[Cite as *State ex rel. Todd v. Indus. Comm.*, 2003-Ohio-2731.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sharyl A. Todd,	:	
Relator,	:	
v.	:	No. 02AP-993
Industrial Commission of Ohio and The Timken Company,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on May 29, 2003

Thomas J. Marchese, for relator.

Jim Petro, Attorney General, and *Thomas L. Reitz,* for respondent Industrial Commission of Ohio.

Day, Ketterer, Raley, Wright & Rybolt, LTD., and *Stephen E. Matasich,* for respondent The Timken Company.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Sharyl A. Todd, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order terminating compensation for temporary total disability as of August 22, 2001, on grounds

that her departure from employment on that date was voluntary, and to issue an order continuing temporary total disability compensation to January 10, 2002.

{¶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. (Attached as Appendix A.) In her decision, the magistrate concluded (1) the commission did not abuse its discretion in finding that relator's termination of employment on August 22, 2001 constituted a voluntary departure from employment with respondent, the Timken Company, and (2) the commission in its 2002 hearings was not barred by the doctrine of res judicata from addressing whether claimant's departure from employment on August 22, 2001 was voluntary in nature. Accordingly, the magistrate determined the requested writ should be denied.

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

{¶4} "Objection No. 1

{¶5} "The Magistrate erred by not referring this case to the Industrial Commission to address whether Respondent's [sic] discharge was causally related to the industrial injury and that the rule violation was a pretext pursuant to *State ex rel. Walters v. Indus. Comm.* (February 13, 2002), Franklin App. No. 01AP-1043 (Magistrate's Decision), adopted (June 25, 2002), 2002-Ohio-3236, appeal dismissed (Dec.3, 2002), S. Ct. No. 2002-1381.

{¶6} "Objection No. 2

{¶7} "The Magistrate erred by not granting a writ of mandamus finding the proper date of termination of temporary total benefits to be the date of the DHO hearing, thereby avoiding an overpayment per *State ex rel. Russell v. Indus. Comm.* (1998), 83 Ohio St.3d 516 [sic].

{¶8} "Objection No. 3

{¶9} "The Magistrate's decision errs by concluding that the issue of voluntary abandonment was not barred by the doctrine of res judicata."

{¶10} Relator's first objection contends the magistrate improperly failed to refer this matter back to the Industrial Commission to address whether relator's discharge was voluntary and whether the employer's rule violation was a pretext pursuant to *State ex rel.*

Walters v. Indus. Comm., Franklin App. No. 01AP-1043, 2002-Ohio-3236. The facts of this case are remarkably similar to *Walters*, and in *Walters* this court considered the very issue relator's complaint raises.

{¶11} The claimant in *Walters* falsified his application by indicating he had no criminal background. The application stated that false information would result in termination. Subsequent to his industrial injury, an investigation was conducted that led the employer to terminate the claimant for violation of a work rule. In the claimant's mandamus action in this court, we applied the rule of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401 to claimant's pre-employment falsification of his application and concluded that, in the absence of a pretextual firing, claimant had voluntarily abandoned his employment when he was terminated for falsifying his application for employment.

{¶12} This court, in *Walters,* noted the potential inequities of terminating an employee for violation of a work rule that does not relate to employment performance and is enforced only after an industrial injury occurs. As a result, this court determined that because the claimant had argued and presented evidence that the employer's termination was a pretextual attempt to avoid an industrial claim, the matter must be returned to the Industrial Commission to consider and determine the claimant's contentions.

{¶13} Like the claimant in *Walters,* relator here was determined in the commission proceedings to have falsified her employment application. As in *Walters,* no evidence indicated relator's falsification was relevant to relator's actual employment duties. Like the employer in *Walters,* the employer here took no action until an industrial claim arose. Accordingly, consistent with this court's decision in *Walters,* we conclude that relator's violation of a work rule through falsification of her employment application properly may result in her termination and a finding of voluntary abandonment of employment as of the date of her termination.

{¶14} Unlike *Walters,* however, relator did not argue or present evidence that the employer here terminated her as a pretext for avoiding an industrial claim. Arguably, the evidence here may be interpreted to suggest pretext, as relator's employer did not terminate relator until the administrative proceedings in the commission resulted in an

award. Nonetheless, relator did not argue the issue of pretext before the commission, and we are hard pressed to find an abuse of discretion in the commission's not considering an argument never presented to it. Accordingly, relator's first objection is overruled.

{¶15} Relator's second objection contends the magistrate erred in not granting a writ to correct the date of termination of temporary total benefits. The magistrate did not address the issue at all in this case, but *Walters* noted that, if a finding of voluntary abandonment is proper, then the issue becomes whether temporary total disability compensation should be terminated retrospectively on a date prior to the district hearing officer's hearing or, under the reasoning articulated in *State ex rel. Russell v. Indus. Comm.* (1998), 82 Ohio St.3d 516, as of the date of the district hearing officer's hearing.

{¶16} In resolving that issue in *Walters*, the court, through its magistrate noted, "The decision in *Russell* applies to disputed terminations of [temporary total disability] that are unresolved until findings of fact are made by the commission on consideration of the competing evidence. The magistrate concludes that the reasoning in *Russell* applies to the present facts and that the commission abused its discretion in ordering a retrospective termination of [temporary total disability]." *Walters* at ¶41.

{¶17} Relator's employer contends *Russell* does not apply to the facts presented here. Having followed *Walters* in determining the voluntary abandonment of employment issue, we likewise follow it in determining the appropriate date for termination of temporary total disability compensation. Consistent with *Walters,* the temporary total disability compensation benefits should be terminated as of the date of the district hearing officer's hearing, January 10, 2002. Relator's second objection is sustained.

{¶18} Relator's third objection contends the issue of voluntary abandonment is precluded by the doctrine of res judicata. For the reasons set forth in the magistrate's decision, relator's contentions are unpersuasive. Relator's third objection is overruled.

{¶19} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it, with the additional conclusion that temporary total disability benefits should be terminated as of the date of the district hearing officer's

hearing on January 10, 2002. Consistent with the magistrate's decision, as amplified here, we deny the requested writ with respect to the issue of voluntary abandonment of employment, but we grant the writ to the extent of ordering the commission to terminate compensation as of January 10, 2002, not August 22, 2001.

Objections sustained in part and overruled in part; writ granted in part and denied in part.

PETREE, P.J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶20} I respectfully dissent.

{¶21} The concept of voluntary abandonment of employment may have some reasonable application in situations where a person who was injured on the job chooses to quit working for reasons unrelated to the injury. In that situation, the decision to quit working cuts off whatever causal link exists between the injury and loss of income, making temporary total disability ("TTD") compensation inappropriate.

{¶22} I can also see some justification for firing a person who has used drugs of abuse inappropriately and thereby endangered herself/himself and the person's coworkers. Although the person has not literally "voluntarily abandoned" employment, the additional penalty of the loss of TTD compensation can serve to deter the person from being a threat to herself/himself and others.

{¶23} I do not see a justification for extending the concept of voluntary abandonment of employment beyond those two narrow situations. I find the doctrine particularly inappropriate in Sharyl Todd's case. Sharyl hurt her right shoulder in 1998. When she filled out her employment application for The Timken Company in 2000, she did not list the injury. She injured her *left* shoulder in January 2001. In August 2001, The Timken Company fired her and then argued that she had voluntarily abandoned her employment by giving an incomplete answer on a form she filled out before she was employed.

{¶24} I am concerned about the logical absurdity presented by claiming a person has voluntarily abandoned a job she does not yet have, especially under the facts of this case. A worker who has been injured on another job, rehabilitates herself, and goes looking for good employment. She finds a good job, but then gets injured in a different part of her body. The employer, more concerned about its financial bottom line than about treating its employee fairly, fires her. The Industrial Commission of Ohio calls the firing a "voluntary abandonment of employment" and cuts off her income.

{¶25} I fear that we as courts sometimes lose sight of the fact that TTD compensation is the sole livelihood for some people who are hurt on the job. When we apply theories like "voluntary abandonment of employment" we take away the ability of an injured person to pay for the basic necessities of life. We make families go hungry. We make families homeless. We disrupt the lives of children whose parents lose self-respect because they can no longer be breadwinners, at least for awhile. Because of the devastating effect of taking away a family's livelihood we (and the commission) should be slow to take away disability payments for nothing more than checking the wrong box in a form or giving an incomplete answer to a question which has no relationship to the injury which took away the employee's ability to work.

{¶26} I cannot sanction in good conscience what the majority of the panel sanctions by failing to grant greater relief. I strongly hope the Ohio Supreme Court will examine the whole doctrine of voluntary abandonment of employment and limit its application to these few situations where its application makes some rational sense.

{¶27} Again, I respectfully dissent.

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APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Sharyl A. Todd,	:	
Relator,	:	
v.	:	No. 02AP-993
Industrial Commission of Ohio and The Timken Company,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on February 21, 2003

Thomas J. Marchese, for relator.

Jim Petro, Attorney General, and *Thomas L. Reitz*, for respondent Industrial Commission of Ohio.

Day, Ketterer, Raley, Wright & Rybolt, LTD., and *Stephen E. Matasich*, for respondent The Timken Company.

IN MANDAMUS

{¶28} In this original action in mandamus, relator, Sharyl A. Todd, asks the court to issue a writ compelling respondent Industrial Commission of Ohio ("commission"), to vacate its order terminating compensation for temporary total disability ("TTD") as of

August 22, 2001, on grounds that her departure from employment on that date was voluntary, and to issue an order continuing TTD to January 10, 2002.

Findings of Fact

{¶29} 1. In 1998, Sharyl A. Todd ("claimant") sustained industrial injuries to her right shoulder. She filed a workers' compensation claim, which was allowed for a sprained right shoulder/arm and a torn right rotator cuff. Claimant had surgery for the shoulder injuries sustained in the 1998 claim.

{¶30} 2. On June 22, 2000, claimant applied for a job with the Timken Company ("Timken"). When asked on one of the pre-employment medical forms whether she had ever had "shoulder problems," claimant answered "No." Claimant signed the form, including the acknowledgement that falsification of any information would be grounds for termination of employment.

{¶31} 3. Timken offered claimant a labor position involving substantial use of her arms and shoulders, including lifting and carrying products, setting up machinery, and operating machinery. Claimant accepted the position.

{¶32} 4. In January 2001, claimant filed a workers' compensation claim stating that she hurt her left shoulder at Timken on December 22, 2000.

{¶33} 5. In May 2001, a district hearing officer ("DHO") allowed the claim for a torn left rotator cuff and impingement syndrome. In addition, the DHO awarded TTD compensation from January 17, 2001 through January 30, 2001, and from February 1, 2001 through March 7, 2001, and to continue upon submission of sufficient evidence. In the order, the DHO noted that claimant had a prior tear of the right rotator cuff.

{¶34} 6. In June 2001, a staff hearing officer ("SHO") affirmed, and further appeal was refused in July 2001.

{¶35} 7. On August 22, 2001, Timken terminated claimant's employment due to falsification of information on her medical form.

{¶36} 8. Timken subsequently filed a motion seeking termination of TTD.

{¶37} 9. On January 10, 2002, a DHO held a hearing and terminated TTD as of the date of the hearing based on maximum medical improvement ("MMI").

{¶38} 10. In February 2002, an SHO affirmed the finding as to MMI but also found that claimant voluntarily terminated her employment in August 2001:

{¶39} "The Staff Hearing Officer affirms the finding that the allowed conditions of the claim have reached maximum medical improvement, based on the 11/12/2001 report from Dr. Reichart so indicating. As such, the District Hearing Officer properly terminated temporary total compensation as of the 1/10/2002 hearing date on the basis of maximum medical improvement.

{¶40} "The Staff Hearing Officer grants the employer's request to find that the claimant be deemed to have voluntarily abandoned her former position of employment effective 8/22/2001, the date of her termination for violation of a written work rule. Specifically, the evidence on file indicates that the employer terminated the claimant for false information on her employment application. The application form included a question in the Medical History section thereof regarding, in part, any past shoulder problems; the claimant checked the box 'no' in response. In fact, claimant had had prior right shoulder problems resulting in surgery. The application form, immediately above the claimant's acknowledgement signature, clearly states in writing that false information supplied in the Medical History portion of the application would be grounds for discharge.

{¶41} "As such, the Staff Hearing Officer finds that the employer has satisfied the requirements of the [*State ex rel.*] Louisiana-Pacific [*Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401] case to show a violation of a written work rule with the claimant's knowledge that such violation could result in termination. Accordingly, the Staff Hearing Officer finds that the claimant voluntarily abandoned her former position of employment as of 8/22/2001, the date of her termination due to violation of a written work rule. As such, the claimant was not entitled to temporary total compensation after 8/22/2001, and the Staff Hearing Officer declares such benefits awarded for periods after that date overpaid and subject to collection pursuant to the provisions of O.R.C. 4123.511(J)."

{¶42} 11. Further appeal was denied.

Conclusions of Law

{¶43} In this original action, claimant raises two issues: (1) that the commission abused its discretion in finding that her termination of employment on August 22, 2001,

constituted a voluntary departure from Timken's employment; and (2) that the commission, in the 2002 hearings, was barred by the doctrine of res judicata from addressing the issue of whether claimant's departure from employment on August 22, 2001, was voluntary in nature.

{¶44} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, the Ohio Supreme Court ruled that a discharge can constitute a voluntary departure from employment where the worker has violated a written work rule and where the work rule or policy: (1) clearly defined the prohibited conduct; (2) identified the violation as a dischargeable offense; and (3) was known to the worker or should have been known to him. Id.; see, also, *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5 (reaffirming that a claimant's conduct is not "voluntary" when causally related to the industrial injury).

{¶45} Where a worker has voluntarily left his job—whether due to a resignation or a *Louisiana-Pacific* discharge—the worker ordinarily is not eligible for TTD compensation following the discharge because the loss of wages is the result of his own choice, not the result of the industrial injury. However, where the worker has taken a new job following a voluntary resignation or discharge, he may subsequently receive TTD compensation where the allowed conditions cause a new period of TTD and a loss of wages due to inability to perform the new job. See *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376; *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305.

{¶46} The fundamental rationale of *Louisiana-Pacific* and related decisions is that a worker will be held to accept the consequences of his or her own actions when the consequences were known ahead of time (or should have been), and where the worker's conduct was not caused by the industrial injury. The commission's task is to determine whether the evidence shows voluntary conduct. *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, 411 (stating that the commission must consider the underlying facts and circumstances of each case to determine whether the discharge may be deemed a voluntary departure for TTD purposes).

{¶47} The important question before the commission is not whether the conduct causing the discharge occurred before or after the industrial injury. Rather, the crucial question for the commission is the causation of the loss of wages—whether the loss of wages resulted from claimant's exercise of free choice or was caused by the allowed conditions. E.g., *State ex rel. Walters v. Indus. Comm.* (Feb. 13, 2002), Franklin App. No. 01AP-1043 (Magistrate's Decision), adopted (June 25, 2002), 2002-Ohio-3236, appeal dismissed (Dec. 3, 2002), S.Ct. No. 2002-1381; *State ex rel. Brandgard v. Indus. Comm.* (Sept. 29, 2000), Franklin App. No. 00AP-518 (Magistrate's Decision), adopted (Jan. 11, 2001), affirmed sub. nom. *McCoy*, supra.

{¶48} In the present action, the commission in its role as the finder of fact essentially found that the claimant had voluntarily falsified her employment application, knowing the information was false and knowing that she could lose her wages at Timken as a result. The evidence cited by the commission—the clear warning on the form and the falsity of the information—constituted "some evidence" to support the commission's finding. The commission's decision regarding voluntary termination of employment was, therefore, within its discretion.

{¶49} The second issue raised by claimant involves the preclusive effect of the orders in which the commission awarded TTD until March 7, 2001—that is, the DHO order of May 2001 and the SHO order of June 2001, which became final in July 2001. It is settled that the principles of res judicata generally apply in administrative proceedings before the commission. E.g., *State ex rel. Crisp v. Indus. Comm.* (1992), 64 Ohio St.3d 507. In *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, the Ohio Supreme Court observed that the doctrine of res judicata precludes the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon in lawful proceedings. The court explained that, in order for the doctrine of res judicata to apply, the issue under consideration must have been "conclusively decided" in the earlier proceeding.

{¶50} Here, in the proceedings from May 2001 to July 2001, the commission conclusively decided that TTD compensation was awarded to March 7, 2001. Therefore, the award of TTD to March 7, 2001, was res judicata and the parties could not relitigate it.

However, the commission did not conclusively decide or even consider the issue of voluntary termination of employment under the principles of *Louisiana-Pacific.* Indeed, in the evidentiary hearings in May and June 2001, Timken could not have raised the issue because it had not yet discharged claimant.

{¶51} Because the employer did not discharge claimant until August 22, 2001, it could not have argued in the hearings of May and June 2001 that the discharge constituted a voluntary departure from employment, nor could the commission have decided the issue in those hearings. Therefore, when Timken subsequently raised the issue, the question of TTD compensation after the date of discharge was not barred.

{¶52} Claimant raises no other issues, and the magistrate concludes that claimant has not met her burden of proving in mandamus that the commission abused its discretion in finding that her termination of employment constituted a voluntary departure from Timken. The magistrate therefore recommends that the court deny the requested writ of mandamus.

/S/ P.A. Davidson
P. A. DAVIDSON
MAGISTRATE