[Cite as *State ex rel. Vaught v. Indus. Comm.*, 2015-Ohio-1228.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kenneth A. Vaught,	:	
Relator,	:	
v.	:	No. 14AP-377
The Industrial Commission of Ohio and B & A Leasing, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on March 31, 2015

Cox, Koltak & Gibson, L.L.P., and *Ronald J. Koltak*, for relator.

Michael DeWine, Attorney General, and *Lisa R. Miller*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTION TO THE MAGISTRATE'S DECISION

BRUNNER, J.

{¶ 1} Relator, Kenneth A. Vaught, has filed this original action and petitioned for a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying his application for temporary total disability ("TTD") compensation and for an order directing payment of TTD compensation.

{¶ 2} This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, appended hereto, including findings of fact and conclusions of law, with a recommendation that this court deny relator's request for a writ of mandamus.

{¶ 3} Relator sustained a work-related injury on October 22, 2002 when the dump truck he was driving rolled over. He received hospital treatment and was released the same day. He told respondent B & A Leasing, Inc., d/b/a Burko Trucking ("employer"), that he would be back to work on Monday, October 28, 2002. However, relator did not return to work on October 28, 2002 and did not notify his employer that he would not be coming into work that day. On October 31, 2002, relator saw a physician and received medication for neck and back pain. The physician's notes indicate a return-to-work date of November 12, 2002.

{¶ 4} Before returning to work, relator changed physicians and on November 11, 2002, he saw Dr. G. Todd Schulte, who had treated him in the past. Dr. Schulte diagnosed a cervical sprain/strain injury with intermittent cervical radiculitis, chronic lumbar spine pain with intervertebral disc disorder, status post-surgical intervention, and a history of degenerative changes of the lumbar spine. Dr. Schulte continued relator on Percocet and indicated that he would request an MRI of the cervical spine. His request for a provocative discography of the lumbosacral region had been denied by relator's managed care organization. Despite his findings, Dr. Schulte did not hold relator back from work.

{¶ 5} According to a November 14, 2002 managed care organization internal communication, relator had not been fired and had not quit; his employer considered him to be "in inactive status." His claim initially was allowed on November 19, 2002 for neck and lumbar region sprains. Still, relator did not contact his employer and did not return to work. In a November 21, 2002 letter, the employer stated:

> Since the day after the accident we have not heard from you. You told us that you were sore and would return to work the following Monday, and you did not call or show up. After many attempts to call you we have decided to terminate your employment with Burko effective today, 11/21/02.

The termination letter was mailed to an address that was different from that on the Ohio Bureau of Workers' Compensation ("BWC") and commission filings and orders.

{¶ 6} On January 13, 2003, Dr. Robert Brown, on behalf of the BWC, noted that relator had pre-existing problems with his neck and lumbar spine and that the workup was incomplete. He opined that relator's request for TTD compensation was supported by the evidence. On January 16, 2003, the BWC mailed an order that granted relator's

request for TTD compensation beginning October 23, 2002, and the C-84 had indicated an estimated return-to-work date of June 1, 2003. On the employer's appeal, a district hearing officer ("DHO") found that relator was terminated based on violation of its "no call/no show policy" and also stated that it was "unclear whether the alleged period of disability is related to this 10/22/2002 injury or a prior low back problem." Denying relator's further appeal, a staff hearing officer ("SHO") noted:

> [T]he employer attempted to reach the injured worker numerous times without success. Furthermore, it is noted that the injured worker had not made any attempts to contact the employer since 10/23/2002. He apparently did return to the employer in February of 2003 to pick up his last check. Based on the above, the Staff Hearing Officer finds that the injured worker voluntarily abandoned his employment which precludes receipt of temporary total compensation.

Appeal of the SHO's decision was refused at the commission level, and more than 11 years later[1] relator filed this mandamus action.

{¶ 7} The magistrate concluded that "relator's failure to report for work or call in to work for one month, constitutes a violation of this and any other employer's work policy, and demonstrates an abandonment of the workforce." (Attached Magistrate's Decision, at ¶ 47.) The magistrate also expressed concern that this decision seemed contrary to the case law which has rejected the argument "that there are some common-sense infractions that need not be reduced to writing in order to foreclose the payment of TTD compensation if violation triggers termination." (Attached Magistrate's Decision, at ¶ 47.) Relator makes the following objection to the magistrate's decision:

> THE ORDER OF THE INDUSTRIAL COMMISSION DENYING KENNETH VAUGHT'S APPLICATION FOR TEMPORARY TOTAL COMPENSATION IS AN ABUSE OF DISCRETION FOR REASON THAT IT IS NOT SUPPORTED

[1] The commission raised laches in its brief to the magistrate but did not plead the doctrine as an affirmative defense "before the parties proceeded to submit evidence and argument in this case." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 84. In addition, relator argued that the commission did not show that it had been "materially prejudiced by the delay." *State ex rel. Case v. Indus. Comm.*, 28 Ohio St.3d 383, 385 (1986). The magistrate did not address the issue, and the commission has filed no objections. *Compare*, Civ.R. 53(D)(3)(b)(iv) ("Except for a claim of plain error, 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).").

BY SOME EVIDENCE AND WAS ENTERED CONTRARY TO LAW.

{¶ 8} After an examination of the magistrate's decision, an independent review of the record pursuant to Civ.R. 53, and due consideration of the objection, we sustain relator's objection. The magistrate quoted the case law at length, specifically *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559 (2001), including its reference to a *written* rule or policy as an absolute prerequisite to precluding TTD where the claimant's employment is terminated post-injury for having violated such rule or policy. *Id.* at 561.

{¶ 9} Relator's actions emulated the claimant's in *State ex rel. Daniels v. Indus. Comm.*, 10th Dist. No. 01AP-1441, 2002-Ohio-3857. When Daniels was released to return to work without restriction, he did not return, did not contact his employer, and did not contemporaneously file medical evidence extending his date of disability. Though not immediately, he was fired under a company policy that made unexcused absences a dischargeable offense. However, that policy was in writing, and although the work rule called for immediate termination and the employer waited five months to fire him after violation of the rule, we found the employer's delay inconsequential. *Id.* at ¶ 3. "The central issue is whether relator knowingly violated a written work rule." *Id.* Affirming, the Supreme Court of Ohio agreed with the commission's finding that any delay in notification was attributable to the claimant, also citing testimony that the claimant failed to keep the company informed of his address and telephone number. *State ex rel. Daniels v. Indus. Comm.*, 99 Ohio St.3d 282, 2003-Ohio-3626, ¶ 12.

{¶ 10} Here, if the employer had a written "no call/no show policy," we might conclude that relator voluntarily abandoned his employment regardless of his firing by not showing up for work as he said he would, by making no attempt to contact the employer until January 21, 2003, and by returning only to get his final paycheck on February 4, 2003. However, there is no evidence that the employer's policy was in writing, and therefore the limitation set forth in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), and mandated in *McKnabb,* must control. *Louisiana-Pacific* stands for the proposition that termination of employment can constitute voluntary abandonment when it is "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." *Id.* at 403. Voluntariness can be imputed to a claimant's misconduct only under such conditions. *State ex rel. Brown v. Hoover Universal, Inc.*, 132 Ohio St.3d 520, 2012-Ohio-3895, ¶ 1. In *McKnabb* the Supreme Court expounded: "because of the potential for abuse, a postinjury firing must be carefully scrutinized. Written termination criteria aid this inquiry and are why *Louisiana-Pacific* requires them." *Id.* at 562.

{¶ 11} In *State ex rel. Phillips Cos. v. Indus. Comm.*, 10th Dist. No. 04AP-222, 2005-Ohio-588, an employer-initiated action, the relator terminated the claimant's employment 11 days after his industrial injury, because there had been 3 consecutive days on which he did not appear or call in for work. The DHO had nonetheless awarded TTD compensation because the employer's ground for termination had not been prohibited and identified by the employer as dischargeable conduct in a written work rule. At the SHO hearing, the employer submitted a "work schedule" stating the rule, but nothing was submitted to show that the rule was written and in effect at the time of the injury. In *Phillips*, the magistrate "properly concluded that the joint stipulation of evidence fails to demonstrate relator's compliance with the requirement of *Louisiana-Pacific* that the claimant's violation be of a written work rule or policy in effect on the date of the claimant's injury." *Id.* at ¶ 4.

{¶ 12} We adopt the magistrate's findings of fact, to which relator raises no specific objection, but not the conclusions of law.

> To be entitled to relief in mandamus, the claimant must establish that [he] has a clear legal right to relief and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph nine of the syllabus. To do so, [he] must demonstrate that the commission abused its discretion and, "in this context, abuse of discretion has been repeatedly defined as a showing that the commission's decision was rendered without some evidence to support it." *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 20, 508 N.E.2d 936 (1987).

State ex rel. Parraz v. Diamond Crystal Brands, Inc., 141 Ohio St.3d 31, 2014-Ohio-4260, ¶ 13. The record contains no evidence of a written employee handbook, work rule or other

policy, let alone any prior warnings, reprimands or other violations to suggest that relator was or should have been aware that not contacting his employer following his injury may be cause for discharge. Without evidence that each of the *Louisiana-Pacific* criteria have been met, the commission's denial of TTD compensation cannot stand.

{¶ 13} While we disagree also with the magistrate's conclusion that relator failed to present any medical evidence that he was actually disabled and absent from work due to the allowed conditions in his claim, our decision that relator did not voluntarily abandon his employment under *Louisiana-Pacific* and *McKnabb* effectively moots consideration of involuntary departure due to physical incapacitation. As indicated in *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 7 (1996), the relator could not abandon his position of employment if he lacked the physical capacity for employment at the time.

{¶ 14} The medical records from relator's emergency room treatment on the day of the accident indicate acute cervical and lumbar strains. Exacerbation of prior neck and back conditions was noted on October 31, 2002, and Dr. Schulte's November 11, 2002 report confirmed the injury, described the accident "causing him to have an injury of his right neck, upper arm, and hand. Since that time, he has complained of intermittent numbness and tingling and severe cervical spine pain." Dr. Schulte also mentioned that he had seen relator "in the past for a lumbar sprain/strain injury with degenerative changes, postsurgical changes, and lumbosacral radiculopathy for which he had undergone treatment." The form C-84 from Dr. Schulte, certifying relator as temporarily and totally disabled, is dated January 6, 2003, and Dr. Brown found TTD to be supported by the evidence notwithstanding the pre-existing neck problems, prior lumbar fusion, and an incomplete workup. There, indeed, was medical evidence of disability as of relator's termination on November 21, 2002.

{¶ 15} The DHO's order denying TTD compensation on account of relator's termination also stated:

> The District Hearing Officer further finds that the injured worker previously treated with Dr. Schulte for a lower back injury, per the 11/11/2002 office note from this physician. The District Hearing Officer finds that it is unclear as to the type and frequency of said treatment, as well as whether such care was ongoing in nature. As such, it is unclear whether the

> alleged period of disability is related to this 10/22/2002 injury or a prior low back problem.

{¶ 16} The SHO's order did not address the suggestion that relator's disability was not related to the injury of October 22, 2002. In its response to relator's objection, the commission argues that the medical evidence was pertinent to consideration of relator's disability at the time of termination when voluntary abandonment is at issue. The commission does not assert this medical evidence as an alternative to voluntary abandonment for denial of TTD compensation. More importantly, the evidence does not support the notion that relator's disability was caused by a non-allowed pre-existing condition rather than an allowed aggravation of that condition. Dr. Schulte referred to relator's "chronic lumbar spine pain with intervertebral dis[c] disorder, status post surgical intervention * * * [and a] [h]istory of degenerative changes of the lumbar spine." Although these conditions may have pre-dated the October 22, 2002 injury, relator was not experiencing symptoms to prevent him from working for his employer before his injury—which is the test for TTD. *State ex rel. Chrysler Corp. v. Indus. Comm.*, 81 Ohio St.3d 158, 166-67 (1998).

{¶ 17} Following an independent review pursuant to Civ.R. 53, we adopt the magistrate's findings of fact but not the conclusions of law. For the foregoing reasons, we sustain relator's objection and grant a writ of mandamus compelling the commission to vacate its denial of TTD compensation for relator and to enter a new order granting relator's January 10, 2003 motion for TTD compensation.

Objection sustained;
writ of mandamus granted.

KLATT and SADLER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Kenneth A. Vaught,	:	
Relator,	:	
v.	:	No. 14AP-377
The Industrial Commission of Ohio and B & A Leasing, Inc.,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on November 25, 2014

Cox, Koltak & Gibson, L.L.P., and *Ronald J. Koltak*, for relator.

Michael DeWine, Attorney General, and *Lisa R. Miller*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 18} Relator, Kenneth Vaught, 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 denied relator's application for temporary total disability ("TTD") compensation, and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 19} 1. Relator sustained a work-related injury on October 22, 2002 when the dump truck he was driving rolled over.

{¶ 20} 2. That same day, relator presented at Mount Carmel East Hospital complaining of back pain. The attending physician Paul Zeeb, M.D., noted that relator had two previous back surgeries and opined that, at that time, relator had acute cervical and lumbar strains. Relator was released from the hospital with medications, and was told to rest, alternate ice and heat, and see a doctor for a follow-up visit.

{¶ 21} 3. Relator does not deny that, when he left that day, he told his employer that he would be back to work on Monday, October 28, 2002.

{¶ 22} 4. It is undisputed that relator did not return to work on October 28, 2002 nor did he notify his employer that he would not be coming into work. In fact, relator never contacted his employer nor did he return to work and, in a letter dated November 21, 2002, relator was notified that he was terminated. Specifically, that letter provides:

> Since the day after the accident we have not heard from you. You told us that you were sore and would return to work the following Monday, and you did not call or show up. After many attempts to call you we have decided to terminate your employment with Eurko effective today, 11/21/02. Your last check is being held by the company until our fuel card and [N]extel phone is returned to us. You are responsible for the [N]extel and any charges that occur until such item is returned. If you are unable to return items please call so we can make arrangements to have them picked up.
>
> We are sorry your employment ended this way without you calling or letting us know anything. Please call me with any questions or concerns.

{¶ 23} 5. On October 31, 2002, relator saw a physician complaining of neck and back pain. The physician's notes reference an exacerbation and noted a previous surgery. The doctor prescribed OxyContin and Percocet, and noted that relator had not worked since October 22, 2002. The office notes also indicate that relator could return to work on November 12, 2002.

{¶ 24} 6. Relator signed a change of physician notice on November 18, 2002 indicating he was changing his physician of record ("POR") from Ralph Newman, D.O., to Dr. G. Schulte and further noted he had seen Dr. Schulte on November 11, 2002.

{¶ 25} 7. In his November 11, 2002 office note, Dr. Schulte noted that he had seen relator for a lumbar sprain/strain in the past and that relator had recently suffered an injury to his right neck, upper arm, and hand. Dr. Schulte noted that relator complained of intermittent numbness, tingling, and severe cervical spine pain. Dr. Schulte indicated that relator had a cervical sprain/strain injury with intermittent cervical radiculitis, chronic lumbar spine pain with intervertebral disk disorder, status post surgical intervention, and a history of degenerative changes of the lumbar spine. Dr. Schulte continued relator on Percocet and indicated he was going to request an MRI of the cervical spine. Dr. Schulte also noted that his request for a provocative discography of the lumbosacral region had been denied by relator's MCO. Despite his findings, Dr. Schulte did not take relator off work.

{¶ 26} 8. In an order mailed November 19, 2002, the BWC allowed relator's claim for sprain of neck and sprain lumbar region.

{¶ 27} 9. On January 13, 2003, Robert Brown, M.D., reviewed relator's request for TTD compensation and, after noting that relator had pre-existing problems with his neck and lumbar spine, and that the workup was incomplete, Dr. Brown opined that relator's request for TTD compensation was supported by the evidence.

{¶ 28} 10. In an order mailed January 16, 2003, the Ohio Bureau of Workers' Compensation ("BWC") granted relator's request for TTD compensation beginning October 23, 2002.

{¶ 29} 11. The employer appealed and the matter was heard before a district hearing officer ("DHO") on February 6, 2003. The DHO denied relator's request for TTD compensation after finding that relator was terminated by his employer due to his failure to call or show up for work for one month. Specifically, the DHO stated:

> The District Hearing Officer finds that the injured worker was terminated by the employer of record as of 11/21/2002, based on violation of its "no call/no show policy." Specifically, the injured worker had not been in contact with the employer of record since 10/23/2002, the day following

> his industrial injury. On that date, the injured worker contacted the Employer of record indicating he would return to work on 10/28/2002, the Monday following the date of injury, which he did not do.
>
> The District Hearing Officer further finds that the injured worker previously treated with Dr. Schulte for a lower back injury, per the 11/11/2002 office note from this physician. The District Hearing Officer finds that it is unclear as to the type and frequency of said treatment, as well as whether such care was ongoing in nature. As such, it is unclear whether the alleged period of disability is related to this 10/22/2002 injury or a prior low back problem.

{¶ 30} 12. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on March 10, 2003. The SHO affirmed the prior DHO order and denied relator's request for TTD compensation again noting that relator failed to show up for work or call his employer for one month and then returned solely to pick up his last pay check in February 2003. Specifically, the SHO stated:

> The request for temporary total compensation from 10/23/2002 to the present and to continue remains denied. The Staff Hearing Officer finds that the injured worker was terminated on 11/21/2002 due to a violation of their "no call/no show" policy. As noted by the District Hearing Officer order, the injured worker had not been in contact with the employer since 10/23/2002 (the day after the injury). On that date, the injured worker contacted the employer indicating that he would return to work on 10/28/2002, the Monday following the date of injury, which he did not do. It is further noted that the employer attempted to reach the injured worker numerous times without success. Furthermore, it is noted that the injured worker had not made any attempts to contact the employer since 10/23/2002. He apparently did return to the employer in February of 2003 to pick up his last check. Based on the above, the Staff Hearing Officer finds that the injured worker voluntarily abandoned his employment which precludes receipt of temporary total compensation.

{¶ 31} 13. Relator filed an appeal arguing that the employer had no written or oral rules regarding calling into work after an injury and that the employer's assertion that telephone calls were made to relator had not been documented.

{¶ 32} 14. In an order mailed April 5, 2003, the commission refused relator's appeal.

{¶ 33} 15. On May 6, 2014, eleven years after the commission refused his appeal, relator filed this mandamus action.

{¶ 34} 16. The matter is currently before the magistrate for consideration.

Conclusions of Law:

{¶ 35} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 36} TTD compensation awarded pursuant to 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. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement ("MMI"). *See* R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982).

{¶ 37} Historically, this court first held that, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued TTD benefits since it is his own action, rather than the industrial injury, which prevents his returning to his former position of

employment. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (1985). The *Jones & Laughlin* rationale was adopted by the Supreme Court of Ohio in *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 517 (1987), wherein the court recognized a "two-part test" to determine whether an injury qualified for TTD compensation. *Ashcraft* at 44. The first part of the test focuses upon the disabling aspects of the injury whereas the latter part determines if there are any other factors, other than the injury, which prevent the claimant from returning to his former position of employment. *Id.* Thus, the *Ashcraft* court held that a claimant's incarceration precluded receipt of TTD compensation because, when a person chooses to violate the law, he is presumed to tacitly accept the consequences of his voluntary acts.

{¶ 38} In *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44, 531 (1988), the court held that an injury-induced abandonment of the former position of employment, as in taking a retirement, is not considered to be voluntary.

{¶ 39} In *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381, 544 (1989), the court held that a claimant's acceptance of a light-duty job did not constitute an abandonment of his former position of employment. The *Diversitech Gen.* court stated, at 383:

> The question of abandonment is "primarily * * * [one] of intent * * * [that] may be inferred from words spoken, acts done, and other objective facts. * * * All relevant circumstances existing at the time of the alleged abandonment should be considered ."

{¶ 40} In *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559 (2001), Michael E. McKnabb sustained a work-related injury and, following surgery, was able to return to work. Approximately six months after he returned to work, McKnabb was fired allegedly for tardiness. His employer had no written employment or disciplinary policy however, the employer's representative explained that, over a six month period, McKnabb had been late 15 to 20 times and had failed to call in to report his lateness. Further, for the two days prior to McKnabb's actual dismissal, he failed to show up for work at all and did not call in to report his absence. The commission found that McKnabb's termination from his employment broke the causal connection between his work-related injury and his inability to work and denied him TTD compensation.

{¶ 41} Ultimately, this court and the Supreme Court of Ohio found that the commission abused its discretion by denying McKnabb TTD compensation. The court stated:

> We have, however, recognized "the great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation." *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, 411, 667 N.E.2d 1217, 1219. Our litigants support this premise but disagree over what is required.
>
> In [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995)], the claimant failed to report for work on three consecutive days without calling. He was dismissed pursuant to plant policy. When asked to characterize, for TTC [sic] purposes, the departure as voluntary or involuntary, we wrote:
>
> "Examining the present facts, we 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 *Watts- i.e.*, that an employee must be presumed to intend the consequences of his or her voluntary acts." *Id*. at 403, 650 N.E.2d at 471.
>
> 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 [sic]. 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 [sic] if violation triggers termination. This argument, however, contemplates only some of the considerations. Written rules do more than just define prohibited conduct. They set forth a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are particularly

> important when dealing with employment terminations that may block eligibility for certain benefits.
>
> This case is a good example. The commission speaks of a "strict" employer policy on tardiness and absenteeism. It was apparently not that strict, however, since the claimant, according to the commission, was late "fifteen to twenty" times during an unspecified six-month period. This scenario raises more questions than it answers: how CCA defined "late" and whether it was the same for all employees; whether the claimant was routinely only a minute late or substantially later; and when the six-month period of tardiness occurred, *e.g.*, whether the accusations of tardiness were suddenly resurrected to justify termination, becoming an issue only after claimant filed a workers' compensation claim.
>
> The commission refers to claimant's "knowledge" of CCA's tardiness policy and the "warning" issued to him concerning chronic tardiness. But the timing of the warning is relevant: was it after the first infraction or the seventeenth? If after the first and the employer continued to ignore late arrival, the validity of the policy may have been diminished in claimant's mind, calling into question claimant's actual knowledge of it. Also relevant is the nature of the warning. These are just some of the areas that verbal policies leave ambiguous.
>
> CCA may well have acted properly. Again, however, because of the potential for abuse, a postinjury firing must be carefully scrutinized. Written termination criteria aid this inquiry and are why *Louisiana-Pacific* requires them.

Id. at 560-62.

{¶ 42} The principles behind the voluntary abandonment doctrine and the adherence to the requirements of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), are obvious. The Supreme Court of Ohio recognized the possibility that some employers would summarily terminate injured workers to avoid having to pay TTD compensation. In order to prevent this abuse, the Supreme Court held in *Louisiana-Pacific* that there must be a written work rule or policy that (1) clearly defines the prohibited conduct, (2) has been previously identified by the employer as a dischargeable offense, and (3) is known or should be known to the employee. By

following this test, an employer can establish that an injured worker has lost wages not due to the allowed conditions in a workers' compensation claim, but due to their own voluntary acts. This way the potential for abuse is significantly minimized if not eliminated altogether.

{¶ 43} In *McKnabb,* the commission had argued that there are some common-sense infractions that do not need to be reduced to writing in order to foreclose TTD compensation if the violation triggers termination. In that case, the employer, supposedly had a strict tardiness policy that had not been enforced. In fact, relator had been late many times before he was injured an no action had been taken. The decision to enforce it at that time with that injured worker was seen as problematic. The court specifically stated:

> Written policies help prevent arbitrary sanctions and are particularly important when dealing with employment terminations that may block eligibility for certain benefits.
>
> * * *
>
> This scenario raises more questions than it answers * * * e.g., whether the accusations of tardiness were suddenly resurrected to justify termination, becoming an issue only after claimant filed a workers' compensation claim.

Id.

{¶ 44} Because of "the potential for abuse," the court stated that a "post-injury firing must be carefully scrutinized." In the present case, relator did not report to work and did not call in to say he would not be at work for an entire month. The magistrate finds it difficult to characterize this as anything other than a voluntary decision on the part of relator to leave his job. There is not even a hint of arbitrary action on the part of the employer and no reason to believe relator was terminated so his employer could avoid paying relator any compensation.

{¶ 45} However, theoretically, relator could still demonstrate that his absence from work and subsequent loss of wages was due to the allowed conditions in his claim. Because, according to *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), relator could not abandon his former position of employment if he lacked the

physical capacity for employment at the time of the abandonment or removal. In order to do so, relator needed to present medical evidence that he was disabled at that time. The medical evidence simply does not support that conclusion.

{¶ 46} After relator was seen at the hospital on October 22, 2002, the next medical record is from October 31, 2002. At that time, his treating physician noted he had suffered an exacerbation and prescribed medication. The doctor also noted that relator could return to work November 12, 2002. Thereafter, relator changed physicians and began treating with Dr. Schulte. In his November 11, 2002 office note, Dr. Schulte is silent as to whether or not relator can return to work. It is not until January 6, 2003 that Dr. Schulte certifies that relator is temporarily and totally disabled. The stipulation of evidence does not establish relator was receiving treatment for the allowed conditions in his claim during the period in which he asserts that he was unable to work.

{¶ 47} Although it seems contrary to case law, which has rejected the commission's prior argument that there are some common-sense infractions that need not be reduced to writing in order to foreclose the payment of TTD compensation if violation triggers termination, the magistrate finds that here, relator's failure to report for work or call in to work for one month, constitutes a violation of this and any other employer's work policy, and demonstrates an abandonment of the workforce. Given that relator has failed to present any medical evidence that he was actually disabled and absent from work due to the allowed conditions in his claim, the magistrate finds that relator has not demonstrated that the commission abused its discretion here.

{¶ 48} Based on the forgoing, it is this magistrate's decisions that this court should deny relator's request for a writ of mandamus.

/S/ MAGISTRATE
STEPHANIE BISCA

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).