[Cite as *State ex rel. L-3 Fuzing v. Indus. Comm.*, 2011-Ohio-4248.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. L-3 Fuzing & Ordnance Systems, Inc.,	:	
Relator,	:	No. 10AP-184
v.	:	(REGULAR CALENDAR)
The Industrial Commission of Ohio and Tanya Trent,	:	
Respondents.	:	

D E C I S I O N

Rendered on August 25, 2011

Thompson Hine LLP, and *M. Scott Young*, for relator.

Michael DeWine, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

Todd G. Kime & Assoc., and *Todd G. Kime*, for respondent Tanya Trent.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

SADLER, J.

{¶1} Relator, L-3 Fuzing & Ordnance Systems, Inc., filed this original action seeking a writ of mandamus ordering respondent, Industrial Commission of Ohio

("commission"), to vacate its order of November 12, 2008 that awards temporary total disability ("TTD") compensation beginning January 24, 2008, and to enter an order finding that respondent, Tanya Trent ("claimant"), is ineligible for said compensation on the basis that she voluntarily abandoned her employment. Relator also requests that the writ order the commission to vacate the order of October 30, 2009 that awards TTD compensation beginning February 27, 2009, and to enter an order denying said compensation on the grounds that claimant is ineligible for said compensation or, in the alternative, that the relied upon medical evidence fails to support the award.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found (1) that the commission did not abuse its discretion in determining that claimant did not voluntarily abandon her employment, and (2) that not all of the commission's award of TTD compensation from February 27 through August 31, 2009 was supported by the medical evidence upon which the commission relied. Accordingly, the magistrate recommended that this court issue a writ of mandamus with respect to the October 30, 2009 order.

{¶3} Relator has filed the following objections to the magistrate's decision:

> [1.] Relator objects to the magistrate's omission within his findings of fact that claimant worked throughout December 2007, missed work from January 3, 2008 through January 15, 2008, before returning to work on January 16, 2008.
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> [2.] Relator objects to the magistrate's omission within paragraphs 6-8 of his findings of fact relating to the contents of claimant's voicemails left with claimant's supervisor, Kitty Long, on January 21, 2008, January 22, 2008, and

> January 23, 2008 as the purported reasons for failing to report to work on such dates.
>
> [3.] Relator objects to the magistrate's omission within his findings of fact as to relator's written policy nos. 4.1 and 6.7, governing excused and unexcused absences, as relevant to a determination as to whether claimant violated relator's written attendance policy subjecting her to termination effective January 22, 2008.
>
> [4.] Relator objects to the magistrate's finding that claimant's accumulation of points for excessive absenteeism were assessed prior to her October 15, 2007 date of injury, and thus could not be used to discharge her effective January 22, 2008.
>
> [5.] Relator objects to the magistrate's finding that because claimant contacted L-3, through voicemails to her supervisor, on January 21, 22, and 23, 2008, stating that she would not be reporting to work, that L-3 was foreclosed from terminating her employment under policy no. 17.1.2, thereby requiring all TTD from January 24, 2008 forward vacated.
>
> [6.] Relator objects to the magistrate's substitution of his unsupported rationale and findings for the indefensible rationale and findings of the staff hearing officer order of November 12, 2008, that relator could not deem the "call in on January 21, 2008 through January 23, 2008 to be unexcused absences and therefore counts towards the accumulation points", thereby requiring all TTD from January 24, 2008 forward vacated.
>
> [7.] Irrespective of claimant's voluntary abandonment of her employment effective January 22, 2008, thus foreclosing all TTD thereafter as set forth in objection nos. 5 and 6, relator objects to the magistrate's failure to find that there were no new and changed circumstances justifying a recommencement of TTD from February 27, 2009 forward because claimant had not returned to work following the cessation of TTD on August 11, 2008.

{¶4} Before addressing relator's objections, we consider the commission's motion to supplement the joint stipulation of evidence. The commission moves to add the

C-84 signed and dated by Dr. Weadick on July 10, 2009, which demonstrates C-84 coverage from June 30 to August 9, 2009. According to the commission, this C-84 was inadvertently omitted from the joint stipulation of evidence. Finding no opposition to the commission's motion in the record, we grant the commission's motion to supplement the joint stipulation of evidence with the July 10, 2009 C-84 signed by Dr. Weadick. We now address relator's objections to the magistrate's decision.

{¶5} First, relator asserts the magistrate's findings of fact should have included the fact that claimant worked during the month of December 2007. Relator contends this is relevant because, in paragraph two of the magistrate's findings of fact, the magistrate quotes Dr. Shaw's statement that claimant "has not been back to work since November." This statement, however, is not the magistrate's finding as to whether or not relator worked in December 2007, but, rather, is an accurate quote of a statement made in Dr. Shaw's report. Accordingly, we find no error in the magistrate's second finding of fact, and overrule relator's first objection.

{¶6} Next, relator challenges paragraphs six through eight of the magistrate's findings of fact. According to relator, it was error for the magistrate to omit claimant's purported reasons for failing to report to work on January 21, 22, and 23, 2008. As later held in the magistrate's decision, pursuant to relator's employee handbook, the relevant inquiry is not why the employee failed to report, but, rather, whether the employee failed to report for work without contacting the employer. Thus, it was not relevant to include claimant's reason for failing to report to work on those days. Moreover, claimant's purported reasons for failing to report to work are discerned from other portions of the magistrate's decision. Accordingly, relator's second objection is overruled.

{¶7} In the third objection, relator contends the magistrate erred in omitting from his findings of fact employee handbook Policy Nos. 4.1 and 6.7, which define "excused" and "unexcused" absences, and explain relator's right to refuse requested absences from work. We note the magistrate did include portions of an affidavit from relator's human resources director that quoted Policy No. 4.1. Additionally, Policy No. 6.7 is not necessarily relevant to the outcome herein. Though Policy No. 6.7 explains relator's right to refuse a request for personal time made 24 hours in advance, said provision does not require an employee to request personal time 24 hours in advance. Accordingly, relator's third objection is overruled.

{¶8} Because they are interrelated, relator's fourth and sixth objections will be addressed together. In these objections, relator takes issue with the magistrate's conclusion that the commission did not abuse its discretion in rejecting relator's claim that claimant's accumulation of points under the disciplinary progression policy constitutes a voluntary abandonment of employment. According to relator, the magistrate's analysis is flawed because the accumulation of points relating to claimant's absenteeism arose after the date of injury rather than before the injury as stated by the magistrate. Additionally, relator contends the staff hearing officer's [SHO's] finding that claimant's January 21 through 23, 2008 absences from work could not count toward the accumulation of points was in error.

{¶9} Regardless of either of these contentions, relator's arguments are not well-taken because we find the commission did not abuse its discretion in finding that relator did not meet its burden of proving the applicability of the affirmative defense of voluntary abandonment. Relator contends claimant accumulated more than six points under the

disciplinary progression policy between October 22, 2007 and January 23, 2008, which made claimant subject to employment termination under the employee handbook. It is relator's position that this point accumulation constitutes voluntary abandonment of her employment such that claimant is barred from receiving TTD compensation. We disagree.

{¶10} A firing can indeed constitute a voluntary abandonment of a position of employment where the firing is a consequence of behavior which the claimant willingly undertook. *State ex rel. Giant Eagle, Inc. v. Indus. Comm.*, 10th Dist. No. 07AP-210, 2007-Ohio-6778, ¶29, citing *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 1993-Ohio-133. As held in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, a firing may be characterized 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. However, where that conduct is causally related to the injury, the termination of employment is not voluntary. *State ex rel. Leaders Moving & Storage Co. v. Indus. Comm.*, 10th Dist. No. 05AP-455, 2006-Ohio-1211, ¶15, citing *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 7, 1996-Ohio-132. "Further, the employer bears the burden of proving that the employee was terminated for violating a written work rule." *Giant Eagle* at ¶30.

{¶11} In the present case, the record does contain a return to work form stating that claimant could return to work effective January 16, 2008 without restrictions; however, the record also contains "physician's report of work ability" forms indicating that

claimant may return to work, but only with restrictions. Further, while relator asserts claimant left early on January 16 and failed to report on January 17 and 18 for reasons unrelated to her injury, there is evidence, as noted by the district hearing officer, that claimant reported for work on January 17 and 18, but was sent home because of a lack of light duty work. Thus, unlike the cases relied upon by relator, this record does contain evidence that claimant's conduct, absenteeism, was related to the industrial injury. Accordingly, we cannot say the commission abused its discretion in finding that relator failed to meet its burden of proof in establishing that claimant's termination was a voluntary abandonment of employment. Accordingly, relator's fourth and sixth objections are overruled.

{¶12} In its fifth objection, relator asserts it was error for the magistrate to conclude that because claimant left voicemail messages for her supervisor on January 21, 22, and 23, 2008, claimant complied with Policy No. 17.1.2. This argument is the same as that made to, and addressed by, the magistrate. For the reasons set forth in the magistrate's decision, relator's fifth objection is overruled.

{¶13} In the final objection, relator challenges the magistrate's conclusion that the record contains some evidence to support the commission's award of TTD compensation from February 27 to August 31, 2009. For the reasons set forth in the magistrate's decision, and based on our decision granting the commission's motion to supplement the record, relator's seventh objection is overruled. However, the magistrate concluded the record contained no C-84 coverage for two separate periods, i.e., April 15 to May 30, 2009 and June 30 to August 9, 2009. Because we have allowed the record to be supplemented, we reject the magistrate's conclusion that there is no C-84 coverage for

the period of June 30 to August 9, 2009, and hereby modify the magistrate's conclusions of law in this regard.

{¶14} Upon an independent review of the record, the magistrate's decision, and due consideration of relator's objections, we find the magistrate has properly determined the relevant facts and applied the appropriate law. Therefore, we overrule relator's objections to the magistrate's decision, and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law as modified herein.

{¶15} In accordance with the magistrate's decision, we grant a writ of mandamus and order the commission to amend the SHO's October 9, 2009 order so that TTD compensation is only awarded for the time periods certified by the four C-84's from Dr. Weadick that are contained in the stipulation of evidence in this mandamus action.

Motion to supplement evidence granted;
objections overruled;
writ of mandamus granted.

CONNOR and DORRIAN, JJ., concur.

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A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. L-3 Fuzing & Ordnance Systems, Inc.,	:	
Relator,	:	
v.	:	No. 10AP-184
The Industrial Commission of Ohio and Tanya Trent,	:	(REGULAR CALENDAR)
Respondents.	:	

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

Rendered on April 29, 2011

Thompson Hine LLP, and *M. Scott Young*, for relator.

Michael DeWine, Attorney General, and *Charissa D. Payer*, for respondent Industrial Commission of Ohio.

Todd G. Kime & Assoc., and *Todd G. Kime*, for respondent Tanya Trent.

IN MANDAMUS

{¶16} In this original action, relator, L-3 Fuzing & Ordnance Systems, Inc. (formerly known as KDI Precision Products, Inc.) ("L-3/KDI" or "relator"), requests a writ

of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate the November 12, 2008 order of its staff hearing officer ("SHO") that awards temporary total disability ("TTD") compensation beginning January 24, 2008, and to enter an order finding that respondent Tanya Trent ("claimant") is ineligible for the compensation on grounds that she allegedly voluntarily abandoned her employment. Further, relator requests that the writ order the commission to vacate its SHO's order of October 30, 2009 that awards TTD compensation beginning February 27, 2009, and to enter an order denying the compensation on grounds that claimant is allegedly ineligible for the compensation, or, in the alternative, that the relied-upon medical evidence fails to support the award.

Findings of Fact:

{¶17} 1. On October 15, 2007, claimant injured her right shoulder and arm while employed with relator, a state-fund employer. Her industrial claim (No. 07-385782) is allowed for: "sprain right shoulder/arm; rotator cuff syndrome, right; sprain rotator cuff, right."

{¶18} 2. On January 11, 2008, claimant was examined by orthopedic specialist Kevin J. Shaw, M.D. Dr. Shaw wrote:

> TANYA * * * presents for re-evaluation of her right shoulder. She has a known of rotator cuff injury documented on MRI as a result of a work injury in October 2007. We have been awaiting approval for surgery. * * * She continues to have pain and actually complains of increased pain. She recently went to the emergency department last week and received Percocet and was placed into a sling. She has not been back to work since November. * * *
>
> * * *

> I discussed pain management and medicine issues. Percocet will make her tolerance to medicines we will need after surgery. I recommended that she decrease the use of this. She is becoming stiff while she is waiting for surgery. I recommend physical therapy to mobilize his [sic] shoulder and prevent frozen shoulder. I recommend that we proceed with surgery soon as possible in order to get her back to work as soon as possible.

{¶19} 3. On January 11, 2008, Dr. Shaw completed a Physician's Report of Work Ability (MEDCO-14) form. On the form, Dr. Shaw indicated that claimant could return to work with restrictions as to the use of her right arm and hand.

{¶20} 4. On January 16, 2008, claimant returned to restricted duty at L-3/KDI. According to claimant's supervisor, Kitty Lung, on Thursday, January 17, and Friday, January 18, 2008, claimant did not show up for work at her scheduled time, and she did not call in to report her absence.

{¶21} 5. Claimant was not scheduled to work on the weekend of January 19 and January 20, 2008, but she was scheduled to work the week beginning Monday, January 21, 2008.

{¶22} 6. On Monday, January 21, 2008, prior to her scheduled time for work, claimant left a voice mail message for Lung informing that she would not be at work that day.

{¶23} 7. On Tuesday, January 22, 2008, prior to her scheduled time for work, claimant again left a voice mail message for Lung informing that she would not be at work that day.

{¶24} 8. On Wednesday, January 23, 2008, Lung received another voice mail message from claimant informing that she would not be at work that day.

{¶25} 9. By letter dated January 23, 2008, relator's Human Resources Associate Tamee Tumbleson informed claimant:

> In line with company policy, your employment has been terminated with L-3 Communications/KDI Precision Products, Inc. effective January 22, 2008 for excessive absenteeism.

{¶26} 10. On June 16, 2008, claimant underwent right shoulder surgery performed by David B. Argo, M.D.

{¶27} 11. On July 16, 2008, Dr. Argo completed a C-84 certifying TTD beginning April 17, 2008.

{¶28} 12. Earlier, on June 15, 2008, Dr. Shaw completed a C-84 certifying TTD beginning December 12, 2007 to an estimated return-to-work date of March 31, 2008.

{¶29} 13. On July 25, 2008, claimant moved for TTD compensation.

{¶30} 14. On September 29, 2008, a district hearing officer ("DHO") heard the request for TTD compensation.

{¶31} 15. Prior to the hearing, relator submitted an affidavit from its Human Resources Director Cyril Puthoff executed September 29, 2008. The Puthoff affidavit states in part:

> * * * On January 22, 2008, Ms. Trent's employment with KDI was terminated pursuant to paragraph 17.1.2 of KDI's Employment Policy, which provides that "Failure to report to work * * * for three (3) or more consecutive days constitutes a voluntary quit."
>
> * * * During all periods in December 2007 and January 2008, when Ms. Trent was at work for KDI, she performed mechanical assembly work that involved the inspection and cleaning of small parts weighing less than 1 pound. This job did not require the use of her right arm.

{¶32} 16. Following the September 29, 2008 hearing, the DHO issued an order awarding TTD compensation beginning January 24, 2008. The DHO's order explains:

> The District Hearing Officer notes that the injured worker amended her request for temporary total disability compensation at the hearing such that the injured worker is now requesting temporary total disability compensation be provided from 01/24/2008 to the date of this hearing, 09/29/2008, and continuing.
> The District Hearing Officer hereby grants the injured worker a period of temporary total disability compensation in this claim. The District Hearing Officer finds that the injured worker was disabled and physically unable to return to her former position of employment as a result of the injuries sustained in this claim. Therefore, the District Hearing Officer hereby grants the injured worker temporary total disability compensation from 01/24/2008 through 08/11/2008, and continuing upon submission of appropriate medical documentation, less sickness and accident benefits paid for this time period.
>
> The District Hearing Officer notes that the employer argued that the injured worker was not entitled to temporary total disability compensation because she had allegedly voluntarily abandoned her employment. The District Hearing Officer notes that the employer terminated the injured worker's employment on 01/23/2008 for violating the employer's no show/no call attendance policy. The employer argued that the employer's termination of the injured worker's employment constituted a voluntary abandonment by the injured worker of her position of employment.
>
> The District Hearing Officer notes the following facts which are pertinent to the resolution of this argument. The employer has alleged, via affidavit filed 09/29/2008, that the injured worker did not call or appear for work for two consecutive days, 01/17/2008 and 01/18/2008, and that the injured worker then called off the following three work days due to an illness in her family from 01/21/2008 thru 01/23/2008. However, the injured worker partially disputes this contention. The injured worker stated at the hearing that she appeared for work on 01/17/2008 and 01/18/2008 but was sent home by her supervisor for lack of light duty work on these dates. The injured worker agreed that she did not

come to work from 01/21/2008 thru 01/23/2008, but states she called in to her supervisor and let her supervisor knew [sic] she would not be in due to an illness in her family. The injured worker was terminated from her position of employment with the employer on 01/23/2008 for violation of the employer's no show/no call attendance policy.

Pursuant to State ex rel. Louisiana-Pacific v. Indus. Comm., [(1995), 72 Ohio St.3d 401] the termination of an injured worker can constitute a voluntary abandonment of the position of employment, so as to bar temporary total disability compensation, where the termination was due to the injured worker's violation of a written work rule or policy that (1) has clearly defined prohibited conduct, (2) which has been previously identified to the injured worker as a dischargeable offense, and (3) was known or should have been known to the injured worker.

The portion of the employer's attendance policy [upon] which the employer is relying states as follows: "17.1.2 Failure to report to work or to contact the Company for three (3) or more consecutive days constitutes a voluntary quit."

The District Hearing Officer finds the testimony of the injured worker persuasive in this matter and therefore finds the injured worker did not voluntarily abandon her employment.

However, even assuming arguendo that the facts are as the employer has alleged, the District Hearing Officer finds the injured worker still did not violate the employer's attendance policy.

The District Hearing Officer finds the employer has a no show/no call policy where if the employee fails to appear for work and fails to call off for three consecutive days, the employee is deemed to have voluntarily quit her position of employment. However, in this claim, the employer's records show the injured worker missed two days of work without calling in but did call in on 01/21/2008 thru 01/23/2008. Therefore, the District Hearing Officer finds the injured worker did not * * * violate the employer's no show/no call policy as the injured worker did not no show/no call for three consecutive days.

> The District Hearing Officer finds the employer did not satisfy the requirements for a finding of a voluntary abandonment under the law as explained above. The District Hearing Officer further finds the injured worker did not voluntarily abandon her employment and the employer's termination of the injured worker's employment is not a bar to her receiving temporary total disability compensation in this claim at this time.
>
> The District Hearing Officer relies on the C-84 by Dr. Shaw, dated 06/25/2008, the C-84 by Dr. Argo, dated 07/16/2008, the operative report by Dr. Argo, dated 06/16/2008, the affidavit by Mr. Puthoff, filed 09/29/2008, the employer's attendance policy, filed 09/29/2008, and the testimony of the injured worker at the hearing.

{¶33} 17. Relator administratively appealed the DHO's order of September 29, 2008.

{¶34} 18. On November 10, 2008, Puthoff executed another affidavit:

> [Two] Supplementing my prior affidavit, Tanya Trent, was employed with KDI until January 22, 2008, at which time her employment was terminated for excessive absenteeism, as memorialized in the January 23, 2008 letter of Tamee Tumbleson.
>
> [Three] Employees at KDI are paid by direct deposit into their bank account. Records show that Ms. Trent worked 4.98 hours on January 16, 2008, at which time she left work early. Contrary to Ms. Trent's assertion at an earlier hearing, records show that she was paid for that time. No one at KDI requested that Mr. [sic] Trent leave work early on January 16.
>
> [Four] Employees at KDI are responsible for clocking themselves in, with the use of a time card, each day that they appear for work. Through the time-clock procedure, they document hours worked, and request time off including personal leave and vacation time.
>
> [Five] Employees clock in for work upon arrival at KDI. An employee will clock out when he/she leaves the facility.

[Six] Time clock records document that Ms. Trent did not appear for work on these five consecutive days:

Thursday, January 17, 2008
Friday, January 18, 2008
Monday, January 21, 2008
Tuesday, January 22, 2008
Wednesday, January 23, 2008

None of Ms. Trent's absences on those days were excused.

[Seven] Under KDI's written employment policy:

"Absence" means failure to attend work when required, including a full day or part of full day [or] scheduled overtime.

* * *

"Family Medical Leave Act" means the provisions of 29 U.S.C. §2611 et. seq.

* * *

"Excused Absence" means absence subject to, and approved for, the use of Personal Time hours pursuant to policy 6.0, or covered by the Family Medical Leave Act.

"Unexcused Absence" means absence for working hours after Personal Time hours (policy 6.0) have been exhausted or for which a request for Personal Time has been denied.

[Eight] Under KDI's written, no fault attendance policy, an employee is assessed a point for each unexcused absence. If an employee accrues six points over a 52 week period of time, that employee is subject to termination for excessive absenteeism. Additionally, three consecutive unexcused absences also result in the termination of one's employment for excessive absenteeism.

[Nine] Ms. Trent accrued 15 points in a 52 week period of time and/or prior to the January 22, 2008 date of the termination of her employment in accordance with KDI's absentee policy. Further, between January 17, 2008 and January 23, 2008, Ms. Trent had five consecutive unexcused absences. This is what prompted the letter of January 23,

2008, memorializing the termination of Ms. Trent's employment effective January 22, 2008 for excessive absenteeism.

{¶35} 19. On November 10, 2008, Lung executed an affidavit:

[One] * * * I was Ms. Trent's supervisor during the period of 2007 through the date of the termination of her employment effective January 22, 2008.

[Two] Employees at KDI are responsible for clocking themselves in, with the use of a time card, each day that they appear for work. Through the time-clock procedure, they document hours worked, and request time off including personal leave and vacation time.

[Three] Employees clock in for work upon arrival at KDI. An employee will clock out when they leave the facility.

[Four] On Thursday, January 17, 2008, Ms. Trent did not show up for work, which is confirmed by her time clock records. She also did not call me to tell me that she would not be coming into work on that day. This was not an excused absence.

[Five] On Friday, January 18, 2008, Ms. Trent did not show up for work, which is confirmed by her time clock records. She also did not call me to tell me that she would not be coming into work on that day. This was not an excused absence.

[Six] I understand that Ms. Trent has alleged that she showed up for work on January 17 and 18, 2008, and that I sent her home because there was no work for her to perform on those days. That is not true. Ms. Trent did not show up for work on those days, which is confirmed by her time clock records.

[Seven] On Monday, January 21, 2008, I received a voicemail from Ms. Trent at or about 4:15 a.m., with the message: "Kitty, this is Tanya, I will not be in today because my grandmother passed away." Ms. Trent was otherwise scheduled to be at work at 7:00 a.m. on January 21. This was not an excused absence.

> [Eight] On Tuesday, January 22, 2008, early in the morning before Ms. Trent's shift would otherwise begin, I received another voicemail from Ms. Trent stating that she would not be in that day because she was at the hospital with her grandmother who was ill. This struck me as odd, because the voicemail from the day before stated that her grandmother had died. This was not an excused absence.
>
> [Nine] On Wednesday, January 23, 2008, I received another voicemail message from Ms. Trent stating that she would not be in that day because she was again at the hospital with her grandmother, Under KDI's policy, this would not be an excused absence.

{¶36} 20. On November 12, 2008, an SHO heard relator's administrative appeal from the DHO's order of September 29, 2008. The hearing was recorded and transcribed for the record.

{¶37} 21. Following the November 12, 2008 hearing, an SHO issued an order that affirms the DHO's order. The SHO's order explains:

> It is the order of the Hearing Officer that the C-86 motion filed on 07/25/2008 and the C-84 form filed on 07/25/2008 are granted.
>
> The Hearing Officer finds that the injured worker was temporarily and totally disabled as a result of the allowed conditions in the claim beginning on 01/24/2008. The Hearing Officer orders that temporary total disability compensation be paid from 01/24/2008 through 08/11/2008 and to continue upon the submission of medical evidence which documents the injured worker's continued inability to return to her former position of employment, less any sickness and accident benefits which may have been paid during this time period.
>
> The employer's attorney argued that temporary total disability compensation was not payable based upon the employer's termination of the injured worker's employment on 01/23/2008. The employer terminated the injured worker's employment on 01/23/2008, indicating in a letter on that same date that it was due to excessive absenteeism. The

employer's attorney argued that the injured worker's termination constituted a voluntary abandonment of her employment, thereby precluding the subsequent payment of temporary total disability compensation.

The Hearing Officer finds that the employer has not met its burden of proof in establishing that the injured worker's termination was a voluntary abandonment of employment. The Hearing Officer finds that the employer's written work rules do not clearly define what conduct was prohibited and would be known by the injured worker to be a dischargeable offense. Specifically, the employer's policy indicates that failure to report to work or to contact the employer for three or more consecutive days constitutes a voluntary quit. The policy also provides for termination of an employee who has accumulated six points pursuant to the employer's disciplinary program.

In this case, the injured worker did not call or appear for work on 01/17/2008 and 01/18/2008, according to the employer's witness. However, the witness then testified that the injured worker telephoned the employer on 01/21/2008, 01/22/2008 and 01/23/2008 indicating that she would not be at work. The employer's attorney argued at hearing that these absences on 01/21/2008 through 01/23/2008 were not excused absences and therefore were the basis for the termination under the policy.

The Hearing Officer reviewed the entire policy submitted by the employer but was unable to determine that the employer could deem the call-in on 01/21/2008 through 01/23/2008 to be unexcused absences and therefore count towards an accumulation of points. The Hearing Officer is able to determine that the injured worked contacted the employer on 01/21/2008. Therefore the section 17.1.2 of the employer's policy is not applicable because this section requires a failure to report or contact the employer for three consecutive days.

The Hearing Officer finds that the employer's policy does not clearly set forth that the injured worker's conduct violated a written work rule that should have been known to the injured worker. Consequently, the Hearing Officer finds that the employer has not met its burden of proof in establishing a voluntary abandonment. The Hearing Officer finds that the

> injured worker's termination of her employment does not preclude the payment of temporary total disability compensation.
>
> This order is based upon the C-84 forms in file from Dr. Shaw and Dr. Argo and the attendance policy filed on 11/10/2008, as well as the affidavit from Ms. Lung dated 11/10/2008.

{¶38} 22. On December 9, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of November 12, 2008.

{¶39} 23. On December 22, 2008, relator moved for reconsideration of the SHO's order of December 9, 2008.

{¶40} 24. On January 22, 2009, the three-member commission mailed an order denying reconsideration.

{¶41} 25. On January 30, 2009, claimant was examined by James T. Lutz, M.D., after a referral from claimant's treating chiropractor Patrick Weadick, D.C. Dr. Lutz wrote:

> Tanya Trent sustained an industrial injury on 10/15/07 whose claim allowances are noted above. Unfortunately, she did not obtain a good result with her surgery in June of 2008, and postop physical therapy. She just recently came under your care and describes some progress while under your treatment. In my opinion, your treatment to date appears medically necessary and appropriate, and should continue.
> * * *

{¶42} 26. On February 27, 2009, claimant was again examined by Dr. Lutz, who wrote:

> Revealed an obese female in no acute distress, whose general appearance was normal. Examination of the right shoulder revealed no obvious structural deformities, or swelling. Marked tenderness was noted over the AC joint and over the trapezius muscle. Deep tendon reflexes of the

> upper extremities were 2+ and symmetrical with the exception of the triceps reflexes, which were 1+ bilaterally. Manual muscle testing of the shoulder musculature revealed moderate generalized weakness rated at 4/5. There was no evidence of gross instability; and a trace of crepitation was noted through range of motion. Range of motion studies were as follows: Flexion 180 degrees, extension 40 degrees, abduction 90 degrees, adduction 30 degrees, external rotation 70 degrees, and internal rotation 50 degrees.

{¶43} 27. On April 6, 2009, Dr. Weadick completed a C-84 on which he certified TTD from February 27, 2009 to an estimated return-to-work date of April 15, 2009. This C-84 was filed April 15, 2009.

{¶44} 28. Dr. Weadick completed another C-84 on which he certified TTD from May 31, 2009 through an estimated return-to-work date of June 30, 2009. This C-84 was filed June 23, 2009.

{¶45} 29. Dr. Weadick completed another C-84 on which he certified TTD from August 10, 2009 through an estimated return-to-work date of August 31, 2009.

{¶46} 30. On August 11, 2009, Dr. Weadick wrote:

> I have reviewed the independent medical exam performed by Dr. Hogya on his opinion of Ms. Trent's present medical condition.
>
> He indicates that the surgery was a success and she is not totally disabled related to her right shoulder condition. However, in his report he finds objective physical examination time that he confirms in my records and in the records of Dr. Lutz. If she is still having physical limitation and pain and disability from her post-surgical shoulder, and the records from myself indicate the patient is improving, and Dr. Lutz and myself opine she is unable to work, then what would it matter if there has been no new intervening injuries or re-injuries to her shoulder?
>
> As indicated in my initial examination, she was suffering significant disability issues with her shoulder. She has been

> steadily improving over time with my treatment. It would be appropriate if she was allowed the opportunity to go through a work hardening program to allow her to continue to get back to work. Unfortunately, not all surgical procedures come out 100 percent. Unfortunately, Ms. Trent continues to suffer significant limitation of her shoulder.

{¶47} 31. Earlier, on December 1, 2008, Dr. Argo wrote:

> Tanya is following up for her right shoulder. She is almost five and a half months out from a rotator cuff repair, subacromial decompression and Mumford. She is doing really well. On examination, her shoulder is strong. She has full range of motion. Her pain is still bothering her as far as sleeping and she is having difficulty with this.
>
> Plan: Really get back into physical therapy and see us back in three months.

{¶48} 32. Following an August 18, 2009 hearing, a DHO issued an order denying TTD compensation beginning February 27, 2009 as requested on Dr. Weadick's C-84 filed April 15, 2009.

{¶49} 33. Claimant administratively appealed the DHO's order of August 18, 2009.

{¶50} 34. Following an October 30, 2009 hearing, an SHO issued an order that vacates the DHO's order of August 18, 2009. Awarding TTD compensation from February 27 through August 31, 2009, the SHO order explains:

> It is the order of the Staff Hearing Officer that the C-84 Request for Temporary Total Compensation, filed by the Injured Worker on 04/15/2009, is granted to the extent of this order.
>
> The Injured Worker requested the payment of temporary total disability compensation from 02/27/2009 through 08/31/2009 based upon C-84 reports from Dr. Weadick.

> It is the finding of the Staff Hearing Officer that the Injured Worker was unable to return to and perform the duties of her former position of employment from 02/27/2009 through 08/31/2009 due to the allowed conditions in the claim. Prior to 02/27/2009 the Injured Worker was previously awarded temporary total disability compensation based upon C-84 reports from Dr. Argo. The office notes of Dr. Argo and Dr. Weadick establish that the Injured Worker had ongoing problems to her right shoulder following her previous surgery to the right shoulder. On 12/01/2008 Dr. Argo noted that the Injured Worker was having good results. However, he noted that the Injured Worker needed to get back into physical therapy.
>
> Therefore, it is hereby the order of the Staff Hearing Officer that the Injured Worker is awarded temporary total disability compensation from 02/27/2009 through 08/31/2009.
>
> This order is based upon the office note of Dr. Argo dated 12/01/2009 [sic]; the office [notes] of Dr. Lutz dated 01/31/2009 and 02/27/2009; the report of Dr. Weadick dated 08/11/2009 and the C-84 report from Dr. Weadick filed on 04/15/2009, 06/23/2009, 07/15/2009 and 08/11/2009.

{¶51} 35. On December 8, 2009, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of October 30, 2009.

{¶52} 36. On February 25, 2010, relator, L-3 Fuzing & Ordnance Systems, Inc., filed this mandamus action.

Conclusions of Law:

{¶53} Two issues are presented: (1) whether the commission, through its SHO, abused its discretion in determining that claimant did not voluntarily abandon her employment, and (2) whether there is some evidence supporting all the commission's award of TTD compensation from February 27 through August 31, 2009.

{¶54} The magistrate finds: (1) the commission did not abuse its discretion in determining that claimant did not voluntarily abandon her employment, and (2) not all

the commission's award of TTD compensation from February 27 through August 31, 2009 is supported by the medical evidence upon which the commission relied.

{¶55} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus with respect to the SHO's order of October 30, 2009, as more fully explained below.

{¶56} Turning first to the voluntary abandonment issue, 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.

{¶57} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 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.

{¶58} In *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559, 561, the court held that the rule or policy supporting an employer's voluntary abandonment claim must be written. The court explained:

> Now at issue is *Louisiana-Pacific*'s reference to a *written* rule or policy. Claimant considers a written policy to be an absolute prerequisite to precluding TTC. The commission disagrees, characterizing *Louisiana-Pacific*'s language as merely illustrative of a TTC-preclusive firing. We favor claimant's position.
>
> The commission believes that there are common-sense infractions that need not be reduced to writing in order to foreclose TTC if violation triggers termination. This argument, however, contemplates only some of the considerations. Written rules do more than just define prohibited conduct. They set froth a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are particularly important when dealing with employment terminations that may block eligibility for certain benefits.

(Emphasis sic.)

{¶59} The commission or its SHO, like any fact finder in any administrative, civil or criminal proceeding, may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence. *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St.3d 134, 2002-Ohio-7089, ¶69.

{¶60} At the commission, relator had the burden of proving by a preponderance of the evidence the affirmative defense of voluntary abandonment of employment. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84,1997-Ohio-71; *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 78 Ohio St.3d 409, 411, 1997-Ohio-9.

{¶61} Moreover, it was the commission's duty to determine for itself whether claimant actually violated the work rule that is the premise for the employer's termination

of employment. *State ex rel. Pounds v. Whetstone Gardens & Care Ctr.*, 180 Ohio App.3d 478, 2009-Ohio-66, ¶40. That is, it is insufficient for the commission to simply determine that the employer terminated the claimant for violation of a work rule. Id.

{¶62} In determining whether the written work rule "clearly defined the prohibited conduct," under the first prong of the *Louisiana-Pacific* case, at 403, it was the duty of the commission to examine the language of the rule allegedly violated to determine whether the rule, as written, clearly defines the prohibited conduct.

{¶63} The record contains portions of the L-3/KDI hourly employee handbook. At issue here is the attendance policy explained in the handbook:

> **17.0 ATTENDANCE**
>
> Employee absenteeism and tardiness hurts KDI in many ways. It not only affects productivity, but also creates difficulties in scheduling, hinders job performance and damages our relationships with customers. It is KDI's policy to minimize absence and tardiness by working with Employees to enact policies that promote regular attendance by everyone.
>
> 17.1 KDI expects all Employees to be in attendance, on time, for each shift they are scheduled to work. Employees are expected to be at their assigned location and ready to begin or resume work at their scheduled time.
>
> 17.1.1 KDI has the right to decide and implement disciplinary action for excessive absence or tardiness, at its discretion and as it deems appropriate.
>
> 17.1.2 Failure to report to work or to contact the Company for three (3) or more consecutive days constitutes a voluntary quit.
>
> 17.2 The No- Fault attendance program applies to all hourly employees.
>
> 17.2.1 Tardy – 1 point

> 17.2.2 Early departure – 1 point
>
> 17.2.3 Unexcused absence not covered by acceptable medical documentation 1 point for each day of absence[.]
>
> 17.2.4 Unexcused absence covered by acceptable medical documentation 1 point for all consecutive days of absence.
>
> 17.3 Personal Time hours are considered an Excused Absence when used according to policy 6.0. After an Employee has exhausted his/her Personal Time any further Occurrence is considered an Unexcused Absence.
>
> 17.4 Disciplinary progression
>
> 17.4.1 Tardy and early departures are one "chimney"
>
> 17.4.2 Full days of absence are a separate "chimney"
>
> 17.4.3 Points will accumulate as follows:
>
> 0-2 points – nothing
>
> 3 points – Verbal warning
>
> 4 points – Written warning
>
> 5 points – 3 day unpaid suspension and final warning
>
> 6 points – termination
>
> 17.4.4 Accelerated progression
>
> 17.4.5 If an employee accumulates 3 points for tardiness in a thirteen week period, the next tardy within the following 13 week period will count as 2 points.
>
> 17.4.6 When determining the number of points a rolling 52 week year will be utilized from the date of the occurrence. The rolling 52 weeks will be extended day for day for each unexcused absence.

{¶64} In his affidavit executed September 29, 2008 on the day of the DHO hearing, Human Resources Director Cyril Puthoff averred that L-3/KDI terminated

claimant's employment pursuant to paragraph 17.1.2 of its handbook attendance policy. No other paragraphs of the attendance policy were cited as being violated.

{¶65} In his order of September 29, 2008, the DHO noted that the employer is relying on paragraph 17.1.2 of its attendance policy. Referring to the attendance policy under 17.1.2 as relator's "no show/no call" policy, the DHO found that "the injured worker did not no show/no call for three consecutive days."

{¶66} On administrative appeal to the SHO, relator claimed an additional violation of its work rules. In an affidavit executed November 10, 2008, Puthoff averred that claimant had accrued 15 points in a 52-week period of time prior to her termination date, and, thus, was subject to termination under L-3/KDI's "Disciplinary progression" policy which is found at 17.4 of the handbook.

{¶67} In affirming the DHO's order, the SHO rejected relator's claim as to violations of either rule.

{¶68} As for relator's claim to violation of paragraph 17.1.2, the SHO found that claimant did contact her employer on January 21, 22 and 23, 2008, and thus did not violate paragraph 17.1.2 which provides:

> 17.1.2 Failure to report to work or to contact the Company for three (3) or more consecutive days constitutes a voluntary quit.

{¶69} In reaching her conclusion, the SHO necessarily found that paragraph 17.1.2 cannot be violated unless the employee fails to contact the employer on three consecutive work days. This finding was a reasonable one in light of the ambiguity of paragraph 17.1.2. Given the ambiguity, the SHO had the discretion to interpret the rule in the manner set forth in the order.

{¶70} Apparently, relator wants to interpret paragraph 17.1.2 as permitting the employer to, in effect, hold the employee's call in to be null and void if the employer determines that the reason given for the work absence is unsatisfactory to the employer. However, that is not what paragraph 17.1.2 states and, clearly, the commission did not abuse its discretion in refusing to give the rule the interpretation that relator sought.

{¶71} Likewise, the commission did not abuse its discretion in rejecting relator's claim that claimant's accumulation of points under the "Disciplinary progression" policy constitutes a voluntary abandonment of employment.

{¶72} In *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*"), the court reconsidered its decision in *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("*Gross I*"). Therein, the *Gross II* court states:

> First, *Gross I* was not intended to expand the voluntary-abandonment doctrine. Until the present case, the voluntary-abandonment doctrine has been applied only in postinjury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her TTD benefits. * * * The doctrine has never been applied to preinjury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception.

Id. at ¶19.

{¶73} More recently, in *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, ¶20, this court, citing *Gross II*, held that "a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment."

{¶74} Applying *Gross II* and *Welded Blank* to the instant case, because relator's progressive discipline claim involves accumulation of points assessed prior to the October 15, 2007 date of injury, the point accumulation cannot be used by relator to prove a voluntary abandonment of employment.

{¶75} Based upon the above analysis, relator has failed to show that the commission abused its discretion in determining that claimant did not voluntarily abandon her employment.

{¶76} Turning to the second issue, the SHO's order of October 30, 2009 awards TTD compensation from February 27 through August 31, 2009. In support, the SHO cites to four C-84s from Dr. Weadick. One of those C-84s allegedly filed on July 15, 2009 cannot be found in the stipulation of evidence. Accordingly, the filing dates of the three C-84s contained in the record and their periods of TTD coverage are as follows:

Date C-84 Filed	Time Period of Coverage
April 15, 2009	"2/27/09 to 4/15/09"
June 23, 2009	"5-31-09 to 6-30-09"
August 11, 2009	"8-10-09 to 8-31-09"

{¶77} As above indicated, there is no C-84 coverage from April 15 through May 30, 2009. Also, there is no C-84 coverage from June 30 through August 9, 2009. Therefore, those periods lacking C-84 coverage must be eliminated from the TTD award.

{¶78} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to amend the October 30, 2009 SHO's order so that TTD compensation is only awarded for the time periods certified by the three C-84s

from Dr. Weadick that are contained in the stipulation of evidence in this mandamus action.

/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).