

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Ohio Welded Blank,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-772
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Steven Farr,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on September 8, 2009

Wegman, Hessler & Vanderburg, Antoinette F. Gideon and Jennifer A. Corso, for relator.

Richard Cordray, Attorney General, and *Stephen D. Plymale*, for respondent Industrial Commission of Ohio.

Sammon & Bolmeyer Co., L.P.A., and *Albert C. Sammon*, for respondent Steven Farr.

Buckingham, Doolittle & Burroughs, LLP, and *Denise A. Gary*, for Amicus Curiae, Setla, LLC.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Ohio Welded Blank, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate its order granting temporary total disability compensation to respondent-claimant Steven Farr

and to find that claimant is not entitled to such compensation because he voluntarily abandoned his employment with relator.

{¶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, which is appended to this decision. In her decision the magistrate determined relator's substance-free work policy ("SFWP") is not clear enough, pursuant to Ohio Supreme Court case law, to warrant a finding that claimant's termination constitutes a voluntary abandonment of his employment. Although the commission premised its decision awarding temporary total disability compensation on its conclusion that claimant did not voluntarily abandon his employment under relator's SFWP, the magistrate determined the commission reached the correct outcome even if it applied the wrong cases. Accordingly, the magistrate determined the requested writ should be denied.

I. Facts

{¶3} We adopt the magistrate's findings of fact which indicate that claimant sustained significant work-related injuries on September 28, 2007. At the time claimant began employment with relator, relator had a SFWP in effect; claimant received a copy when he was hired in January 2004 and again in 2006 when it was updated. The policy states that, "[u]nless prohibited by law, termination of employment will occur as a result of * * * [f]ailing a management initiated drug test which includes, but is not limited to, reasonable suspicion, post incident/accident, random and return-to-duty testing." (Magistrate's Decision, ¶26.) The post-accident testing provisions in the SFWP provide that an employee who is injured at work "will be required to undergo a physical

examination, including urinalysis or similar test for drug, alcohol, or other substance abuse at the time of the accident." (Magistrate's Decision, ¶26.)

{¶4} While claimant was in the emergency room post-accident, he provided a urine sample for testing; the results were positive for marijuana. Relator's human resources manager, Ray Weaver, received the results on October 3, 2007 and met with claimant on October 24, 2007, when he informed claimant he would be terminated because he tested positive for marijuana. A follow-up letter on October 30, 2007 advised that relator was terminating claimant's employment effective September 28, 2007.

{¶5} Claimant sought temporary total disability compensation beginning September 28, 2007. A district hearing officer heard the motion, including relator's contention that claimant was not entitled to temporary total disability compensation because he voluntarily abandoned his employment when he tested positive for marijuana. Noting relator did not assert claimant's marijuana use caused his industrial injury, the district hearing officer refused to conclude claimant voluntarily abandoned his position of employment.

{¶6} The district hearing officer acknowledged the line of cases that followed *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153, but concluded the voluntary abandonment doctrine is applied successfully to deny temporary total disability compensation "when the circumstances that arise that create the voluntary abandonment occurred after the date of injury." (Magistrate's Decision, ¶32.) Because "the activities that cause the employer to argue voluntary abandonment occurred before the injury," the district hearing officer determined claimant did not

voluntarily abandon his employment and was entitled to temporary total disability compensation. (Magistrate's Decision, ¶32.)

{¶7} Relator appealed, arguing the district hearing officer improperly applied the Supreme Court's opinion in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*"). The staff hearing officer affirmed the district hearing officer's order and granted claimant's request for temporary total disability compensation from September 29, 2007 through January 1, 2008.

{¶8} In doing so, the staff hearing officer rejected relator's voluntary abandonment argument. The staff hearing officer noted the "[f]acts are clear that claimant became disabled as a result of the 9-28-07 workplace injury and there is no allegation or evidence that drug intoxication had anything to do with the injury being sustained." (Magistrate's Decision, ¶34.) The staff hearing officer found "no legal precedent which would apply an abandonment of the work-place theory to pre-injury behavior, discovered after the injury, where the injury has caused disability independent of the dischargeable [offense]." (Magistrate's Decision, ¶34.) Accordingly, the staff hearing officer determined the positive marijuana test did not render claimant ineligible to receive temporary total disability compensation. The commission refused further appeal, and relator commenced this mandamus action.

II. Objections

{¶9} Because the magistrate determined no writ should issue, relator filed objections to the magistrate's conclusions of law:

1. The Magistrate erred in holding that OWB's Substance-Free Workplace Policy is not clear enough to warrant a finding that Farr voluntarily abandoned his employment.

2. The Magistrate erred in raising issues that were never raised by Farr at the administrative level and were therefore waived.

3. The Magistrate's decision would set a harmful precedent for Ohio employers with substance-free workplace policies with drug testing provisions in that under the reasoning set forth by the Magistrate no policy could ever be drafted to be clear enough to warrant a finding of voluntary abandonment for testing positive to a post-accident test.

{¶10} In addition, the commission filed objections to the magistrate's decision.

The commission's objections to the magistrate's findings of fact do not assert they are erroneous, but need explanation or clarification:

1. Workplace impairment from the effects of substance use justifying termination of employment is determined solely by the company's opinion and includes the effects of prescribed drugs.

2. Farr's admission of a single use of marijuana does not qualify him for a reasonable cause lay-off without pay while attending a rehabilitation program.

The commission, however, objected to the magistrate's conclusions of law as erroneous:

1. The commission properly applied applicable law to find Farr did not voluntarily abandon his employment with OWB.

2. If the ambiguity of the OWB substance-free workplace rules should have been addressed in the commission's order, then the magistrate should have recommended issuing a limited writ requiring a new hearing and order considering the issue of ambiguity rather than denying a writ on a ground not addressed in the administrative order.

III. Voluntary Abandonment

{¶11} Because both relator's and the commission's objections to the magistrate's decision assert, in part, that (1) the magistrate erred in deciding this action on a basis the commission did not resolve, and (2) the magistrate wrongly failed to address the only

issue the commission determined, we address those objections jointly. We agree with the parties that the magistrate wrongly determined, in the first instance, that relator's SFWP is too ambiguous to support a voluntary abandonment claim. While the issue may have been before the commission, neither the district hearing officer nor the staff hearing officer resolved it. Instead, both addressed whether claimant's positive marijuana test amounted to a voluntary abandonment of employment that precludes claimant's receiving temporary total disability compensation for the injuries he sustained during his workplace accident. Accordingly, we sustain both relator's and the commission's objections to the extent they assert the magistrate, at the least, should have returned the matter to the commission to exercise its discretion to resolve any claim of ambiguity in the SFWP. As a result, we do not adopt the magistrate's conclusions of law.

{¶12} The remaining objection argues the merits of the issue presented to the magistrate: whether claimant's pre-injury use of marijuana in violation of the SFWP constitutes a voluntary abandonment of employment that precludes his receipt of temporary total disability compensation. Relator's argument invokes the principle set forth in *Louisiana-Pacific*, where the Supreme Court held that an employee's termination for violating work rules could be construed as a voluntary abandonment of employment that served to bar temporary total disability compensation. In that case, the employer was notified the employee was medically able to return to work, but the employee did not report to work for three consecutive days. The employer automatically terminated the employee's employment for violation of the company's absentee policy as set forth in the employee handbook. When the employee subsequently moved for additional temporary

total disability compensation benefits, the court determined the employee's violation of the work rule constituted a voluntary abandonment of employment.

{¶13} The principle set forth in *Louisiana-Pacific* concerning voluntary abandonment "is potentially implicated whenever [temporary total disability] compensation is requested by a claimant who is no longer employed in a position that he or she held when the injury occurred." *Gross II* at ¶16, quoting *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶38. Nonetheless, "voluntary departure from the former position can preclude eligibility for [temporary total disability] compensation only so long as it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss." *Id.*

{¶14} When the Supreme Court applied those principles to the facts in *Gross II*, the court noted that the employee's violation of the work rule in that case actually caused the injury. In reconsidering *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("*Gross I*"), where the voluntary abandonment doctrine was applied to deny temporary total disability benefits, the court clarified that "*Gross I* was not intended to expand the voluntary-abandonment doctrine." *Id.* at ¶19. The court explained that "[u]ntil the present case, the voluntary-abandonment doctrine has been applied only in postinjury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her [temporary total disability] benefits." *Id.* "The doctrine has never been applied to preinjury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception." *Id.*

{¶15} At the same time we recognize the line of cases beginning with *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132. *Pretty Products* explained that "[t]he 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." *Id.* at 7. Thus, "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." *Id.*, quoting *State ex rel Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48, 1993-Ohio-141. See also *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951 (concluding that a truck driver who is already disabled when terminated for losing his driver's license as a result of a subsequent drunk driving conviction was not disqualified from temporary total disability compensation).

{¶16} In *State ex rel. v. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, the Supreme Court took the opportunity to directly address the two lines of cases. The Supreme Court observed that the litigants in that case treated the cases as mutually exclusive: the company argued that *Louisiana-Pacific* was dispositive, and the claimant relied on *Pretty Products*. The Supreme Court, however, stated *Pretty Products* clarified *Louisiana-Pacific* so that the character of an employee's departure, voluntary or involuntary, is not the only relevant element; instead, timing of the termination may be equally germane. *Id.* at ¶10.

{¶17} In explaining how the two lines of cases are to be applied, the Supreme Court noted that "*Louisiana-Pacific* and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination

are not met, the employee's termination is deemed involuntary and compensation is allowed." Id. at ¶11. By contrast, "[i]f the *Louisiana-Pacific* three-test part is satisfied * * * suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination." Id. Because the claimant in *Reitter Stucco* was medically incapable of returning to his former position of employment at the time of his discharge, the court concluded he was eligible for temporary total disability compensation. As the court explained, "[A] claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled." Id. at ¶10. Thus, "even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time discharge occurred." Id.

{¶18} We face similar contentions here. The employer argues voluntary abandonment under *Louisiana-Pacific*; the claimant contends *Pretty Products* controls. Even if, as *Reitter Stucco* explains, the three-prongs of *Louisiana-Pacific* are met in the employer's action under its SFWP, we nonetheless must consider whether claimant was disabled at the date of termination. Here, due to the serious nature of the injuries claimant received, no doubt exists that he was disabled. Only on January 2, 2008 was he released to work. Accordingly, under *Reitter Stucco*, claimant is entitled to benefits.

{¶19} Relator nonetheless contends this case is distinguishable from the noted decisions because claimant committed the act on which the termination occurred prior to the date of his injury: he ingested marijuana sometime during the week preceding his

injury. As a result, relator asserts, claimant's situation is unlike those in *Pretty Products* and *Reitter Stucco* where the claimant violated the work rule subsequent to the injury.

{¶20} *Gross II*, however, undermines relator's contention. *Gross II* stated the voluntary abandonment doctrine had not been applied to work rule violations preceding or contemporaneous with the injury. Here even if we adopt relator's position that the date of the infraction, not the date of termination, determines application of the voluntary abandonment doctrine, *Gross II* indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits. The result is especially compelling here, where the employer presented no evidence to suggest the injury resulted from relator's being under the influence of drugs or alcohol.

{¶21} Accordingly, the objection to the magistrate's conclusions of law is sustained.

{¶22} Following independent review pursuant to Civ.R. 53, we conclude the magistrate properly determined the salient facts, and we adopt them as our own. For the reasons set forth above, we do not adopt the magistrate's conclusions of law, we sustain the objections to the magistrate's decision to the extent indicated, and we deny the requested writ of mandamus.

*Objections sustained to the
extent indicated; writ denied.*

BROWN and TYACK, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] Ohio Welded Blank,	:	
	:	
Relator,	:	
	:	
v.	:	No. 08AP-772
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Steven Farr,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on February 25, 2009

Wegman, Hessler & Vanderburg, Antoinette F. Gideon and Jennifer A. Corso, for relator.

Richard Cordray, Attorney General, and Stephen D. Plymale, for respondent Industrial Commission of Ohio.

Sammon & Bolmeyer Co., L.P.A., and Albert C. Sammon, for respondent Steven Farr.

Buckingham, Doolittle & Burroughs, LLP, and Denise A. Gary, for Amicus Curiae, Setla, LLC.

IN MANDAMUS

{¶23} Relator, Ohio Welded Blank, 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 granted temporary total disability ("TTD") compensation to respondent Steven Farr ("claimant") and ordering the commission to find that claimant is not entitled to that compensation because he voluntarily abandoned his employment with relator.

Findings of Fact:

{¶24} 1. Claimant sustained a work-related injury on September 28, 2007. At the time of his injury, claimant was working performing his normal duties. Claimant shut down his machine in order to pick up a piece of plank metal that was on the floor. As he did so, he was struck by a piece of sheet metal that was being moved by a robot. Relator sustained significant injuries and his workers' compensation claim has been allowed for the following conditions: "complicated laceration-chest, laceration left upper arm, open wound nose; lumbar strain/sprain."

{¶25} 2. Since the beginning of claimant's employment with relator, relator had a Substance-Free Workplace Policy ("policy") in place. Claimant received a copy of the policy when he was hired in January 2004, and again in 2006 when the policy was updated.

{¶26} 3. The policy provides, in pertinent part:

* * * The Company requires all employees to report for work and remain in condition to perform their duties free from any substance abuse effects. Employees shall not be under the influence of any alcohol or any drug, legal or illegal, which adversely affects their ability to perform their duties in any way.

The possession, transfer, sale, manufacture, distribution, dispensing[,] trafficking or use of illegal drugs or alcohol while on company premises, or while conducting company business, or during working hours, including meal periods and breaks is absolutely prohibited. Violation of these rules

by an employee will be reason for disciplinary action up to and including termination. * * *

STANDARDS:

Employees who violate the above provisions will be subject to disciplinary action up to and including termination. * * *

The providing of services to the Company by any individual at any time when the individual is, in the opinion of the Company, subject to the effects of any controlled substance abuse, is prohibited. Employees reasonably suspected by the Company to have violated this provision, may be referred for substance abuse testing, medical evaluation, and/or subject to disciplinary action up to and including termination. Unless prohibited by law, termination of employment will occur as a result of the following:

- Refusal to submit to a drug and/or alcohol test
- Failing to complete a substance abuse treatment program
- Failing a management initiated drug test which includes, but is not limited to, reasonable suspicion, post incident/accident, random and return-to-duty testing.

* * *

TYPES OF DRUG TESTING:

Employees subject to this drug testing program are required to be tested under the following six types of tests:

* * *

C) Post Accident

[One] An employee who is injured at work, with the exception of minor first aid, will be required to undergo a physical examination, including urinalysis or similar test for drug, alcohol, or other substance abuse at the time of the accident.

* * *

[Five] If, during the course of the injury reporting process, an employee comes forward to voluntarily admit to a substance abuse problem, they will fall under the reasonable cause and return to duty testing policy. * * *

D) Reasonable Cause

[One] If an employee comes forward and volunteers to be helped to overcome a habit prior to taking any test covered in this policy, the employee will fall under the reasonable cause provision. The employee will be laid-off, without pay, during which time they can undertake to satisfactory completion a drug dependency rehabilitation program[.] * * *

[Two] When there is reasonable cause to believe that an employee covered by this policy is using a prohibited drug, the employee will be required to submit to a drug test.

* * *

[Four] A decision to test must be based on specific contemporaneous physical, behavioral or performance indicators of probable drug use. Examples of this are evidence of repeated errors on the job or unsatisfactory time and attendance records coupled with a specific contemporaneous event that indicates probable drug use.

* * *

TESTING PROCEDURES:

A) Drug testing will be performed utilizing urine samples with an eight-drug screening. Alcohol will be done by breath analyzer.

{¶27} 4. While at the emergency room, claimant provided a urine sample for testing. The results were positive for marijuana.

{¶28} 5. The results of the testing were received by relator's Human Resources Manager, Ray Weaver, on October 3, 2007.

{¶29} 6. Weaver met with claimant on October 24, 2007, and informed claimant that he was going to be terminated because he tested positive for marijuana.

{¶30} 7. On October 30, 2007, claimant was sent the following letter:

As we discussed, on October 24, 2007, you tested positive for an illicit substance on a drug screen on September 28, 2007. This positive drug screen is a violation of the Company's Substance Abuse Policy and in accordance with this policy the Company is terminating your employment effective September 28, 2007. You will be receiving a separate letter outlining your rights, if any, to continue your health insurance coverage under COBRA.

Also, with regards to your workers' compensation claim, your medical expenses will be covered under the claim. However, your positive drug screen in violation of Company policy may affect your eligibility for other compensation and benefits under Ohio's workers' compensation laws. Leslie Harth at Associated Compensation Resources will be assisting you with the processing [of] your claim.

{¶31} 8. Claimant sought TTD compensation beginning September 28, 2007. His motion was supported by the October 12, 2007 C-84 of his treating physician, Patrick E. Sziraky, M.D.

{¶32} 9. The motion was heard before a district hearing officer ("DHO") on March 4, 2008. At the hearing, relator argued that claimant was not entitled to TTD compensation because he had voluntarily abandoned his employment when he tested positive for marijuana. The DHO specifically noted that relator did not allege that claimant's use of marijuana caused his industrial injury. Further, claimant acknowledged that he had used marijuana some time during the week before the injury. In addressing relator's argument that claimant voluntarily abandoned his employment when he tested positive for marijuana, and that this voluntary abandonment foreclosed his eligibility for TTD compensation, the DHO stated:

The employer argues that pursuant to the State ex rel Louisiana-Pacific Corp. v. Industrial Commission of Ohio, 72 Ohio St. 3rd 401 (1995), the claimant voluntarily abandoned

his position of employment because he violated a clearly defined work rule that was in writing, the work rule had previously been identified as a dischargeable offense, and the violation was known or should have been known to the injured worker as a dischargeable offense. It is noted that there have been several cases regarding violation of work rules and voluntarily [sic] abandonment since Louisiana-Pacific. Of note are the State ex rel. Pretty Products, Inc. v. Industrial Commission of Ohio, 77 Ohio St. 3d 5 (1996), State ex rel. OmniSource Corp. v. Industrial Commission of Ohio, 113 Ohio St. 3d 303 (2007), and State ex rel. Gross v. Industrial Commission of Ohio, 115 Ohio St. 3d 249 (2007), [Gross II] and State ex rel. Reitter Stucco, Inc. v. Industrial Commission of Ohio, Slip Opinion No. 2008-Ohio-499-No. 2007-0060 – submitted Nov. 27, 2007 – decided Feb. 13, 2008. Significant language exists in the Gross [II] case. On page 253 of the Gross [II] case the court states, "Until the present case, the voluntary-abandonment doctrine has been applied only in post-injury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her TTD benefits... The doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury. [*State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500] Gross I did not intend to create such an exception."

Therefore, the case law supports a conclusion that the Voluntary Abandonment Doctrine can be applied successfully to deny temporary total disability compensation when the circumstances that arise that create the voluntary abandonment occurred after the date of injury. This conclusion is consistent with the Gross [II] Case and the Reitter Stucco, Inc. Case.

In this claim, the activities that caused the employer to argue voluntary abandonment occurred before the injury (smoking of marijuana sometime within a week before the industrial injury) or arguably contemporaneous with the industrial injury (the claimant having marijuana in his system). This claim does not involve a circumstance that caused voluntary abandonment after the injury. While the termination from employment occurred in excess of 30 days after the date of injury, the circumstances that gave rise to the termination of employment occurred before the injury or arguably contemporaneous with the injury.

The claimant remains entitled to temporary total disability compensation and the voluntary abandonment doctrine does not apply to deny temporary total disability compensation and/or to terminate temporary total disability compensation. Temporary total disability compensation is medically supported.

{¶33} 10. Relator appealed arguing that *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*"), does not preclude the application of the voluntary abandonment doctrine to pre-injury misconduct. Relator essentially argued that claimant abandoned his employment with relator when he used marijuana and, before the injury, reported to work. Because his marijuana use preceded his injury, relator argued that it was his marijuana use which caused claimant to be without wages and not the industrial injury.

{¶34} 11. The matter was heard before a staff hearing officer ("SHO") on April 25, 2008. The SHO affirmed the prior DHO's order and granted claimant's request for TTD compensation from September 29, 2007 through January 1, 2008, because claimant was released to return to work on January 2, 2008. The SHO rejected relator's voluntary abandonment argument:

* * * Staff Hearing Officer finds that claimant's termination for violation of the drug free work place policy discovered post injury does not prevent qualification for entitlement to payment of temporary total disability compensation. Facts are clear that claimant became disabled as a result of the 9-28-07 workplace injury and there is no allegation or evidence that drug intoxication had anything to do with the injury being sustained. A positive marijuana metabolite level was discovered during routine post-accident testing which caused claimant to be terminated after the disability due to the injury had begun. As soon as he was physically able, claimant returned to work with a different employer. This would rebut the contention that claimant had abandoned the work force or otherwise removed himself from employment

voluntarily and unrelated to the claim. The presence of a prohibited drug level was discovered subsequent to the injury and after disability from the injury existed independent of any drug policy violation. Staff Hearing Officer finds no legal precedent which would apply an abandonment of the work- place theory to pre-injury behavior, discovered after the injury, where the injury has caused disability independent of the dischargeable defense. *Pretty Products v. Industrial Commission*, (1996), 77 Ohio St.3d 5, and *State ex rel. Reitter Stucco, Inc. v. Industrial Commission*, slip Opinion no. 2008-Ohio-499-No. 2007-0060 – submitted Nov. 27, 2007 - decided Feb. 13, 2008, are followed. Claimant was disabled due to the injury at the time of termination. The cause of the termination is unrelated to the injury claim. Since claimant was medically incapable of returning to his former position of employment at the time of his discharge, Staff Hearing Officer concludes that he is eligible to receive the temporary total disability compensation as ordered.

{¶35} 12. Relator's further appeal was refused by order of the commission mailed July 2, 2008.

{¶36} 13. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶37} 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.

{¶38} As a preliminary matter, there is no allegation that claimant's drug use contributed to his accident. As such, R.C. 4123.54 is irrelevant.

{¶39} Relator makes the same argument here that it has made all along. Specifically, relator contends that claimant was terminated because he used marijuana and reported to work. The drug test simply confirmed this. Because claimant's use of marijuana preceded the date of his injury, relator argues that claimant is currently without wages because he smoked marijuana and reported to work, and not because he was injured on the job.

{¶40} Claimant argues that it is clear his injury was the cause of his loss of wages and points out that he returned to work at another job as soon as he was able. Further, claimant asserts that the drug test itself is the "conduct" for purposes of the voluntary abandonment doctrine. If he would not have been injured, there would not have been a drug test and, consequently, he would not have been terminated. Claimant also asserts that, because he was disabled at the time that the test was performed, he could not have voluntarily abandoned his job pursuant to *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5.

{¶41} If relator's argument is correct, all positive post-accident drug tests would bar a claimant from receiving TTD compensation (provided the employer had a policy in effect).

{¶42} If claimant's argument is correct, a positive post-accident drug test would never bar the receipt of TTD compensation (absent the application of R.C. 4123.54).

{¶43} 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 MMI. See R.C. 4123.56(A); *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630.

{¶44} 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.

{¶45} 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 continued 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.

{¶46} 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 & Laughlin* 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 further 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.

{¶47} 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.

{¶48} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, the Supreme Court of Ohio was asked to determine whether an employee's termination 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.

{¶49} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from 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.

{¶50} 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.

{¶51} 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. 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.

{¶52} Recently, the Supreme Court of Ohio decided *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 the claimant had violated a work place safety rule as well as repeated verbal warnings, and he was terminated.

{¶53} Ultimately, upon rehearing the matter, the Supreme Court of Ohio 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.

{¶54} Relator argues that the Supreme Court's decision in *Gross II* clearly supports their position. The claimant in *Gross II* was eligible for TTD compensation because the conduct giving rise to the termination was causally related to the injury. In the present case, claimant's conduct (smoking marijuana and reporting to work) is not causally related to the injury and TTD compensation should be denied.

{¶55} Conversely, claimant argues that the Supreme Court's decision in *Gross II* clearly supports his position. The court specifically stated that the voluntary abandonment doctrine had been applied only in post-injury circumstances in which the claimant's volitional actions severed the causal relationship between the injury and the loss of earnings. In the present case, claimant's actions not only occurred pre-injury but did not sever the causal relationship between the injury and his loss of earnings.

{¶56} They cannot *both* be correct.

{¶57} Shortly after the Supreme Court's decision in *Gross II*, the Supreme 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 Supreme Court of Ohio 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.

{¶58} Clearly, the Supreme Court's interpretation of its holding in *Gross II* differs from the arguments made in the present case by the parties. Further, it is clear that the

specific holding in *Gross II* applies only where the claimant is injured by the same misconduct that led to his or her termination.

{¶59} 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.

{¶60} 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.

{¶61} 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. In the present case, it is clear that relator's chief goal is to avoid employees reporting to work when they are under the effects of drugs or alcohol. In the findings of fact, the magistrate set out relator's policy which specifically provided:

The following procedures represent the policy of SHILOH INDUSTRIES, INC. concerning substance abuse. This policy applies to all applicants, current employees, and contract or leased individuals as well as consultants, contractors, vendors, and visitors on the company premises at all facilities. The Company requires all employees to report for work and remain in condition to perform their duties **free from any substance abuse effects. Employees shall not be under the influence of any alcohol or any drug, legal or illegal, which adversely affects their ability to perform their duties in any way.**

The possession, transfer, sale, manufacture, distribution, dispensing[,] trafficking or use of illegal drugs or alcohol while on company premises, or while conducting company business, or during working hours, including meal periods

and breaks is absolutely prohibited. **Violation of these rules by an employee will be reason for disciplinary action up to and including termination.** * * *

STANDARDS:

Employees who violate the above provisions will be subject to disciplinary action up to and including termination. * * *

The providing of services to the Company by any individual at any time when the individual is, in the opinion of the Company, subject to the effects of any controlled substance abuse, is prohibited. Employees reasonably suspected by the Company to have violated this provision, may be referred for substance abuse testing, medical evaluation, and/or subject to disciplinary action up to and including termination. Unless prohibited by law, termination of employment will occur as a result of the following:

- **Refusal to submit to a drug and/or alcohol test**
- **Failing to complete a substance abuse treatment program**
- **Failing a management initiated drug test** which includes, but is not limited to, reasonable suspicion, post incident/accident, random and return-to-duty testing.

* * *

C) Post Accident

* * *

[Five] If, during the course of the injury reporting process, an employee comes forward to voluntarily admit to a substance abuse problem, they will fall under the reasonable cause and return to duty testing policy. * * *

D) Reasonable Cause

[One] **If an employee comes forward and volunteers to be helped to overcome a habit prior to taking any test covered in this policy, the employee will fall under the reasonable cause provision. The employee will be laid-off, without**

**pay, during which time they can undertake to
satisfactory completion a drug dependency
rehabilitation program[.] * * ***

(Emphasis added.)

{¶62} According to relator's policy, when an employee is under the influence of any drug that adversely affects their ability to perform their duties in any way, that employee will be subject to "disciplinary action up to and including termination." Also, when an employee is reasonably suspected to have violated the policy, the employee may be subject to disciplinary action up to and "including termination." Further, when an employee refuses to "submit to a drug * * * test" or fails "to complete a substance abuse treatment program," or fails a "management initiated drug test * * * post incident/accident," the employee may be terminated. However, if the employee comes forward voluntarily, even after an accident, and admits his drug use, the employee will fall "under the reasonable cause provision * * * and will be laid-off [while] they * * * undertake to satisfactory completion a drug dependency rehabilitation program."

{¶63} Is relator's policy clear? No. It is not clear what constitutes a violation. Is it clear that claimant violated the policy? No. In the present case, there is no allegation that claimant was under the influence of drugs. Further, there is no allegation that relator suspected that claimant had violated the policy. Is it clear that claimant should have known that he would be terminated in this situation? No. In fact, at the hearing, claimant was not asked if he understood the consequences of the policy. Further, he admitted he used marijuana the week before, but it was not established at hearing whether he understood the length of time the substance would remain in his system. Was claimant in a position to come forward following his injury so he could avoid being terminated? No.

The record is clear that he passed out, was given morphine and could only verbally consent to the drug test hours later when he was not in a position to sign any documents. Further, there is no evidence that a representative from relator was available at the hospital so claimant could have come forward and admitted he used marijuana the previous week.

{¶64} Under these specific circumstances, the magistrate finds that relator's policy is not clear enough, pursuant to *Louisiana-Pacific, McKnabb* and *Ashcraft*, to warrant the finding that claimant's termination constitutes a voluntary abandonment such that TTD compensation can be denied. Here, the commission did award claimant TTD compensation based on the commission's interpretation of *Gross II* and *Pretty Products*. The magistrate finds that the commission reached the correct outcome even if it applied the wrong cases.

{¶65} Based on the foregoing, it is this magistrate's decision that this court should deny relator's request for a writ of mandamus because the commission properly awarded TTD compensation, although for the wrong reasons.

/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).