CLARITY DE-*KLEIN*ED:
VOLUNTARY ABANDONMENT AFTER *State ex rel. Klein v. Precision Excavating & Grading Co.*, ___ Ohio St.3d ___, 2018-Ohio-3890

Introduction

Voluntary abandonment is a judicially-created, affirmative defense to an injured worker's request for temporary total disability compensation (temporary total) or permanent total disability compensation (PTD). See *State ex rel. Jenkins v. Indus. Comm.*, 10th Dist. Franklin No. 16AP-534, 2017-Ohio-7896, ¶4. As an affirmative defense, voluntary abandonment must be raised and proved by the employer or the BWC. See id. A claimant's only burden is to prove that his disability is caused by the allowed conditions in his workers' compensation claim. A claimant has no duty to eliminate other causes of his disability. See *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84. (1997).

Voluntary abandonment can occur in one of two ways. The first is when a claimant quits his former position of employment and/or the entire workforce for reasons unrelated to her injury. The second type of voluntary abandonment occurs when a claimant is terminated or fired by the employer when she violates a written work rule that 1) clearly defined the prohibited conduct; 2) was identified by the employer as a dischargeable offense before the offense occurred; and 3) was known or should have been known to the claimant. See *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995).

Voluntary abandonment has its origins not in any statute, but in *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982). The syllabus of *Ramirez* states: "Under R.C. 4123.56, temporary total disability is defined as a disability which prevents a worker from returning to his former position of employment." The Court also stated that

> R.C. 4123.56 … specifically refers to the capability of an employee "to return to his former position of employment." "Position" is defined by Webster's Third New International Dictionary as "the group of tasks and responsibilities making up the duties of an employee." The Industrial Commission, in determining whether relator was entitled to temporary total disability, did not consider whether he was capable of returning to his former position of employment as a construction laborer.

See *Ramirez*, 69 Ohio St.2d at 632.

In 1985, the 10th District Court of Appeals created voluntary abandonment in *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist. 1985). The court framed the issue before it and held as follows:

> the issue before us is whether a person who has voluntarily taken himself out of the work force and abandoned any future employment by voluntarily retiring is prevented from returning to his former position of employment by an industrial injury which renders him unable to perform the duties of such former position. This raises an issue of causal relationship.

> Relator's argument is to the effect that even if claimant were able to perform the duties of his former employment, he would not return to that position since he has retired or, in other words, has abandoned that position. The court in *Ramirez* recognized the possibility that an employee might abandon his former position of employment by indicating that temporary total disability compensation may be terminated when an employee has returned to work, without limitation as to whether the return to work was to the former position of employment. We find that the same result must ensue from a voluntary retirement.
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> 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 worker 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. Such action would include such situations as the acceptance of another position, as well as voluntary retirement.

In 1987, the Supreme Court adopted voluntary abandonment based upon *Jones & Laughlin*. See *State ex rel. Ashcraft*, 34 Ohio St.3d 42 (1987). In *Ashcraft*, the claimant requested TTD while incarcerated. The Court found that incarceration is a voluntary abandonment independent of the disabling nature of the allowed conditions. The Court held that there is a two-part test for voluntary abandonment issues:

> The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position. The secondary consideration is a reflection of the underlying purpose of temporary total compensation: to compensate an injured employee for the loss of earnings which he incurs while the injury heals [citations omitted]. When a claimant has voluntarily removed himself from the work force, he no longer incurs a loss of earnings because he is no longer in a position to return to work. This logic would apply whether the claimant's abandonment of his position is temporary or permanent.

Ashcraft, 34 Ohio St.3d at 44. This language sets forth the two-part test that is at the core of every abandonment issue. Part one: do the allowed conditions prevent the injured worker from performing the job duties of the former position? Part two: are there any non-injury reasons for claimant's departure from the former position and/or workforce?

When the abandonment is due to the allowed conditions, it is "involuntary" and does not preclude the payment of temporary total. See *State ex rel. Rockwell Interntnl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988), syllabus. The Court stated that in determining whether an abandonment is voluntary or involuntary, the

> proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

Rockwell, 40 Ohio St.3d at 46. Voluntary abandonment issues are "primarily [ones] of intent that may be inferred from words spoken, acts done, and other objective facts … All relevant circumstances existing at the time of the alleged abandonment should be considered." See *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989).

Confusion comes from the different standards for establishing temporary total eligibility from a medical perspective vis-à-vis voluntary abandonment. Medically, the issue is whether the allowed conditions prevent the injured worker form performing the job duties of the former position of employment – the specific job itself is immaterial. See *Ramirez*, 69 Ohio St.2d at 632. However, when it comes to voluntary abandonment, the former position itself is the focus. See *State ex rel. Thomas v. Indus. Comm.*, 42 Ohio St.3d 31 (1989); *State ex rel. McGraw v. Indus. Comm.*, 56 Ohio St.3d 137 (1990); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. In *McCoy*, the Court explicitly stated that the "former position of employment test" (i.e., the job duties of the former position) is not the standard for voluntary abandonment. Rather, voluntary abandonment is based on the need for a causal connection between the allowed condition and the loss of wages. If something other than the allowed conditions precludes the claimant from continuing to work at the former position itself, then voluntary abandonment is applicable. In other words, but for the industrial injury, the claimant would be gainfully employed. See *McCoy*, at ¶ 29-35.

Over the years, courts have struggled to apply this confusing quagmire of their own creation. Yet, despite the chaos, a few clear principles emerged:

1) voluntary abandonment does not apply if the dischargeable offense occurred *before* the work injury. Several courts have held that voluntary abandonment cannot be premised on pre-injury conduct. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 19. See also, *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, ¶ 14; *State ex rel. L-3 Fuzing v. Indus. Comm.*, 10th Dist. No. 10AP-184, 2011-Ohio-4248;

2) voluntary abandonment does not apply when a long latency disease such as mesothelioma, asbestosis or pneumoconiosis causes disability after a voluntary retirement. See *State ex rel. Liposchak v. Indus. Comm.* (1995), 73 Ohio St.3d 194 (mesothelioma); *State ex rel. Vansuch v. Indus. Comm.* (1998), 83 Ohio St.3d 558 (asbestosis); *State ex rel. Reliance Electric Co. v. Wright* (2001), 92 Ohio St.3d 109 (pneumoconiosis); *State ex rel. E.I. DuPont DeNemours & Co. v. Indus. Comm.*, 10th Dist. No. 05AP-944, 2006-Ohio-3913 (asbestosis);

3) voluntary abandonment does not apply if the conduct for which the claimant is terminated was "causally connected" to the injury itself. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 19 (claimant was fired for the conduct that caused his injury - pouring water into a deep fryer); *State ex rel. Feick v. Wesley Community Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986 (termination for negligent driving that resulted in injury); *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758 (termination for causing the accident in which claimant was injured); *State ex rel. Cordell v. Pallet Cos., Inc.*, 149 Ohio St.3d 483, 2016-Ohio-8446 (claimant terminated for failing a post-injury drug test – the rule violation was discovered because of the work injury); and

4) voluntary abandonment does not apply if the claimant was not already disabled due to the injury at the time of the abandonment. In other words, a claimant cannot abandon a job that s/he is already unable to perform due to the industrial injury. See *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996); *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951; *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916; *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499; *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758. This line of cases squarely and unambiguously held that if the injury is the cause of the inability to work, any subsequent event that would prevent the claimant from working (such as termination) is of no consequence and temporary total is payable.

Unfortunately, this fourth clear exception to voluntary abandonment was eliminated by the Supreme Court's recent decision in *State ex rel. Klein v. Precision Excavating & Grading Co.*, ___ Ohio St.3d ___, 2018-Ohio-3890. And so begins a new era of chaos.

The Holding in *Klein*

In *Klein*, the claimant sustained a chest injury on November 5, 2014 and his physician wrote him off work through an estimated January 5, 2015. Prior to the injury, claimant had contemplated moving to Florida for better weather and better job opportunities. Two weeks after his injury, he informed the BWC of his new address in Florida. The Industrial Commission awarded temporary total, but only through November 20, 2014, the date that claimant apparently left Ohio and the former position of employment for Florida. Temporary total was denied after November 20, 2014 because claimant voluntarily quit for reasons unrelated to the allowed conditions, even though he was already disabled by them before moving to Florida for better job opportunities.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court followed the law and granted the writ citing *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), *State ex rel. Omnisource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499. Those cases clearly established a rule of causal connection that if the allowed conditions have already disabled the claimant from the job duties of the former position, subsequent events are irrelevant, even if they would otherwise establish a voluntary abandonment defense.

The employer appealed as of right to the Supreme Court. Alleging "due respect for the principles of stare decisis," the Court reversed, denied the writ, and overruled *Omnisource* and *Reitter Stucco*. Citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, the Court explained that it was refusing to follow its own decisions in *Omnisource* and *Reitter Stucco* because they were wrongly decided, because they defy practical workability, and because no undue hardship will result from them being overruled. The Court purported to base its reasoning on the need for a causal connection between the lost wages and the allowed conditions. According to the Court, even if that connection exists, subsequent voluntary abandonment of the former position for reasons unrelated to the injury breaks the connection and temporary total is not payable thereafter. And that principle is true regardless of whether the abandonment is due to a claimant quitting or being terminated.

Although it overruled *Omnisource* and *Reitter Stucco*, the Court spared other voluntary abandonment cases, such as *State ex rel. Cordell v. Pallet Cos., Inc.*, 149 Ohio St.3d 483, 2016-Ohio-8446, *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, and *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250. Those cases involve situations where the injury and the termination are connected. The Court found those situations distinguishable from Mr. Klein's situation and the facts in *Omnisource* and *Reitter Stucco*, where the claimants quit the former positon for reasons unrelated to the injury.

Commentary and Conclusion

The Court claims to have clarified the law in *Klein*. But in reality, this case will only further convolute the voluntary abandonment quagmire. The Court focused on causal relationship, but if the injury creates disability before a voluntary abandonment, there is already a causal relationship between the injury and the lost wages. That was precisely the point of *Pretty Prods.*, *Omnisource*, and *Reitter Stucco*: you cannot abandon a job from which you are already disabled by the work injury. Thus, the Court relied on causal relationship to overrule cases that properly applied that very principle.

The claimant in *Klein* was unable to work because of a chest injury. The fact that he moved to Florida did not cure his chest injury. Moreover, the claimant's moved to Florida, at least in part, due to better job opportunities there. Thus, there was no abandonment of the entire workforce. Apparently, anything that a claimant does to remove herself from the former position, even if she is already disabled by an industrial injury, can result in voluntary abandonment if the claimant's action is unrelated to her injury. From a policy perspective, this decision is dangerous because it clearly gives employers an incentive to fire injured workers.

In the wake of *Klein*, it is hard to know how to advise clients on the applicability of voluntary abandonment. However, several points can be made:

1) pre-injury conduct still cannot give rise to voluntary abandonment – *Klein* did not abrogate this exception. Indeed, the facts in *Klein*, as well as in the cases it overruled (*Omnisource* and *Reitter*

Stucco), involved situations where the actions that gave rise to the abandonment occurred after the injury;

2) disability caused by long latency occupational diseases such as asbestosis, mesothelioma, and pneumoconiosis remains beyond the reach of voluntary abandonment;

3) a causal connection between the injury and separation from the former position will preclude voluntary abandonment (as in *Gross II* where the behavior that causes the injury also constitutes a work rule violation that results in termination, or as in *Cordell* where the injury results in the discovery of the rule violation). But great care must be taken when advising clients who want to leave the former position while eligible for or actually receiving temporary total. Unless the client demonstrates that his intent to leave the former position is motivated by the work injury, then *Klein* will likely operate to terminate temporary total.

Ohio workers' compensation is a statutory creation. R.C. 4123.95 sets forth clear-cut legislative intent that the laws be applied liberally in favor of injured workers and their dependents. Conservative jurists constantly crow about respect for the separation of powers. Never legislate from the bench, they say. Always show respect for *stare decisis* and the intent of the legislature, they say. But in voluntary abandonment, we see the brazen violation of each of these tenants. What the conservative justices of the Ohio Supreme Court say regarding these matters differs quite radically from what they do. Clarity of and respect for precedent have been abandoned when it comes to voluntary abandonment.