

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
FRANKLIN COUNTY, OHIO

STATE, EX REL. Gross,	:	
	:	
Relator-Appellee,	:	Case No. 05-1689
	:	
v.	:	[Appeal from Original Action
	:	filed in the Tenth Appellate
INDUS. COMM., et al.,	:	District as Case No. 04AP-756]
	:	
Respondents-Appellants	:	

AMICUS OHIO AFL-CIO AND OHIO STATE BUILDING AND CONSTRUCTION  
TRADES COUNCIL, AFL-CIO MEMORANDUM IN SUPPORT OF RELATOR GROSS'  
MOTION FOR RECONSIDERATION

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There are a number of problems with the *per curiam* opinion in this case which justify the Court's reconsideration of the matter. The Ohio AFL-CIO and the Ohio State Building and Construction Trades Council, AFL-CIO request this Court to reconsider its *per curiam* decision because of the harm that decision does to the workers of this state and the workers' compensation system which was designed to protect them.<sup>1</sup>

The Court's *per curiam* decision in the present case provides an incentive for employers to fire workers who have been injured on the job based on the accident which caused them to be injured. Such an incentive is contrary to the purpose of the workers' compensation system, as established by the people of Ohio in Art. II, Sec. 35 and the legislature through R.C. Chapter 4123.

Injured workers suffer enough due to merely being injured. Yet this Court's decision will now give employers an incentive to seek out reasons to fire them because of their injury - thereby saving money for the employer. This is not the reason the workers' compensation system was adopted.

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<sup>1</sup> Amicus Ohio AFL-CIO, is an unincorporated association composed of affiliated labor unions who represent employees throughout the state of Ohio.

Amicus Ohio State Building and Construction Trades Council, AFL-CIO, is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction in Ohio.

The legislature, in enacting the workers' compensation law, has enacted a number of exclusions. It has provided that certain types of injury are not compensable (see R.C. 4123.01(C)). Nowhere has the legislature provided that an injury due to the negligence or fault of an injured worker is excluded.

This Court (not the Commission) has made a factual determination that Mr. Gross, a 16 year old, suffered his injuries because he "wilfully" ignored "repeated" warnings. In making the factual finding that Mr. Gross engaged in "wilful" activities which should bar his receipt of temporary total compensation for his work-related injury, this Court has overlooked the fact that OSHA cited the employer for failing to provide proper protective equipment and for failing to train their employees in the proper use of the protective equipment.

This Court's *per curiam* decision permits this employer to profit from its failure to properly train Mr. Gross by finding that the accident was his fault and further finding that as a result he is barred from temporary total.

This Court's finding that "wilfully" ignoring "repeated" warnings bars Mr. Gross from temporary total improperly writes into the statute a requirement not created by the legislature. The legislature has not provided that "wilfully" ignoring "repeated" warnings should bar an injured worker from the receipt of workers' compensation.

In R.C. 4123.54, the legislature has indicated what workers' activities will serve to bar workers' compensation. R.C. 4123.54 bars an injured worker from participating if he has a self-inflicted injury, or one which is due to abuse of a controlled substance. Nowhere did the legislature provide that "wilful" or "repeated" activities bar compensation.

This case is effectively about a 16 year old who acted unwisely. The legislature has not provided that an unwise act bars compensation. In fact, the purpose of the workers' compensation system is to cover workplace injuries whether they are accidental in nature, or due to the injured worker's own fault, provided that they were in the course and scope of his employment. Mr. Gross' injuries in this case occurred in the course and scope of his employment and therefore should be compensable.

The whole purpose of the workers' compensation system adopted by Art. II, Sec. 35 was to avoid notions of "fault" or "negligence" interfering with the right of an injured worker to receive compensation for injuries caused by his employment. There were not supposed to be arguments about negligence or who was at fault. Yet this Court's *per curiam* decision in the present case imports the notion of fault into the determination of whether the injured worker will be eligible to receive temporary total compensation for the recovery period following

his injury, and also provides an incentive to employers to seek employee fault as a means of saving money.

This Court has recognized in the VSSR context that the purpose of workers' compensation is to protect injured workers from the harm caused by their own actions

Specific safety requirements exist to "protect employees against their own negligence and folly as well as to provide them a safe place to work." "

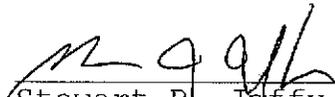
State ex rel. Danstar Builders, Inc. v. Indus. Comm. (2006), 108 Ohio St.3d 315, 2006-Ohio-1060, para. 12.

That is the purpose of workers' compensation - to compensate employees for injuries at work, even if such injuries result from their own "negligence and folly."

The legislature did not provide for workers who were injured due to their own fault or negligence to be denied workers' compensation - yet that is the result written into the law by this Court's *per curiam* decision. Such a decision harms the injured workers' of this state and is contrary to the purpose

of workers' compensation. Therefore, this Court should  
reconsider its decision.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served upon the following this 8<sup>th</sup> day of January 2007, by depositing a copy in the United States Mail, postage pre-paid, addressed to:

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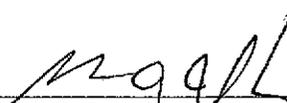
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