fact, RMI acknowledged that editing time records was permissible. Claimant testified that she and Rogers had an agreement that claimant would be permitted to edit her time records. Rogers testified that she never made any such arrangement with claimant and Endicott testified that editing only occurs in small increments, such as 15 minutes, and not the hour period of editing performed by claimant. Here, the commission found claimant's testimony to be credible and, because RMI did not submit its policy regarding editing, the commission determined that RMI did not establish that claimant violated the editing policy. Although RMI argues that its witnesses were more credible, the commission disagreed. Because the credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder, this magistrate cannot say that the commission abused its discretion in

finding claimant's testimony credible. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶42} RMI also argues that claimant's statements were self-serving and, on those grounds, should have been rejected by the commission. However, the magistrate notes that the statements of both Rogers and Endicott are likewise self-serving and this argument does not support RMI's position that a different outcome was necessitated by the evidence.

{¶43} RMI also asserts that, if the commission would have applied the rationale from *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St.3d 173, 2005-Ohio-4386, the commission would have found that claimant's actions were deliberate and motivated by an intent to deceive. In *Strimbu*, Willie E. Marshall, Jr., completed an application for employment with Nick Strimbu, Inc. Marshall was asked to list all his employers for the last ten years and was informed that any false or misleading information may result in his discharge. Marshall was hired and, shortly thereafter, he sustained a work-related injury and applied for TTD compensation.

{¶44} Strimbu discovered that Marshall had omitted the name of one employer on his application, discharged him for falsifying his application, and argued that TTD compensation was not payable. The commission disagreed and rejected Strimbu's argument that *Louisiana-Pacific* applied.

{¶45} Strimbu sought a writ of mandamus in this court; however, this court denied the writ and upheld the commission's reasoning in full.

{¶46} On appeal, the Supreme Court of Ohio affirmed this court's decision:

In the case at bar, the commission found, after being unconvinced that Marshall had violated a written work rule or

policy, that Marshall's discharge did not constitute a voluntary abandonment. At issue is a clause in Marshall's employment application that states that by its signing, Marshall understood that "false or misleading information given in [his] application or interview(s) may result in discharge." Marshall's application omitted reference to prior employment with PI&I Motor Express. The litigants' arguments reveal a consensus that an omission—in order to constitute falsification—must be deliberate and motivated by an intent to deceive. Strimbu claimed, at the hearing, that the omission was deliberate and amounted to falsification. Marshall stated that it was inadvertent and that he simply forgot PI&I while attempting to recount all of his employers over the past decade.

The commission was persuaded by Marshall's testimony, and we—like the court of appeals—defer to that determination. The commission is exclusively responsible for determining evidentiary weight and credibility. *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414, 417, 662 N.E.2d 364. Because this determination was within the commission's prerogative and was supported by evidence, we decline to find that it was an abuse of discretion.

The judgment of the court of appeals is affirmed.

Id. at ¶9-11.

{¶47} RMI argues that *Strimbu* applies and that, inasmuch as claimant deliberately altered her time records, she clearly had intent to deceive and her request for TTD compensation should have been denied. RMI argues that here the evidence is clear that claimant's actions of editing her time records were deliberate and pass the intent test of *Strimbu*.

{¶48} However, RMI again overlooks the commission's reasoning. The commission determined that RMI did not sustain its burden of proving that claimant voluntarily abandoned her employment. The commission found claimant's testimony that she and Rogers had reached an agreement that claimant could edit her time

records in this manner. Finding that claimant had permission to edit her time records and that RMI did not submit a policy which showed that the manner in which claimant had edited her time records was a violation of a written work rule, the issue of intent was never an issue. As such, the magistrate finds that *Strimbu* does not require a different result here.

{¶49} Lastly, RMI argues that this court should apply the rationale from *State ex rel. Eberhardt v. Flixible Corp.* (1994), 70 Ohio St.3d 649, which found that equivocal or inconsistent medical opinions do not constitute some evidence upon which the commission can rely. RMI asserts that here, claimant has given inconsistent statements. Endicott testified that claimant admitted she was editing her time records and did not attempt to provide an explanation. In contrast, at the hearing, claimant testified that she had approval from Rogers to edit her time records. Given these inconsistent statements, RMI contends that the commission should have rejected claimant's testimony.

{¶50} The only evidence that claimant made inconsistent statements comes from the testimony of Endicott and Rogers. That testimony is in direct conflict with claimant's testimony that she had the authority to edit her time records. Because the commission did not find the testimony of either Endicott or Rogers to be credible, the commission rejected RMI's interpretation. Therefore, even if the holding from *Eberhardt* was to apply here, RMI has not demonstrated that the commission abused its discretion.

{¶51} Having found that none of RMI's arguments demonstrate that the commission abused its discretion in granting TTD compensation to claimant, it is this magistrate's decision that this court should deny RMI's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
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).