

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. :
David M. Gross, :
 :
Appellee, : Case No. 05-1689
 :
v. :
 :
The Industrial Commission : On Appeal from the
of Ohio, et al., : Franklin County Court
 : of Appeals, Tenth
Appellants. : Appellate District
 :

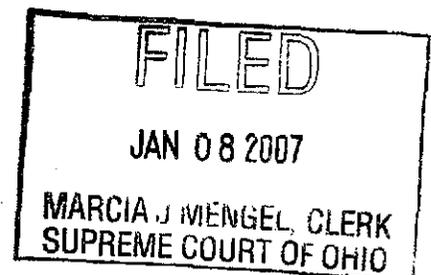
APPELLEE DAVID M. GROSS' MOTION FOR RECONSIDERATION

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

This Court should reconsider its recent decision in this case, as the result is contrary to the very foundation of our workers' compensation system in the State of Ohio. Additionally, what is equally shocking about this Court's decision is that it creates grossly disparate treatment between claimants who violate safety rules, punishing those who are most seriously injured. Such a result is, quite frankly, disturbing.

The following are some of the reasons why Appellee Gross requests reconsideration:

- (1) This decision wrongfully injects fault into the workers' compensation system;
- (2) This decision creates a lopsided system where the most seriously injured get nothing, and those less seriously injured enjoy lost wage benefits;
- (3) This decision gives employers added incentive to terminate employees, who have limited ability to develop evidence in rebuttal;
- (4) This decision conflicts with the purposes of temporary total disability compensation;
- (5) This Court found facts to exist which the Industrial Commission never found.

1. This decision wrongfully injects fault into the workers' compensation system.

This Court recently had the occasion to examine the goals of the workers' compensation system and to explain its history in detail in *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 849 N.E.2d 1004, 2006-Ohio-3257, ¶17:

{¶ 17} "The common-law system proved incapable of dealing with the often devastating social and economic consequences of industrial accidents. It became undeniable that the tort system had failed as a regulatory device for

distributing economic losses borne by injured Ohio workers and their families and that it should be replaced by a workers' compensation system in which those losses would be charged, without regard to fault or wrongdoing, to the industry rather than to the individual or society as a whole. See, e.g., *Goodman v. Beall* (1936), 130 Ohio St. 427, 5 O.O. 52, 200 N.E. 470; *Indus. Comm. v. Weigandt* (1921), 102 Ohio St. 1, 4, 130 N.E. 38, 38-39; *State ex rel. Munding v. Indus. Comm.* (1915), 92 Ohio St. 434, 111 N.E. 299; *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 97 N.E. 602. *Id.* (Emphasis added)

The result in this case clashes with the very nature of the workers' compensation system of Ohio. This Court is clearly injecting fault into the system through the voluntary abandonment doctrine and its application to workplace injuries. This is not what the Legislature intended in drafting the Workers' Compensation Act and its various amendments.

In rendering its decision, this Court also disregarded its previous decision in *Laudato v. Hunkin-Conkey Const. Co.* (1939), 135 Ohio St. 127, 19 N.E.2d 898. In *Laudato*, this Court held that the employee's fault in causing his injury was irrelevant to compensability, in circumstances that have several similarities to the instant case – both *Laudato* and Appellee Gross violated a work rule known to them:

“Nowhere in the Workmen's Compensation Law of Ohio is to be found a provision which makes injuries compensable only when and if sustained during proper performance of work. On the contrary, all injuries, except those willfully self-inflicted, received in the course of and having a causal connection with the employment, ‘either through its activities, its conditions or its environments,’ are compensable, independent of the question of negligence, fault or assumption of risk. ‘The test of right to award from the insurance fund under the Workmen's Compensation Law, for injury in the course of employment is not whether there was any fault or neglect on the part of the employer, or his employees, but whether the employment had some

causal connection with the injury, either through its activities, its conditions, or its environments.” *Id.* at 131.

The behavior of David Gross is clearly analogous to the claimant in *Laudato*. Instead of traversing an unsafe area to accomplish his employer’s goals as did *Laudato*, Gross engaged in an unsafe manner of cleaning his employer’s boiler. Irrespective of their particular acts, both injured workers were within the scope of their employment at the time of their injuries. While both injured workers were engaged in unsafe conduct, there is still a causal connection between their injury and their employment. Notwithstanding longstanding Ohio workers’ compensation jurisprudence that provides predictability in the circumstances encountered both by *Laudato* and *Gross*, this Court has seen fit to inject fault and culpability into the Compensation Act, making predictability impossible.

For the last seventy years since *Laudato*, this Court has stood firm in its interpretation of Ohio’s Workers’ Compensation Act – that employee fault, whether negligent, reckless, willful, or deliberate, when acting in furtherance of the employer’s goals, was irrelevant in determining workers’ compensation benefits. The *Gross* decision eliminates nearly seventy years of injured worker protection and compensation jurisprudence. This drastic change takes place without legislation and with no support whatsoever in the workers’ compensation statutes.

Particularly disturbing is that this Court has found a voluntary abandonment – and a forfeiture of temporary total disability benefits – by a sixteen year old boy, a boy too young to enter into a contract, too young to drink alcohol or purchase tobacco products, too young to join the military, too young for jury duty, and too young to vote. Despite all

the prohibitions on his behavior that legally exist, this Court nonetheless found him competent to voluntarily abandon his employment through “willful” conduct.

2. This decision creates a lopsided system where the most seriously injured get nothing and those less seriously injured enjoy lost wage benefits.

What is perhaps most shocking about this Court’s decision is that it creates grossly disparate treatment between claimants who violate safety rules, punishing those who are most seriously injured. This is truly punitive. The disparate treatment – a compensation gap – is created between those injured workers whose injuries allow them to perform a job search after the violation of the safety rule, and those who are too disabled to perform a job search after the safety violation.

For example, suppose an injured worker willfully violates a safety rule and his injuries are so significant that it forces him to be hospitalized. This individual cannot perform a job search. That injured worker is not entitled to any type of compensation under R.C. Section 4123.56 as he cannot undertake a job search and the injured worker receives no compensation. *See State ex rel. Consol. Freightways v. Engerer* (1996), 74 Ohio St.3d 241, 658 N.E.2d 278.

On the other hand, assume that an employee violates the same safety rule but whose injuries do not prevent him from performing a job search. This injured worker qualifies for wage loss benefits under R.C. Section 4123.56(B). The less significantly injured worker is entitled to lost wage benefits, while the more significantly injured worker gets nothing. This Court’s decision creates two classes of injured workers – injured workers who violate a safety rule and cannot perform a job search get no benefits, while injured workers who violate a safety rule but can look for a job remain eligible for

a temporary total disability substitute, wage loss compensation. This kind of result is unconscionable.

This unequal access to workers' compensation benefits has no legitimate basis and is certainly contrary to the distinctions made in the Workers' Compensation Act. Nowhere in the Workers' Compensation Act is there opportunity for claimants who are less injured to get more benefits than those claimants who are more seriously injured.

This decision is a bad result for injured workers – people who need benefits most at a time when this decision has the potential of taking them away. Right after the industrial injury is when these injured workers are most vulnerable, yet this Court does nothing to protect them. This Court, in creating the voluntary abandonment doctrine based upon its interpretation of a statute, has clearly overlooked another statute, R.C. § 4123.95, which states that “Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.” In reaching its decision in this case, this Court has clearly forgotten that this statute is part of the Workers' Compensation Act.

3. This decision gives employers added incentive to terminate employees, who have limited ability to develop evidence in rebuttal.

For those workers whose injuries are greatest, employers have a great incentive to discover – or in some cases, manufacture – the evidence to characterize an injured workers' behavior as falling within the “willful” category.

After the decision in this case, “willful” behavior may be found where the employee has never engaged in this behavior before. After this decision, can an employer defeat TTC in the claim by merely pointing to the employment handbook, obtaining the totally disabled injured worker's testimony that he received a copy of the employment

handbook, and arguing that the claimant's conduct was "willful" merely because it is prohibited under the employment handbook?

For those injured workers who are too disabled to conduct a job search which may entitle them to wage loss compensation under R.C. Section 4123.56(B) there may be absolutely no remedy. They may have a compensable claim due to the statutory restrictions on non-compensability, but the promise of future benefits may ring hollow unless they can successfully discredit Industrial Commission hearing testimony from their employers and the other workers who will inevitably claim that "I warned him not to do that, or he would get hurt!"

Under R.C. Section 4123.90, terminations of employment which occur in retribution for pursuing workers' compensation benefits are prohibited. The injured worker is given a statutory right to pursue a remedy in Common Pleas Courts. That right may be restricted in practice, as this Court has now given employers a greater incentive to raise the voluntary abandonment defense early and often in the claim. Where TTC and R.C. Section 4123.90 claims are being separately pursued respectively through the Industrial Commission and Common Pleas Court, is a finding that a voluntary abandonment occurred a bar to a 4123.90 action? This Court's ruling in *State ex. rel. Kroger Co. v. Indus. Comm.* (1988), 80 Ohio St.3d 649, 687 N.E.2d 768 seems to indicate as much. This Court's decision takes voluntary abandonment to a level in which it is likely to become the employer's favorite weapon, and may foreclose other rights.

Unfortunately, no real discovery process exists through the Industrial Commission – subpoenas must be requested and are rarely granted, no depositions before hearings are allowed, and the rules of evidence do not apply at hearings. The claimant is unfairly

vulnerable to a group of fellow workers coming into a hearing with the same story – that they “warned” the claimant about not doing the prohibited behavior, and yet it was done anyways. Without the ability to develop evidence contrary to this inevitable testimony, it may be difficult for deserving claimants to overcome this additional barrier to TTC, and otherwise properly awardable benefits will not be granted. This Court should be reluctant to allow fault to be entered into the workers compensation system, when few procedural devices exist to protect the injured worker from these possible abuses.

4. This decision conflicts with the purposes of temporary total disability compensation.

This decision is a dramatic expansion of the voluntary abandonment doctrine that conflicts with the history of temporary total disability compensation jurisprudence. This Court previously decided in reviewing the voluntary abandonment doctrine that “a claimant can abandon a former position or remove himself or herself from the workforce only if he or she has the physical capacity for employment at the time of the abandonment or removal.” *State ex. rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466, citing *State ex. rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 48, 623 N.E.2d 55. After this Court’s decision, this statement can no longer be considered true.

In this case, this Court has created a new legal fiction – that a resignation from employment can be retroactive. This idea is truly bizarre. If David Gross had been, instead of being the individual who opened the lid to the boiler, one of the bystanders and immediately told his supervisor “I quit effective yesterday”, would he have been denied benefits for his injury? Of course not. Yet, this Court has determined that David Gross

retroactively terminated his employment to the time in which he engaged in the prohibited conduct. This Court has found a termination through behavior that, if expressly made through words, would be nonsensical.

This Court has clearly departed from its original finding of voluntary abandonment in *State ex. rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517 N.E.2d 533, when it first determined that employees may take actions which are deemed equivalent to an express resignation. This Court's decision extends the voluntary abandonment line of cases beginning with *Ashcraft* to bizarre results. If, as this Court has stated, Gross' deemed "resignation" occurred when he poured water into the boiler, the employment relationship would seem to have been severed at that moment. Does Gross now become entitled to pursue common law remedies accruing at the time of his injury, as he cannot be considered to be an employee of FF&F at the moment of his injury?

While this Court claims that his conduct precipitating termination (and therefore, his voluntary abandonment) occurred simultaneously, a close review of the facts indicates that Gross poured water into the boiler before he was injured. Seemingly, this Court has found the termination to be retroactive to the moment of pouring water into the boiler, an act which occurred before his injury. How does this Court reconcile its holding that Gross "quit" moments before he was injured in a compensable workers' compensation claim which does not provide TTC benefits due to the fact that he was not employed at the time of his injury? Clearly, the prohibited conduct and the injury were not "simultaneous." Will the Court extend its reasoning to find that no employment relationship ever existed due to an alleged voluntary abandonment based upon a falsification of a job application? If so, then the only logical result is to find that no workers' compensation claim could

ever exist in those circumstances. Such a result needlessly shifts the risk of employment dangers onto the backs of injured workers, their families, and ultimately, society.

This Court's decision also conflicts with the public policy behind temporary total disability compensation. *State ex. Rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 732 N.E.2d 355 ("*Baker II*") is helpful to understanding this policy, yet this Court ignored its rationale in reaching the decision in this case. In *Baker II*, on reconsideration, this Court reversed itself in its application of the voluntary abandonment doctrine, crafting an exception to this harsh doctrine. This Court should do the same in this case.

In *State ex. Rel. Baker v. Indus. Comm.* (1999), 87 Ohio St.3d 561, 722 N.E.2d 67 ("*Baker I*"), the predecessor to *Baker II*, this Court decided that because the claimant voluntarily resigned his employment, he became ineligible for future periods of temporary total disability compensation. In *Baker I* and *II*, the claimant re-aggravated a workers' compensable injury with a subsequent employer and was denied benefits. In *Baker II*, this Court engaged in a thorough examination of both the policy behind temporary total disability compensation and the voluntary abandonment doctrine. A similar analysis is appropriate in this case.

In reviewing the temporary total disability statute, the *Baker II* Court noted as follows:

"R.C. 4123.56 is instructive in that it ties an injured worker's eligibility for TTD to the worker's capability of returning to his former position of employment. This "former position of employment" standard was intended to be a threshold physical measurement of whether an injured worker was able to perform the duties of the job that he held at the time of the injury. A worker's physical capabilities are unrelated to whether the worker is actually working at his former position of employment and whether

the former position is even available for the injured worker to return to after he is medically released.” *Id.* at 379.

The Court went on to note that “eligibility for TTD is contingent upon an injured worker’s inability to perform the duties of his former position of employment.” (citing *State ex. Rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 23 O.O.3d 518, 433 N.E.2d 586; *State ex. Rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 29 OBR 162, 504 N.E.2d 451). Significantly, this Court also stated that “this eligibility standard is consistent with the purpose of TTD, which is to compensate an injured worker for the loss of earnings he incurs while his injury heals.” *Id.* at 380.

In this case, this Court upheld the Industrial Commission’s application of the voluntary abandonment doctrine and ineligibility for temporary total disability compensation without considering whether Gross was capable of being physically unable to perform his former duties. This Court’s decision unfairly deprives Gross of necessary benefits while his injuries heal. The failure by this Court to address these issues causes this decision to be unnecessarily harsh.

In *Baker II*, this Court distinguished the two cases which it relied upon in denying TTC benefits in *Baker I – Jones & Laughlin, supra*, and *State ex. Rel. McGraw v. Indus. Comm.* (1990), 56 Ohio St.3d 137, 564 N.E.2d 695. In both cases, this Court had the occasion to determine TTD eligibility in the face of voluntary abandonment. Both *Jones & Laughlin* and *McGraw* are distinguishable from the case at bar, as well, and *Baker II* provides insight into the path the law needs to take to fulfill the goals of the Workers’ Compensation Act.

This Court first distinguished *Jones & Laughlin* from *Baker II*. First, this Court noted that it agreed with the Court of Appeals that “voluntary retirement may preclude a

claimant from receiving temporary total disability benefits to which he otherwise might be entitled, if by such retirement the claimant has voluntarily removed himself *permanently* from the workforce.” *Id.* at 381. Applying this rule of law, this Court stated that “Baker did not permanently abandon the work force. Baker secured other employment and continued to work until the injuries received in his original industrial accident again rendered him temporarily and totally disabled.” *Id.* at 382. No finding was ever made that determined that Gross ever intended to permanently abandon the work force, yet voluntary abandonment was found. The fact that Gross was only sixteen (16) years old at the time of his injury is strong evidence that he did not intend to permanently abandon the workforce.

This Court should place the emphasis upon the injured worker’s ability to return to the workforce – in a similar role to the former position of employment – rather than simply concluding that temporary total disability compensation is unavailable due to the loss of a job. This Court should ask the following question when reviewing TTC eligibility: “But for the industrial injury, would the injured worker be physically able to work?” Such analysis is clearly superior to denying benefits merely because the former position of employment is unavailable.

5. This Court found facts to exist which the Industrial Commission never found.

Finally, this Court is the first to review the facts of this case and find that Gross “willfully” and “repeatedly” ignored warnings prior to his injury. The Industrial Commission, in rendering its decision, never stated that the basis for its voluntary abandonment application was that Gross repeatedly was warned, and yet willfully engaged in that behavior anyways. In the future, can an injured worker voluntarily

abandon his employment based on a finding that his conduct was "willful" by showing that it was merely prohibited in the employment handbook? Does this doctrine even apply when an employee is expressly directed by his supervisor to engage in conduct prohibited by the employment handbook? Even assuming that the doctrine would not apply in that circumstance, for reasons discussed previously, injured workers do not have sufficient discovery tools to flesh that out at hearings before the Industrial Commission.

CONCLUSION

This decision turns the workers' compensation system on its head. This decision re-injects fault into a system that was designed to be a no-fault system, an idea repugnant to compensation law in Ohio.

The result of this decision is to create a two-tiered system among those groups of workers whose terminations result from violating safety rules. The irony is that the less seriously injured end up with wage loss benefits that are denied to their more seriously injured counterparts. This is an idea that is against the very nature of workers' compensation and has no legislative basis in the Act.

Additionally, this decision gives employers incentive to abuse the Industrial Commission framework. This is not what the workers' compensation system was designed to do.

This decision conflicts with previous decisions on the voluntary abandonment doctrine from this Court. This Court went to great lengths to distinguish these previous cases. However, the Court relied upon logic that leads to absurd results if applied in other circumstances.

Finally, this Court for the first time makes the finding that Gross' behavior was "willful" and that he was repeatedly warned. The Industrial Commission did not make that finding. Neither did the Magistrate and neither did the Tenth District Court of Appeals.

For all of the foregoing reasons, Appellee Gross requests this Court re-consider this matter.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Motion for Reconsideration was sent by ordinary U.S. mail to counsel of record for appellants, Edna Scheuer, Scheuer, Mackin & Breslin, 11025 Reed Hartman Hwy., Cincinnati, OH 45242, and Andrew Alatis, Assistant Attorney General, State of Ohio, 150 E. Gay St., 22nd Floor, Columbus, OH 43215 on January 8, 2007.



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