

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ohio State University Cancer Research Hospital,	:	
	:	
Relator,	:	
	:	
v.	:	No. 09AP-1027
	:	
Industrial Commission of Ohio and Lafonda Carson,	:	(REGULAR CALENDAR)
	:	
Respondents.	:	

D E C I S I O N

Rendered on August 17, 2010

Dinsmore & Shohl, LLP, Michael L. Squillace and Christen S. Hignett, for relator.

Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Ohio State University Cancer Research Hospital, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order which granted temporary total disability compensation to respondent Lafonda Carson, and to find claimant's termination from

employment with relator barred his receipt of temporary total disability compensation for the time period at issue.

I. Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended to this decision. In her decision, the magistrate concluded that "relator has not demonstrated that the commission abused its discretion in finding that claimant was entitled to [temporary total disability] compensation because relator terminated claimant while he was performing modified job duties and the termination related solely to conduct which occurred prior to the date of claimant's injury." (Magistrate's Decision, ¶40.) Accordingly, the magistrate determined the requested writ should be denied.

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

1. The Magistrate's decision violates *State ex rel. Mitchell v. Indus. Comm.* and *State ex rel. Noll v. Indus. Comm.* in that she finds that the order of the Industrial Commission is not an abuse of discretion based upon a legal theory not set forth in the order.
2. The Magistrate erred in applying *State ex rel. Ohio Welded Blank v. Indus. Comm.* to the captioned case and underlying workers' compensation claim.
3. The Magistrate's decision that the Relator should have terminated the claimant either before he was hurt or after he returned to his former position of employment has no basis in law and is inconsistent with this Court's holding in *State ex rel. Adkins v. Indus. Comm.* and *State ex rel. Apostolic Christian Home, Inc. v. Indus. Comm.* that a claimant's

termination after a return to light duty constitutes a voluntary abandonment.

{¶4} We adopt the magistrate's findings of fact which reflect that relator terminated claimant's employment after his industrial injury for pre-injury rule infractions described as "conduct unbecoming a medical center employee and violations of university policy." (Magistrate's Decision, ¶22.) A district hearing officer granted claimant's application for temporary total disability compensation, noting in part relator's failure to support relator's allegation of a work rule infraction. Relator appealed. A staff hearing officer acknowledged relator provided the staff hearing officer evidence that claimant violated a work rule. The staff hearing officer nonetheless concluded relator's appeal lacked merit under *State ex rel. OmniSource v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, as claimant "was not physically able to return to his former position of employment at the time of his discharge." (Magistrate's Decision, ¶27.)

{¶5} With that factual predicate, we overrule relator's objections and deny the requested writ because (1) all evidence in the stipulated record indicates relator's infractions occurred prior to his injury and thus fail to support application of the voluntary abandonment doctrine, and (2) to the extent the staff hearing officer applied *OmniSource* rather than *State ex rel. Adkins v. Indus. Comm.*, 10th Dist No. 07AP-975, 2008-Ohio-4260 and *State ex rel. Apostolic Christian Home, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-1078, 2009-Ohio-5670, relator suffered no prejudice because relator presented no evidence that claimant violated work rules during the time he returned to work under light duty restrictions.

II. Objections

A. First Objection

{¶6} Relator's first objection asserts the magistrate violated *State ex rel Noll v. Indus. Comm.* (1991), 57 Ohio St.3d 203 and *State ex rel. Mitchell v. Indus. Comm.* (1998), 83 Ohio St.3d 399 when the magistrate premised her decision on grounds the commission did not cite. Relator's objection is somewhat unusual, as *Noll* typically is applied to commission decisions that fail to disclose the basis for the decision, not to decisions of this court's magistrate. Indeed, relator does not cite any cases that have applied *Noll* to anything but commission decisions and orders. In any event, relator suffers no prejudice, as we decline to adopt the magistrate's conclusion of law. Relator's first objection is overruled.

B. Second Objection

{¶7} Relator's second objection disputes application of *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646 to the facts present here. Relator contends claimant's rule infractions are a voluntary abandonment of employment that precludes an award of temporary total disability compensation.

{¶8} *Welded Blank* addressed whether a pre-injury rule infraction was a proper basis for finding a voluntary abandonment of employment and thus denying an award of temporary total disability compensation following the employee's industrial injury. In resolving the issue, *Welded Blank* noted the Supreme Court in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") "stated the voluntary abandonment doctrine has not been applied to work rule violations preceding or

contemporaneous with the injury." *Welded Blank* at ¶20, citing *Gross II* at ¶19 (stating "the voluntary-abandonment doctrine has been applied only in postinjury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her [temporary total disability] benefits"). Applying the language of *Gross II*, we concluded in *Welded Blank* that the claimant's pre-injury infraction did not permit the employer to invoke the voluntary abandonment doctrine to preclude payment of temporary total disability benefits.

{¶9} Relator seeks to distinguish *Welded Blank* by pointing out that *Welded Blank* involved an undetected pre-injury rule infraction, but claimant's rule violations here were known prior to the injury. Although we agree the facts of this case are slightly different than those of *Welded Blank*, we revert to the language of *Gross II* that specified the voluntary abandonment doctrine has not been applied to pre-injury rule violations. Relator may terminate claimant's employment as a result of his rule infraction, but relator may not use claimant's pre-injury rule violations to invoke the voluntary abandonment doctrine and preclude payment of temporary total disability benefits. *Gross II*, *Welded Blank*. Relator's second objection is overruled.

C. Third Objection

{¶10} Relator's third objection contends the staff hearing officer wrongly applied *OmniSource* to the facts of this case. Relator asserts the appropriate case law is found in *Adkins* and *Apostolic Christian Home*, both of which permit application of the voluntary abandonment doctrine if an employee commits a rule infraction after returning to light duty

work. Any error in the staff hearing officer's applying *OmniSource* to the facts of this case is harmless.

{¶11} The commission's staff hearing officer determined that any post-injury rule infraction would not permit application of the voluntary abandonment doctrine because claimant was unable to return to his former position of employment. The staff hearing officer cited *OmniSource* for the proposition that a claimant who is disabled when terminated for a rule infraction is not disqualified from temporary total disability compensation.

{¶12} As relator points out, some evidence indicated claimant returned to light-duty work. Relying on *Adkins* and *Apostolic Christian Home*, relator contends that an employee who returns to light-duty work and commits a rule infraction voluntarily abandons his or her employment and thus is not entitled to temporary total disability compensation.

{¶13} Even if claimant returned to light-duty work following his injury, *Adkins* and *Apostolic Christian Home* would not apply here, as the evidence does not support relator's contention that claimant's rule infraction continued beyond the date of his injury. According to the stipulated evidence, all violations occurred prior to his injury. For that reason, *Gross II* and *Welded Blank* control, rendering the staff hearing officer's potentially improper citation to *OmniSource* non-prejudicial. Relator's third objection is overruled.

{¶14} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts, and we adopt those as our own. For the

reasons set forth in this decision, we overrule relator's objections and deny the requested writ of mandamus.

*Objections overruled;
writ denied.*

FRENCH and CONNOR, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Ohio State	:	
University Cancer Research Hospital,	:	
	:	
Relator,	:	
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v.	:	No. 09AP-1027
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Lafonda Carson,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on April 21, 2010

Dinsmore & Shohl, LLP, Michael L. Squillace and Christen S. Hignett, for relator.

Richard Cordray, Attorney General, and Charissa D. Payer, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶15} Relator, Ohio State University Cancer Research Hospital, 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 granted

temporary total disability ("TTD") compensation to respondent Lafonda Carson ("claimant"), and ordering the commission to find that claimant's termination from her employment with relator barred his receipt of TTD compensation for the time period at issue.

Findings of Fact:

{¶16} 1. Claimant sustained a work-related injury on January 29, 2009, and his workers' compensation claim has been allowed for "sprain lumbosacral."

{¶17} 2. Nancy V. Rodway, M.D., completed a MEDCO-14 form indicating that claimant was totally disabled from work from February 6, 2009, until his next appointment.

{¶18} 3. Claimant next saw Dr. Rodway on February 16, 2009. At that time, Dr. Rodway indicated that claimant could return to full-duty work with the following restrictions: "This full duty will be lifting no more than 20 pounds, and bending and twisting only occasionally. I do not want him to push/pull/squat/kneel. He will stand and walk occasionally and sit frequently. I want him to change positions every 30 minutes, and I will see him again in 2 weeks."

{¶19} 4. Claimant and relator entered into a transitional work agreement covering the time period of February 17 through March 2, 2009. Claimant was given a job within the restrictions of Dr. Rodway and claimant accepted that position.

{¶20} 5. Claimant and relator signed a second transitional work agreement covering the period of March 2 through April 2, 2009.

{¶21} 6. Claimant continued to work with these restrictions.

{¶22} 7. In a letter dated March 19, 2009, claimant was notified that he was being terminated from his position effective March 20, 2009, "based on your demonstration of conduct unbecoming a medical center employee and violation of university policy."

{¶23} 8. A review of the case report compiled by relator, claimant had been under investigation for some time concerning allegations that he was violating relator's Sexual Harassment Policy. The case report is ten pages long and is in the stipulation of evidence at pages 52 through 62. The allegations were numerous. The earliest allegations appear to have occurred in 2004 and the latest in 2008.

{¶24} 9. At claimant's next appointment with Dr. Rodway, on April 3, 2009, Dr. Rodway noted that claimant was not working and opined that he could perform work within the restrictions set out earlier. That same day, Dr. Rodway completed a C-84 indicating that claimant was unable to return to his former position of employment and was totally disabled from March 21 through an estimated return-to-work date of May 21, 2009.

{¶25} 10. At claimant's next appointment with Dr. Rodway, on May 19, 2009, Dr. Rodway indicated that she was going to request work conditioning and would lighten claimant's restrictions as follows: "He will lift no more than 20 pounds continuously. I still do not want him pushing or pulling or squatting or kneeling, but he can begin to reach, bend, more than frequently. I will see him in two weeks. C-84 was updated." Dr. Rodway continued to certify claimant as temporarily totally disabled through August 2009.

{¶26} 11. Claimant's request for TTD compensation was heard before a district hearing officer ("DHO") on May 13, 2009. At that time, the DHO granted claimant's

request based on the medical evidence he submitted. With regard to relator's argument that claimant had been terminated from his employment because of violations of relator's Sexual Harassment Policy, the DHO noted that relator failed to provide any documentation regarding the specifics of claimant's conduct that eventually resulted in his termination. As the DHO noted, relator's unilateral assertion that claimant violated an acknowledged work rule, without documentation of the conduct, did not constitute sufficient evidence upon which to find that claimant had voluntarily abandoned his employment. As an additional reason, the DHO noted that, because claimant had not returned to his former position of employment, he could not abandon his former position of employment citing *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951.

{¶27} 12. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on June 22, 2009. The SHO modified the prior DHO's order and granted claimant's request for TTD compensation based on the records from Dr. Rodway. The SHO addressed relator's argument that claimant's termination should bar his receipt of TTD compensation as follows:

The employer has argued that temporary total disability compensation is not properly payable on a theory that the Injured Worker voluntarily abandoned his former position of employment when he engaged in conduct which resulted in his discharge. This allegation had not been adequately documented at the District Hearing, but the employer presented substantial documentation at this hearing. The Staff Hearing Officer finds that the discharge cannot act as a bar to the payment of temporary total disability compensation for the reason that the Injured Worker was not physically able to return to his former position of employment at the

time of the discharge. The Staff Hearing Officer relies upon the rule of State ex rel. Omnisource v. Indus. Comm. The Staff Hearing Officer is cognizant that some of the conduct which resulted in the Injured Worker's discharge occurred prior to the date of injury, however, the employer has not identified that he was discharged solely for that conduct.

{¶28} 13. Relator's further appeal was refused by order of the commission mailed July 21, 2009.

{¶29} 14. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶30} 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.* (1967), 11 Ohio St.2d 141. 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.* (1986), 26 Ohio St.3d 76. 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.* (1987), 29 Ohio St.3d 56. 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.* (1981), 68 Ohio St.2d 165.

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

{¶32} 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.* (1988), 40 Ohio St.3d 44.

{¶33} In *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, the court determined that a firing can constitute a voluntary abandonment of the former position of employment because, although discharge is not necessarily consented to, it often is a consequence of behavior that the claimant willingly undertook and may take on a voluntary character.

{¶34} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, the Supreme Court of Ohio was asked to determine whether an employee's termination for violating work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

{¶35} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from employment. However, the court found 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.

{¶36} Since the *Louisiana-Pacific* case, this court and the Supreme Court of Ohio have considered cases involving several variations applying the above law. A line of cases has followed the reasoning from *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, and the courts have held that a claimant can abandon a former position of employment or remove himself or herself from the workforce only if he or she has the physical capacity for employment at the time of the abandonments or removal.

{¶37} This line of reasoning has been applied by this court in two cases which are similar to the present case, but which do not resolve the present case. In *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP-975, 2008-Ohio-4260, and *State ex rel. Apostolic Christian Home, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-1078, 2009-Ohio-5670, the claimants were medically unable to return to their former positions of employment. However, their employers offered them work within their restrictions and they accepted those new positions of employment. Thereafter, the claimants violated their employer's written work rules and were terminated. In both cases, this court upheld the commission's determination that the claimants had voluntarily abandoned their

modified jobs when they violated the employer's written work rules and that the payment of TTD compensation was precluded.

{¶38} The present case is similar to both *Adkins* and *Apostolic Christian Home* in one respect: In the present case, claimant was unable to return to his former position of employment and was released to return to work with restrictions which were accommodated by his employer. As such, like the claimants in *Adkins* and *Apostolic Christian Home*, the claimant here was performing a modified job at the time he was terminated. However, that is where the similarity ends.

{¶39} In both *Adkins* and *Apostolic Christian Home*, the claimants violated written work rules *after* they had returned to the modified employment offered by the employer and they were terminated. In the present case, claimant was terminated because of behavior he committed *prior* to the date of his injury. This is a significant distinction because this court has held that a pre-injury infraction by a claimant is not grounds for concluding that a claimant voluntarily abandoned his or her employment. See *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646. The conduct which gave rise to claimant's termination occurred between 2004 and 2008. Claimant's work-related injury occurred in January 2009. While the magistrate can appreciate relator's position—claimant has clearly violated relator's Sexual Harassment Policy for a number of years—the timing of claimant's termination becomes critical for purposes of his eligibility for TTD compensation. Unfortunately, relator should have either terminated claimant before he was injured or waited until he was released to return to his former position of employment. Relator certainly has a right to terminate claimant's

employment; however, because the conduct for which claimant was terminated occurred prior to his industrial injury and relator terminated him before he was medically capable of returning to his former position of employment, his termination is not a bar to the payment of TTD compensation.

{¶40} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion in finding that claimant was entitled to TTD compensation because relator terminated claimant while he was performing modified job duties and the termination related solely to conduct which occurred prior to the date of claimant's injuries. As such, it is this magistrate's conclusion that this court should deny relator's 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).