[Cite as *State ex rel. Apostolic Christian Home, Inc. v. King* , 2009-Ohio-5670.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Apostolic Christian Home, Inc.,	:	
Relator,	:	No. 08AP-1078
v.	:	(REGULAR CALENDAR)
Robin L. King and The Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on October 27, 2009

Critchfield, *Critchfield & Johnston*, *Ltd*., and *Susan E. Baker*, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

Plevin & Gallucci Co., *L.P.A.*, and *Frank Gallucci*, *III*; *Paul W. Flowers Co.*, *L.P.A.*, and *Paul W. Flowers*, for respondent Robin L. King.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, Apostolic Christian Home, Inc. ("relator"), 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 awarding respondent Robin L. King ("respondent") temporary total disability ("TTD") compensation beginning July 1, 2008, and to enter a new order denying that compensation on the ground that respondent voluntarily abandoned her employment with relator.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded that the commission abused its discretion, and recommended that this court issue a writ of mandamus ordering the commission to vacate its prior order and to enter a new order that adjudicates relator's voluntary abandonment claim using the date and time of respondent's alleged violation of a work rule as the date and time upon which the alleged voluntary abandonment occurred. The commission filed objections to the magistrate's decision, and relator filed a memorandum opposing the objections. This cause is now before the court for a full review.

{¶3} This case concerns an alleged voluntary abandonment by the injured worker. Voluntary departure from employment precludes temporary total disability compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46. Where the injured worker is terminated because he or she commits a "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" the injured worker may properly be said to have voluntarily abandoned the position of employment, precluding their receipt of TTD benefits. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 403.

{¶4} The dispute in this case arises from the particular sequence of events surrounding relator's termination of respondent. Following her industrial injury, respondent returned to work under light-duty restrictions, pursuant to her treating physician's recommendations and an agreement for light-duty work effective June 6, 2008.

{¶5} The record contains a typed memorandum from respondent's supervisor dated June 27, 2008, in which the supervisor recounts two heated conversations with respondent and the fact that respondent failed to report for work on the day following these conversations, and did not call in to advise relator that she would be absent. The record also contains a two-page, hand-written statement by respondent, dated July 27, 2008, in which she details her version of the conversations and, inter alia, indicates that she told her supervisor that she would not be coming to work that Saturday. Respondent's supervisor admitted receiving a copy of the statement on the date it was written. On June 30, 2008, relator's director of nursing signed a form detailing respondent's alleged verbal abuse of her supervisor on June 27, 2009, and her failure to report for work on June 28 and 29, 2009, without calling in to advise of her absence.

{¶6} Meanwhile, also on June 30, 2009, respondent's treating physician examined her and completed a "Physician's Report of Work Ability" in which he stated

that respondent was "totally disabled from work from 6/30/08 to 7/10/08." On July 1, 2008, relator's director of nursing sent a letter to respondent terminating her for violations of relator's no call-no show policy. On July 15, 2008, consistent with her June 30, 2008 report, respondent's treating physician executed a C-84 certifying that respondent was temporarily and totally disabled from June 29, 2008 through an estimated return-to-work date of August 12, 2008.

{¶7} The commission granted respondent's request for TTD from July 1, 2008, and rejected relator's voluntary-abandonment claim based on the case of *State ex rel. Omnisource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951. In that case, the Supreme Court of Ohio held that an injured worker can only abandon a former position of employment if the worker is capable of performing the duties of the position at the time of the alleged abandonment. In this case, the commission reasoned that because respondent was restricted from performing her original position, she could not have abandoned it.

{¶8} Contrarily, citing this court's decision in *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, the magistrate concluded that the commission's application of *Omnisource* was legally incorrect because where the injured worker is capable of performing a *light-duty* position, he or she *can abandon* that position. Thus, the magistrate determined, the commission should have focused on respondent's light-duty position, not the position she held when she sustained her industrial injury, and it was possible for respondent to have abandoned that light-duty position if she was physically capable of performing it at the time of her alleged voluntary abandonment. The magistrate recommended that we issue a writ of mandamus ordering the commission to

vacate its previous order and to adjudicate respondent's request for TTD and relator's voluntary-abandonment claim in a new order.

{¶9} The magistrate then went further, and stated that when the matter returns to the commission, the commission should focus on the date or moment that respondent allegedly violated the relevant work rule, not the date upon which she was terminated, when it considers relator's claims anew and conducts its *Louisiana-Pacific* analysis. The commission objects to the recommendation that this court make any determination affecting the finding of facts and the analysis thereof concerning relator's *Louisiana-Pacific* abandonment claim. It argues that when the matter is returned to it for adjudication of relator's voluntary-abandonment claim, it should conduct the *Louisiana-Pacific* voluntary-abandonment analysis in the first instance, and the voluntary-abandonment-related issue that the magistrate reached is not ripe and should not be determined here because the commission did not reach the voluntary-abandonment analysis in its prior order. (In its memorandum contra, relator argues that the commission did indeed reach the issue in its prior order; however, our review of the prior order reveals that the staff hearing officer did not engage in a *Louisiana-Pacific* analysis of whether relator had successfully demonstrated a voluntary abandonment.) The commission argues that it should be the first to determine all aspects of the voluntary-abandonment issue, taking into account the particular facts and circumstances of this case, as developed at a new hearing.

{¶10} Article II, Section 35 of the Ohio Constitution provides that the commission has the authority to "determine all right of claimants" respecting the workers' compensation system. Thus, we agree that the commission, not this court, should be the

body that initially determines whether, under *Louisiana-Pacific* and its progeny, respondent abandoned her position of employment and whether the abandonment precludes receipt of any or all of the requested TTD. See *State ex rel. Luther v. Ford Motor Co.*, 10th Dist. No. 04AP-1127, 2006-Ohio-134 (in a case involving an alleged voluntary abandonment, the commission must be the first to determine whether the principles discussed in *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357 apply).

{¶11} For these reasons, we sustain the commission's objections. We adopt the magistrate's findings of fact, and we adopt the magistrate's conclusions of law pertaining to the application of *Adkins*, but we reject the magistrate's remaining conclusions of law and we modify the magistrate's decision accordingly. We grant a writ of mandamus ordering the commission to vacate its order awarding respondent TTD from July 1, 2008, and to issue a new order adjudicating respondent's request for TTD and relator's claim of voluntary abandonment.

Objections sustained,
writ of mandamus granted.

BROWN and CONNOR, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

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State of Ohio ex rel. Apostolic Christian Home, Inc.,	:	
Relator,	:	
v.	:	No. 08AP-1078
Robin L. King and The 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 June 19, 2009

Critchfield, Critchfield & Johnston, Ltd., and *Susan E. Baker*, for relator.

Richard Cordray, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶12} In this original action, relator, Apostolic Christian Home, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Robin L. King ("claimant") temporary total disability ("TTD") compensation beginning July 1, 2008, and to enter an order denying

said compensation on grounds that claimant allegedly voluntarily abandoned her employment with relator.

Findings of Fact:

{¶13} 1. On June 1, 2008, claimant sustained an industrial injury while employed as a nurse's aide for relator, a state-fund employer. The industrial claim (No. 08-339571) is allowed for "sciatica; sprain lumbosacral."

{¶14} 2. On June 6, 2008, claimant was examined during an office visit at the "Healthy Benefits" clinic by treating physician Robert Kleinman, M.D. On that date, Dr. Kleinman released claimant to light-duty work with certain restrictions.

{¶15} 3. On June 9, 2008, director of nursing Janet Tomele, claimant's immediate supervisor Kathleen S. Gochnauer, R.N., and claimant signed a written agreement regarding claimant's return to light-duty work. The agreement states:

> Per recommendation of Healthy Benefits you are to work 4 hr./day. You will be responsible to fold laundry, fill ice cups, per charge nurse cover center desk, use walkie talkie and pagers to communicate as needed.
>
> You are not to lift over 10 lbs.: no bending, twist/turn, reach below knee, push/pull, squat/kneel. You will work within these restrictions, if anyone asks you to do something outside these parameters, you are to refuse.

{¶16} 4. The record contains a typewritten memorandum dated June 27, 2008 that is signed by Gochnauer. The memorandum states:

> On this night, Robin King, aide, came to work at 11PM for 4hrs. of light duty. However, she was not scheduled on the breakdown to work. This nurse went out to the circle where Robin was working and asked Robin "Why are you working tonight, you are not scheduled on the breakdown?" She replied, "I know but Janet told me I am scheduled for this light duty job Monday through Friday and not on the

weekends.["] This nurse then said "You are on the break-down for tomorrow night, not tonight." Robin said, "I know but she said this is a Monday through Friday night job and you can call her to ask her to check on that if you want to." I said, "No, if that's what you were told, that's okay. I was just wondering because you are not on the breakdown tonight." Robin again stated "Well, you can call Janet if you want to." I again told her "No, that's not necessary. How long will you be doing this?" Robin asked "What?" I said, "Light duty." Robin raised her voice and said "I don't know." I asked her "Will your therapist release you?" Robin said again in a raised voice, "I don't know. I have to go back to the hospital and then I guess they will let me know. I don't know." Her voice was louder at this time. During this conversation, Amanda Williams, Lorena Conley, Sharon Zimmerman were standing at the circle witnessing the conversation. Edna Begley and Tammy Palmer approached the circle during the conversation and did not hear all of the conversation. Lorena Conley then asked Robin King, "Would you want to come in tomorrow night (Saturday night) because we are short and no one is working the 200 Hall." Robin then answered, "No, I am to work Monday through Friday, no weekends." Lorena and this nurse then left the circle.

Approximately 12:10AM, Saturday, June 28, 2008, Robin King came into the med. Room and asked this nurse to copy something for her. I said "Sure." I did not read the two papers she handed me. I put them into the copy-fax machine and copied them and asked her if they came out okay. Robin said "Yes." She then handed this nurse the copied two papers and said "This is yours." I asked her "What is it?" She said, "Read it and you'll see. I am going home now, my back is killing me." I started to read the papers and she walked out of the room and I called to her "Robin, can I talk to you about this?" She calmly said, "Yes, you can walk down to the time clock with me." I said, "Robin, I didn't say some of this." Robin immediately became upset and her voice became louder and she said, "Yes, you did!" I said, "I didn't ask you to come in tomorrow night, it was Lorena." She said, "No, it was you that said that and you violated my Hippa rights by asking me that about how long am I going to be doing light duty in front of everyone. Do you know how embarrassing that was for me? You are the supervisor here and you should know that you are violating the Hippa Rights by asking me in front of all those people." This nurse replied, "I

> apologize to you, Robin. I did not mean to offend you or violate your privacy and I am sorry. Yes, I am your supervisor and I was just asking you that for my information because I have a right to know about staffing and I asked you also because I wanted to know how your back is doing." During my reply, Robin was interrupting me and becoming upset and was not listening to my response. She also said "I can't work the floor." This nurse replied, "No, Lorena didn't mean for you to work the floor tomorrow night, she meant for you to come in for light duty and it would help if you passed ice water and folded laundry and do the things you do on light duty. It would help out because we are short Saturday night. We both know you can't work the floor." Robin replied, "I'm not coming in tomorrow night." Robin then said, "We shouldn't be having this conversation without a witness." This nurse replied, "I'll go get Lorena (Conley) so that she can listen." Robin replied, "No, I don't want her here." This nurse asked her "Why? She could witness what is said." Robin said, "No, I am so stressed when you two are working with me." I asked her, "What do I do that stresses you so much?" She replied, "I just can't work with you two. I am going home." I said, "Please stay. We can talk about this. I really would like to get this worked out." She said, "No, I'm going home." This nurse again apologized to her and Robin then left approximately 12:35AM, Saturday, June 28, 2008.
>
> * * *
>
> Addendum: Robin King did not come in to work light duty on Saturday, June 28, 2008 as scheduled on the breakdown, nor did she call to say she was not coming. KSG

{¶17} 5. The record contains claimant's June 27, 2008 two-page handwritten statement that was copied by Gochnauer at claimant's request and then handed to Gochnauer by claimant on June 27, 2008. The statement reads:

> I feel my rights have been violated (Privacy)[.] Kathy asked me why I was here because I was not on the schedule to work tonight. I told her I work M-F pm Janet. Communication between her + liana must not be on same page because schedule hasnt been Mon-Fri – I said I could call Janet if she needed me to – Janet said if I had a problem I was to let her know – she again said I wasnt on the schedule tonight but I

> was for the weekend. I again repeated my last statement – And she said How long is this going to go on with you – Is it up to your therpy? (she asked me this in an unfriendly tone in front of Lorena, Tammy, [illegible]-Edna Sharon, Amanda etc. I told her I could call you if she needed me to if its a problem but its not up to me – she said you are schedule for this weekend and we dont have anyone to work 200 Hall. I said I dont know why the schedule has me on this weekend – but its up to the Healthy works clinic to discharge me from Lt. Duty. I feel horriblel.

(Emphasis sic; sic passim.)

{¶18} 6. The record contains a so-called "Grievance Form" signed by Tomele on June 30, 2008. It states:

> EMPLOYEE NAME: Robin King
>
> DATE OF INCIDENT: 6/27/08, 6/28/08, 6/29/08
>
> DESCRIPTION OF INCIDENT: Verbally abusive to supervisor 6/27/08, No call, No show 6/28 + 6/29[.] After she was reminded per phone 6/28/08 @ 12 noon that she was scheduled for her light duty this weekend.

{¶19} 7. By letter dated July 1, 2008 from Tomele, claimant was informed: "This notice is to inform you that your services are no longer needed as you were informed 6/30/08 at 3:30 PM per phone."

{¶20} 8. The record contains copies of pages four, five, eight, and nine which are apparently taken from relator's employee manual.

{¶21} On page four, the manual states:

> WORK SCHEDULES
>
> Work schedules will be posted bi-weekly or monthly and correspond to the bi-weekly pay period. It is the responsibility of each employee to report to work as scheduled. Scheduling requests must be made in writing to the respective department head. Employees are not to change the work schedules. This is done either by de-

partment head or by their authorized representative. After posting of the time schedule, it is the responsibility of each employee to find his/her own replacement should he/she request a change.

{¶22} On page eight, the manual states:

DISMISSAL FROM EMPLOYMENT

The following listed activities give rise to disciplinary action and may lead to dismissal by the Administrator. A review by the Board of Directors can be requested in the event of termination. There will be no termination pay.

* * *

3) Insubordination and/or refusal to follow orders of a supervisor.

* * *

8) Any contentious personality behavior resulting in a failure to cooperate with fellow employees and management that occurs on more than one occasion.

{¶23} On page nine, the manual states:

DISCIPLINARY PROCEDURES

A four-step disciplinary procedure will be followed for the following acts of misconduct:

* * *

3) Excessive absenteeism or tardiness.

a) Absent more than three days per quarter without supporting doctor statement except for reason of major illness or accident for two consecutive quarters. This would lead to disciplinary action. If any employee is absent for only one day for an illness it will be counted as only one day if an excuse from the DON is obtained.

b) Tardiness of three times in any three consecutive months or six times within the last twelve months.

c) Illness – self or immediate family.

> Any employee need not violate the same infraction to move through warning steps of discipline. All reported violations which occurred during the previous twelve months may be used as a basis for discharge.
>
> The four steps of disciplinary action are as follows:
>
> 1) Verbal warning with a notation in the employee's personnel file.
>
> 2) Written warning reviewed with and signed by the employee.
>
> 3) Disciplinary suspension without pay for maximum of five working days.
>
> 4) Discharge.
>
> DISPUTE RESOLUTION
>
> The possibility of a misunderstanding or conflict can arise in any organization. If any employee believes a policy or practice has been applied unfairly or inconsistently, the Board of the Apostolic Christian Home Inc. has adopted a procedure to resolve the issue. * * *
>
> The Board encourages all employees to feel free to discuss their concerns with their supervisor any time a concern arises. Confidentiality is always a vital part of these discussions. If the informal procedure does not bring satisfactory results the following steps should be followed.
>
> STEP 1:
>
> The employee should register the concern in writing and present it to the supervisor. The supervisor has five (5) working days to respond in writing to the written complaint.

{¶24} 9. On June 30, 2008, claimant presented for an office visit and examination with Dr. Kleinman. In his typewritten office note, Dr. Kleinman stated: "PLAN: 1. No work at this time. The patient is to be off work from 06.30.08 until

07.10.08. I feel that she is having difficulty going beyond her restrictions at work and I have encouraged her to take time off work to see if this will not help her heal."

{¶25} The office note generated by the June 30, 2008 visit incorrectly lists the "Date of Service" as June 6, 2008. The parties to this action agree that the date of service should have been recorded as occurring on June 30, 2008.

{¶26} Also, the office note states that the date and time of dictation of the office note is "06/30/08 2:35 PM." Presumably, either Dr. Kleinman or his certified nurse practitioner, Michelle Waterson, dictated the office note following the June 30, 2008 examination.

{¶27} 10. On June 30, 2008, Dr. Kleinman completed a "Physician's Report of Work Ability." On the form, Dr. Kleinman indicated that claimant is "totally disabled from work from 6/30/08 to 7/10/08."

{¶28} 11. On July 14, 2008, Dr. Kleinman completed a C-84 on which he certified TTD from June 29, 2008 to an estimated return-to-work date of August 12, 2008.

{¶29} 12. On July 15, 2008, the Ohio Bureau of Workers' Compensation ("bureau") mailed an order awarding TTD compensation beginning July 1, 2008 based upon "medical from Dr[.] Kleinman."

{¶30} 13. On a C-84 dated October 7, 2008, Dr. Kleinman extended TTD to an estimated return-to-work date of October 9, 2008.

{¶31} 14. Relator administratively appealed the July 15, 2008 bureau's order.

{¶32} 15. Following an August 18, 2008 hearing, a district hearing officer ("DHO") issued an order affirming the bureau's order of July 15, 2008. In his order, the

DHO explains why he rejects relator's claim of a voluntary abandonment of employment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401.

{¶33} 16. Relator administratively appealed the DHO's order of August 18, 2008.

{¶34} 17. Following an October 10, 2008 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of August 18, 2008, yet awards TTD compensation beginning July 1, 2008. The SHO's order explains:

> The Employer has challenged the Claimant's request for temporary total compensation beginning 07/01/2008, alleging that the Claimant's termination from employment on 06/30/2008 acts as a bar to the receipt of temporary total compensation thereafter.
>
> Following the Claimant's industrial injury on 06/01/2008, the Claimant accepted an offer of light duty employment beginning 06/09/2008. The Claimant worked in a light duty position until she was terminated by the Employer on 06/30/2008 for allegedly ignoring scheduled work dates on 06/28/2008 and 06/29/2008. The Employer does not argue that the Claimant was able to return to work at her former position of employment at any time from 06/09/2008 through her termination date.
>
> The Ohio Supreme Court has held 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." State ex rel. OmniSource Corp. v. Indus. Comm. (2007), 113 Ohio St. 3d 303. As the Claimant was clearly unable to return to work at her former position of employment at the time her employment was terminated, the Hearing Officer finds that the Claimant's alleged voluntary abandonment of employment does not affect her ability to receive temporary total compensation.
>
> It is the order of the Staff Hearing Officer that temporary total compensation is granted from 07/01/2008 through 10/08/2008, and to continue upon submission of appropriate

> medical proof of disability due solely to the allowed conditions in this claim.
>
> This order is based on the office notes of Dr. Kleinman from 06/30/2008 (mis-dated 06/06/2008) through 09/08/2008 that describe increasing symptoms due to the Claimant's job duties that led to her inability to continue working at light duty; and the 07/14/2008 and 10/07/2008 C-84 reports of Dr. Kleinman that disable the Claimant due to the allowed conditions in this claim.

{¶35} 18. On October 28, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 10, 2008.

{¶36} 19. On October 28, 2008, relator, Apostolic Christian Home, Inc., filed this mandamus action.

Conclusions of Law:

{¶37} The SHO's order of October 10, 2008 contains two mistakes of law: (1) the order improperly suggests that claimant could not, as a matter of law, voluntarily abandon her former position of employment as a nurse's aide beginning June 9, 2008, the date relator, by written agreement, approved claimant's return to light-duty work, and (2) the order incorrectly holds that the date and time of employer termination of its employee for violation of a written work rule marks the abandonment of employment for purposes of applying the judicial rule that any medical inability to return to work precludes a commission determination of a voluntary abandonment of employment that precludes TTD compensation.

{¶38} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶39} 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.

{¶40} In *Louisiana-Pacific*, at 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.

{¶41} 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[.] * * *

{¶42} In *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, at ¶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."

{¶43} In *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499 at ¶10-11, the court states:

> *Pretty Prods.* was decided shortly after *Louisiana-Pacific.* In *Pretty Prods.,* we held that the character of the employee's departure—i.e., voluntary versus involuntary—is not the only relevant element and that the timing of the termination may be equally germane. In *Pretty Prods.,* we suggested that a claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled. Id., 77 Ohio St.3d at 7, 670 N.E.2d 466; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, ¶ 10. Thus, even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the discharge occurred.
>
> The present litigants treat the two cases as mutually exclusive, with the company urging that *Louisiana-Pacific* is dispositive and Mayle and the commission citing *Pretty Prods.* Yet *Louisiana-Pacific* and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. If the *Louisiana-Pacific* three-part test is satisfied, however, suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination. We thus take this opportunity to reiterate that *Louisiana-Pacific* and *Pretty Prods.* are not mutually exclusive and that they may both factor into the eligibility analysis.

{¶44} In *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, following her industrial injury which prevented her from returning to her former position of employment as a laborer, Judy M. Adkins accepted her employer's job offer of light-duty work. However, on August 26, 2002, Adkins failed to report to work for the light-duty position that she was offered and failed to call her employer prior to or on that date to explain why she would not be reporting for work. Thereafter, the employer informed Adkins that her employment with the company was terminated for her failure to report to work on August 26, 2002.

{¶45} Following a December 2002 hearing, an SHO denied Adkins' request for TTD compensation on grounds that Adkins voluntarily abandoned her employment when she violated one of her employer's work rules by failing to report to work as scheduled. Thereafter, Adkins again requested TTD compensation to cover a July 2007 surgery. Following a September 2007 hearing, another SHO, citing the previous SHO's determination, also denied TTD compensation on grounds that Adkins had voluntarily abandoned her employment under the *Louisiana-Pacific* case.

{¶46} Adkins then filed a mandamus action in this court to challenge the commission's finding that she had abandoned her former position of employment. This court denied the writ.

{¶47} Speaking through its magistrate, this court explained:

> While *Louisiana-Pacific* involved a failure to report to the former position of employment without notification to the employer, this case involves a failure to report to the recently accepted alternative employment without notification. Not-withstanding this distinction, it was not improper for the

> commission to cite *Louisiana-Pacific*, nor did the commission misanalyze the legal issue before it.
>
> * * * Relator accepted Spherion's job offer. Acceptance required relator to follow Spherion's work rules.
>
> Relator's failure to report to her light-duty job on August 26, 2002 led Spherion to terminate her employment because of the rule violation. That is, relator's violation with respect to the light-duty job prevents her from ever returning to her former position of employment as a laborer with Spherion. Thus, it can be said that relator abandoned her former position of employment by violating the work rule after accepting alternative employment.
>
> 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.

Id. at ¶53-56.

The First Mistake of Law:

{¶48} As earlier noted, the SHO's order of October 10, 2008 improperly suggests that claimant could not, as a matter of law, voluntarily abandon her former position of employment as a nurse's aide beginning June 9, 2008, the date relator agreed to accept claimant's return to light-duty work. The SHO's order suggests that claimant could not have abandoned her former position of employment at any time subsequent to June 9, 2008, because the employer undisputedly accepted claimant's inability to return to her former position of employment when it agreed to accept her

return to light-duty employment. The *Adkins* case, however, compels the conclusion that claimant's return to light-duty work did not, as a matter of law, preclude a voluntary abandonment of employment for violation of a written work rule during the period of the light-duty employment.

The Second Mistake of Law:

{¶49} As noted previously, the SHO's order of October 10, 2008 incorrectly holds that the date and time of the employer termination of its employee for violation of a written work rule marks the abandonment of employment.

{¶50} As the commission points out in this action, the dictation of Dr. Kleinman's office note at 2:35 p.m. on June 30, 2008 indicates that claimant was examined prior to Tomele's 3:30 p.m. telephone call to claimant on the same date. Thus, according to the commission, it can be found that the treating physician's certification of total disability preceded the employer's termination and, thus, a finding of voluntary abandonment is precluded.

{¶51} Admittedly, the case law is less than clear as to whether voluntary abandonment occurs on the date and time of the claimant's conduct that leads to the termination or occurs on the date and time that the employer takes the action to terminate.

{¶52} In the magistrate's view, the principle of law at issue is derived from *Louisiana-Pacific* wherein the court states: "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." Id. at 403.

{¶53} Under *Louisiana-Pacific*'s voluntary abandonment doctrine, it is the employee who initiates the employment separation by his or her violation of a written work rule. The employer's action to terminate necessarily comes after the employee violates the work rule and, in some cases, may substantially lag the employee's action or inaction that presents a violation particularly where the employer is required to investigate or gather evidence of the violation.

{¶54} To hold that a voluntary abandonment is precluded by a disability arising after the employee's actual rule violation but before employer termination can occur is inconsistent with the principle that an employee is presumed to intend the consequences of his or her voluntary acts.

{¶55} Thus, based upon the above analysis, the SHO's order of October 10, 2008 contains a clear mistake of law by holding that the date and time of employer termination of its employee marks the abandonment of employment.

{¶56} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of October 10, 2008 and, in a manner consistent with this magistrate's decision, enter a new order that adjudicates relator's voluntary abandonment claims.

/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).