

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John P. Clevenger,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-828
	:	
Ohio Staff Leasing, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on June 25, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Taft, Stettinius & Hollister L.L.P., and Nicholas E. Davis, Jr., for respondent Ohio Staff Leasing, Inc.

Richard Cordray, Attorney General, and *Kevin J. Reis*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

BROWN, J.

{¶1} Relator, John P. Clevenger, has filed an original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio, to vacate its order denying relator temporary total disability ("TTD") compensation after

finding he had voluntarily abandoned his employment with respondent, Ohio Staff Leasing, Inc.

{¶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. On March 16, 2009, the magistrate issued a decision, including findings of fact and conclusions of law, which is appended to this decision, and recommended that this court order the commission to award relator TTD compensation beginning October 8, 2007 through February 15, 2008. No objections have been filed to that decision.

{¶3} Based upon an examination of the magistrate's decision and an independent review of the evidence, and finding no error of law or other defect on the face of the magistrate's decision, this court adopts the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's recommendation, relator's request for a writ of mandamus is hereby granted, and the commission is ordered to vacate its order denying relator TTD compensation, and to enter a new order awarding said compensation for the period beginning October 8, 2007 through February 15, 2008.

Writ granted.

BRYANT and TYACK, JJ., concur.

APPENDED

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. John P. Clevenger,	:	
Relator,	:	
v.	:	No. 08AP-828
Ohio Staff Leasing, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on March 16, 2009

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for relator.

Taft, Stettinius & Hollister L.L.P., and Nicholas E. Davis, Jr., for respondent Ohio Staff Leasing, Inc.

Richard Cordray, Attorney General, and Kevin Reis, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶4} Relator, John P. Clevenger, 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 denying relator temporary total disability ("TTD") compensation after finding that he had voluntarily abandoned his employment with Ohio Staff Leasing, Inc. ("OSL"), based on the results of a post-accident drug test.

Findings of Fact:

{¶5} 1. Relator sustained a work-related injury on October 8, 2007, and his workers' compensation claim has been allowed for "sprain of right shoulder; biceps tendon rupture, right."

{¶6} 2. OSL has a drug free workplace policy which was in effect at the time of relator's injury. Further, relator acknowledged that he received a copy of the policy and was aware of the contents.

{¶7} 3. Pursuant to OSL's policy, relator provided a urine sample for a post-accident drug test. The results of that test were positive for cannabinoid (marijuana).

{¶8} 4. Upon receipt of relator's drug test results, OSL formalized his termination by letter dated October 15, 2007. That letter provided:

At the time of hire on February 7, 2007 you signed and acknowledged our Drug Free Work Place Policy. This policy states that positive testing for drugs or alcohol will be immediate discharge from employment with Ohio Staff Leasing, Inc.

Your post-accident drug test was positive for marijuana, therefore effective today October 15, 2007 we accept your voluntary termination of employment with Ohio Staff Leasing, Inc.

{¶9} 5. Relator sought TTD compensation based upon the medical records of his treating physician, Ronald D. Kantner, D.C., who opined that relator was temporarily totally disabled beginning the day of the injury, October 8, 2007.

{¶10} 6. Based upon the medical evidence, relator sought an award of TTD compensation.

{¶11} 7. Relator's request was heard before a district hearing officer ("DHO") on February 26, 2008. The DHO determined that relator was not entitled to TTD compensation because he violated OSL's drug free workplace policy and, pursuant to *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, relator had voluntarily abandoned his employment and was not entitled to TTD compensation. Relator's counsel had argued that, pursuant to *State ex rel. Pretty Prod., Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, he could not have abandoned his employment because he was temporarily and totally disabled as a result of the work-related injury at the time the urine sample was provided and his employment was ultimately terminated. The DHO concluded that *Pretty Products* was not applicable to the facts of his case and denied him TTD compensation.

{¶12} 8. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on April 8, 2008. The SHO modified the prior DHO's order and found that TTD compensation should be denied beginning October 8, 2007. The SHO again rejected relator's argument that *Pretty Products* applied and, instead, agreed with OSL's argument that *State ex rel. Cobb v. Indus. Comm.* (2000), 88 Ohio St.3d 54 applied. Specifically, the SHO stated:

Pretty Products is a 1996 case. Pretty Products indicated that an injured worker could not have abandoned his place of employment when he was Temporarily and Totally Disabled (TTD) at the time of his firing. However, Pretty Products involves an injured worker who was fired because of absenteeism related to his injury. It differs from the facts in the case at hand. The Cobb case is directly on point

regarding the issues at hand. Cobb is a 2000 case. Cobb was terminated related to a positive post-accident drug screen. The Supreme Court of Ohio in Cobb found that a post-accident drug screen, a firing related to a positive post-accident drug screen, was sufficient for preventing payment of TTDC in an allowed claim. Therefore, TTDC is barred pursuant to Louisiana-Pacific.

The injured worker was fired based upon a violation of a known, written work rule. As such, TTDC is not found to be appropriately paid.

{¶13} 9. Relator's further appeal was refused by order of the commission mailed May 2, 2008.

{¶14} 10. In determining that relator was not entitled to an award of TTD compensation, the commission applied OSL's drug free workplace policy which provides, in pertinent part:

OBJECTIVES:

- Ohio Staff Leasing's objective is to establish and maintain a safe, healthy work environment for all its employees.
- To reduce the incidence of accidental injury to employees, and/or property.
- To reduce absenteeism, tardiness, and poor work performance.

* * *

DEFINITIONS:

EAP is defined as the Employee Assistance Provider.

* * *

Illegal Drug is defined as any drug or controlled substance, the sale, or consumption of which is (unlawful) illegal. This includes but is not limited to cocaine, marijuana, heroin, PCP, and any so called "designer drug".

Accident is defined as an unplanned, unexpected, or unintended event, which occurs on Ohio Staff Leasing premises or work site or during the completion of the employees job tasks.

* * *

A Safety Sensitive Job Task is defined, but will not be limited to, all employees working at a job site.

* * *

TESTING PROCEDURES:

The following drugs will be included in the testing:

	Cut of Values
Cocaine (and its derivatives, including crack cocaine)	300 ng/ml
Cannabinoids (THC\Marijuana, hash)	50 ng/ml
Opiates (Heroin, Codeine, etc.)	2000 ng/ml
Amphetamines (Central nervous system stimulants)	1000 ng/ml
Phencyclidine (PCP[])	25 ng/ml
Barbiturates	300 ng/ml
Benzodiazepines	300 ng/ml
Propoxyphene/Metabolite	300 ng/ml
Methadone	300 ng/ml

* * *

POLICY PROHIBITIONS:

* * *

Illegal Drugs

- The possession, distribution, consumption, or use of a drug or controlled substance on Ohio Staff Leasing premises or during working hours is strictly prohibited.
- The purchase, sale, trade, or delivery of illegal drugs or controlled substance by any employee to another employee or person on Ohio Staff Leasing premises is prohibited and will be cause for termination.
- Presenting for work with the presence of illegal drugs in system is prohibited.

VIOLATIONS:

Possession, Distribution, or Consumption

- Possession, distribution, or consumption of any substance in violation of this policy will be subject to disciplinary action up to and including discharge.

Unfit

- Any employee reporting for work in an unfit condition as a result of the use of any substance described by this policy may be subject of discipline and may in addition be referred to EAP for evaluation and, if indicated, treatment. Refusing to go to EAP and complete evaluation and treatment subjects the employee to discipline up to and including discharge.

* * *

TESTING PROGRAMS:

Reasonable Suspicion

Reasonable suspicion testing will occur when Management or Supervision has reason to suspect that an employee may be in violation of Ohio Staff Leasing's policy.

* * *

- Any employee whose use of any of the substances described in this policy results in excessive absenteeism or tardiness, is the cause of accidents, or poor work performance will be referred to EAP for evaluation and, if indicated, treatment.
- Observed behavior; direct observation or drug/alcohol use, possession, or physical symptoms by another credible Ohio Staff Leasing employee.
- Abnormal conduct or erratic behavior.

* * *

- Reasonable suspicion will be based on documentation and whenever possible, coexisting observations by trained Supervisors.

* * *

Post Accident

An employee may be tested for drugs and alcohol if, during the course of the work shift, is involved in one of the following:

- An accident or mishap involving damage of \$1,500.00 or more to equipment, product, or vehicle.
- An accident or mishap involving an injury requiring treatment beyond first-aid.
- An employee whose test results show that they have been tampered with or are tainted will be subject to discharge.

Random Testing

10% of Ohio Staff Leasing workforce will be randomly drug tested as further detailed.

* * *

Employees randomly chosen will be given a random drug testing notice[.] * * * There is one exception: Any employee voluntarily entering a rehabilitation program will be exempt until they have successfully completed the EAP program.

Return-to-work

Employees whose drug test is positive will be referred to the EAP for rehabilitation. An employee refusing or who does not successfully complete rehabilitation will be terminated.

* * *

REHABILITATION AND FOLLOW UP:

* * *

Positive Test for non Safety Sensitive Position

Referral to EAP

* * *

- Consequences of not complying with the EAP referral are dismissal.

(Emphases sic.)

{¶15} 11. OSL's drug free workplace policy also contains the following relevant paragraph:

Workers' Compensation Benefits

Workers' Compensation benefits can only be withheld if upon a thorough investigation, it is found that Ohio Staff Leasing proves consumption of alcohol or drugs was the direct or root cause of the accident or mishap.

{¶16} 12. Relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶17} 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.

{¶18} TTD compensation awarded pursuant to R.C. 4123.56 has been defined as compensation for wages lost where a claimant's injury prevents a return to the former position of employment. Upon that predicate, TTD compensation shall be paid to a claimant until one of four things occurs: (1) claimant has returned to work; (2) claimant's treating physician has made a written statement that claimant is able to return to the former position of employment; (3) when work within the physical capabilities of claimant is made available by the employer or another employer; or (4) claimant has reached maximum medical improvement. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶19} It is undisputed that voluntary abandonment of the former position of employment can preclude payment of TTD compensation. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44.

{¶20} In *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, this court was asked to determine whether a claimant was entitled to continue payment of TTD compensation after he permanently retired from the workforce. This court applied a two-part analysis to determine whether an injury qualified for TTD compensation. First, this court focused on the disabling aspects of the injury that prevented the claimant from returning to his former position of employment. Second, the court inquired whether there was any reason, other than the injury, that was preventing the claimant from returning to work. This court concluded that a claimant's voluntary retirement with no intention of returning to the workforce constituted a reason to terminate TTD compensation because his disability would no longer be the cause of his loss of

earnings. This reflected the underlying purpose of TTD compensation: to compensate an employee for the loss of earnings while the industrial injury heals.

{¶21} In *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, the Supreme Court of Ohio applied the underlying principle of the *Jones* decision to a claimant who was in prison. While incarcerated, the claimant filed a motion seeking TTD compensation related to an industrial injury sustained three years earlier. The commission denied the request on grounds that his incarceration constituted an abandonment of his former position of employment. Although the claimant argued that his incarceration was not a permanent abandonment of the workforce and it could not be regarded as voluntary, the court determined that the temporary nature of his abandonment was irrelevant. The court concluded that a person who violates the law is presumed to tacitly accept the consequences of his voluntary acts. The court concluded that the claimant's loss of earnings was no longer related to the injury while he was incarcerated. The court held that the claimant had voluntarily removed himself from the workforce and was not eligible for TTD compensation.

{¶22} Following *Ashcraft*, the voluntary abandonment doctrine was carefully interpreted and applied so that the ultimate goals of the workers' compensation system can be met. In *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, the court determined that a firing can constitute a voluntary abandonment of the former position of employment. The court reasoned that "[a]lthough 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." *Id.* at 121.

{¶23} In *Louisiana-Pacific*, the Supreme Court of Ohio was asked to determine whether an employee's violation for violating work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

{¶24} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from the employment. However, the court found 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 known to the employee. Defining such an 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." *Id.* at 403.

{¶25} In *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559, the Supreme Court of Ohio emphasized the importance of written work rules that clearly define the prohibited conduct and the consequences of a violation. The *McKnabb* court stated:

* * * Written rules do more than just define prohibited conduct. They set forth a standard of enforcement as well. Verbal rules can be selectively enforced. Written policies help prevent arbitrary sanctions and are particularly

important when dealing with employment terminations that may block eligibility for certain benefits.

This case is a good example. The commission speaks of a "strict" employer policy on tardiness and absenteeism. It was apparently not that strict, however, since the claimant, according to the commission, was late "fifteen to twenty" times during an unspecified six-month period. This scenario raises more questions than it answers: how [the employer] defined "late" and whether it was the same for all employees; whether the claimant was routinely only a minute late or substantially later; and when the six-month period of tardiness occurred, e.g., whether the accusations of tardiness were suddenly resurrected to justify termination, becoming an issue only after claimant filed a workers' compensation claim.

The commission refers to claimant's "knowledge" of [the employer's] tardiness policy and the "warning" issued to him concerning chronic tardiness. But the timing of the warning is relevant: was it after the first infraction or the seventeenth? If after the first and the employer continued to ignore late arrival, the validity of the policy may have been diminished in claimant's mind, calling into question claimant's actual knowledge of it. Also relevant is the nature of the warning. These are just some of the areas that verbal policies leave ambiguous.

Id. at 561-562.

{¶26} In *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, the Supreme Court of Ohio provided a thorough analysis of the evolution of the voluntary abandonment doctrine as a potential bar to the receipt of TTD compensation. In *McCoy*, the claimant had been released to return to work and was later fired for violating a written work rule. It was determined that the claimant's discharge constituted a voluntary abandonment from employment under *Louisian-Pacific*. Thereafter, claimant began working for another employer and suffered a flare-up of the symptoms related to his original injury. Ultimately, the court concluded that "[a] claimant

who voluntarily abandoned his or her former position of employment or who was fired under circumstances that amount to a voluntary abandonment of the former position will be eligible to receive temporary total disability compensation pursuant to R.C. 4123.56 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." *Id.* at syllabus.

{¶27} The court reiterated further that all forms of death and disability benefits provided under R.C. Chapter 4123 are intended to compensate claimants for the loss sustained due to the injury. The court stated:

* * * For purposes of compensability, a causal relationship must exist between the employee's industrial injury and the loss that the requested benefit is designed to compensate. We have stated repeatedly that "the purpose of temporary total disability benefits under R.C. 4123.56 is to compensate for loss of earnings * * *." *Ramirez*, 69 Ohio St.2d at 634, 23 O.O.3d 518, 433 N.E.2d 586. More specifically, TTD benefits are designed "to compensate an injured employee for the loss of earnings which he incurs while the injury heals." *Ashcraft*, 34 Ohio St.3d at 44, 517 N.E.2d 533. Thus, in order to qualify for TTD compensation, the claimant must show not only that he or she lacks the medical capability of returning to the former position of employment but that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings. In other words, it must appear that, but for the industrial injury, the claimant would be gainfully employed.

Id. at ¶35.

{¶28} Recently, the Supreme Court of Ohio decided *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*"). In that case, the claimant injured himself and two other employees when he placed water in a pressurized deep fryer, heated the fryer and opened the lid. Following an investigation, it was determined

that claimant had violated a workplace safety rule as well as repeated verbal warnings and he was terminated.

{¶29} Ultimately, upon rehearing the matter, the court determined that the claimant was eligible to receive TTD compensation. In so finding, the court scrutinized all the evidence and focused on the employer's termination letter to the claimant. The court stated:

There is no question that Gross sustained a disabling injury. The issue is whether his injury or his termination (because of the violation of a rule) is the cause of his loss of earnings. The distinctions between voluntary and involuntary departure are complicated and fact-intensive. An underlying principle, however, is 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. * * * *Rockwell*[:] * * * *McCoy*[.] * * * The Tenth District Court of Appeals followed that principle. The court concluded from KFC's termination letter 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." * * *

Id. at ¶23.

{¶30} Shortly after the Supreme Court's decision in *Gross II*, the court had the opportunity to consider a decision from this court which had been authored between the Supreme Court of Ohio's decisions in *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("*Gross I*") and *Gross II*. In *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758, at ¶8, the court explained its holding in *Gross II* as follows:

* * * *Gross II* held that if a claimant is injured by the same misconduct that led to his or her termination, eligibility for temporary total disability compensation is not compromised.

Gross II controls and renders the court of appeals reasoning moot. Compensation is therefore payable.

{¶31} In the present case, the commission relied on *Gross II* and *Pretty Products* to find that claimant's termination did not constitute a voluntary abandonment. However, neither case is applicable to the factual situation presented here.

{¶32} The Supreme Court of Ohio has made it clear: the commission and courts must carefully consider all the facts and circumstances surrounding any decision to terminate an employee for any reason when it occurs near in time to the injury sustained by the employee. In every case of this nature, courts must review the employer's policy to determine whether or not the violation of the written work rule constitutes a voluntary abandonment precluding the payment of TTD compensation to the injured worker.

{¶33} Following the Supreme Court of Ohio's decision in *Gross II*, parties have referred back to this court's appellate decision (*State ex rel. Gross v. Indus. Comm.*, 10th Dist. No. 04AP-756, 2005-Ohio-3936) and this court's reference to the *Pretty Products* case. Since that time, on numerous occasions, parties have cited *Pretty Products* to argue that a claimant can voluntarily remove himself from the workforce only if he has the physical capacity for employment at the time of the abandonment or removal. In *Pretty Products*, the court referred a matter back to the commission because the commission's order was so vague that the court could interpret the order in three different ways. In that decision, the court stated:

The timing of a claimant's separation from employment can, in some cases, eliminate the need to investigate the character of departure. For this to occur, it must be shown that the claimant was already disabled when the separation occurred. "[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. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 48, 623 N.E.2d 55, 58.

Id. at 7.

{¶34} Based upon the above paragraph, claimants are now arguing that a post-injury drug test which yields positive results for some substance and constitutes grounds for termination can never result in a voluntary abandonment of the workforce which bars TTD compensation because the claimants were already disabled as a result of the work-related injury when the drug test was performed. OSL argues the violation occurred pre-injury at a time when he was not disabled.

{¶35} On the one hand, employers want to hire workers who do not abuse drugs. Further, employers clearly have a vested interest in requiring employees to report to work without the presence of any illegal substance in their system.

{¶36} On the other hand, people do abuse drugs and, as in this case, the abused drug, marijuana, is commonly abused. Employees argue that their recreational use of a drug such as marijuana should not be considered a voluntary abandonment of the workplace which bars future TTD compensation unless the drug is affecting their ability to perform their job and was a factor in causing their injury.

{¶37} Both sides have vested interests and legitimate arguments. Following the Supreme Court of Ohio's example in *Gross II*, the magistrate finds that it is imperative to carefully review all the facts and circumstances including the employer's policy and work rule to determine, in each individual case, whether the positive drug test which results in the employee's termination bars future TTD compensation.

{¶38} In the instant case, the objective of OSL's drug free workplace policy is to establish and maintain a safe and healthy work environment for all its employees, to reduce the incidents of accidental injury to employees, and/or property, and to reduce absenteeism, tardiness, and poor work performance. Further, the policy specifically prohibits an employee from presenting for work with the presence of illegal drugs in their system. Here, OSL specifically identifies the presence of illegal drugs in an employee's system as grounds for terminating that employee's employment. As such, at first blush, OSL's policy did provide a clear written work rule which had been identified by OSL as a dischargeable offense and which was known or should have been known to relator.

{¶39} However, the magistrate specifically notes that OSL's drug free workplace policy contains the following additional paragraph:

Workers' Compensation Benefits

Workers' Compensation benefits can only be withheld if upon a thorough investigation, it is found that Ohio Staff Leasing proves consumption of alcohol or drugs was the direct or root cause of the accident or mishap.

(Emphasis added.)

{¶40} A strict reading of the above language leads to but one conclusion: relator's workers' compensation benefits can only be withheld if, after a thorough investigation, OSL proves that relator's use of drugs was the direct or root cause of his accident. TTD compensation is a "workers' compensation benefit" which, according to the above language, can only be withheld from relator if OSL proves that the presence of marijuana in his system was a direct or root cause of the accident which led to his injuries.

{¶41} After a thorough review of the record, there is no evidence in the record to establish that OSL investigated and proved that relator's consumption of marijuana was the direct or root cause of his accident. Further, OSL has not even claimed that relator's drug use had any relationship to his injury. As such, even though the *Louisiana-Pacific* test arguably has been met in this case, and OSL's policy provides that presenting for work with the presence of illegal drugs in one's system is prohibited and cause for discharge, relator remains eligible for TTD compensation because OSL has not proven that the presence of marijuana in his system was the direct or root cause of his industrial accident. OSL can and did terminate relator's employment. However, upon review, relator's termination does not bar his receipt of TTD compensation.

{¶42} Based on the foregoing, it is this magistrate's conclusion that relator has demonstrated that the commission abused its discretion by denying him TTD compensation based upon a finding that he had voluntarily abandoned his employment. Because the medical evidence in the record supports the conclusion that relator was temporarily totally disabled during the requested time period, and OSL has not established that relator's drug use was the direct or root cause of the industrial accident, this court should order the commission to award relator TTD compensation beginning October 8, 2007 through February 15, 2008.

/s/ Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).