[Cite as *Stat ex rel. Parraz v. Indus. Comm.*, 2013-Ohio-764.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Elena Parraz,	:	
Relator,	:	No. 11AP-806
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Diamond Crystal Brands, Inc.,	:	
Respondents.	:	

D E C I S I O N

Rendered on March 5, 2013

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

Michael DeWine, Attorney General, and *Latawnda N. Moore*, for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Diamond Crystal Brands, Inc.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

CONNOR, J.

{¶ 1} Relator, Elena Parraz ("relator"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying her application for temporary total disability ("TTD") compensation pursuant to a determination that she voluntarily

abandoned her employment with respondent, Diamond Crystal Brands, Inc. ("Diamond Crystal"), by violating a written work rule and to issue a new order awarding said compensation.

{¶ 2} The court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision. Therein, the magistrate concluded the commission did not abuse its discretion in determining that relator's termination due to the violation of a written work rule (the attendance policy) constituted a voluntary abandonment of her employment and that relator failed to provide sufficient medical evidence demonstrating that the absences were related to the industrial injury. As a result, the magistrate recommended denial of the writ requesting that the order denying TTD be vacated.

{¶ 3} Relator filed objections to the magistrate's decision. The commission filed a memorandum opposing the objections. Diamond Crystal also filed a memorandum in response. This cause is now before the court for a full review regarding relator's objections.

{¶ 4} Relator objects to the following conclusions of law set forth in the magistrate's decision: (1) that the accumulation of 14 points under the attendance policy is "other conduct constituting voluntary abandonment," regardless of whether or not the termination resulted from intentional and willful violations of the attendance policy; (2) the mischaracterization of relator's argument as claiming that attendance points accumulated due to illness or other circumstances beyond her control "should not be used to terminate her" and the magistrate's incorrect conclusion that relator's proposal would jeopardize the attendance policies of all employers and place an additional burden on employers to investigate and determine whether an employee's failure to report to work should actually count against the employee (relator submits this improperly shifts the burden of proof); and (3) that there is no contemporaneous medical evidence that relator's post-injury absences were due to her industrial injuries, and consequently no abuse of discretion in failing to consider *State ex rel. NIFCO, LLC v. Woods*, 10th Dist. No. 02AP-1095, 2003-Ohio-6468.

{¶ 5} In her first objection, relator argues no court has held that any termination of employment that can be justified under an employer's work rules or policies constitutes voluntary abandonment without regard to the volitional nature of the conduct. Because her attendance problems were not willful (but instead negligent), relator argues she did not voluntarily abandon her job.

{¶ 6} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), the Supreme Court of Ohio held voluntary departure from employment precluded TTD compensation. The court determined termination was voluntary where it was generated by the claimant'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 by the employee. *Id.* at 403.

{¶ 7} Based on *Louisiana-Pacific* and its progeny, relator argues that the voluntary nature of the claimant's conduct must be considered in determining whether or not she is eligibile for TTD. Relator attempts to distinguish her case from *State ex rel. Feick v. Wesley Community Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986.

{¶ 8} The claimant in *Feick* was terminated after her third incident involving a company motor vehicle. We held Feick had not voluntarily abandoned her employment and was not barred from receiving TTD compensation because her conduct, while negligent, did not "involve either willful or other conduct constituting voluntary abandonment." *Id.* at ¶ 6. We declined "to adopt a per se rule that no form of negligent conduct leading to an employee's discharge could ever constitute a voluntary abandonment of employment." *Id.* We further determined "there may be situations in which the nature or degree of the conduct, though not characterized as willful * * *, may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment." *Id.*

{¶ 9} In the instant case, the magistrate characterized relator's conduct as "other conduct constituting voluntary abandonment," finding, in essence, that under *Feick*, something less than willful and intentional misconduct may constitute voluntary abandonment. Relator disagrees with the magistrate's interpretation of *Feick* and argues this comment about other conduct is merely dictum and therefore not affirmative authority for the proposition that intentional or volitional misconduct is not required to

find voluntary abandonment. However, we find no error in the magistrate's interpretation of *Feick*.

{¶ 10} In analyzing the facts set forth in *Feick*, the court determined those facts did not rise to the level of conduct that constituted voluntary abandonment. However, the *Feick* court recognized that there may be situations in which conduct is not willful, but the nature or degree of the conduct rises to such a level of indifference or disregard for workplace rules and polices so as to support a finding of voluntary abandonment. In this case, and in analyzing the facts at bar, the magistrate properly determined that this was such a situation. Although not willful, relator's conduct did rise to such a level of indifference or disregard for workplace rules and polices as to support a finding for voluntary abandonment.

{¶ 11} Specifically, the evidence demonstrates relator was aware of the attendance policy, which was in writing and applied neutrally to all employees. However, relator routinely violated the attendance policy, and had accumulated 10.5 points (out of a possible 14 points before termination occurred) even before her injury. A short time later, she accrued an additional 1.5 points and received a written, final warning advising her she had accumulated 12 points. A few months later, she received additional points, thereby accruing 14 attendance points, which resulted in termination. In this factual scenario, these repeated acts of neglect and/or carelessness are sufficient to constitute voluntary abandonment.

{¶ 12} In her second objection, relator submits her argument does not threaten the ability of employers to enforce their attendance policies. Relator argues the issue of whether an employer has a legal right to fire an employee is a separate and distinct issue from the issue of whether the firing occurred under circumstances that justify a finding of voluntary abandonment for purposes of workers' compensation, because not every termination which is justifiable, pursuant to a written rule or policy, necessarily constitutes voluntary abandonment.

{¶ 13} Relator argues the employer has failed to meet its burden of proof in establishing voluntary abandonment and in demonstrating relator subjected herself to termination as a result of willful and volitional misconduct. Relator further claims the

magistrate improperly faulted her for failing to show that specific absences were beyond her control. We find no merit in relator's argument.

{¶ 14} Diamond Crystal established that it met the criteria set forth in *Louisiana-Pacific* and demonstrated a prima facie case of voluntary abandonment. Relator did not present evidence demonstrating that her termination was pretextual or that her absences were related to her allowed conditions, as shall be explained more fully below in addressing the third objection. Instead, relator's termination was a result of her own conduct. Even if it was not willful, as stated above, the nature or degree of the conduct rose to such a level of indifference or disregard for workplace rules and polices so as to support a finding of voluntary abandonment.

{¶ 15} Finally, in her third objection, relator argues she submitted medical evidence as well as her own affidavit demonstrating that some of her absences from work were related to her industrial injury. As a result, relator submits the magistrate erred in rejecting her argument that certain absences related to her industrial injury were improperly taken into consideration in determining that she voluntarily abandoned her employment as a result of her absenteeism, in violation of *NIFCO*.

{¶ 16} We find no error in the magistrate's determination that there was no contemporaneous medical evidence submitted to demonstrate that relator's absences from work were related to her industrial injury. The work excuse written here was dated several days *after* relator had already missed work on February 3, 2011, and *after* relator had already been tardy on February 4, 2011 for a flat tire, and it was written to excuse relator's absences for February 3, 7, 8, and 9, 2011. Also, relator's C-84 certified that she was TTD beginning February 14, 2011, but the evidence indicates relator was not seen by the doctor for this evaluation until February 17, 2011.

{¶ 17} Moreover, in her affidavit, dated May 31, 2011 and submitted June 1, 2011, relator averred that she had been unable to work on February 3, 2011, due to worsening back pain. Yet, this was contradictory to her April 27, 2011 testimony before the district hearing officer, when she testified her February 3, 2011 absence was the result of illness, with no mention of a work-related injury. Finally, in that affidavit, relator also averred that her September 1 and 3, 2010 absence and one-half day leave, respectively, were also

the result of back pain, but at the time of those occurrences, she did not submit evidence indicating that her absence was due to a work-related injury.

{¶ 18} Based upon the foregoing, we find no violation of *NIFCO* and we overrule relator's third objection.

{¶ 19} In conclusion, after an independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the appropriate law. Therefore, relator's objections to the magistrate's decision are overruled and we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

Objections overruled;
writ of mandamus denied.

BRYANT, J., concurs.
TYACK, J., dissents.

TYACK, J. dissenting.

{¶ 20} Because I have a different view of the doctrine of voluntary abandonment of employment for purposes of entitlement to workers' compensation benefits, I would reach a different conclusion about whether the doctrine applies here. I would sustain the objection to the magistrate's decision and grant a writ of mandamus.

{¶ 21} First, I note that we are not deciding whether or not Diamond Crystal Brands, Inc. had just cause to terminate Elena Parraz's employment for purposes of unemployment compensation. The standard for just cause is significantly lower in that context than in workers' compensation cases.

{¶ 22} Here we are deciding that Elena Parraz did or did not voluntarily abandon her job. The doctrine of voluntary abandonment of employment arose in two specific contexts. First, an employee who simply stopped coming to work was deemed to have voluntarily abandoned the job. This severed the causal connection between the injury and the loss of income. Allowing the stoppage of temporary total disability compensation in such a situation made a certain amount of sense. The injured worker was losing money because the worker quit work, not because the worker had been injured.

{¶ 23} In the second context, the doctrine of voluntary abandonment of employment was extended to situations where the worker had engaged in conduct so egregious that the worker had to know he or she would be fired if the egregious conduct were discovered. Such conduct included showing up at the job site while under the influence of alcohol or a drug of abuse. Over time, some employees extended this situation to one where showing up at work with measurable evidence of a drug of abuse in one's blood or urine was deemed a basis for finding voluntary abandonment of employment.

{¶ 24} Some employers, apparently more concerned about the corporate bottom line than the well being of their employees who were injured on the job, began trying to push the boundaries of the doctrine outward. For instance, employment applications were reviewed to see if any mistakes or inaccuracies could be found. If any were found, such employers argued that temporary total disability payments could be discontinued because the employee had "abandoned" a job not yet obtained.

{¶ 25} Diamond Crystal Brands, Inc., had a legitimate attendance policy to encourage its workers to show up on the days they were scheduled for work and to encourage the workers to be prompt. I have no problem with such a policy and its goals. I do have a problem with using the policy as the basis for firing someone and then accusing the person of having voluntarily abandoned their employment because they were a few minutes late due to having a flat tire.

{¶ 26} The word "voluntary" implies an act of will, not an act of accident or negligence. Elena Parraz tried to come to work on time, but was briefly delayed due to the flat tire. She did, in fact, show up for work. She did not abandon her work and she did not choose to be late. I simply cannot apply the doctrine of voluntary abandonment of employment to her situation.

{¶ 27} As I indicated above, I would sustain the objections to our magistrate's decision and grant a writ of mandamus ordering that temporary total disability compensation be resumed. Because the majority of this panel does not do so, I respectfully dissent.

A P P E N D I X

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Elena Parraz,	:	
Relator,	:	No. 11AP-806
v.	:	(REGULAR CALENDAR)
Industrial Commission of Ohio and Diamond Crystal Brands, Inc.,	:	
Respondents.	:	

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

Rendered on April 26, 2012

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

Michael DeWine, Attorney General, and *Latawnda N. Moore*, for respondent Industrial Commission of Ohio.

Law Offices of Margelefsky & Mezinko, LLC, and *Vincent S. Mezinko*, for respondent Diamond Crystal Brands, Inc.

IN MANDAMUS

{¶ 28} Relator, Elena Parraz, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's application for temporary total disability ("TTD") compensation based on a finding that relator had voluntarily

abandoned her employment with respondent Diamond Crystal Brands, Inc. ("Diamond Crystal") when she violated a written-work rule.

Findings of Fact:

{¶ 29} 1. Relator sustained a work-related injury on July 20, 2010, and her workers' compensation claim has been allowed for the following conditions: "sprain lumbosacral, left; herniated disc L5-S1."

{¶ 30} 2. Relator sought treatment from Occupational Care Consultants ("OCC") the day after her injury and was ultimately referred to physical therapy in August 2010.

{¶ 31} 3. Relator began treating with Robert E. Riley, D.C. On September 22, 2010, Dr. Riley completed a Medco-14 physician report of work ability form releasing relator to return to work with restrictions from September 23 to October 23, 2010. Dr. Riley placed relator on restrictions of occasional lift/carry up to ten pounds; no bending, twisting, turning, reaching below the knee, squatting or kneeling; occasional pushing, pulling, standing and walking; continuous sitting; and changing positions every 30 minutes. Dr. Riley continued to complete Medco-14 forms returning relator to work with restrictions through March 15, 2011. The only change Dr. Riley made concerning relator's restrictions was on December 22, 2010 when he increased the amount of weight she was permitted to lift/carry to 15 pounds.

{¶ 32} 4. Diamond Crystal was able to accommodate the restrictions and relator returned to light-duty work through February 1, 2011.

{¶ 33} 5. During the time relator was working light-duty, she missed one-half day of work on September 3, 2010, and a full day of work on November 3, 2010. Further, relator was on vacation February 2, 2011, absent from work on February 3, 2011, and tardy for work on February 4, 2011.

{¶ 34} 6. During her employment with Diamond Crystal, relator was a member of United Food and Commercial Workers' Local 911 and was employed under a union contract. The collective bargaining agreement ("CBA") has an attendance policy which is point-based. Under the attendance policy, employees are required to notify the plant call-in-line at least one-half hour prior to the beginning of their shift to be considered as providing proper notification. Employees are required to report to work within one hour

of their scheduled start time and failure to do so results in being considered absent for the day. Concerning the accumulation of total points, the policy provides:

> A. TARDY
>
> - Tardy with proper notification 1/2 hour prior to start of shift, and then arriving [w]ithin 1 hour of scheduled start time. [Points 1/2]
>
> - Tardy with no notification or late notification (call in less than 1/2 hour prior to start of shift) and then arriving within 1 hour of shift start. [Points 1]
>
> B. ABSENCE
>
> - Leaving work early with permission, after working more than 4 hours (5 hours if on 10-hour shift) [Points 1/2]
>
> - Leaving work early with permission, and failing to work at least 4 hours (5 hours if on 10-hour shift) [Points 1]
>
> - Absent with proper notification [Points 1.0]
>
> - Absent with late notification (call less than 1/2 hour before shift start) [Points 1.5]
>
> - No Call/No Show – fails to report and fails to call [Points 2]
>
> - Home early – Volunteer [Points 0]
>
> - Personal Leave of Absence [Points 0]
>
> - Fourth and any subsequent instances thereafter of Medical Leave of Absence (not Covered by FMLA) and/or individual Doctor's note (with proper notification) during the program year. (The first three incidents will have no points charged in the program year for all regular employees.) Dental and Eye visits notes will be considered as Doctor's notes. [Points 1]
>
> - Any day on which law enforcement agencies close access roads to the plant facility [Points 0]

> - Any absence or leave covered by The Family and Medical Leave Act (FMLA) [Points 0]
>
> **Point Threshold**
>
> The attendance policy will be point-based with intervals between steps to provide employees an opportunity to correct their behavior. The point-based program will have the following point thresholds effective March 15, 2004.
>
> 8 points – verbal warning
> 10 points – written warning
> 12 points – final warning
> 14 points – termination

Further, the attendance policy provides two ways for employees to reduce their points: working 40 consecutive scheduled work days without a point assessment reduces their total number of points by one; and, at the end of the program year (November 15) all employees with less than 8 points have their point total reduced to zero for the following year.

{¶ 35} 7. Relator acknowledged that she received a copy of the attendance policy on April 17, 2008.

{¶ 36} 8. As of July 19, 2010, the day before relator sustained her work-related injury, she had accumulated 10.5 attendance points and was given a written warning which she acknowledged.

{¶ 37} 9. Relator was absent from work September 1, 2010 and took a half day leave on September 3, 2010. This resulted in 1.5 points. Relator did not present evidence at that time that her absence was due to her injury.

{¶ 38} 10. As of September 9, 2010, relator had accumulated 12 attendance points and was issued a final warning which she acknowledged that same day. Relator did not provide Diamond Crystal with a medical excuse for these absences.

{¶ 39} 11. On November 22, 2010, relator signed an acknowledgement form concerning her attendance for the year 2010. That document notified relator of the following:

> In accordance with Attachment C – Attendance Program of your bargaining unit agreement, the end of the program year was November 14, 2010. Employees with 8 points or more

> will carry that point total forward into the next program year, starting November 15, 2010.
>
> Records indicate that as of November 14, 2010 your point total was 12 and as such, the total will carry forward.

{¶ 40} 12. According to relator's attendance calendar, she was absent from work on February 3, 2011, and tardy on Friday, February 4, 2011. Relator did not submit any evidence to her employer to indicate that either the absent/tardy were related to her injury. In fact, relator later testified that her absence on February 3, 2011 was due to a general illness and not the injury. Relator indicated that she was tardy on February 4, 2011 because she had a flat tire.

{¶ 41} 13. Because relator had reached 14 points under the attendance policy, her employment with Diamond Crystal was terminated.

{¶ 42} 14. On February 7, 2011, Dr. Riley signed an authorization for absence indicating that "in order to avoid aggravation of a health condition, I recommend that this patient be excused from work until (date) 2/3/11 & 2/7 - 2/9/11."

{¶ 43} 15. Relator saw Dr. Riley on February 17, 2011. In his office notes, Dr. Riley stated that relator's description of her job duties exceeded her restrictions and that she was experiencing an aggravation of her symptoms.

{¶ 44} 16. That same day, Dr. Riley completed a C-84 certifying that relator was temporarily and totally disabled from February 14, 2011 through an estimated return-to-work date of March 7, 2011. Ultimately, Dr. Riley would complete additional C-84 forms extending relator's period of disability through June 17, 2011.

{¶ 45} 17. In an order mailed March 28, 2011 the Bureau of Workers' Compensation ("BWC") granted relator's motion for TTD compensation beginning February 17, 2011. The BWC denied relator's request for TTD compensation beginning February 14, 2011 because she was not seen by a doctor until February 17, 2011.

{¶ 46} 18. Diamond Crystal appealed and the matter was heard before a district hearing officer ("DHO") on April 27, 2011. The DHO applied *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), and determined that relator had voluntarily abandoned her employment. Specifically, the DHO stated:

> The District Hearing Officer finds the union contract between the Employer of record and the bargaining unit employees contains an article on attendance. This attendance policy provides for a point system regarding tardiness and absences. The policy specifically indicates that it is point based and there are intervals between steps to provide the employees with an opportunity to correct their behavior. At eight points, the employee will receive a verbal warning; at ten points, the employee will receive a written warning; at 12 points, the employee will receive a final warning and at 14 points, termination occurs. The District Hearing Officer finds that the Employer of record submitted the disciplinary action forms showing the Injured Worker's progression through the point system. On 01/14/2011, the Injured Worker signed a statement indicating she knew her point total was 12 and these points carried over from 2010 into 2011. The Injured Worker was then absent from work on 02/03/2011 and tardy on 02/04/2011, giving rise to the last two points, for a total of 14 points and her subsequent termination.
>
> Counsel for the Injured Worker argued that the work-related injury was the actual cause of the termination and therefore temporary total disability compensation was payable. However, at today's hearing, the Injured Worker stated that her absence on 02/03/2011 was because she was sick, with no mention of a work-related injury and the tardiness on 02/04/2011 was due to a flat tire. Therefore, the District Hearing Officer finds that it was not the work-related injury that gave rise to the termination, but the Injured Worker's own actions.

{¶ 47} 19. Relator appealed and submitted an affidavit which she signed on May 13, 2011. In that affidavit, relator made the following relevant statements:

> * * * I worked full duty on August 30 and August 31. I was upstairs lifting 50 pound bags of material and my back pain became worse.
>
> * * * As a result of my increased back pain, I was unable to work on September 1. I contacted Dr. Riley and began treating with him on September 2, 2010. Dr. Riley put me back on restrictions.

> * * * I returned to work with restrictions on September 2 and September 3, 2010, but had to leave early from work on September 3 because of back pain.
>
> * * * I then worked light duty until November 3, 2010, when I was unable to work because of back pain. I provided a slip from Dr. Riley to my employer.
>
> * * * I continued to work light duty until February 3, 2011, when I was unable to work because of worsening back pain. I did not see Dr. Riley until February 7, 2011 at which time he certified me off work for February 3 and February 7 through February 9, 2011. I gave this slip to my employer.
>
> * * * On February 4, 2011, I was [late] about five minutes for work because of a flat tire. I contacted my employer immediately to let them know that I would be there as quickly as I could. I made every effort possible to be on time for work.
>
> * * * I returned to work and worked light duty on February 10 and 11, and then I was notified that I was terminated.
>
> * * *
>
> * * * At no time did I miss work or come to work late purposefully with the intention of being terminated. I very much wanted to keep my job. I was doing my best to work in spite of my ongoing back pain.

Relator argued that several of her absences from work were related to the industrial injury and further argued that her actions and absences did not rise to the level of willful conduct necessary for a finding of voluntarily abandonment.

{¶ 48} 20. Relator's appeal was before a staff hearing officer ("SHO") on June 28, 2011. The SHO affirmed the prior DHO's order and denied relator's request for TTD compensation. After noting that relator had returned to light-duty work as of September 2, 2010, the SHO listed relator's absences from work. Thereafter, the SHO identified the attendance policy under the CBA and found that relator had voluntarily abandoned her employment with Diamond Crystal. Specifically, the SHO stated:

> [T]he Injured Worker in this claim had a history of prior problems under the Employer's Attendance Policy Point System. At the end of the attendance program year for 2010, the Injured Worker had twelve points accumulated and, therefore, those twelve points carried forward for the 2011 attendance program.
>
> Furthermore, this Staff Hearing Officer makes note of the fact that, as of the date of her injury in this claim, of 07/20/2010, the Injured Worker had already accumulated ten and a half points. Therefore, prior to her injury, she was already only three and a half points away from mandatory termination.
>
> Pursuant to the Ohio Supreme Court's holding in the case of State ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995)[,] 72 Ohio St.3d 41, it was held that a termination from Employer to be considered "voluntary" when the termination was generated by an Injured Worker's violation of a written work rule that (1) clearly define 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.
>
> It is the finding of this Staff Hearing Officer that the written contract between United Food and Commercial Worker's Local 911 and Diamond Crystal Brands, Incorporated clearly define the prohibited conduct under the written attendance policy in regard to tardy and absences. Furthermore, it is the finding of this Staff Hearing Officer that said written contract clearly identified that an accumulation of fourteen points would result in termination.
>
> Furthermore, this Staff Hearing Officer finds that the Injured Worker either knew or should have known the terms of the written contract and, specifically, the Attendance Policy as she signed a document, on 04/17/2008, saying she received a copy of the contract and the attendance policy and that she was given the opportunity to review and question the policy in order to obtain a full understanding. Furthermore, the Injured Worker signed another document, on 11/22/2010, which apprised her of the fact that she had already accumulated twelve points, under the Attendance Policy Point System as of 11/14/2010, and, thus, was only two points away from termination.

> Therefore, it is the finding of this Staff Hearing Officer that the Injured Worker's termination, on 02/11/2011, meets all of the criteria under the Louisiana-Pacific decision and, therefore, said termination constitutes a "voluntary abandonment" of the former position of employment so as to bar the payment of temporary total disability compensation until such time as she re-enters the work force and, due to the original industrial injury, once again becomes temporarily and totally disabled while working at her new job, pursuant to the Ohio Supreme Court[']s holding in the case of State ex rel. McCoy v. Dedicated Transport Incorporated (2002)[,] 97 Ohio St.3d 25.

{¶ 49} 21. Relator's further appeal was refused and she filed this complaint in mandamus with this court.

Conclusions of Law:

{¶ 50} Relator makes the same two arguments here that she made before the commission. First, relator cites this court's decision in *State ex rel. Feick v. Wesley Comm. Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986, and argues that, although Diamond Crystal was within its rights to terminate her under the policy, her termination does not constitute a bar to TTD compensation because there is no evidence in the record to demonstrate that her conduct was a result of willful or intentional misconduct in violation of the policy. Second, citing this court's decision in *State ex rel. Nifco, LLC v. Woods*, 10th Dist. No. 02AP-1095, 2003-Ohio-6468, relator argues that her absences were clearly related to the allowed condition in her claim; therefore, the commission abused its discretion in finding that she voluntarily abandoned her employment.

{¶ 51} For the reasons that follow, it is this magistrate's decision that relator has not demonstrated the commission abused its discretion.

{¶ 52} The Supreme Court of Ohio has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983).

{¶ 53} 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.*, 69 Ohio St.2d 630 (1982).

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

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

{¶ 55} In *Louisiana-Pacific*, the Ohio Supreme Court characterized a firing as "voluntary" where the firing is generated by the employee'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 by the employee. "[A] 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." *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118, 121 (1993).

{¶ 56} Further, it is undisputed that a claimant can voluntarily abandon their employment under *Louisiana-Pacific* even if they cannot return to their former position of employment but where they are working at a modified-duty job. *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260; *State ex rel. Ohio Univ. Cancer Research Hosp. v. Indus. Comm.*, 10th Dist. No. 09AP-1027, 2010-Ohio-3839.

{¶ 57} In *Adkins*, the claimant, Judy M. Adkins, was medically unable to return to her former position of employment; however, her employer was able to offer her a light-

duty job which her physician of record indicated was within her restrictions. Adkins did not report to work as scheduled on August 26, 2002. Adkins did not report to work until September 3, 2002. During that time period, Adkins did not call or contact her employer in any manner. Due to her employer's no show/no call policy, Adkins was terminated.

{¶ 58} Adkins filed a C-84 requesting TTD compensation; however, the commission denied her request after finding that she had voluntarily abandoned her employment effective August 26, 2002 when she failed to report to work after accepting her employer's light-duty job offer.

{¶ 59} Adkins filed a mandamus action and this court upheld the commission's determination. This court specifically compared Adkins' situation to the situation of the claimant in *Louisiana-Pacific* and stated:

> In *Louisiana-Pacific*, the claimant was fired by her employer for violating the employer's written work rule making it a dischargeable offense when there is an "absence [of] more than three (3) consecutive days without notification to your foreman or plant manager." Id. at 403, 650 N.E.2d 469. Holding that the claimant's termination constituted a voluntary abandonment of the former position of employment, the court explained:
>
> * * * [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 Watts—i.e., that an employee must be presumed to intend the consequences of his or her voluntary acts. Id.
>
> While *Louisiana-Pacific* involved a failure to report to the former position of employment without notification to the employer, this case involves a failure to report to the recently accepted alternative employment without notification. Notwithstanding this distinction, it was not improper for the commission to cite *Louisiana-Pacific*, nor did the commission misanalyze the legal issue before it.

Adkins at ¶ 52-53.

{¶ 60} Relator acknowledges that, where an employee violates the employer's attendance policy, that employee can be terminated whether they were working at their former position of employment or at a modified job, and that their termination can constitute a bar to the receipt of TTD compensation. Relator's argument here is that her action in not reporting to work and/or not calling Diamond Crystal and accumulating points was not intentional; instead it was negligent and should not constitute a bar to the payment of TTD compensation.

{¶ 61} Relator relies on this court's decision in *Feick*; however, the magistrate finds that this court's decision in *Feick* is not applicable to the facts of this case.

{¶ 62} In *Feick*, the claimant, Emily Feick, was terminated for violating a written-work rule after she was involved in, and cited for, a motor vehicle accident while operating one of her employer's vehicles. Prior to this accident, Feick had been involved in two other accidents involving her employer's vehicles which had resulted in a verbal warning and a written warning. The written warning notified Feick that any further violation of a company rule would result in termination.

{¶ 63} Feick applied for TTD compensation; however, the commission denied her request. Specifically, the commission found that Feick had violated a written-work rule which clearly defined the prohibited conduct, had been previously identified by her employer as a dischargeable offense, and was known or should have been known to her.

{¶ 64} Feick filed a mandamus action in this court and this court determined that Feick's act of running a red light which resulted in her third motor vehicle accident was a result of negligence and that it was not a willful act on her part. This court's magistrate explained:

> The *Louisiana-Pacific* court's reliance upon *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517 N.E.2d 533, and *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 623 N.E.2d 1202, to underpin its holding that a firing can constitute a voluntary abandonment was a critical component of its rationale. As relator here correctly points out, the injured worker must have *willingly* undertaken the misconduct for which she was fired in order for the misconduct to take on a voluntary character. Willful misconduct is, b[y] definition, something more than negligence. *Brockman v. Bell* (1992), 78 Ohio

> App.3d 508, 515, 605 N.E.2d 445, citing *Tighe v. Diamond* (1948), 149 Ohio St. 520, 80 N.E.2d 122.

(Emphasis sic.) *Feick* at ¶ 27.

{¶ 65} In adopting in part this magistrate's decision, this court stated:

> The magistrate found no evidence in the record that the claimant's act of running a red light was willful, and neither do we. We decline, however, to adopt a per se rule that no form of negligent conduct leading to an employee's discharge could ever constitute a voluntary abandonment of employment. Rather, as suggested by the commission, there may be situations in which the nature or degree of the conduct, though not characterized as willful (e.g., repeated acts of neglect or carelessness by an employee), may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment. We do not find, however, that the facts of this case involve either willful or other conduct constituting voluntary abandonment.

Id. at ¶ 6.

{¶ 66} In the present case, relator appears to argue that she never intentionally or willfully was absent from work. Relator specifically argues:

> The attendance policy here assesses points for absence or tardiness, regardless of the cause. Thus, absence due to illness, family emergency or other circumstances which plainly do not involve knowing and intentional misconduct result in the accumulation of points. In the case at bar, there is simply no evidence to demonstrate that relator's absences leading up to her termination were willful or intentional acts in defiance of the employer's attendance policy.

{¶ 67} The evidence indicates that relator had an attendance problem. She already had accumulated 10.5 points (out of 14) before she was injured. There is no evidence explaining how/why relator had accumulated 10.5 points (i.e., did she present a note from a doctor concerning her health or some other incident beyond her control). Further, at the time she accumulated points for absence/tardy after the date of her injury, relator never offered an explanation. The premise underlying voluntary abandonment when an employee violates an employer's written-work rule is centered on the concept that

employees make choices and must accept the consequences of the choices they make. Relator asserts that she had no control over an illness or a flat tire and, as such, any points assessed for such reasons were not assessed volitionally. Instead, absences due to illness and tardiness due to a flat tire are beyond her control and should not be used to terminate her.

{¶ 68} Both the commission and Diamond Crystal argue that relator had a chronic attendance problem. Diamond Crystal put relator on notice of her point total and relator knew she would be terminated if she accumulated 14 points. The policy is neutral and applied to all employees equally.

{¶ 69} The burden of proof was on Diamond Crystal to establish that relator violated a written-work rule she knew or should have known would result in her termination. Diamond Crystal did. Relator has not presented any evidence that her termination was pretextual. Instead, relator asserts she had no control over any of her absences/tardiness.

{¶ 70} Relator's argument jeopardizes the attendance policy of all employers and places an additional burden on employers to investigate and determine whether the failure of an employee to report to work should actually count against the employee. This is not the law. How far back would Diamond Crystal have to look? How many of relator's absences would Diamond Crystal have to ignore and not count in relator's point total? Relator had a history of attendance problems and has not presented any compelling evidence from which this court could conclude that the commission abused its discretion. Further, relator's argument completely ignores both this court's refusal in *Feick* to adopt a per se rule that no form of negligent conduct leading to an employee's discharge would ever constitute a voluntary abandonment of employment, and this court's statement that the facts in *Feick* did not involve willful or "other conduct constituting voluntary abandonment." The magistrate finds that relator's conduct here is "other conduct constituting voluntary abandonment" and, as such, *Feick* does not apply.

{¶ 71} Relator's second argument is that several of her absences in 2010 and at least one absence in 2011 were actually caused by the allowed conditions in her workers' compensation claim. Because her absences were related to her industrial injury, relator contends that they cannot be used to bar her receipt of TTD compensation.

{¶ 72} Relator cites this court's decision in *Nifco* in support of her argument. In that case, the claimant, Tracey Woods, sustained a work-related injury and her doctor released her to return to work with restrictions from April 25 to April 29, 2002. The restrictions included light-duty work, no lifting over ten pounds, and no repetitive use of her left arm. On April 30, 2002, Woods' physician of record certified that she was totally disabled from work from April 30 through May 6, 2002. Woods did not return to work.

{¶ 73} In a letter dated May 14, 2002, Nifco terminated Woods' employment. According to the letter, on April 24, 2002, Woods informed Nifco that she needed to work in a light-duty position that did not require her to use her left arm. The letter further indicated that Nifco called Woods on April 24, 2002, and informed her that there was a position available which would accommodate her restrictions. Woods was told to return to work on April 25, 2002. Woods did not return to work and she was terminated after accumulating too many points.

{¶ 74} The commission granted Woods' request for TTD compensation based on evidence which established that Woods' absences from work on April 25, April 26, May 13, and May 14, 2002 were injury-related. Pursuant to *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), the commission determined that those absences could not form the basis for finding that Woods had voluntarily abandoned her employment sufficient to bar her receipt of TTD compensation.

{¶ 75} Nifco filed a mandamus action; however, this court found that the commission had not abused its discretion.

{¶ 76} Upon review, the magistrate has determined that *Nifco* does not apply to the facts of this case. First, this court noted that Nifco had failed to provide Woods with a written job offer of light-duty work. Nifco had only notified Woods over the phone. As such, Nifco did not satisfy the first prong of *Louisiana-Pacific*. Second, there was contemporaneous medical evidence establishing that Woods' absences from work were related to her injuries. Here, there is no contemporaneous medical evidence that relator's absences from work were caused by her work-related injury. The only evidence offered is a statement by Dr. Riley written after her termination indicating that she had been absent on three days due to her injuries and statements in an affidavit relator prepared after the DHO argument attesting to the same. This is not contemporaneous medical evidence that

distinguishes this case from *Nifco*. The commission did not abuse its discretion by failing to consider this court's decision in *Nifco* and applying it to the facts.

{¶ 77} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion by finding that her termination constituted a voluntarily abandonment of her employment following receipt of TTD compensation and finding that relator failed to present sufficient medical evidence that any absences were related to the injuries she had sustained at work. As such, it is this magistrate's decision that this court should deny relator's 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).