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Recent Developments in Voluntary Abandonment

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“FIRED” UP: EVOLVING TRENDS IN VOLUNTARY ABANDONMENT

WHAT IS VOLUNTARY ABANDONMENT

- Voluntary abandonment is an affirmative defense to a claimant’s request for total disability compensation (i.e. TTD, PTD)
- Issue is whether a causal connection exists between the injury and the loss of wages
- Temporary total disability compensation (TTD)
 - Compensation paid to a claimant when they are unable to return to the former position of employment as a result of disability from the allowed conditions
 - Paid to compensate for lost earnings due to disability up and to the point claimant returns to work or the allowed conditions have reached maximum medical improvement
 - Permanent total disability compensation (PTD)
 - Compensation paid where allowed conditions prevent a return to sustained remunerative employment

ORIGIN OF VOLUNTARY ABANDONMENT DOCTRINE

- *State, ex rel. Jones & Laughlin Steel Corp., v. Indus. Comm.*, 29 Ohio St. 3d 145 (10th Dist. 1985)
- Claimant voluntarily retired; subsequently moved for temporary total disability compensation
- “One who has voluntarily retired and has no intention of ever returning to his former position of employment is not prevented from returning to that former position by an industrial injury which renders him unable to perform the duties of such former position of employment.”
- “A workers is prevented by an industrial injury from returning to his former position of employment where, but for the industrial injury, he would return to such former position of employment.”

- “However, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment.”

EXPANSION OF VOLUNTARY ABANDONMENT

IMPRISONMENT

- *State, ex rel. Ashcraft, v. Indus. Comm.* (1987), 34 Ohio St. 3d 42
- Claimant moved for temporary total disability compensation while imprisoned. TTD denied because claimant not in a position to return to work while in prison; his loss of earnings was no longer “on account of the injury”
- A person who violates the law is presumed to tacitly accept the consequences of his voluntary acts.
- Now codified in R.C. 4123.54(J)

VIOLATION OF WRITTEN WORK RULE

- *State, ex rel. Louisiana Pacific Corp., v. Indus. Comm.*, 1995-Ohio-153, 72 Ohio St. 3d 401
- Termination for violation of a written work rule can give rise to a voluntary abandonment
- Termination must be pursuant to a written policy that
 - 1) Clearly defines the prohibitive conduct
 - 2) Has previously been identified as a dischargeable offense, and
 - 3) Was known or should have been known by the employee

- Pretext
 - Timing and circumstance of discharge
 - Burden shift to claimant
 - Claimant must raise or it is waived

JOB CHANGE

- *State, ex rel. McGraw, v. Indus. Comm.* (1990), 56 Ohio St. 3d 137
- Held that a voluntary departure to perform work for another employer for reasons unrelated to the industrial injury precludes the receipt of TTD

JOB CHANGE PART II

- *State, ex rel. Baker, v. Indus. Comm.*, 2000-Ohio-485, 89 Ohio St. 3d 376 (*Baker II*)
- In *Baker I*, the court affirmed the rule in McGraw (above)
- Upon reconsideration in *Baker II*, the Court held: “When a claimant who is medically released to return to work following an industrial injury leaves his or her former position of employment to accept another position of employment, claimant is eligible to receive temporary total disability compensation pursuant to R.C. 4123.56(A) should the claimant re-aggravate the original industrial injury while working at his or her new job.”

POST-VOLUNTARY ABANDONMENT RE-EMPLOYMENT

- *State, ex. rel. McCoy, v. Dedicated Transport, Inc.*, 2002-Ohio-5305, 97 Ohio St. 3d 25
- Held that a claimant who voluntarily abandons his or her former position of employment or who is fired under circumstances that amounted to a voluntary abandonment of the former position will be eligible to received TTD if he or she re-enters the workforce and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job
- Must be employed at the time of the subsequent disability

TIMING OF THE PROHIBITED CONDUCT AND DISABILITY

DISCHARGEABLE CONDUCT WHILE ON TTD

- *State, ex rel. Brown, v. Indus. Comm.*, 1993-Ohio-141, 68 Ohio St. 3d 45
 - PTD not terminated by subsequent incarceration
 - “. . . a claimant who has a permanent total disability is incapable of abandoning a position because that position, in effect, does not exist. Indeed, a claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal.”
- *State, ex rel. Pretty Products, Inc., v. Indus. Comm.*, 1996-Ohio-132, 77 Ohio St. 3d 5
 - Referenced *Brown* where issue was TTD and termination for absenteeism
- *State, ex rel. OmniSource Corp., v. Indus. Comm.*, 2007-Ohio-1951, 113 Ohio St. 3d 303
 - TTD payable despite termination for no CDL while on TTD (incarceration)
- *State, ex rel. Reitter Stucco, Inc., v. Indus. Comm.*, 2008-Ohio-499, 117 Ohio St. 3d 71
 - TTD payable despite termination for nasty comments about company president
- Even if a termination satisfies the *Louisiana Pacific* criteria, the eligibility for TTD remains if the claimant was disabled at the time the dischargeable conduct occurred

DISCHARGEABLE CONDUCT SIMULTANEOUS WITH INJURY

- *State, ex rel. Gross, v. Indus. Comm.*, 2007-Ohio-4916, 115 Ohio St. 3d 249 (*Gross II*)
- In *Gross I*, 112 Ohio St. 3d 65, the court held that a violation of a workplace safety rule that both resulted in termination and caused the injury amounted to a voluntary abandonment precluding TTD

- Upon reconsideration, the court revisited prior case law noting that where an employee's departure from the workplace is causally related to the injury, it is not voluntary and does not preclude TTD
- Termination was for conduct that caused the injury, i.e. related
- The court expressed concern that Gross I added fault to a no fault system and unnecessarily expanded the vol ab doctrine
- “Until the present case, the voluntary abandonment doctrine has been applied only in post-injury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her TTD benefits. . . . The doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury.”

DISCHARGEABLE CONDUCT WHILE WORKING WITH RESTRICTIONS

- *State, ex rel. Adkins v. Indus. Comm.*, 2008 Ohio 4260
 - Termination while capable of light duty
- *State, ex rel. Jacobs v. Indus. Comm.*, 2014-Ohio-1560, 139 Ohio St. 36
 - Claimant released to return to work with restrictions
 - Claimant returned for one hour and left to go see doctor never to be seen or heard from again
 - “When a claimant is discharged because of actions that were initiated by the claimant and that were not related to the industrial injury, a voluntary separation from employment has occurred that breaks the causal relationship between the industrial injury and the loss of earnings.”
- *State, ex rel. Hildebrand v. Wingate Transport, Inc.*, 2011-Ohio-3787, 114 Ohio St. 3d 533
 - Claimant released to return to work with restrictions quit after a disagreement with employer unrelated to his injury
 - TTD not payable

- *Pretty Products* did not apply as claimant was not receiving TTD at the time he was terminated
- The lack of evidence of work available not dispositive

DISCHARGEABLE CONDUCT BOTH BEFORE AND AFTER INJURY

- *State, ex rel. Parraz v. Diamond Crystal Brands, Inc.*, 2014-Ohio-4260, 141 Ohio St. 3d 31
- Claimant terminated under progressive discipline for attendance policy violations
- Points accrued both before and after injury
- *Louisiana Pacific* criteria met and termination amounted to voluntary abandonment

PRE-INJURY CONDUCT DISCOVERED POST-INJURY REVISITED

- *Gross II*: Voluntary abandonment has never been applied to pre-injury conduct

FALSIFICATION OF EMPLOYMENT APPLICATION DISCOVERED POST-INJURY

- *State, ex rel. Walters v. Indus. Comm.*, 2002-Ohio-3236; *State, ex rel. Lawrence v. Indus. Comm.*, 2007-Ohio-759
- Court entertained that pre-injury falsification of employment application discovered post-injury could give rise to a voluntary abandonment; cases remanded to Commission to address issue of pretextual firing
- *State, ex rel. Strimbu, Inc. v. Indus. Comm.*, 2005-Ohio-4386, 106 Ohio St. 3d 173
- Omission of a prior employer on employment application not grounds for voluntary abandonment without evidence of “intent to deceive.”

POST-INJURY DRUG TESTS

- *State, ex rel. Hisle v. Indus. Comm.* (1999), 140 Ohio App. 3d 550
- Termination for positive post-injury drug test amounted to voluntary abandonment precluding receipt of TTD

- “In particular, we are unpersuaded by relator’s argument that, as a matter of law, he cannot be found to have abandoned his employment due to the fact that he was injured.”
- *State, ex rel. PaySource USA, Inc. v. Indus. Comm.*, Case No. 08AP-677 (10th Dist. June 30, 2009)
 - Pre-injury violation of drug policy discovered by post-injury drug test amounted to voluntary abandonment
- *State, ex rel. Ohio Welded Blank v. Indus. Comm.*, 2009-Ohio-4646
 - Decided same year as *PaySource*
 - Relied on *Gross II* to find that pre-injury conduct discovered post-injury cannot be the basis of a voluntary abandonment finding
 - “Although the infraction may be grounds for terminating relator’s employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits. The result is especially compelling here, where the employer presented no evidence to suggest the injury resulted from Relator’s being under the influence of drugs or alcohol.”
- *State, ex rel. James F. Cordell v. Indus. Comm.*, 2016-Ohio-8446
 - Court of Appeals relied on *Gross II* and *Ohio Welded Blank* to find that a positive post-injury drug test did not arise to a voluntary abandonment
 - Noted that *PaySource* was a memorandum decision that adopted a Magistrate’s decision to which there were no objections. “It does not appear that the applicability of *Gross II* was even raised in *PaySource*.”
 - Supreme Court held that when an employee is terminated after a workplace injury for conduct prior to and unrelated to the workplace injury, his termination does not amount to a voluntary abandonment of employment when (1) the discovery of the dischargeable offense occurred because of the injury and (2) at the time of the termination, the employee was medically incapable of returning to work as a result of the injury

POST-INJURY RETIREMENT

- Voluntary versus involuntary
- Voluntary: job separation unrelated to injury
- Job abandonment versus workforce abandonment
 - Former: focus on voluntary
 - Latter: Focus on but-for relationship
- Even involuntary retirement can preclude total disability compensation if subsequent circumstances indicate an intent to abandon the entire workforce
- *State, ex rel. Honda of America Mfg., Inc. v. Indus. Comm.*, 2014-Ohio-1894, 139 Ohio St. 3d 290
- *State, ex rel. Floyd v. Formica Corp.*, 2014-Ohio-3614, 140 Ohio St. 3d 260
- *State, ex rel. Pierron v. Indus. Comm.*, 2008-Ohio-5245
- *State, ex rel. Corman v. Allied Holdings*, 2008-Ohio-5153

OH YEAH...I ALMOST FORGOT ONE...

State, ex rel. Klein v. Precision Excavating & Grading Co., 2018-Ohio-3890, 155 Ohio St.3d 78

- A claimant who voluntarily removes herself from her former position of employment for reasons unrelated to a workplace injury is no longer eligible for temporary total disability compensation, even if she claimant remains disabled at the time of her separation from employment
- Abundant evidence that Mr. Klein decided, well before the date of injury, to quit his job and move to Florida

- No concern about pretext
- Focus upon proximate cause between lost earnings and the workplace injury
- *Reitter Stucco* (one set of rules for terminated employees and another for employees who voluntarily leave the workplace) and *OmniSource* cases are overruled
- Judge Kennedy's concurring opinion – agrees that *Reitter Stucco* and *OmniSource* should be overruled but believes the majority decision did not go far enough
- Should also have overruled *Pretty Products*, *Gross II* and *Cordell*