[Cite as *State ex rel. Hildebrand v. Indus. Comm.*, 2011-Ohio-3787.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Brian J. Hildebrand, Jr.,	:	
Relator,	:	
v.	:	No. 10AP-625
Wingate Transport, Inc., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 2, 2011

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and *Theodore A. Bowman,* for relator.

Barno Law, Inc., John A. Barno, Melissa A. Black and *Jamison S. Speidel,* for respondent Wingate Transport, Inc.

Michael DeWine, Attorney General, and *Derrick Knapp,* for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, Brian J. Hildebrand, Jr., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its

order denying him temporary total disability compensation based upon a finding that he voluntarily quit his employment with respondent Wingate Transport, Inc., and to find he is entitled to such compensation because he was disabled at the time he quit.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision.

{¶3} The magistrate cited two arguments relator made: (1) he did not quit his employment with his employer, but was fired, and (2) he could not have voluntarily abandoned his employment because, at the time, he was physically incapable of performing his job. In response to those arguments, the magistrate concluded (1) the commission's finding that relator quit his employment with his employer should not be disturbed, and (2) the voluntary abandonment doctrine does not apply where, "as here, the employee voluntarily quit his employment for reasons unrelated to his injuries." (Mag. Dec., ¶29.) Accordingly, the magistrate determined the requested writ should be denied.

II. Objections

{¶4} Relator filed three objections to the magistrate's conclusions of law:

> [1.] [T]he Magistrate incorrectly found that relator argued that he did not quit his employment with respondent, Wingate Transport, but was fired.
>
> [2.] [T]he Magistrate incorrectly found that the voluntary abandonment doctrine does not apply when the injured worker has voluntarily quit his employment, concluding that a "voluntary quit" is distinguishable and treated differently from discharges/terminations.

> [3.] [T]he Magistrate failed to address relator's argument that the Staff Hearing Officer's finding that Employer was "ready, willing and able" to make a light-duty job offer but for relator's voluntary abandonment was an abuse of discretion.

Relator's objections largely reargue those matters adequately addressed in the magistrate's decision.

A. First Objection

{¶5} Relator's first objection asserts "he has never argued that the commission's finding that he voluntarily quit his job was an abuse of discretion." (Objections, 3.) Because relator apparently agrees he quit his employment, and the magistrate analyzed the case on that basis, relator suffered no prejudice in the magistrate's framing the issue as she did. Relator's first objection is overruled.

B. Second Objection

{¶6} Relator's second objection focuses on the gist of his action and addresses whether an employee's quitting his or her job for reasons unrelated to his industrial injury constitutes a voluntary abandonment that precludes temporary total disability compensation. As the magistrate pointed out, and relator agrees, the facts indicate he quit his employment. The magistrate properly observed that "the voluntary or involuntary nature of the departure from employment focuses on whether or not the departure is causally related to the work-related injury." (Mag. Dec., ¶49.) Here, as the magistrate appropriately concluded, abandonment arising out of discharge from employment is different than abandonment that occurs when an employee quits his or her position of employment for reasons unrelated to his injury.

{¶7} Relator responds by citing *State ex rel. Pretty Products, Inc. v. Indus. Comm.,* 77 Ohio St.3d 5, 1996-Ohio-132 and its progeny for the principle that an employee can abandon his or her employment only when the employee has the physical capacity for employment at the time of the abandonment or removal. They, however, address instances where the employee was discharged from employment, not where, as here, the employee quits for reasons unrelated to his injury. For the reasons set forth in the magistrate's decision, the distinction is valid and disposes of relator's request for temporary total disability compensation where relator has not resumed employment. See *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376. Relator's second objection is overruled.

C. Third Objection

{¶8} Relator's third objection asserts the magistrate failed to address his argument that the staff hearing officer wrongly stated the employer had a light-duty job ready and waiting for him when no evidence to that effect is in the record. Even if he lacked a modified- or light-duty job to return to, relator quit despite being physically capable of working a modified-duty job: Dr. Bertollini released relator to a modified-duty job as of June 9, 2009 with an estimated return to regular duty on June 20, 2009. See *State ex rel. Santiago v. Indus. Comm.*, 10th Dist. No. 09AP-419, 2010-Ohio-1020 (concluding an injured claimant who returned to light-duty work voluntarily abandoned his employment when he quit because he did not want to work some evening shifts). Because relator quit his job for reasons unrelated to his injury, the presence or absence of a light- or modified-duty job waiting for relator with his former employer is not crucial to

determining relator's entitlement to temporary total disability compensation. Relator's third objection is overruled.

III. Disposition

{¶9} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts, with one exception: relator was released to modified-duty work as of June 9, 2009 with an estimated return to regular-duty work on June 20, 2009. Moreover, the magistrate applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact, as modified, and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ denied.

KLATT and TYACK, JJ., concur.

_____

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Brian J. Hildebrand, Jr.,	:	
Relator,	:	
v.	:	No. 10AP-625
Wingate Transport, Inc., and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on March 23, 2011

Gallon, Takacs, Boissoneault & Schaffer Co. L.P.A., and *Theodore A. Bowman*, for relator.

Barno Law, LLC, John A. Barno, Melissa A. Black and *Jamison S. Speidel*, for respondent Wingate Transport, Inc.

Michael DeWine, Attorney General, and *Derrick Knapp*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} Relator, Brian J. Hildebrand, Jr., 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 denying him temporary total disability ("TTD")

compensation based upon a finding that he voluntarily quit his employment with respondent Wingate Transport, Inc. ("Wingate"), and ordering the commission to find that he is entitled to that compensation because he was disabled at the time he quit.

Findings of Fact:

{¶11} 1. Relator alleged that he sustained a work-related injury on June 3, 2009 and, although Wingate challenged the claim, relator's claim was eventually allowed for "left sacroiliac sprain/strain."

{¶12} 2. According to testimony taken at the hearing before the staff hearing officer ("SHO"), relator did immediately report the injury to his supervisor.

{¶13} 3. On June 8, 2009, relator sought treatment from Matthew Bertollini, D.C. According to his office notes and his report from that same day, Dr. Bertollini diagnosed relator as having left sacroiliac joint sprain/strain and noted further:

> * * * It is also probable, based on the physical exam, that there is also an element of discal pathology, that was substantially aggravated by the injury, however, an MRI is likely needed to further evaluate for this. We will begin a trial of therapeutic rehabilitation for pain relief and increased range of motion, consisting of strengthening and stabilization exercises and anti-inflammatory modalities as it is felt that this should benefit the patient functionally and allow him less difficulty with his job functions.

{¶14} 4. That same day, June 8, 2009, Dr. Bertollini completed a form asking that relator be excused from work from June 8 to June 9, 2009 with an estimated return-to-work date of June 10, 2009.

{¶15} 5. The next day, June 9, 2009, Dr. Bertollini completed a second work restriction form releasing relator to modified duty work with the following restrictions: maximum lifting capability 10 pounds; low force pushing/pulling 20 pounds; no repetitive

bending; use caution while entering/exiting vehicles; and light recreation only. These restrictions were in place from June 9 through June 19, 2009, with an estimated return to modified duty work date of June 20, 2009.

{¶16} 6. Relator reported to work on June 9, 2009 and, according to the SHO order, a confrontation ensued. Specifically, the SHO made the following factual findings:

> * * * The Injured Worker had previously "totaled" his personal motor vehicle in a roll-over accident. Therefore, Jeffrey Wingate, the owner of the Employer corporation, lent him his personal vehicle, a 1996 Jeep, to drive after the Injured Worker's prior motor vehicle accident. Since the Injured Worker had reportedly driven Mr. Wingate's Jeep while intoxicated and since he had already been using Mr. Wingate's personal vehicle for over six months, Mr. Wingate asked him to return the key to his 1996 Jeep on 06/09/2009. The Injured Worker then became agitated and asked Mr. Wingate how he expected him to get to work the following day. The Injured Worker was told that he should call someone to make other arrangements. The Injured Worker then asked if he was being fired and he was told "no", he was not being fired. It was just time for him to stop using his Employer's personal vehicle. The Injured Worker then became very upset and began loading up his tools, toolboxes and equipment in the pick-up truck of an owner-operator who drove a tractor trailer rig on behalf of Wingate Transport, Inc.
>
> The Injured Worker then filed for unemployment compensation benefits on 06/16/2009. The Ohio Department of Job and Family Services issued a finding on 07/27/2009, stating that, "The Injured Worker quit Wingate Transport, Inc., on 06/09/2009. Facts establish that the Injured Worker quit for personal reasons that he/she did not wish to disclose. Ohio's legal standard that determines if a quit is without just cause is what an ordinary person would have done under similar circumstances. After a review of the facts, this agency finds that the Injured Worker quit without just cause".

{¶17} 7. In a letter dated June 12, 2009, Jeff Wingate, the owner of Wingate, provided the following explanation of the events in a letter providing, in pertinent part, as follows:

> On June 9, 2009 at approx 10:15 AM, while attending a seminar, I received a concerning phone call from Deborah Myler in my office stating that Brian Hildebrand had reported to work.
>
> She stated that Mr. Hildebrand had just come from a doctor's appointment. I asked her to make sure that he had a release to work before allowing him to proceed. She stated that he had told her that he had placed a stack o[f] papers in on my desk with the release.
>
> I then phoned Mr. Hildebrand at the office asking him the same. He stated that he could return to work with light duty. I asked him if he had the appropriate papers to show & he said yes, and that he placed them on my desk.
>
> I then said to Mr. Hildebrand that I thought it was time for him to return the keys to my 1996 Jeep that I had allowed him to drive. I asked that he give them [to] Deborah Myler. He became agitated and asked how he was going to get to work the following day. I suggested that he call someone to make other arrangements. *He asked if he was being fired & I said no, that I just thought it was time for him to return my personal vehicle*.
>
> I then received a phone call from Deborah Myler, stating that Mr. Hildebrand had walked out of the office to the shop & began loading up tool boxes & equipment in the back of a pick up truck owned by Ron Murray, an owner operator with Wingate Transport. Mr. Murray would later tell me that M[r]. Hildebrand had told him he was fired & asked if he would help him load up tools & equipment.
>
> I hurriedly left the seminar & arrived at the office/shop to observe Mr. Hildebrand lifting heavy tools, tool boxes, an[d] many articles into the back of Mr. Murray's pick up truck.
>
> I asked Mr. Hildebrand what he was doing and he stated that I had fired him. I said I had not fired him & asked why he had

taken on such a bad attitude. I received no answer. I asked if he was quitting? He again said that I had fired him. I suggested to Mr. Hildebrand that he should leave the premises until he could cool off & we could talk. He continued to load items into the back of the pick up truck. I asked that he immediately stop until I could identify all that he was taking. He refused. I asked Mr. Hildebrand again to immediately leave the premises or I would have to call the Toledo Police. There was no cooperation & I called the police.

The police arrived shortly, evaluated the situation, & told Mr. Hildebrand to unload all the items until he could produce appropriate documents to identify his belongings. He refused & the police asked again. He eventually cooperated & began to unload all of the items. The police then suggested that Mr. Hildebrand call to set up a time in which we could mutually go through all of the items. I said that Thursday June 11, or Friday June 12 would be fine for me. There was a computer in the back of the pick up that Mr. Hildebrand said was his. I did not recognize it as being one of the company's and allowed him to take that.

A car showed up to pick up Mr. Hildebrand. I asked Mr. Hildebrand to return his keys to the property. I received all but the gate key. As he began to get into the car & I noticed that Mr. Hildebrand still had in his possession the company phone assigned to him as the mechanic.

Mr. Hildebrand reached to give it to me & immediately removed t[he] SIMM card in the phone placing it in his pocket. * * *

The police told him to return it. Again, Mr. Hildebrand was uncooperative with the police. * * * Mr. Hildebrand, fumbled through his pockets, pulled a SIMM card & placed in into the working company phone, turned the phone on, showed the officer, got into the car, & left.

I walked back into the office after all of the disruption, reviewed his paperwork only to discover that Mr. Hildebrand had <u>not</u> been released for work until the following day, June 11 [sic], 2009 and for light duty only. He was restricted to:

> [One] Not to lift more than 10lbs.
> [Two] Low force pushing/pulling of 20 lbs[.]
> [Three] No repetitive bending[.]
> [Four] Use caution when entering / exiting vehicles[.]
> [Five] Light recreation only.
>
> I found this disturbing after witnessing all the heavy items that had been lifted into the pick up truck.

(Emphasis added; emphasis sic.)

{¶18} 8. On June 16, 2009, relator presented at the Ohio Department of Job and Family Services ("ODJFS") to apply for unemployment compensation. A determination was made to disallow relator's application for unemployment compensation benefits due to a "disqualifying separation from employment or other reasons described in the following text:"

> The claimant quit WINGATE TRANSPORT INC. on 06/09/2009. Facts establish that the claimant quit for personal reasons that he/she did not wish to disclose. Ohio's legal standard that determines if a quit is without just cause is what an ordinary person would have done under similar circumstances. After a review of the facts, this agency finds that the claimant quit without just cause under Section 4141.29(D)(2)(a), Ohio Revised Code. Therefore, no benefits will be paid until the claimant obtains employment subject to an unemployment compensation law, works six weeks, earns wages of $1260, and is otherwise eligible.

{¶19} 9. Thereafter, on June 18, 2009, relator completed a First Report of an Injury form and submitted it to Wingate.

{¶20} 10. On June 17, 2009, Dr. Bertollini signed a C-84 certifying that relator was temporarily and totally disabled from his employment from June 8, 2009 through an estimated return-to-work date of July 9, 2009.

{¶21} 11. Relator's claim was allowed by order of the Ohio Bureau of Workers' Compensation ("BWC") on July 2, 2009.

{¶22} 12. Wingate appealed the claim allowance and the matter was heard before a district hearing officer ("DHO") on August 4, 2009. The DHO vacated the prior BWC order and denied relator's claim in its entirety.

{¶23} 13. Relator filed an appeal and the matter was heard before an SHO on August 31, 2009. The SHO vacated the prior DHO order and, as noted previously, allowed relator's claim for left sacroiliac sprain/strain. Thereafter, the SHO considered whether or not relator was entitled to receive TTD compensation. After setting forth what the SHO determined were the facts (provided here in this decision at finding of fact six), the SHO concluded that relator was not entitled to TTD compensation as follows:

> * * * [I]t is the finding of this Staff Hearing Officer that the Injured Worker voluntarily abandoned his former position of employment, on 06/09/2009. It is the further finding of this Staff Hearing Officer that the Injured Worker has not re-entered the workforce since 06/09/2009. Thus, it is the finding of this Staff Hearing Officer that it was the Injured Worker's own actions for reasons unrelated to the injury, which preclude him from returning to his former position of employment. Therefore, he is not entitled to the payment of temporary total disability benefits, since it was the Injured Worker's own action, rather than the injury, that precludes him from returning to the former position of employment. Furthermore, it is the finding of this Staff Hearing Officer that the Employer was ready, willing and able to offer light-duty employment within the Injured Worker's residual functional capacity, but for the fact that the Injured Worker had voluntarily abandoned his former position of employment.
>
> Therefore, it is the order of this Staff Hearing Officer that temporary total disability compensation is hereby denied for the period from 06/09/2009 through 08/31/2009.

> It is the further finding of this Staff Hearing Officer that the Injured Worker's voluntary abandonment of his former position of employment will not constitute a bar to the future payment of temporary total disability compensation, pursuant to Ohio Revised Code section 4123.56, if he subsequently re-enters the workforce and, due to the disability resulting from impairment due to the allowed condition in this claim, becomes temporarily and totally disabled while working at his new job, pursuant to the Ohio Supreme Court's holding in the case of State ex rel. McCoy vs Dedicated Transport, Inc. (2002) 97 Ohio St. 3d 25.

(Emphasis sic.)

{¶24} 14. Relator's further appeal was refused by order of the commission mailed September 19, 2009.

{¶25} 15. Relator filed a request for reconsideration arguing that the SHO should have applied *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, and found that he could not have abandoned his employment since he was incapable of performing his job at that time and because relator had appealed the decision of ODJFS denying his request for unemployment compensation. Relator argued that there was a clear mistake of law and new and changed circumstances.

{¶26} 16. After initially taking relator's request for reconsideration under consideration, the commission denied the request in an order mailed May 8, 2010.

{¶27} 17. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶28} Relator makes the following two arguments: (1) he did not quit his employment with Wingate—he was fired, and (2) he could not have voluntarily abandoned his employment with Wingate on June 9, 2009 because, at that time, he was physically incapable of performing his former job.

{¶29} It is this magistrate's decision that: (1) because findings of fact and credibility to be given the evidence are within the commission's discretion as fact finder, the commission's finding that relator quit his employment with Wingate should not be disturbed, and (2) the voluntary abandonment doctrine should not apply where, as here, the employee voluntarily quits his employment for reasons unrelated to his injuries since there is no need to determine whether relator intended to terminate his employment with Wingate and there is no reason to determine whether Wingate had some ulterior motive in terminating relator.

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

{¶31} This case must be considered within the historical context in which the voluntary abandonment doctrine has developed. In *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, Ernesto Rosado sustained a work-related injury. At some point in time, Rosado voluntarily retired from his job with Jones & Laughlin. Based on Rosado's voluntary retirement, Jones & Laughlin argued in this court that Rosado should not be entitled to an award of TTD compensation. Because Jones &

Laughlin had failed to raise the issue before the commission, this court denied Jones & Laughlin's request for a writ of mandamus ordering the commission to vacate its award of TTD compensation; however, this court did address the issue of whether or not an employee's voluntary retirement from the workforce for reasons unrelated to an industrial injury precludes the payment of TTD compensation.

{¶32} After citing the syllabus rule of *Ramirez*, this court stated that:

> * * * [T]he industrial injury must not only be such as to render the claimant unable to perform the functions of his former position of employment, but it also must prevent him from returning to that position. * * *

Id. at 147.

{¶33} Thereafter, this court set forth the issue before it:

> * * * Accordingly, the issue before us is whether a person who has voluntarily taken himself out of the work force and abandoned any future employment by voluntarily retiring is prevented from returning to his former position of employment by an industrial injury which renders him unable to perform the duties of such former position. This raises an issue of causal relationship.

Id.

{¶34} Ultimately, this court concluded as follows:

> * * * [O]ne who has voluntarily retired and has no intention of ever returning to his former position of employment is not prevented from returning to that former position by an industrial injury which renders him unable to perform the duties of such former position of employment. A worker is prevented by an industrial injury from returning to this former position of employment where, but for the industrial injury, he would return to such former position of employment. However, 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 temporary total disability benefits since it is his own action,

> rather than the industrial injury, which prevents his returning to such former position of employment. Such action would include such situations as the acceptance of another position, as well as voluntary retirement.

Id.

{¶35} It was not until *State ex rel. Ashcraft v. Indus. Comm*. (1987), 34 Ohio St.3d 42, that the foundation for the voluntary abandonment doctrine as we know it today began to take shape. In that case, Nelson C. Ashcraft was injured while working in the scope of his employment as a welder and received TTD compensation for a period of time. After his TTD compensation ceased, Ashcraft was incarcerated in West Virginia on a felony charge, subsequently convicted and imprisoned for first degree murder. Thereafter, Ashcraft sought TTD compensation from the commission.

{¶36} The commission ordered Ashcraft's motion suspended until he was released from incarceration. As such, Ashcraft was precluded from receiving any TTD compensation while incarcerated.

{¶37} Ashcraft filed a mandamus action in this court seeking an order compelling the commission to hear the application for TTD compensation. This court granted the writ and the matter was appealed to the Supreme Court of Ohio.

{¶38} After considering the purpose of TTD compensation and considering the holding from *Jones & Laughlin*, the *Ashcraft* court, at 44, reiterated that the crux of the decision in *Jones & Laughlin* was:

> * * * The crux of this decision was the court's recognition of the two-part test to determine whether an injury qualified for temporary total disability compensation. The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from

> returning to his former position. The secondary consideration is a reflection of the underlying purpose of temporary total compensation: to compensate an injured employee for the loss of earnings which he incurs while the injury heals. * * *

{¶39} The *Ashcraft* court concluded that when a claimant has voluntarily removed himself or herself from the workforce, he or she no longer suffers a loss of earnings because he or she is no longer in a position to return to work. The court concluded that this logic would apply whether the claimant's abandonment of his position was temporary or permanent. Ultimately, the court concluded that Ashcraft's incarceration constituted a factor which, independently of his previously recognized work-related injury, precluded his receipt of TTD compensation. In so finding, the *Ashcraft* court stated, at 44:

> While a prisoner's incarceration would not normally be considered a "voluntary" act, one may be presumed to tacitly accept the consequences of his voluntary acts. When a person chooses to violate the law, he, by his own action, subjects himself to the punishment which the state has prescribed for that act.

{¶40} In *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, the court again considered whether or not retirement should preclude the payment of TTD compensation. In that case, Rollin Sharp sustained a low back injury in the course of his employment with Rockwell International. TTD compensation was paid until such time as Sharp was released to return to light-duty work. Ultimately, Sharp retired from his employment, but, thereafter, filed an application to reactivate his claim and requested TTD compensation. Rockwell International argued that TTD compensation should not be paid to Sharp because he had voluntarily retired from his employment.

{¶41} Ultimately, the Supreme Court of Ohio found that TTD compensation was payable based upon the commission's finding that Sharp's retirement was causally

related to his industrial injury, and thus was not voluntary. Specifically, the *Rockwell* court stated, at 46:

> Neither *Ashcraft* nor *Jones & Laughlin* states that *any* abandonment of employment precludes payment of temporary total disability compensation; they provide that only voluntary abandonment precludes it. While a distinction between voluntary and involuntary abandonment was contemplated, the terms until today have remained undefined. We find that a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

{¶42} In 1995, the Supreme Court of Ohio decided the seminal case of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153. In that case, Patrick Longmore sustained an injury while in the course of his employment with Louisiana-Pacific Corporation, a self-insured employer under Ohio's workers' compensation laws, who began paying TTD compensation. Longmore was released to return to work on December 17, 1990; however, he did not report to work nor did he call in on December 17, 18, or 19, 1990. In a letter dated December 20, 1990, Louisiana-Pacific notified Longmore that his failure to report to work for three consecutive days violated the company's policy and he was terminated.

{¶43} The commission awarded Longmore TTD compensation and this court denied Louisiana-Pacific's request for a writ of mandamus.

{¶44} On appeal, the Supreme Court of Ohio granted the writ of mandamus after finding that Longmore's termination did bar his receipt of TTD compensation. Specifically, the *Louisiana-Pacific* court stated, at 403:

> Recognizing the parallels underlying incarceration and firing, we observed in *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 121, 623 N.E.2d 1202, 1204:
>
> "We agree that firing 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. * * *"
>
> 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.

{¶45} Recent cases have considered different scenarios. Specifically, recent cases have held that a claimant who cannot return to the former position of employment, but who is working in a post-injury modified job, can voluntarily abandon their employment and TTD compensation will not be paid.

{¶46} Specifically, in *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, the claimant, Judy Adkins, sustained a work-related injury, was unable to return to her former position of employment, and accepted a light-duty job. Thereafter, Adkins failed to report to work after accepting the light-duty job offer and was terminated pursuant to her employer's policy. Adkins sought TTD compensation; however, her request was denied and she sought a writ of mandamus.

{¶47} This court upheld the commission's order, in spite of the language in *Pretty Prods.* This court determined that *Pretty Prods*. did not directly address the situation where the rule violation involves accepted alternative employment rather than the former position of employment. Finding that Adkins could be presumed to intend the consequences of her voluntary act, this court found that the commission did not abuse its discretion by finding that she had voluntarily abandoned her employment.

{¶48} Similarly, in *State ex rel. Santiago v. Indus. Comm*., 10th Dist. No. 09AP-419, 2010-Ohio-1020, the claimant, Johnathon R. Santiago, sustained a work-related injury, was unable to return to his former position of employment, and return to work in a light-duty position. After several weeks, Santiago quit his job after being informed that he would be required to work some evening shifts. Finding that he voluntarily abandoned his employment when he quit, the commission denied his request for TTD compensation and this court concluded that finding was not an abuse of discretion.

{¶49} As above indicated, the voluntary or involuntary nature of the departure from employment focuses on whether or not the departure is causally related to the work-related injury. Further, it is clear that an employee working modified duty can also be terminated for a *Louisiana-Pacific* violation and TTD compensation can be denied. Also, an employee may be terminated from a modified-duty job or may quit a modified-duty job and the commission can determine that their departure was voluntary and precludes an award of TTD compensation. However, as hereinafter provided, a voluntary departure need not bar the payment of TTD compensation forever.

{¶50} In 2000, the Supreme Court of Ohio issued its decision in *State ex rel. Baker v. Indus. Comm*. (2000), 89 Ohio St.3d 376 ("*Baker II*"). In that case, Paul W.

Baker sustained a work-related injury and received a period of TTD compensation. Baker's treating physician released him to return to full-time work, restricted to light duty. However, Baker signed a termination notice indicating that he had accepted other employment.

{¶51} Baker began his new job as a truck mechanic; however, allegedly due to his original industrial injury, Baker left this position and requested TTD compensation. The commission denied Baker TTD compensation and, after unsuccessfully seeking a writ of mandamus in this court, Baker appealed to the Supreme Court of Ohio.

{¶52} The Supreme Court of Ohio issued its first decision in that case, *State ex rel. Baker v. Indus. Comm*. (2000), 87 Ohio St.3d 561 ("*Baker I*") and denied Baker TTD compensation because he had voluntarily abandoned his employment with his original employer when he accepted other employment.

{¶53} On reconsideration, the court found that changing jobs was clearly distinguishable from other situations of voluntary abandonment of employment and that a change in job did not preclude a claimant from receiving TTD compensation. Specifically, the court held as follows:

> When a claimant who is medically released to return to work following an industrial injury leaves his or her former position of employment to accept another position of employment, the claimant is eligible to receive temporary total disability compensation pursuant to R.C. 4123.56(A) should the claimant reaggravate the original industrial injury while working at his or her new job.

Id. at syllabus.

{¶54} Later, in *State ex rel. David's Cemetery v. Indus. Comm.*, 92 Ohio St.3d 498, 502, 2001-Ohio-1271, the Supreme Court of Ohio explained its holding in *Baker II*:

> * * * *Baker* explained that the critical abandonment in evaluating TTC eligibility was abandonment of the entire work force, not simply abandonment of the former position of employment. This did not occur here. Other cases cited by David's Cemetery, such as *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm*. (1995), 72 Ohio St.3d 401, 650 N.E.2d 469; *State ex rel. McClain v. Indus. Comm*. (2000), 89 Ohio St.3d 407, 732 N.E.2d 383; and *State ex rel. Smith v. Superior's Brand Meats* (1996), 76 Ohio St.3d 408, 667 N.E.2d 1217, *are not dispositive, because they deal with employment discharge, not a voluntary quit*.

(Emphasis added.)

{¶55} Based on the above cases, it is clear that employment discharges/-terminations and voluntary quits/retirements are treated differently. However, the initial focus is still on whether or not the departure is causally related to the allowed conditions.

{¶56} Relator argues that this court should apply the rationale from *Pretty Prods*. and the cases which followed to his situation. For the reasons that follow, this magistrate disagrees.

{¶57} *Pretty Prods*. was a discharge case. Maxine Dansby sustained a work-related injury and her employer certified the claim. Dansby's treating physician certified that Dansby was unable to return to her former job in a series of medical excuse slips. The last of these slips certified that she could return to work on March 1, 1991.

{¶58} Dansby did not return to work on March 1, 1991, nor did she produce an excuse slip extending her disability. Dansby did not report to work the following two days and was terminated. Ultimately, the commission awarded TTD compensation; however, on appeal to the Supreme Court of Ohio, the court determined that the vagueness of the commission's order required further explanation and clarification for the commission's reasoning and sent the matter back to the commission. The court found that the

commission's order was open to three different interpretations. As part of its decision, the court stated:

> 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, 58.

Id. at 7.

{¶59} This is the language to which relator points in support of his argument. Further, relator cites the decisions in *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499.

{¶60} All of these cases involved employees who were unable to return to their former positions of employment and were not working in modified-duty jobs. They were all discharged from their employment for allegedly violating written work rules of their employer. Pursuant to *Pretty Prods*., it was determined that they could not voluntarily abandon a job when they were unable to return to their former position of employment or otherwise were employed in a modified-duty job. None of these cases involve an employee who voluntarily quit their employment after sustaining a work-related injury. While relator continues to argue that he was fired and did not voluntarily quit, the commission made this factual finding and, as stated previously, because there is some evidence in the record supporting the commission's determination, this court cannot change that fact.

{¶61} Because relator voluntarily quit his employment with Wingate for personal reasons unrelated to his work-related injury, neither *Louisiana-Pacific* nor *Pretty Prods.* nor *OmniSource* nor *Reitter Stucco* apply because voluntary quits are treated completely different from termination/discharge cases. Further, because relator has not resumed other employment, the decision in *Baker II* and the cases which followed it are likewise not applicable here. Relator has not presented a reason for this court to take away from him or other injured workers their independent decisions to leave their employment.

{¶62} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion and this court should deny his request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).