

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Karen Grimm,	:	
Relator,	:	
v.	:	No. 06AP-286
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and	:	
Kaleel Brothers, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 29, 2007

Schiavoni, Schiavoni, Bush & Muldowney, Joseph J. Bush, III, and Shawn R. Muldowney, for relator.

Marc Dann, Attorney General, and Eric J. Tarbox, for respondent Industrial Commission of Ohio.

Stefanski & Associates LLC, and Janice T. O'Halloran, for respondent Kaleel Brothers, Inc.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} Relator, Karen Grimm, filed this original action in mandamus requesting this court to issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order denying relator's request for temporary total disability ("TTD") compensation and entering an order granting such 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, including findings of fact and conclusions of law, recommending that this court deny the requested writ. (Attached as Appendix A.)

{¶3} In brief, relator suffered a work-related injury on February 24, 2005, and she saw Jung M. Kim, M.D., the following day. Dr. Kim released relator to return to work with restrictions. Relator's employer, respondent, Kaleel Brothers, Inc. ("employer"), provided relator a written offer of modified job duties. Although relator did not sign the written offer, she did return to work in some capacity and within her restrictions.

{¶4} On March 18, 2005, relator saw Dr. Kim again, and Dr. Kim released her to return to sedentary work only. That same day, the employer provided relator a written offer of modified job duties within Dr. Kim's restrictions, but relator did not sign the written offer. The modified job required relator to work the day shift instead of the evening shift. Nevertheless, relator reported to work for the evening shift on March 20, 2005, and she was sent home.

{¶5} Relator and the employer presented differing accounts of what occurred after March 20, 2005. Relator testified that she called off work on March 21, 2005, and that she was advised to remain off work until she saw Dr. Kim again. The employer presented testimony that relator was not advised to stay off work and that she was expected to report to work. Relator did not report for work on March 22, 2005.

{¶6} In a letter dated March 22, 2005, and sent to relator by certified mail on March 23, 2005, the employer terminated relator's employment. Relator signed for the letter on March 31, 2005.

{¶7} On March 23, 2005, Dr. Kim certified relator as being totally disabled from work from March 23 through March 30, 2005. Relator began treating with James J. Sansone, D.C., who certified relator as being totally disabled from work from March 25, 2005, until April 25, 2005. Relator filed a motion for TTD compensation beginning on March 25, 2005.

{¶8} Following a hearing on September 15, 2005, a district hearing officer ("DHO") denied relator's application. The DHO concluded: (1) that relator had refused the employer's March 18, 2005 offer of a job within her restrictions; and (2) that relator had voluntarily abandoned her employment by failing to report for work or call in on March 22, 2005. Following a hearing on November 14, 2005, a staff hearing officer ("SHO") affirmed the DHO's order for the same reasons.

{¶9} As noted, relator seeks a writ of mandamus ordering TTD compensation. The magistrate issued a decision denying the requested writ. Relator objects to the magistrate's finding that she was not entitled to TTD compensation because she was terminated on March 22, 2005, and she objects to the magistrate's decision that she "voluntarily abandoned her employment when she waited three days to have her doctor review the latest light duty job offer from the employer."

{¶10} However, we agree with the magistrate's conclusion that there was some evidence to support the commission's findings. While relator disputes those factual findings, the commission holds discretion to weigh the evidence and resolve questions

of credibility. Here, the commission believed the employer's account of what occurred. Specifically, the commission found that relator did not accept the March 18, 2005 job offer and that she violated a written work rule by not reporting to work on March 22, 2005. Based on this evidence, the commission could properly deny TTD compensation. Therefore, we overrule relator's objections.

{¶11} Having overruled relator's objections, and based on our independent review of the evidence, we adopt the magistrate's decision, including the findings of fact and conclusions of law contained in it, as our own. Accordingly, we deny relator's request for a writ of mandamus.

*Objections overruled,
writ of mandamus denied.*

BRYANT and McGRATH, JJ., concur.

A P P E N D I X A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Karen Grimm,	:	
Relator,	:	
v.	:	No. 06AP-286
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Kaleel Brothers, Inc.,	:	
Respondents.	:	

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

Rendered on October 13, 2006

Schiavoni, Schiavoni, Bush & Muldowney, Joseph J. Bush, III, and Shawn R. Muldowney, for relator.

Jim Petro, Attorney General, and Eric J. Tarbox, for respondent Industrial Commission of Ohio.

Stefanski & Associates LLC, and Janice T. O'Halloran, for respondent Kaleel Brothers, Inc.

I N M A N D A M U S

{¶12} Relator, Karen Grimm, 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 request for temporary total

disability ("TTD") compensation on grounds that she had both refused a suitable job offer within her physical restrictions and voluntarily abandoned her employment with Kaleel Brothers, Inc. ("employer"). Relator requests that this court order the commission to grant her TTD compensation.

Findings of Fact:

{¶13} 1. Relator sustained a work-related injury on February 24, 2005, and her claim was originally allowed for "lumbar strain."

{¶14} 2. Relator was seen by Jung M. Kim, M.D., on February 25, 2005. Dr. Kim released relator to return to work with restrictions concerning the use of her low back.

{¶15} 3. That same day, the employer provided relator with a modified duty job offer within the restrictions set forth by Dr. Kim. The form was signed by Terry Kaleel. At the bottom of the form there is a notation that relator refused to sign the form.

{¶16} 4. It appears from the record that relator did return to work in some capacity within the physical restrictions provided by Dr. Kim.

{¶17} 5. On March 18, 2005, relator was again seen by Dr. Kim and was released to return to work with restrictions. Specifically, Dr. Kim noted that relator could perform sedentary work only and he recommended desk work.

{¶18} 6. The employer provided relator with a written job offer which would require her to answer phones, check paper work, check bins, and inventory counts with the freedom to take breaks as necessary to change positions and the freedom to perform the job either standing or sitting. This form was again signed by Terry Kaleel

but was not signed by relator. This modified job would require that relator work the day shift instead of the evening shift.

{¶19} 7. Relator reported to work for the evening shift on March 20, 2005, but was sent home.

{¶20} 8. At the hearing before the staff hearing officer ("SHO") relator testified that she called into work on March 21, 2005, and was advised to stay off work until she saw Dr. Kim again. However, Mr. Kaleel testified that relator was not advised to stay off work and that she was expected to report to work. Because relator failed to report to work or contact the employer, a termination letter dated March 22, 2005, signed by Mr. Kaleel was sent to relator informing her that she was being terminated as follows:

Karen Grimm, we have made every attempt to accomindate [sic] a modified job duty based on you[r] restrictions from Dr. Kim. On Friday 03-18-05 Mike Vaughn handed to you and witnessed you reading the new modified duty job offer and your new schedule starting on 03-18-05.

Monday thru Friday 10:00 am to 7:00 pm.

Monday 03-21-05 you reported off work via telephone.

Tuesday 03-22-05 you failed to show up for work nor did you call off for work.

By your actions on Tuesday 03-22-05, this is a violation of the company attendance policy. Therefor your position with Kaleel Bros. Inc. has been terminated for the violation.

{¶21} 9. The termination letter was sent by certified mail on March 23, 2005, and was not signed for by relator until March 31, 2005.

{¶22} 10. On March 23, 2005, Dr. Kim certified relator as being totally disabled from work from March 23 through March 30, 2005.

{¶23} 11. Mr. Kaleel testified that he contacted Dr. Kim and learned that relator had informed Dr. Kim that the employer did not have any work for her within her restrictions. At that time, Mr. Kaleel faxed a copy of the modified job offer which had been offered to relator and, in response, Dr. Kim completed another C-84 indicating that relator could return to work with restrictions from March 24 to March 30, 2005, provided that she be permitted to change position as needed and could sit, stand, walk, or lay down.

{¶24} 12. Relator began treating with James J. Sansone, D.C., who certified relator as being temporarily totally disabled from March 25 until April 25, 2005, based upon the diagnosis of lumbar sprain/strain.

{¶25} 13. Relator filed a motion requesting the payment of TTD compensation from March 25, 2005 and continuing.

{¶26} 14. Relator's motion was heard before a district hearing officer ("DHO") on September 15, 2005, and resulted in an order denying the application. The hearing officer provided two separate reasons for denying relator's request for TTD compensation:

[First] * * * The District Hearing Officer finds that the Injured Worker received a written job offer which was within her physical restrictions. This job offer was presented to the Injured Worker on 03/18/05. The Injured Worker did not go to work on her next scheduled day after the presentation of this job offer and in fact did not return. Based upon the Injured Worker's refusal to accept the light-duty job which was within her physical restrictions, temporary total disability compensation is denied.

[Second] The District Hearing Officer also finds that temporary total disability compensation is further barred by the Injured Worker's voluntary abandonment of her employment. The Injured Worker violated a written work rule when

she did not call to explain her absence from work. The Employer submitted a copy of this written work rule to the file and the Injured Worker acknowledged at hearing that she was aware of and had previously received this policy. Furthermore, the Injured Worker testified that she did not come to work on 03/22/05. Since the Injured Worker was terminated as the result of her violation of a written work rule, the District Hearing Officer finds that the Injured Worker voluntarily abandoned her employment. Therefore, temporary total disability compensation is not properly payable.

{¶27} 15. Relator appealed and the matter was heard before an SHO on November 14, 2005. (A transcript was made of these proceedings and is provided at pages 99 through 152 of the Supplemental Stipulated Record.)

{¶28} 16. Following the hearing, the SHO affirmed the prior DHO order and denied relator's request for TTD compensation for the same two reasons: (1) relator failed to accept a valid light-duty job offer in compliance with her physical restrictions; and (2) relator voluntarily abandoned her employment with the employer.

{¶29} 17. Relator's further appeal was refused by order of the commission mailed December 10, 2005.

{¶30} 18. Relator's request for reconsideration was refused by order mailed January 11, 2006.

{¶31} 19. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶32} 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.* (1967), 11 Ohio St.2d 141. 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.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

{¶33} In this mandamus action, relator makes two arguments. First, relator contends that the commission abused its discretion by determining that the employer terminated her employment on March 22, 2005. Relator contends that the actual date of her termination was March 23, 2005. As such, because Dr. Kim certified her as being temporarily and totally disabled as of March 23, 2005, relator contends that she could not have voluntarily abandoned her job because she was unable to work. Second, relator argues that the employer effectively rehired her on March 24, 2005, when the employer telephoned Dr. Kim and then faxed Dr. Kim a copy of the modified job which the employer had been willing to make available to relator. For the reasons that follow, the magistrate finds that relator's arguments are not well-taken.

{¶34} 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 MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶35} As above indicated, TTD compensation is not payable to a claimant when work within the physical capabilities of the claimant is made available by the employer or another employer. In the present case, the employer evidenced a willingness to accommodate relator's restrictions and offered her employment, at her normal full wages, at a position which accommodated her restrictions as set out by Dr. Kim. Because the commission determined that the employer made a good-faith job offer to relator of a position within her physical capabilities, TTD compensation would not be payable.

{¶36} With regards to the date that relator was terminated, Mr. Kaleel testified at the hearing that the decision to terminate relator was made on March 22, 2005, and she was terminated effective at the close of business that day. Conversely, relator argued at the hearing that the employer did not terminate her until March 23, 2005, the day the certified letter was actually mailed. Mr. Kaleel had explained that the decision to terminate relator was made on March 22, 2005, the letter was prepared, but was not mailed until the morning of March 23, 2005.

{¶37} Questions of credibility are for the commission to determine. In the present case, the commission had some evidence before it to determine that relator was terminated from her employment on March 22, 2005, due to her failure to call in and inform her employer that she would not be coming to work. Further, there is some evidence upon which the commission could rely that relator could work at this time.

Therefore, the cases which provide that an employee cannot be terminated from their employment for violating a written work rule at a time that the employee was disabled and could not work, do not apply. Because there is some evidence in the record to support this factual determination, the commission's decision in this regard does not constitute an abuse of discretion.

{¶38} It is undisputed that voluntary abandonment of the former position of employment can preclude payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. In *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 121, the court stated as follows:

* * * [F]iring can constitute a voluntary abandonment of the former position of employment. Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character. * * *

{¶39} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, the court characterized a firing as "voluntary" where that firing is generated by the employee's violation of a written work rule or policy which: (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.

{¶40} In the present case, the employer presented evidence from its employee handbook to establish that an employee may be terminated for their failure to notify the employer that they would be absent from work. Relator did not dispute that she understood the policy. Instead, relator argued that she had called into work on March 21, 2005, and that she was told by her employer that she did not need to call in or report to work until after she saw Dr. Kim again. On the other hand, Mr. Kaleel

testified that no such conversation took place. Specifically, he indicated that he did not tell relator that she did not need to report to work or call in until after she saw Dr. Kim again. As before, this was a question of fact to be determined by the commission. The commission had some evidence before it from which it could conclude that relator did violate the employer's policy at a time when she was not temporarily totally disabled and when the employer was making work available for her within her physical capabilities and that relator violated a written work rule. Because there is some evidence in the record from which the commission could have made this factual determination, relator has not demonstrated that the commission abused its discretion.

{¶41} Further, relator argues that by speaking with Dr. Kim on March 24, 2005, the employer had effectively rehired her. At the hearing, Mr. Kaleel testified that he telephoned Dr. Kim after receiving Dr. Kim's report certifying relator as temporarily and totally disabled. Mr. Kaleel testified that Dr. Kim told him that he had not been made aware that the employer had made a job offer to relator within her physical capabilities as Dr. Kim had previously indicated. Mr. Kaleel testified that he faxed to Dr. Kim's office a copy of the modified job offer which the employer had offered to relator. In response, Mr. Kaleel testified that Dr. Kim faxed back a new physical capabilities form indicating that relator could perform that particular job.

{¶42} Based upon a review of the stipulated evidence, this magistrate concludes that it was not unreasonable for the commission to reject relator's arguments that she had effectively been rehired thereby making her eligible for TTD compensation.

{¶43} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in determining that she was

not entitled to TTD compensation on grounds that she had refused a suitable job offer made by her employer and that she had, thereafter, voluntarily abandoned her employment with this employer. As such, this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE