[Cite as *State ex rel. Gross v. Indus. Comm.*, 2005-Ohio-3936.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. David M. Gross,	:	
Relator,	:	
v.	:	No. 04AP-756
The Industrial Commission of Ohio, and Food, Folks & Fun, Inc., dba KFC,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on August 2, 2005

Hochman & Roach Co., L.P.A., Gary D. Plunkett and *Brett Bissonnette*, for relator.

Jim Petro, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Scheuer, Mackin & Breslin, Edna Scheuer and *Megan K. Roach*, for respondent Food Folks & Fun., Inc.

ON OBJECTIONS TO THE MAGISTRATE'S DECISION
IN MANDAMUS

FRENCH, J.

{¶1} Relator, David M. Gross, 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 terminated relator's temporary total disability ("TTD") compensation on the grounds that he had voluntarily abandoned his employment with respondent, Food, Folks & Fun, Inc., dba KFC ("employer"), when he violated a written work rule.

{¶2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, including findings of fact and conclusions of law, recommending that this court deny relator's request for a writ of mandamus. (Attached as Appendix A.) Relator filed objections to the magistrate's decision, raising the following as error:

> OBJECTIONS NUMBER 1. THE MAGISTRATE ERRED IN CONCLUDING THAT THE "VOLUNTARY ABANDONMENT" DOCTRINE FOUND IN [*State ex rel.*] *LOUISIANA-PACIFIC* [*Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401] WAS APPLICABLE WHEN THERE WAS NOT A "CLEARLY WRITTEN EMPLOYMENT POLICY" THAT IDENTIFIED A DISCHARGEABLE OFFENSE.
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> OBJECTION NUMBER 2. THE MAGISTRATE ERRED WHEN SHE CONCLUDED THAT RELATOR "VOLUNTARILY ABANDONED" HIS EMPLOYMENT WHEN THE DATE OF HIS TERMINATION OCCURRED DURING A TIME HE WAS TOTALLY DISABLED AS A RESULT OF HIS INDUSTRIAL INJURY.
>
> OBJECTION NUMBER 3. THE MAGISTRATE ERRED WHEN SHE DETERMINED THAT RELATOR "VOLUNTARILY ABANDONED" HIS EMPLOYMENT BASED UPON A "VIOLATION OF A COMPANY POLICY" THAT WAS CONNECTED WITH HIS WORKPLACE INJURY.

> OBJECTION NUMBER 4. THE MAGISTRATE ERRED WHEN SHE DETERMINED THAT *LOUISIANA-PACIFIC* COULD BE APPLIED TO CONDUCT THAT OCCURRED PRIOR TO THE INDUSTRIAL INJURY.
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> OBJECTIONS NUMBER 5. THE MAGISTRATE ERRED WHEN SHE FAILED TO CONCLUDE THAT THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION WHEN IT DETERMINED THAT *LOUISIANA-PACIFIC* ALLOWS AN EMPLOYER TO CIRCUMVENT THE PROVISIONS OF THE WORKERS COMPENSATION LAW BY ENTERING INTO A PRIVATE "CONTRACT" WITH ITS EMPLOYEES.

{¶3} The magistrate made detailed findings of fact, and we adopt those findings as our own. In brief, relator sustained severe burns while cleaning a fryer in the course of his employment, and his claim for the injury was allowed. The employer subsequently terminated relator's employment and then moved to terminate relator's TTD compensation on the grounds that relator voluntarily abandoned his employment when he violated the employer's written work rules.

{¶4} In her conclusions of law, the magistrate correctly set out the standards by which we must decide whether to issue a writ in this case, and we also adopt those conclusions as our own.

{¶5} All five of relator's objections ask us to review the magistrate's legal interpretation and application of *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, at least in some respect. We address relator's third objection first and, for the reasons that follow, we sustain that objection.

{¶6} It is well-established that a discharge from employment may be "voluntary" in some circumstances. *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118. In *Louisiana-Pacific*, the Ohio Supreme Court stated that, when a

worker has been discharged for violating a rule, the commission may conclude that the discharge constituted a voluntary relinquishment of employment where: (1) the employer's rule or policy defined the prohibited conduct clearly in writing; (2) the rule or policy identified the violation as a dischargeable offense; and (3) the worker knew, or should have known, both the rule and the consequences of violating the rule or policy.

{¶7} Where a claimant has voluntarily relinquished his or her job, either by resigning or by abandoning it under *Louisiana-Pacific*, the claimant is deemed to have accepted the consequence of being without wages for a period of time and is not eligible to receive TTD compensation. See, e.g., *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559.

{¶8} The Ohio Supreme Court has explained, however, that, where the conduct is causally related to the injury, the termination of employment is not voluntary. *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 7. Rather, "the underlying facts and circumstances of each case determine whether a departure by firing may be voluntary or involuntary." Id. This court has, in many cases, reaffirmed the Supreme Court's holding in *Pretty Products* and has considered (or required the commission to consider) whether a particular termination was voluntary. See, e.g., *State ex rel. Griffin v. Ken Greco Co., Inc.*, Franklin App. No. 03AP-937, 2004-Ohio-5262 (remanding to consider causal connection between allowable condition and abandonment); *State ex rel. Transco Railway Products, Inc. v. Brown*, Franklin App. No. 03AP-213, 2003-Ohio-7037 (remanding for further explanation of voluntariness); *State ex rel. NIFCO, LLC v. Woods*, Franklin App. No. 02AP-1095, 2003-Ohio-6468 (denying writ where discharge causally related to injury was not voluntary); *State ex rel. Walters*

v. Indus. Comm., Franklin App. No. 01AP-1043, 2002-Ohio-3236 (remanding to consider whether discharge was causally related to injury and/or the rule violation was pretext).

{¶9} The Supreme Court has cautioned that "a postinjury firing must be carefully scrutinized." *McKnabb* at 562. Cf. *State ex rel. Daniels v. Indus. Comm.*, 99 Ohio St.3d 282, 2003-Ohio-3626. The court also has emphasized the "great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation. We therefore find it imperative to carefully examine the totality of the circumstances when such a situation exists." *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, 411.

{¶10} The relevant circumstances of this case are not in dispute. In a letter dated February 13, 2004, the employer advised relator that it had "completed [its] investigation into the accident that occurred on November 26, 2003[.]" The letter recounted the eyewitness testimony and other evidence showing that relator had failed to follow express instructions not to put water into the gas pressure fryer for cleaning, and that relator put water in the fryer, closed the lid, and heated it. This failure to heed all warnings "resulted in causing injuries to yourself and two fellow employees." The letter also stated:

> As you know from our Employee Handbook, for which you signed an acknowledgment of receipt on August 29, 2003, Food, Folks & Fun, Inc., cannot and will not tolerate employees who pose a danger to themselves and others based upon their refusal or failure to follow instructions and recognized safety procedures. Also, Page 32 of the Handbook (the Safety section) states that you are to "follow all warnings and instructions about the safe operation of all equipment. **Never** **boil** water in a cooker to clean it." Additionally, on page 35 of the Handbook, the critical

> violations [section] states that you can be immediately terminated for "violating F.F.F. health, security or safety guidelines that cause or could cause illness or injury to anyone." * * *
>
> Pursuant to those sections of the Handbook, and our investigation, your employment at Food, Folks & Fun, Inc. is hereby terminated effective February 13, 2004.

(Emphasis sic.)

{¶11} From this termination letter, we can only conclude that relator's termination was causally related to his injury. The letter states expressly that the employer's actions arose from "the accident" that caused relator's injury. The letter also states expressly that the employer is firing relator for his actions *because they caused injury*. In this respect, we look to *Pretty Products*, where the court stated:

> A third possible interpretation of the commission's order is that the commission found that claimant had been fired because of her industrial injury. If that indeed was the case, a finding of involuntary departure could be sustained. * * *

Pretty Products at 8. Given the causal relation between relator's injury and his termination, pursuant to *Pretty Products*, relator's termination was not "voluntary."

{¶12} We acknowledge respondents' arguments that an employer should be able to hold employees accountable for their actions, particularly where those actions pose a danger. In response, we note the Supreme Court's admonition in a case involving an injured employee's termination for violating the employer's absenteeism policy, *Coolidge v. Riverdale Local School Dist.*, 100 Ohio St.3d 141, 2003-Ohio-5357, at ¶45:

> * * * By virtue of sustaining a work-connected injury, the workers' compensation claimant enters a system "in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations." *Holeton v. Crouse*

> *Cartage Co.* (2001), 92 Ohio St.3d 115, 119, 2001 Ohio 109, 748 N.E.2d 1111. This system redefines the employment relationship with respect to injury-induced or disability-related discharges. Under this system, the workers' compensation claimant is entitled to whatever protection is accorded injured workers by the provisions and policies of the Workers' Compensation Act, regardless of whether comparable protections are provided to employees by other bodies of law. However "neutral" or "evenhanded" an employer's absenteeism policy may be, it cannot override the statutory protections.

{¶13} So, too, here, the employer's employee handbook cannot override the statutory protections afforded to relator. Those protections afford him TTD following his "involuntary" termination.

{¶14} For these reasons, we sustain relator's third objection to the magistrate's decision and find that the commission abused its discretion when it determined that relator had voluntarily abandoned his employment. To the extent that our decision on the third objection does not respond to relator's other objections, our decision renders those remaining objections moot. On these grounds, we grant relator's request to issue a writ of mandamus ordering respondent commission to vacate its order terminating relator's TTD compensation.

Objections sustained in part,
writ of mandamus granted.

BROWN, P.J., and BRYANT, J., concur.

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A P P E N D I X A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. David M. Gross,	:	
Relator,	:	
v.	:	No. 04AP-756
The Industrial Commission of Ohio and Food, Folks & Fun, Inc.,	:	(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 16, 2005

Hochman, Roach & Plunkett Co., L.P.A., *Gary D. Plunkett* and *Brett Bissonnette*, for relator.

Jim Petro, Attorney General, and *Andrew J. Alatis*, for respondent Industrial Commission of Ohio.

Scheuer, Mackin & Breslin, *Edna Scheuer* and *Megan K. Roach*, for respondent Food, Folks & Fun, Inc.

IN MANDAMUS

{¶15} Relator, David M. Gross, 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 terminated relator's temporary total disability

("TTD") compensation on the grounds that he had voluntarily abandoned his employment with respondent Food, Folks & Fun, Inc., dba KFC ("employer"), when he sustained his injuries by violating a written work rule.

Findings of Fact:

{¶16} 1. Relator sustained a work-related injury on November 26, 2003, and his claim has been allowed for:

> Right second degree burn abdominal wall; right second degree burn back; right second degree burn thigh; right second degree burn back; right second degree burn forearm; right ten to nineteen percent, third degree body burn.

{¶17} 2. After investigating the circumstances surrounding relator's injuries, the employer terminated relator's employment on February 13, 2004. The employer explained relator's termination as follows:

> * * * Eye witnesses to this event have confirmed that you refused to follow expressed instructions. You were to never put water into the 690 Henny-Penny gas pressure fryer for cleaning or performing a "boil out". You were warned one time previous to the accident * * *. Also, on the night of the accident, you were instructed, by your Supervisor, to drain the water from the fryer. Even after these warnings by your supervisors, you choose to leave the water in the fryer, close the lid, and heat the fryer. Additionally, a co-worker then warned you not to open the lid. For reasons only known to you, you choose to ignore all warnings which resulted in causing injuries to yourself and two fellow employees.
>
> * * *
>
> As you know from our Employee Handbook, for which you signed an acknowledgment of receipt on August 29, 2003, Food, Folks & Fun, Inc., cannot and will not tolerate employees who pose a danger to themselves and others based upon their refusal or failure to follow instructions and recognized safety procedures. Also, Page 32 of the Handbook (the Safety section) states that you are to "follow all warnings and instructions about the safe operation of all

> equipment. Never boil water in a cooker to clean it". Additionally, on page 35 of the Handbook, the critical violations sections states that you can be immediately terminated for "violating F.F.F. health, security or safety guidelines that cause or could cause illness or injury to anyone." * * *

(Emphasis sic.)

{¶18} 3. Pursuant to an investigation by the Occupational Safety and Health Administration, the employer was cited for two violations:

> Citation 1 Item 1 Type of Violation: Serious
>
> 29CFR 1910.132(a): Personal protective equipment, including protective equipment for eyes, face, head, extremities, and protective clothing was not provided and used where necessary by reason of hazards of processes or environment encountered in a manner capable of causing injury:
>
> (a) On November 26, 2003, kitchen employees cleaning and working around the Henny Penny Gas Pressure Fryer, were not provided with, nor required to wear, all the appropriate personal protective equipment (PPE), such as gloves, aprons, and goggles, thereby exposing them to hot water spraying out of the pressure fryer.
>
> Citation 1 Item 2 Type of Violation: Serious
>
> 29CFR 1910.132(f)(1): The employer had not trained each employee who was required to use personal protective equipment (PPE) on:
>
> a. when PPE was necessary;
> b. what PPE was necessary;
> c. how to properly use the PPE;
> d. the limitations of the PPE; and,
> e. the proper care, useful life, and disposal of PPE.
>
> (a) On November 26, 2003, some of the employees cleaning and working around the Henny Penny Gas Pressure Fryer, had not been provided with adequate training on what personal protective equipment (PPE) to wear, and when and how to wear it, when cleaning the fryers.

{¶19} 4. The employer signed a settlement and stipulation agreement before the United States of American Occupational Safety and Health Review Commission regarding violation No. 2, that its employees had not been trained properly with regard to what personal protective equipment to wear, and when and how to wear it when cleaning the Henny Penny Gas Pressure Fryer.

{¶20} 5. It is undisputed that relator was 16 years old at the time of his injury and that he had been working for the employer for less than three months.

{¶21} 6. The employer filed a motion to terminate relator's TTD compensation on March 2, 2004. The grounds for the motion were that relator had voluntarily abandoned his employment with the employer when he boiled water in the fryer and caused his injuries.

{¶22} 7. The matter was heard before a district hearing officer ("DHO") on April 12, 2004, and resulted in an order denying the employer's motion. The DHO concluded that there was no evidence that relator had voluntarily injured himself. Furthermore, the DHO noted that relator had testified that his injury occurred because he was cleaning the pressure cooker in a manner in which he had been previously trained by other employees to whom the employer had entrusted the training even though this contradicted the written instructions submitted by the employer in support of its argument.

{¶23} 8. The employer appealed and the matter was heard before a staff hearing officer ("SHO") and resulted in an order vacating the prior DHO order. The SHO concluded that the employer had demonstrated that the test from *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, had been met as the employer had established that the termination was generated by relator's violation of a written work

rule which clearly defined the prohibited conduct, had been previously identified by the employer as a dischargeable offense, and was known or should have been known to relator. The SHO noted that relator had been provided with a copy of the employee handbook, and accepted the testimony regarding the incident and the subsequent investigation conducted by the employer. Specifically, evidence was presented that relator had been told, on more than one occasion, not to boil water in the fryer, that relator had been instructed to drain water out of the fryer after putting it in there before, and lastly, on the day of the accident, after he had boiled water in the fryer, a fellow employee told him not to open it. Furthermore, the SHO did not find relator's testimony to be persuasive as relator had not filed or proffered any evidence to support his argument that he had been instructed to violate the employer's safety procedures when cleaning a fryer. The SHO found that the greater weight of the evidence established that relator violated company safety requirements, resulted in his termination, and found that his TTD compensation should be terminated as of the employer's letter dated February 13, 2004.

{¶24} 9. Relator's further appeal was refused by order of the commission mailed July 1, 2004.

{¶25} 10. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶26} 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.

{¶27} TTD compensation awarded pursuant to R.C. 4123.56 has always been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630. Where an employee's own actions, for reasons unrelated to the injury, preclude him or her from returning to his or her former position of employment, he or she is not entitled to TTD benefits, since it is the employee's own action rather than the injury that precludes return to the former position. *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145. When determining whether an injury qualifies for TTD compensation, the court utilizes a two-part test. The first part of the test focuses on the disabling aspects of the injury. The second part of the test determines if there are any factors, other than the injury, which would prevent the claimant from returning to his or her former position of employment. See *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42. However, only a voluntary abandonment precludes the payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44. As such, voluntary abandonment of the former position of employment can, in some instances, bar eligibility for TTD compensation.

{¶28} A firing can constitute a voluntary abandonment of the former position of employment when the firing is a consequence of behavior which claimant willingly undertook. See *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118. The rationale for this is that a person is deemed to tacitly accept the consequences of their voluntary acts.

{¶29} In *Louisiana-Pacific*, the Supreme Court of Ohio held that a claimant's violation of a written work rule or policy will be considered tantamount to a voluntary abandonment of employment when the rule or policy (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 by the employee.

{¶30} In the present case, the employer presented evidence that the work rules were in a written form and that relator had actually received a copy of those rules. The written policy provided that employees were not to clean the fryer by boiling water inside the fryer. It is undisputed that relator received a copy of the handbook and that his injuries were sustained when he cleaned the fryer by boiling water in it. The SHO also accepted, as credible, the evidence showing that relator had been told, on several occasions, not to boil water in the fryer. Further, a warning label was affixed to the fryer as well. *Lousiana-Pacific* provides that where an employee has been given a handbook which clearly identifies the prohibited conduct and indicates that such conduct constitutes a dischargeable offense, the violation by the employee and subsequent discharge of the employee bars the receipt of TTD compensation. The logic from cases like *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, applies. The worker comes to work under the influence of drugs where such conduct is listed in a

handbook as prohibited and that such conduct constitutes a dischargeable offense. The worker sustains injuries and later tests positive for drugs. The worker is thereafter discharged. The worker's medical bills will be paid, however, the worker is not entitled to TTD compensation. The rationale is that it is the termination from employment which causes the wage loss and not the industrial injury.

{¶31} Based on the foregoing, the magistrate finds that relator has not demonstrated that the commission abused it discretion and this court should deny relator's request for a writ of mandamus.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE