



Workers' Compensation Seminar

Voluntary Abandonment-Is It Still a Viable Defense for Employers?

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VOLUNTARY ABANDONMENT

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I History

State ex rel. Rockwell Intern'l v. Indus. Comm. (1988), 40 Ohio St. 3d 44, 46: Voluntary departure from employment precludes temporary total disability compensation.

State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St. 3d 44: “While the prisoner’s incarceration would not normally be considered a ‘voluntary’ act, one may be presumed to tacitly accept the consequences of his voluntary acts.”

State ex rel. Brown v. Indus. Comm. (1993), 68 Ohio St. 3d 45, 48: “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. Watts v. Schottenstein Stores Corp. (1993), 68 Ohio St. 3d 188, 121: “We agree that 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. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St. 3d 401, 402: “We 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 know to the employee. Defining such as 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.”

II. Employer Aggressive Use of the Defense

A. Pre-Injury Actions

State ex rel. McKnabb v. Indus. Comm. (2001), 92 Ohio St. 3d 559, 561-62: Although employer contended there existed a strict verbal attendance policy, the Court found the rule “apparently not that strict” as the claimant was tardy some fifteen to twenty times during a six month period but warned only once. The work rule applied by the employer when terminating an employee must be applied as written, as failure to do so will cast doubt on whether the injured worker had the requisite “actual knowledge” of the policy.

State ex rel. Ohio Welded Blank v. Indus. Comm. (2009), 2009 Ohio App. LEXIS 3950: Positive post-injury drug screen for marijuana was not grounds for denial of temporary total disability based upon voluntary abandonment as claimant was disabled prior to termination.

State ex rel. PaySource USA, Inc. v. Indus. Comm. (2009), 2009 WL 3246775: Positive post-injury drug screen for cocaine *was* basis for denial of temporary total disability as the use of the prohibited substance prior the industrial injury was the prohibited conduct resulting in termination.

State ex rel. Ohio State Univ. Cancer Research Hosp. v. Indus. Comm. (2010), 2010 Ohio 3839: Claimant terminated while performing light duty work for conduct pre-dating the injury. In applying Welded Blank, the court ruled that pre-injury conduct could not be a basis for denial of temporary total disability; Adkins and Apostolic not applicable

B. Post-Injury Actions

State ex rel. Pretty Products v. Indus. Comm. (1996), 77 Ohio St. 3d 5: Claimant terminated under the collective bargaining agreement for failure to submit an updated medical excuse. Court did not find voluntary abandonment as, citing State ex rel. Brown, “(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. NIFCO v. Woods (2003), 2003 Ohio 6468: In citing Pretty Products, the court held that injury-induced absences cannot form the basis of denial of temporary total disability based upon voluntary abandonment.

State ex rel. OmniSource v. Indus. Comm. (2007), 113 Ohio St. 3d 303: Applying Brown and Pretty Products, Court held that a post-injury DUI did not bar payment of temporary total disability as claimant was already disabled at the time of termination.

State ex rel. Reitter Stucco v. Indus. Comm. (2006), 2006 Ohio 6260: In applying Brown and Pretty Products, court held that post-injury verbal threats made by claimant toward his supervisors and company are not grounds for denial of temporary total disability as claimant was disabled at time the threats were made.

C. Rule Violations Inducing Injury

State ex rel. Gross v. Indus. Comm. (2007), 115 Ohio St. 3d 249 (“Gross II”): Actions of the injury itself violated a written work rule. Court held that claimant was not precluded from the payment of temporary total disability compensation based upon voluntary abandonment, finding that “If an employee’s departure from the workplace ‘is causally related to his injury,’ it is not voluntary and should not preclude the employee’s eligibility for TTD compensation,” citing Rockwell and McCoy. Court notes “it was not our intention in Gross I to inject fault into the analysis of voluntary abandonment or to undermine the no-fault nature of our workers’ compensation system.”

State ex rel. Upton v. Indus. Comm. (2008), 119 Ohio St. 3d 461: In applying Gross II, court held that an injury-induced preventable accident could not be a basis to denial temporary total disability based upon voluntary abandonment.

D. Termination While on Light Duty

State ex rel. Adkins v. Indus. Comm. (2008), 2008 Ohio 4260: Claimant accepted light duty employment but failed to report to work or to call her employer to explain why she was not reporting for work was found to have voluntarily abandoned her lite duty position and was precluded from the payment of temporary total disability. Court accepted the magistrate’s determination 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.”

State ex rel. Apostolic Christian Home, Inc. v. King (2009), 2009 Ohio 5670: Follows Adkins in finding Louisiana Pacific applicable for a claimant’s failure to report to a light duty position.

E. Post-Abandonment Return to Work

State ex rel. McCoy v. Indus. Comm.(2002) 97 Ohio St. 3d 25, 40: “A claimant who voluntarily abandons his or her former position of employment (is) eligible to receive temporary total disability compensation if he or she reenters the work force and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job.”

State ex rel. Eckerly v. Indus. Comm. (2005) 105 Ohio St. 428, 430: Court upholds IC denial of temporary total disability even though claimant had returned to work, as the injured worker “had no job at the time of his alleged disability.”

State ex rel. Estates Express Lines v. Indus. Comm. (2009) 2009 Ohio 2148: Court of appeals found temporary total disability payable from the date of the claimant’s surgery forward despite previous finding of voluntary abandonment, where the claimant accepted a seasonal job and was thereafter laid off. In citing B.O.C. Group v. Indus. Comm., (1991) 58 Ohio St. 3d 199, the court held “the decision to lay off claimant was one initiated by the employer...Therefore, the fact that the claimant was laid off does not preclude ‘receipt’ of temporary total disability

compensation....(A)n employer initiated departure is still considered voluntary as a general rule.”

III. The Conundrums

Pay Source v. Ohio Welded Blank

Adkins/Apostolic v. Pretty Products