

[Cite as *State ex rel. Robinson v. Indus. Comm.*, 2012-Ohio-4372.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Shelby K. Robinson, :
Relator, :
v. : No. 11AP-900
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Progressive Parma Care Center, LLC and :
Parma Care Nursing & Rehabilitation, :
Respondents. :

D E C I S I O N

Rendered on September 25, 2012

Agee, Clymer, Mitchell & Laret, and Robert M. Robinson, for relator.

Michael DeWine, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.

Critchfield, Critchfield & Johnston, Ltd., and Susan E. Baker, for respondent Progressive Parma Care Center, LLC, and Parma Care Nursing & Rehabilitation.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

FRENCH, J.

{¶ 1} Relator, Shelby K. Robinson ("relator"), filed an original action, which asks this court to issue a writ of mandamus ordering respondent, Industrial Commission of

Ohio ("commission"), to vacate its order that denied relator temporary total disability ("TTD") compensation and to enter an order granting that compensation.

{¶ 2} This 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, which includes findings of fact and conclusions of law and is appended to this decision, recommending that this court deny the requested writ.

{¶ 3} As detailed in the magistrate's decision, relator suffered a work-related injury on April 10, 2008. She was treated and released to light-duty work, which her employer, Progressive Parma Care Center, LLC ("employer"), provided. The report of a state surveyor later revealed that (1) on April 11, 2008, relator failed to communicate a dietary order change properly, and (2) on April 15, 2008, relator administered a tube feed improperly. Based on these actions and relator's "substandard" disciplinary record, employer terminated relator on April 16, 2008, and informed her of that termination by letter dated April 30, 2008.

{¶ 4} Thereafter, relator submitted C-84 forms certifying that she was temporarily totally disabled beginning on April 10, 2008. The Ohio Bureau of Workers' Compensation determined that TTD was payable, but a district hearing officer of the commission denied TTD based on relator's voluntary abandonment of her position. A staff hearing officer ("SHO") similarly found that relator voluntarily abandoned her employment.

{¶ 5} Before the magistrate, relator argued that the commission abused its discretion by denying TTD. More specifically, relator argued that employer could not point to a specific written work rule that she violated, as *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), requires. In her decision, however, the magistrate described the evidence analyzed by the SHO and the foundations for the SHO's decision—relator knew the applicable standard of care, her actions violated her job description and the employee handbook, and she understood the consequences of her violations. The magistrate concluded that the commission did not abuse its discretion in that respect.

{¶ 6} Relator also argued before the magistrate that she presented medical evidence indicating that she could not return to her former position at the time employer terminated her and could not even perform light-duty work. The magistrate rejected this argument based on the obvious fact that relator was performing light-duty work at the time she violated the applicable rules.

{¶ 7} Finally, relator argued that employer did not terminate her until the extent of her injuries became apparent. The magistrate concluded, however, that the record revealed employer's attempts to arrange a personal meeting to discuss her violations; only after those attempts failed did employer send relator a letter indicating her termination, effective April 16, 2008. The SHO specifically addressed relator's argument that her termination was pretextual and determined that it was not.

{¶ 8} For all these reasons, the magistrate concluded that the commission did not abuse its discretion by denying TTD. As noted, the magistrate requested that we deny the requested writ.

{¶ 9} Relator filed objections to the magistrate's decision. In her objections to the magistrate's legal conclusions, relator makes the same arguments she made before the magistrate. We agree, however, with the magistrate's careful and thorough reasoning, and we reject those arguments.

{¶ 10} In her only objection to the magistrate's factual findings, relator contends that the magistrate erred by stating the following: "Further, it is undisputed that relator continued to refuse to speak with her supervisor * * *." To the contrary, relator argues that she spoke by telephone with her supervisor, Emma Washington, on April 18, 2008.

{¶ 11} The record reflects that Ms. Washington called relator on April 16 and 17, 2008, and asked relator to call her. Relator returned the calls on April 18 and spoke to Ms. Washington, who asked her to come into the office. Relator did not do so.

{¶ 12} In light of these facts, we change the previously quoted sentence to the following: "Further, it is undisputed that relator continued to refuse to attend a personal meeting with her supervisor * * *." Nevertheless, we conclude that this change has no substantive impact on our resolution of the issues before us.

{¶ 13} In conclusion, based on our independent review, we overrule relator's objections to the magistrate's legal conclusions and, to the limited extent noted, sustain relator's objection to the magistrate's factual findings. We adopt the magistrate's findings of fact, except to the extent noted, and conclusions of law as our own. Accordingly, we deny the requested writ.

*Objections sustained in part, overruled in part;
writ of mandamus denied.*

KLATT and DORRIAN, JJ., concur.

Progressive Parma Care Center, LLC ("employer" or "Parma Care") for violations of a written work rule which relator was aware could result in her termination, and ordering the commission to find that her termination does not bar her entitlement to TTD compensation.

Findings of Fact:

{¶ 15} 1. Relator was hired as a Licensed Practical Nurse ("LPN") with Parma Care beginning in 1996.

{¶ 16} 2. At the time she was hired, relator received a written job description and received updated employee handbooks during her employment, including the 2007 update. During the course of her tenure, relator was counseled and/or disciplined as least 11 times. The record includes 6 counseling/disciplinary actions between November 8, 2007 and April 15, 2008, the day before she was terminated.

{¶ 17} 3. Relator was given a job description for a primary care nurse when she was hired. Relator was on notice that she was required to perform her nursing duties in accordance with current federal, state, and local standards, guidelines and regulations that govern the facility and are required by the director of nursing services. Some of relator's major duties and responsibilities included:

The purpose of your job position is to carry out the day to day nursing activities of the facility during your tour of duty. Such activities must be **in accordance with current Federal, State, and local standards, guidelines and regulations that govern our facility and as maybe required by the Director of Nursing Services** to ensure the highest degree of quality care is maintained at all times.

* * *

- Implement and maintain established nursing objectives and standards.

* * *

- Administer professional services such as; catheterization, tube feedings, suction, applying and changing dressings/bandages, packs, colostomy, and drainage bags,

taking blood, giving massages and range of motion exercises, care of the dead/dying, etc., as required.

(Emphasis added; emphasis sic.)

{¶ 18} 4. Parma Care's employee handbook, "revised 05/01/07," provides for progressive discipline, specifically, in pertinent part:

Progressive Quality Care recognizes its rights and responsibilities in operating and managing its facilities. These include the right to establish rules and regulations covering the conduct of employees while on duty and the method and procedure to be used by employees in performing their work. It also includes the right to discipline and discharge employees for the violation of its rules.

* * *

An employee's immediate supervisor has the responsibility to enforce work rules and to administer the corrective action policy in a fair, equitable and consistent manner.

The immediate supervisor will investigate the situation prior to meeting with the employee to gather all the facts relating to the problem. If during the counseling session, the employee brings to light new facts relating to the situation, the supervisor will suspend the disciplinary process until he/she has fully investigated the new information.

* * *

Guidelines

At no time will a written reprimand or other disciplinary documentation be placed in an employee's file without first being discussed with the employee. The employee must fully cooperate with the supervisory investigation and during counseling and/or training sessions. Employees are required to sign written reprimands. By signing the warning, an employee is not admitting wrongdoing, merely acknowledging that the disciplinary action was discussed with him/her. The employee may write comments on the counseling form. Once completed, valid counseling forms will be permanently retained in the employees record.

Violation of any of the following rules may result in suspension or immediate termination due to the serious nature of such a violation. It is possible that offenses against company rules and procedures not on this list also may end in termination.

* * *

[Five] A serious violation of any facility or departmental work rule, policy or procedure.

* * *

The following are examples of rules of conduct that, if violated, may result in progressive discipline as outlined at the end of this section.

* * *

[Five] A violation of any facility or departmental work rule, policy, or procedure. Any action that th[r]ough it's secondary effect could cause the facility to lose business, residents, or reputation.

* * *

The progressive discipline system used by Progressive Quality Care is as follows:

[One] The first violation may result in an oral warning (a notation of which is placed in the employee's personnel file);

[Two] A second violation within a year may result in a written warning and/or suspension (a copy of which is placed in the employee's personnel file); and

[Three] The third violation within a year may result in discharge.

[Four] After 12 months a violation will no longer be included in the determination of the employee's position in the progressive disciplinary process, unless the violations are substantially repeat violations of the same rule.

[Five] Violations need not be of the same type or of the same rule to be considered progressive.

{¶ 19} 5. On January 18, 2008, relator received a verbal warning. The employee discipline form indicates that the type of violation was Rules or Procedures/Progressive. A review of that document indicates that relator had not signed off on shower sheets for various days in December 2007.

{¶ 20} 6. An employee discipline form dated February 29, 2008 is included and the type of violation was noted to be Serious/Critical. A review of that document indicates that relator had failed to properly suction a resident and this was found to be unacceptable. It was noted that this was a final warning and that any future rule violation may result in further disciplinary action including termination. Relator checked a box acknowledging: "I agree with the Company's statement."

{¶ 21} 7. On April 10, 2008, relator sustained a work-related injury while attempting to reposition a patient. Ultimately, relator's claim would be allowed for the following conditions: "sprain lumbar region, L3-L4 herniated disc, radiculopathy right lumbar, herniated disc w/free fragment at L5-S1."

{¶ 22} 8. The day of her injury, relator was treated by Parma Care's Health Source and was released to light-duty work which Parma Care provided.

{¶ 23} 9. While working light duty, a state surveyor (an employee from an accrediting organization charged with reviewing nursing homes and hospital facilities to ensure they meet state and federal guidelines concerning the safe care of residents and patients) determined that, on April 11, 2008, relator had failed to properly communicate a dietary order change for a resident written on April 11 and that, on April 15, 2008, relator was administering a tube feed to a resident at an improper rate. When relator was informed of the first violation, her failure to properly communicate the dietary order change, she scratched the order on the back of an alcohol pad and gave it to the dietary department.

{¶ 24} 10. Relator's supervisor filled out two different employee discipline forms on which it was noted that relator's failure to properly communicate the dietary order change was considered a Serious/Critical violation of the Rules of Procedure and,

pursuant to the progressive discipline plan, this was her third violation in one year and resulted in her termination. Likewise, the failure to administer the tube feed at the proper rate was also considered a Serious/Critical violation which, pursuant to the progressive discipline plan, also resulted in her termination.

{¶ 25} 11. According to the documentation in the stipulation of evidence, relator was terminated on April 16, 2008. Relator's supervisor attempted to contact her regarding her violations; however, relator did not take the calls and refused to meet with her supervisor.

{¶ 26} 12. Because relator did not come into work to speak with her supervisor, relator was informed of her termination in a letter dated April 30, 2008. That letter informed relator of the following:

Our policy is to handle personnel matters face-to-face whenever we can. You have been absent from work since April 19, 2008. You had spoke with Emma Washington on April 18, 2008 and told her you could not come to the facility to meet with her. Therefore, I must write to express that your employment with Parma Care Center is termination for cause effective April 16, 2008.

Your job performance repeatedly has been substandard, as your disciplinary record shows. Then on April 11, 2008, you put the facility in jeopardy by violating Ohio Department of Health regulations by failing to communicate a resident's dietary order to the Dietary Department. When the Dietary Department manager requested on April 15, 2008 that you correct this failure, you wrote an inadequate order on the back of an alcohol swab that neither identified the resident nor otherwise complied with our policy regarding clinical documentation, on which you in-serviced most recently on February 28, 2008. Topic of in-service was dietary communication. This error could have had a negative impact on the resident's health and safety. In addition, on April 15, 2008 you failed to check a tube feed that someone else noticed was infusing faster then had been ordered by the resident's physician.

(Emphasis. sic.)

{¶ 27} 13. On April 17, 2008, relator was again seen at health source. Relator indicated that she had attended physical therapy and that she was getting better until April 16, 2008 when the physical therapy exercises increased her back pain. Relator was released to return to work with restrictions.

{¶ 28} 14. An MRI performed April 17, 2008 revealed the following:

[One] Free disc fragment within the neutral foramen on the right at L5-S1 likely impinging the right L5 nerve root.

[Two] Disc herniation centrally at L3-4.

{¶ 29} 15. Thereafter, relator submitted C-84 forms certifying that she was temporarily totally disabled from all employment, including light duty, beginning April 10, 2008, the date of the injury.

{¶ 30} 16. The Ohio Bureau of Workers' Compensation ("BWC") determined that TTD compensation was payable beginning April 16, 2008.

{¶ 31} 17. Parma Care appealed and the matter was heard before a district hearing officer ("DHO") on July 14, 2008. The DHO determined that TTD compensation be denied after finding that Parma Care had met its burden of proving that relator voluntarily abandoned her employment. The DHO relied on the various discipline forms Parma Care submitted and the employee handbook provisions regarding progressive discipline which can ultimately lead to termination.

{¶ 32} 18. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on August 28, 2008. The SHO affirmed the prior DHO order and denied TTD compensation finding that relator was terminated on April 16, 2008 for violating a written work rule which relator was aware could result in her termination. Specifically, the SHO stated:

The Staff Hearing Officer finds that claimant was terminated from her employment effective 4/16/08 for violation of a written work rule, which violation claimant was aware could result in her termination. Claimant's termination is found to constitute a "voluntary abandonment" of employment. Payment of temporary total disability compensation for the requested period (4/17/08 forward) is, therefore, barred. The Staff Hearing Officer finds no authority for the propositions that a claimant's involuntary termination must be in writing,

can be found effective only after a face-to-face, pre-termination meeting or is effective only after actual knowledge of same has been communicated to a claimant. To require such actions in order to execute a valid termination of employment would be to grant the claimant the power to forestall a termination indefinitely.

The rationale of the Supreme Court of Ohio, as set forth in Louisiana-Pacific Corporation –v- Industrial Commission of Ohio (1995), 72 Ohio State 3d 401, is relied upon. The Staff Hearing Officer finds that claimant was provided with a copy of a company handbook setting forth the various policies, rules and disciplinary procedures related to claimant's employment. Contained in the handbook, as illustrative of conduct that may result in disciplinary action and termination of employment, are references to "refusal to obey supervisory instructions pertaining to . . . job duties" and "facility or departmental work rule, policy or procedure" (pages 11 and 12, Company Handbook). Additionally, the Employee Discipline Form dated 2/29/08 clearly stated that any further violations "will result in termination". While claimant, at hearing (8/28/08), disputed the significance of her actions on 4/15/08 (dietary change order; tube feeding rate), she did not offer a persuasive argument or evidence to refute the employer's assertion that her actions were violations of specified policies and rules.

{¶ 33} 19. At the hearing, relator argued that Parma Care did not meet its burden of proof because Parma Care was not able to point to a specific written work rule that relator violated. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995). The SHO rejected relator's argument stating:

Claimant asserts that Louisiana-Pacific is inapplicable and argues that the employer has not pointed to a specific written work rule that was violated by claimant. As an LPN, claimant is deemed knowledgeable in various area of nursing practice. To require the employer herein to enumerate each of the myriad actions or omissions that might possibly occur in the course of an LPN's work activity would be impossible. The Staff Hearing Officer does not find that Louisiana-Pacific requires such infinitesimal specificity in a written work rule. Claimant's quarrel is more accurately characterized as one pertaining to the specificity of the Handbook's rules and policies, as opposed to the absence of same.

The Staff Hearing Officer finds no competent medical evidence on file that establishes that claimant was temporarily and totally disabled, due to the work injury herein, at the time of or prior to her termination from employment on 4/16/08. To the extent that they are relevant to the issues presented, the opinions of a nurse practitioner (Employer's Health Source, MedCo-14s and related records) do not constitute competent evidence, for purposes of worker's compensation law, upon which an opinion as to temporary, total disability can be based.

The Staff Hearing Officer does not find that the employer's payment of vacation pay to claimant subsequent to her work injury of 4/10/08, constitutes an express or implied "waiver" of the defense of voluntary abandonment of employment or constitutes an express or implied modification or reinstatement of the previous "at-will" employment relationship that existed prior to the 4/10/08 injury. Per the testimony of Ms. Walcher (Human Resources/Payroll Department), such payment of accrued vacation pay was made to departing employees regardless of the circumstances of their separation from employment. Additionally, per Ms. Walcher, it was the belief of the employer that there was a legal obligation to make such payments regardless of the circumstances surrounding a separation from employment (see, Korsnak –v- CRL, Inc., et al (No. 84403), 2004 Ohio 611; 2004 Ohio App. LEXIS 5608).

{¶ 34} 20. In an order mailed January 29, 2011, the commission refused relator's appeal.

{¶ 35} 21. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 36} For the reasons that follow, it is this magistrate's decision that this court deny relator's request for a writ of mandamus.

{¶ 37} 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).

{¶ 38} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.*, 26 Ohio St.3d 76 (1986). On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.*, 29 Ohio St.3d 56 (1987). Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165 (1981).

{¶ 39} 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.

{¶ 40} In *Louisiana-Pacific*, the court characterized a firing as "voluntary" when that 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 to the employee.

{¶ 41} 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; and *State ex rel. Ohio*

State Univ. Cancer Research Hosp. v. Indus. Comm., 10th Dist. No. 09AP-1027, 2010-Ohio-3839.

{¶ 42} 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.

{¶ 43} 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. Adkins filed a mandamus action in this court; however, this court upheld the decision of the commission. Adkins had argued that, because she was unable to return to her former position of employment at the time she was terminated, she remained eligible for TTD compensation. This court disagreed and stated:

Relator's reliance on [*State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996)] is misplaced. While relator was medically unable to return to her former position of employment at the time that she was terminated from that employment, she was undisputedly medically capable of reporting to the light-duty job she had accepted. *Pretty Products* does not directly address the situation here where the rule violation involves accepted alternative employment rather than the former position of employment. Nevertheless, it is clear that relator can be presumed to intend the consequences of her voluntary act. That is, relator can be presumed to intend that her failure to report to her newly accepted light-duty job can lead to her loss of all employment at Spherion.

Adkins at ¶ 56.

{¶ 44} It is undisputed that relator was working in a light-duty capacity at the time she was terminated. As such, her termination could be a bar to her receipt of TTD compensation.

{¶ 45} In arguing that her termination should not bar the receipt of TTD compensation, relator contends that Parma Care cannot point to a specific written work rule that she violated and, as such, Parma Care's burden of proof under *Louisiana-Pacific* was not met.

{¶ 46} Relator was working as an LPN at the time she was injured and continued to work, albeit in a light-duty capacity, thereafter. As a member of the medical profession, the SHO found that relator was deemed to be knowledgeable concerning the standard of care she was required to provide no matter who her employer was. The SHO also pointed out that, one of relator's job duties was to immediately record new/changed diet orders and to forward that information to the dietary department. Further, the SHO noted that, as part of her job duties, relator was required to administer professional services including tube feedings. The SHO found that it was understood that tube feeding would be performed according to certain accepted guidelines. The SHO found that Parma Care had established that relator's conduct had violated these provisions of her job description.

{¶ 47} Thereafter, the SHO considered the employee handbook and its reference to any refusal to obey supervisory instructions pertaining to job duties, and violations of any facility or departmental work rule, policy, or procedure. The SHO also found that relator knew or should have known the consequences of violations incorporated under Parma Care's progressive discipline system. The SHO also pointed to the progressive discipline form dated February 29, 2008 which clearly informed relator that any further violation will result in her termination. Relator signed that document indicating that she understood her circumstances. Thereafter, relator failed to note a dietary order change and failed to properly tube feed a resident. Although Parma Care was not immediately aware of these violations, the violations were brought to Parma Care's attention by the state surveyor. The evidence indicates that, as soon as Parma Care was

aware of the violations, Parma Care took steps to terminate relator's employment. Further, at this time, it is undisputed that relator was performing light-duty work.

{¶ 48} At oral argument, counsel argued that since these two rules were not specifically identified, relator's violations could have led to her termination but that termination would not be a bar to her receipt of TTD compensation. Conversely, Parma Care argued that professionals, such as nurses, doctors, and lawyers, are required to obey certain standards of care or codes of conduct, and that it would be impossible to specifically identify every offense for which that person could be terminated. Further, Parma Care pointed out that both of these actions are identified in relator's job description. (See Finding of Fact No. 3.)

{¶ 49} The magistrate understands that *Louisiana-Pacific's* requirement of a written work rule exists so that employees are on notice that their action could result in their termination. *Louisiana-Pacific* involved an employee who allegedly violated the company's rule regarding absences of more than three consecutive days as a dischargeable offense. However, the court did not determine whether or not the employee's termination should be considered a voluntary abandonment because the commission had not yet addressed that question. Instead, the court held that employers bear the burden of establishing that the injured worker violated a written work rule or policy that: (1) clearly defined the prohibited conduct; 2) had been previously identified by the employer as a dischargeable offense; and (3) was known or should have been known to the employee. The reason for the requirement is simple: an employee must know that their actions can result in their termination. Unless the employee has notice, the employee's actions cannot lead to a voluntary abandonment of their job.

{¶ 50} Here, relator's job description informed her that she must carry out her job "in accordance with current Federal, State, and local standards, guidelines and regulations that govern our facility and as maybe required by the Director of Nursing Services."

{¶ 51} Further, the requirement concerning recording new/changed diet orders and immediately forwarding them to the dietary department is also included in relator's job description. Also, effective July 2003, relator was informed that a specific diet slip

was to be used to communicate any changes. The same is true for the administration of professional services, including tube feedings. Thereafter, the employee handbook provides that discipline, including discharge, was possible for any "serious violation of any facility or departmental work rule, policy or procedure."

{¶ 52} The magistrate finds that relator's responsibilities, not only as an LPN, but, also, as an employee at Parma Care, where sufficiently identified so that relator had notice that her actions could result in her termination. The magistrate finds that the SHO's order identified the evidence upon which the decision finding that Parma Care had met its burden of proving that relator voluntarily abandoned her employment and, the magistrate finds that relator has not demonstrated that the commission abused its discretion.

{¶ 53} Thereafter, relator argues that she presented medical evidence which would indicate that, not only was she unable to return to her former position of employment at the time she was terminated, she was unable to perform even the light-duty work which she was performing. Inasmuch as her medical evidence indicates that she was unable to perform any work at the time she was terminated, relator contends that *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), should apply and that TTD compensation should be paid.

{¶ 54} Relator's argument ignores the obvious fact that she was working in a light-duty capacity at the time she violated these specific rules. Further, the magistrate agrees with the commission's determination that Parma Care took steps to immediately notify relator of her termination and that the fact that relator ultimately was not notified until April 30, 2008 had no bearing on whether or not Parma Care had properly terminated her effective April 16, 2008, before there was any additional medical evidence of the severity of her condition.

{¶ 55} Further, relator contends that Parma Care did not terminate her until after Parma Care knew that her physical condition was worse than originally anticipated and she was not going to be able to continue working.

{¶ 56} The stipulated record indicates that relator's supervisor called her on April 16 and 17, 2008 and left messages asking relator to call. Relator's supervisor

testified that she wanted to speak to relator personally; however, relator did not return the phone calls until April 18, after the MRI. Further, it is undisputed that relator continued to [attend a personal meeting] with her supervisor and, as such, she was notified by certified letter mailed April 30, 2008 that she had been terminated effective April 16, 2008.

{¶ 57} The commission determined that Parma Care's evidence that relator was terminated on April 16 was credible and made that finding. As such, relator was terminated prior to any doctor certifying that she was unable to return to even light-duty work. It is undisputed that the commission must carefully analyze situations such as this on a case-by-case basis to determine whether or not the employer's termination is pre-textual, meant solely to avoid paying TTD compensation, or not. The commission determined here that Parma Care's decision to terminate relator was not pre-textual, that the written work rules were identified with enough clarity that relator knew or should have known the consequences of her actions, especially in light of Parma Care's progressive discipline system which had notified relator on February 29, 2008 that any further violation would result in her termination.

{¶ 58} Based on the foregoing, it is this magistrate's decision that relator has not demonstrated that the commission abused its discretion in finding that she voluntarily abandoned her employment and in denying her application for TTD compensation and 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).