[Cite as *State ex rel. Gray v. Indus. Comm.*, 2013-Ohio-670.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. James W. Gray,	:	
Relator,	:	No. 12AP-38
v.	:	(REGULAR CALENDAR)
LaRiche Chevrolet-Cadillac-Subaru, Inc. and Industrial Commission of Ohio,	:	
Respondents.	:	

D E C I S I O N

Rendered on February 26, 2013

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

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

DORRIAN, J.

{¶ 1} Relator, James W. Gray, commenced this original action requesting a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate an October 12, 2011[1] order of its staff hearing officer ("SHO") denying him temporary total disability ("TTD") compensation beginning March 29, 2011. Relator asks that we also vacate the commission's order of November 3, 2011, which denied relator's appeal of the SHO order. Finally, relator asks that we order the commission to award him

[1] The magistrate refers to this same order as the September 26, 2011 order, consistent with the date of the hearing. We refer to the October 12, 2011 date, consistent with the date the order was mailed.

TTD or, alternatively, to vacate the two orders and remand the cause to the commission for further proceedings.

{¶ 2} The commission timely filed an answer to the complaint. Respondent LaRiche Chevrolet-Cadillac-Subaru, Inc. ("LaRiche") has not appeared in this action.

{¶ 3} This court assigned the matter to a magistrate pursuant to Civ.R. 53(D) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision which includes findings of fact and conclusions of law and concluded that the commission had abused its discretion. The magistrate recommended that this court issue a writ of mandamus ordering the commission to vacate the denial of TTD compensation on eligibility grounds and to enter a new order that adjudicates the merits of relator's motion for TTD compensation. The magistrate's decision is appended to this decision. The commission has filed objections to the magistrate's decision.

{¶ 4} For the reasons that follow, we adopt the magistrate's decision and grant the requested writ of mandamus.

I. The Magistrate's Decision

{¶ 5} In his decision, the magistrate found as fact that relator's previous employer, LaRiche, had terminated his employment in 2009. As grounds for the termination, LaRiche observed that relator "got a DUI [driving under the influence]—is no longer insurable—will not be able to perform duties [without] license." (Employee Termination Report.)

{¶ 6} The magistrate recognized that a voluntary departure from employment precludes receipt of TTD compensation but that an involuntary departure does not. Pursuant to *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995) and its progeny, a claimant who is fired for violating a written work rule or policy may be deemed to have made a voluntary departure from employment where a three-pronged test is met: (1) the work rule must clearly define the prohibited conduct; (2) the prohibited conduct must have been previously identified by the employer as a dischargeable offense; and (3) the employee must have known, or should have known, of the rule. *Id.* at 403.

{¶ 7} The magistrate observed that the main issue presented was whether a written rule contained in an employee handbook received by relator "clearly defined" that

being convicted of a DUI, i.e., driving under the influence of alcohol, was prohibited conduct justifying termination of employment. The employer's rule stated:

> **MOTOR VEHICLE RECORD (MVR) INQUIRY**
> Employees expected to drive dealership vehicles must provide the dealership with current and acceptable motor vehicle driving information. Employment and/or assignment will be conditional pending the receipt of a satisfactory report from the State of Ohio Department of Motor Vehicles.

{¶ 8} The magistrate concluded that the above-quoted work rule did not meet the first prong of the *Louisiana-Pacific* test, i.e., it did not "clearly warn[] relator that a conviction for driving under the influence and the resultant loss of driving privileges could result in job termination." (Magistrate's Decision, at ¶ 48.) He further concluded that the rule "addresses the qualification that must be met by an employee who is expected to drive dealership vehicles," rather than clearly advising employees that receipt of a DUI resulting in a license suspension or uninsurability constituted cause for their termination. (Magistrate's Decision, at ¶ 55.)

II. The Commission's Objections to the Magistrate's Decision

{¶ 9} In its objections, the commission contends that: (1) the magistrate substituted his judgment for that of the commission in violation of the established standard of review in mandamus; and (2) the commission did not abuse its discretion in finding that relator had voluntarily abandoned his employment by LaRiche.

III. Analysis and Disposition

{¶ 10} We have independently reviewed the record and concur with the magistrate's analysis. The parties agree as to the facts and further agree that *Louisiana-Pacific* provides the analytical framework for determining whether violation of LaRiche's written work rule may be deemed a voluntary abandonment of employment. However, they disagree on the meaning of the LaRiche work rule.

{¶ 11} The commission, through its SHO, determined that the rule "required [relator] to have a current and acceptable motor vehicle driver's license," throughout his employment. (Oct. 12, 2011 SHO decision, at 2.) The magistrate found that interpretation to be unreasonable. We agree. The commission may not, in the guise of interpreting the rule, effectively rewrite it to provide something that its text clearly does not.

{¶ 12} The magistrate concluded that the rule at issue did not establish a disciplinary rule but, rather, established a "qualification" for employment for employees expected to drive dealership vehicles. We agree. We observe that the caption of the LaRiche rule references a Bureau of Motor Vehicles ("BMV") "inquiry"—singular rather than plural—and the rule itself references receipt of only a single BMV report ("Employment and/or assignment will be conditional pending the receipt of *a* satisfactory report from the [BMV]."). (Emphasis added.) The rule does not reference consequences that would flow from receipt of subsequent reports concerning an employee's driving, should such reports occur. Moreover, the company could have adopted a written work rule that made continued employment dependent upon an employee maintaining a current and acceptable motor vehicle driver's license or insurability.[2] The LaRiche rule at issue does not provide notice of such a condition for continued employment but, rather, imposes a qualification upon which initial employment and work assignment would be dependent. We agree with the magistrate that the rule as drafted cannot reasonably be interpreted as clearly defining that a DUI conviction was cause for termination.

{¶ 13} Accordingly, the magistrate did not improperly substitute its judgment for that of the commission in determining as a legal matter the meaning of the LaRiche work rule.

{¶ 14} We therefore overrule the commission's objections and adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. We grant a writ of mandamus ordering the commission to vacate the October 12, 2011 SHO order that denied TTD compensation beginning on March 29, 2011 on eligibility grounds and its November 3, 2011 order denying relator's appeal of the SHO order. We further order the commission to enter a new order that adjudicates the merits of relator's May 10, 2011 motion for TTD compensation.

Objections overruled; writ of mandamus granted.

TYACK and SADLER, JJ., concur.

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[2] *See* Magistrate's Decision, at ¶ 52-53.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. James W. Gray,	:	
Relator,	:	
		No. 12AP-38
v.	:	
		(REGULAR CALENDAR)
LaRiche Chevrolet-Cadillac-Subaru, Inc. and Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on August 21, 2012

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

Michael DeWine, Attorney General, and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 15} In this original action, relator, James W. Gray, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation beginning March 29, 2011 on eligibility grounds, and to enter an order awarding the TTD compensation.

Findings of Fact:

{¶ 16} 1. On November 17, 2005, relator sustained an industrial injury while employed in the "detail" department of respondent LaRiche Chevrolet-Cadillac-Subaru,

Inc. ("LaRiche"), a state-fund employer. On that date, relator fell from a ladder while cleaning the top of a vehicle.

{¶ 17} 2. The industrial claim (No. 05-412165) is allowed for:

> Fracture calcaneus closed – left; left ankle traumatic arthropathy; left lateral popliteal nerve lesion.

{¶ 18} 3. On August 3, 2005, relator signed a document prepared by LaRiche. In the document, relator acknowledged that he had received and reviewed a copy of the employee handbook.

{¶ 19} 4. The record contains only one page of the employee handbook. On that page, the handbook states:

> **MOTOR VEHICLE RECORD (MVR) INQUIRY**
> Employees expected to drive dealership vehicles must provide the dealership with current and acceptable motor vehicle driving information. Employment and/or assignment will be conditional pending the receipt of a satisfactory report from the State of Ohio Department of Motor Vehicles.

{¶ 20} 5. On February 11, 2009, LaRiche terminated relator's employment. The job termination is recorded on a form captioned "Employee Termination Report." On the form, under a section captioned "Involuntary Discharge," a box is marked beside the pre-printed statement "Violation of Company rule (explain rule and nature of violation in remarks section)."

{¶ 21} At the bottom of the form, in the space provided for remarks, the following is written by hand:

> Employee got a DUI—is no longer insurable—will not be able to perform duties [without] license.

{¶ 22} 6. In July 2009, relator began working at the Fraternal Order of Eagles ("FOE") in Fostoria, Ohio.

{¶ 23} 7. In June 2010, relator was laid off from his employment at the FOE due to lack of work.

{¶ 24} 8. On February 14, 2011, orthopedic surgeon, Thomas G. Padanilam, M.D., wrote:

> ASSESSMENT —
> [One] History of left calcaneus fracture with degenerative changes in the subtalar joint, post-traumatic.
> [Two] History of peroneal nerve injury.
>
> PLAN — I think there are two sources of his pain. One is the subtalar joint arthritis. The other is deep peroneal nerve. I do not believe there is anything we can do about the peroneal nerve pain as there may be some neuropathy component to it. He is also complaining of some numbness and tingling in the bottom of the foot. I did talk to him about potentially doing the subtalar fusion to see if we can help alleviate some of that discomfort. Given all that, he wants to proceed with a left subtalar fusion. This will not resolve all of his pain, but it should help decrease his pain.

{¶ 25} 9. On February 23, 2011, Dr. Padanilam completed a C-9 request for authorization for left subtalar fusion. The C-9 request was approved by the managed care organization.

{¶ 26} 10. On March 29, 2011, Dr. Padanilam performed "left subtalar joint fusion" according to his operative report of record.

{¶ 27} 11. Earlier, on March 16, 2011, Dr. Padanilam completed a C-84 on which he certified a period of TTD to begin March 29, 2011. June 30, 2011 was given as the estimated return-to-work date.

{¶ 28} 12. On May 10, 2011, relator moved for TTD compensation beginning March 29, 2011.

{¶ 29} 13. Following an August 16, 2011 hearing, a district hearing officer ("DHO") issued an order awarding TTD compensation starting March 29, 2011. The DHO's order explains:

> The District Hearing Officer finds that the Injured Worker is temporarily and totally disabled due to the allowed physical conditions in this claim. Pay temporary total disability from 03/29/2011 to present and continuing based on certification from Thomas Padanilam, M.D.
>
> The Injured Worker underwent surgery authorized and paid for in this claim on 03/28/2011 [sic]. Dr. Padanilam has certified temporary total disability from the day after surgery forward.

> The Injured Worker was terminated from the risk Employer on 02/11/2009. He subsequently returned to employment with the eagles in Fostoria working for approximately one year. With a subsequent return to employment the Injured Worker is not currently barred from receiving temporary total disability.
>
> Further there is no written work rule submitted to the Injured Worker's file in regard to his 02/11/2009 termination. Therefore, there is insufficient information for the District Hearing Officer to make a finding under the [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 403 (1995)] case.

{¶ 30} 14. The Ohio Bureau of Workers' Compensation ("bureau") administratively appealed the DHO's order of August 16, 2011.

{¶ 31} 15. Following a September 26, 2011 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order of August 16, 2011, and denies relator's motion for TTD compensation. The SHO's order of September 26, 2011 explains:

> The Injured Worker's C-86 motion, filed 05/10/2011, requests the payment of temporary total disability compensation, from 03/29/2011 through 05/10/2011 and continuing. The basis for said request is the fact that the Injured Worker had surgery performed by Thomas Padanilam, M.D., on 03/29/2011, consisting of a left subtalar joint fusion and fluoroscopic evaluation of the subtalar joint region for treatment of the left calcaneus fracture and the traumatic arthropathy of the left ankle. Therefore, it is asserted that he is entitled to the payment of temporary total disability compensation from the date of this surgery through a reasonable period of recovery thereafter.
>
> The Bureau of Workers' Compensation objected to the request for payment of temporary total disability compensation. The basis for said objection was the fact that the Injured Worker had been terminated from his former position of employment and his last day worked was 02/11/2009. He was terminated for violation of a company rule. The written rule stated that, "Employees expected to drive dealership vehicles must provide the dealership with current and acceptable motor vehicle driver information. Employment and/or assignment will be conditional pending

the receipt of a satisfactory report from the State of Ohio Department of Motor Vehicles" (emphasis added). The Injured Worker signed an acknowledgement, on 08/03/2005, that he had received a copy of the Information Handbook for Employees which stated that written requirement.

The Injured Worker subsequently was convicted of Driving Under the Influence and, therefore, lost his driver's license. Therefore, the Injured Worker's last day worked with LaRiche Chevrolet-Cadillac was on 02/11/2009. He was then terminated due to his violation of the written work rule which required him to have a current and acceptable motor vehicle driver's license.

Therefore, it is the finding of this Staff Hearing Officer that the Injured Worker's termination, in February of 2009, constitutes a "voluntary abandonment" of his former position of employment, because said termination was generated by the Injured Worker's violation of a written work rule that (1) clearly defined the prohibited conduct, (2) had previously been identified by the Employer as a dischargeable offense, and (3) was known or should have been known to the employee.

However, it is the further finding of this Staff Hearing Officer that the Injured Worker subsequently obtained employment with the Fraternal Order of Eagles in Fostoria, Ohio. Therefore, pursuant to the Ohio Supreme Court's holding in the case of State ex rel. McCoy v. Dedicated Transport, Inc. (2002), 97 Ohio St.3d 25, an Injured Worker who voluntarily abandoned his former position of employment, or was fired under circumstances that amount to a "voluntary abandonment" of the former position of employment, will be eligible to receive temporary total disability compensation, pursuant to Ohio Revised Code Section 4123.56, if he re-enters the workforce and, due to the original industrial injury, once again becomes temporarily and totally disabled while working at his new job.

It is the finding of this Staff Hearing Officer that the Injured Worker only worked for the F[r]aternal Order of Eagles for approximately one year. The testimony at hearing, on Monday, 09/26/2011, indicates that the Injured Worker was not working at the time that he was scheduled for the surgery of 03/29/2011.

> Therefore, it is the further finding of this Staff Hearing Officer that the Ohio Supreme Court's decision in the case of State ex rel. Eckerly v. Industrial Commission (2005), 105 Ohio St.3d 428, applies to the facts and circumstances of the instant claim. The Ohio Supreme Court, in the Eckerly case, stated that, "The present claimant seemingly misunderstands McCoy. He appears to believe that, so long as he establishes that he obtained another job – even if for a day – at some point after his departure from Tech II, Temporary Total Disability Compensation eligibility is forever thereafter re-established. Unfortunately, this belief overlooks the tenant that is key to McCoy and all other Temporary Total Compensation cases before and after: that the industrial injury *must remove the claimant from his or her job.* This requirement obviously cannot be satisfied if the claimant had no job *at the time of the alleged disability"* (emphasis in original).
>
> Therefore, it is the finding of this Staff Hearing Officer that the disability resulting from impairment due to the allowed conditions in this claim did not "*remove the claimant from his or her job . . . at the time of the alleged disability*."
>
> Therefore, it is the order of this Staff Hearing Officer that **temporary total disability compensation is hereby DENIED for the requested period from 03/29/2011 through 09/26/2011.**

(Emphasis sic.)

{¶ 32} 16. On November 3, 2011, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of September 26, 2011.

{¶ 33} 17. On January 12, 2012, relator, James W. Gray, filed this mandamus action.

Conclusions of Law:

{¶ 34} The main issue is whether the employer's written rule regarding "[e]mployees expected to drive dealership vehicles" clearly defined the conduct for which relator was discharged.

{¶ 35} Finding that the rule at issue fails to clearly define the conduct for which relator was discharged, it is the magistrate's decision that this court issue a writ of mandamus as more fully explained below.

{¶ 36} Turning to the first issue, a voluntary departure from employment precludes receipt of TTD compensation. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist.1985); *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987). An involuntary departure, such as one that is injury induced, cannot bar TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988).

{¶ 37} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 403 (1995), 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.

{¶ 38} In *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St.3d 559, 561 (2001), 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 [forth] a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are

> particularly important when dealing with employment terminations that may block eligibility for certain benefits.

(Emphasis sic.)

{¶ 39} Here, the issue is focused on the first prong of the *Louisiana-Pacific* case. That is, the employer's written work rule must clearly define the prohibited conduct for which the employee was discharged in order to support a voluntary abandonment of employment.

{¶ 40} This court has visited this type of issue in prior cases. Most recently, in *State ex rel. Wilkes v. Indus. Comm.*, 10th Dist. No. 09AP-216, 2010-Ohio-1648, this court issued a writ of mandamus ordering the commission to vacate its finding of a voluntary abandonment where the employer's written rule regarding a post-accident drug screen policy failed to clearly define the conduct for which the claimant was discharged. In *Wilkes*, the claimant, William J. Wilkes, was discharged by his employer for departing a local hospital emergency room, at which he had sought treatment approximately 36 hours after his injury, without providing a urine specimen to hospital personnel.

{¶ 41} In *Wilkes*, this court, speaking through its magistrate, cites to *State ex rel. Wal-Mart Stores, Inc. v. Riley*, 159 Ohio App.3d 598, 2005-Ohio-521 (10th Dist.), a case cited by relator in support of his position that his employer's written work rule fails to clearly define the conduct for which he was discharged. However, relator does not cite to *Wilkes* in this action.

{¶ 42} In *State ex rel. Naylor v. Indus. Comm.*, 10th Dist. No. 04AP-715, 2005-Ohio-2712, this court issued a writ of mandamus ordering the commission to vacate its finding of a voluntary abandonment where the employer's written rule regarding work absences failed to clearly define the conduct for which the claimant, Linda G. Naylor, was discharged. In *Naylor*, the claimant was discharged for her failure to notify her employer that her scheduled surgery had been cancelled during an employer-approved work absence.

{¶ 43} In *Wal-Mart*, the case upon which relator relies, this court denied a writ of mandamus where the commission determined that the claimant, Linda L. Riley, had not voluntarily abandoned her employment and awarded Riley TTD compensation.

{¶ 44} In *Wal-Mart*, the commission determined that the employer's written work rule failed to clearly define the prohibited conduct for which Riley had been discharged. Apparently, Riley was discharged for spreading rumors and for talking about people in the break room. Prior to her May 14, 2003 discharge, Riley had received a verbal warning in the fall of 2002 that Wal-Mart documented. In that documentation, it was stated that Riley " '[n]eeds to work together as a team with fellow associates and discuss issues with management not co-associates in break room.' " *Wal-Mart* at ¶ 10.

{¶ 45} In November 2002, Riley received " 'a level-two written coaching for improvement.' " *Wal-Mart* at ¶ 11. In Wal-Mart's documentation, Wal-mart suggested that Riley had demonstrated a " '[l]ack of respect for the individual creating a hostile work environment.' " *Id.* The documentation further stated:

> "THE BEHAVIOR OR PERFORMANCE EXPECTED NEXT TIME:
>
> Come to work[,] do your job and worry about yourself[.] Discuss issues with management not break room[.] Take care of customers in a polite way[.]"

(Emphasis sic.) *Id.*

{¶ 46} In *Wal-Mart*, this court determined that the commission had correctly decided that the employer work rule at issue was too vague and that it failed to clearly define the prohibited conduct.

{¶ 47} Here, as earlier noted, the work rule at issue provides:

> **MOTOR VEHICLE RECORD (MVR) INQUIRY**
> Employees expected to drive dealership vehicles must provide the dealership with current and acceptable motor vehicle driving information. Employment and/or assignment will be conditional pending the receipt of a satisfactory report from the State of Ohio Department of Motor Vehicles.

{¶ 48} The factual issue before the commission was whether the written work rule clearly warned relator that a conviction for driving under the influence and the resultant loss of driving privileges could result in job termination.

{¶ 49} According to relator, the work rule:

> does not clearly define any specific prohibited conduct, nor does it clearly apprise employees that termination will result

> from such conduct. The rule fails to state what would, and more importantly, what would not, constitute "acceptable motor vehicle driving information" or "a satisfactory report" from the department of motor vehicles. The language of the rule, on its face, sets out no requirement that employees must be eligible for coverage under the dealership's insurance policy, nor does it define acts or events which would render an employee ineligible for such coverage.
>
> The rule is deficient not only for its failure to clearly define required or prohibited conduct, but also for its failure to clearly spell out the proposition that termination of employment will result from a deviation from its ill-defined standards of conduct. The statement "Employment ***and/or assignment*** will be conditional pending the receipt of a satisfactory report from the State of Ohio Department of Motor Vehicles" readily admits of the interpretation that an employee whose DMV report is "unsatisfactory"—whatever that may mean—will be subject to reassignment to duties which do not involve driving dealership vehicles. The rule, in short, not only fails to clearly identify prohibited conduct, but compounds the difficulty thereby created by equivocating as to the consequences of whatever the prohibited conduct might be.

(Emphasis sic.) (Relator's brief, at 7-8.)

{¶ 50} Here, the commission counters relator's argument:

> Gray, however, contends that this rule was not clear, arguing that the rule does not go on to specify what would constitute "acceptable motor vehicle driving information." Such an argument is specious. The rule specifically references its employees who are expected to drive the dealership's cars. By law, such persons must have a valid driver's license and the rule is not deficient for using the phrase "acceptable motor vehicle driving information" or "a satisfactory report." It is plain that the loss of Gray's driver's license due to driving while under the influence would be neither "acceptable motor vehicle driving information" nor "a satisfactory report." Because of his own actions, Gray made himself unable to legally perform at least one of his expected job duties.
>
> Gray goes on to argue that the rule is also unclear because the rule states that "employment and/or assignment will be conditional" on the satisfactory report from the BMV. Gray

> contends that the rule is not clear as to the consequences. However, the rule is clear that a consequence of violating this rule may be termination. The employer's rule gave its employees clear notice that the loss of an employee's driving privileges could result in loss of employment.

(Commission's brief, at 4-5.)

{¶ 51} In the magistrate's view, the juxtaposition of the rule at issue is relevant to the analysis.

{¶ 52} Immediately above the rule at issue, the handbook page provides:

> **DRUG TESTING**
> LaRiche Chevrolet - Cadillac is committed to providing a safe, efficient, and productive work environment for all employees; therefore, job applicants and current employees may be asked to provide body substance samples (such as urine and/or blood) to determine illegal use of drugs or alcohol. Any employee who refuses to submit to drug testing is subject to disciplinary action up to and including termination of employment.
>
> Questions concerning this policy should be directed to the Human Resource Administrator.

{¶ 53} Immediately below the rule at issue, the handbook page provides:

> **EQUAL EMPLOYMENT OPPORTUNITY POLICY**
> LaRiche Chevrolet - Cadillac was built upon teamwork and equal opportunity. We will continue to be successful when people are treated fairly and allowed to advance and achieve their full potential. We are proud of the fact that we extend equal employment opportunities to all qualified employees and applicants for employment without regard to race, color, religion, sex, age, national origin, or disability, which if needing accommodation, may be reasonably accommodated as required by law.

{¶ 54} It can be observed that the handbook makes clear that "[a]ny employee who refuses to submit to drug testing is subject to disciplinary action up to and including termination of employment." Similar language is not found in the rule at issue. In effect, the commission invites this court to infer a disciplinary warning into the word "conditional." This court should decline the invitation.

{¶ 55} In the magistrate's view, the rule at issue does not read as a disciplinary rule. Rather, the rule addresses the qualification that must be met by an employee who is expected to drive dealership vehicles. Given the above, it is clear that the rule at issue fails to clearly define the conduct for which relator was discharged. Thus, the magistrate concludes that the commission abused its discretion in finding that relator voluntarily abandoned his employment.

{¶ 56} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate the September 26, 2011 order of its SHO that denies TTD compensation beginning March 29, 2011 on eligibility grounds, and to enter a new order that adjudicates the merits of relator's May 10, 2011 motion for TTD compensation.

/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).