

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. : Case No. 05-1689  
David M. Gross, :  
 :  
Relator-Appellee, :  
 :  
v. : On Appeal from the Franklin County  
 : Court of Appeals Tenth Appellate  
Industrial Commission of Ohio, : District  
 :  
Respondent, :  
 :  
and :  
 :  
Food, Folks & Fun, Inc., dba KFC, :  
 :  
Respondent-Appellant. :

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MEMORANDUM OF RESPONDENT-APPELLANT, FOOD FOLKS & FUN, INC., dba KFC  
OPPOSING RELATOR-APPELLEE'S MOTION FOR RECONSIDERATION

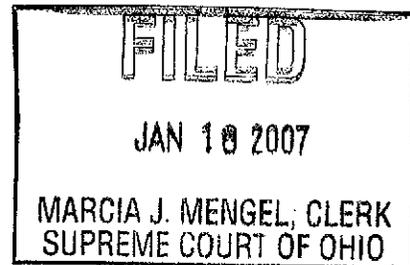
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## STATEMENT OF FACTS

Appellee, David Gross sustained injuries on November 26, 2003 while employed by Appellant, Food, Folks & Fun, Inc. (hereafter “FFF”) at a KFC Restaurant. (Supp. 1).<sup>1</sup> Specifically, Mr. Gross was injured when he was sprayed with hot water from a cooker/fryer. (Id.). His claim was allowed for burns to certain parts of his body, and he was awarded temporary total disability compensation. (Id. at 10-11).

Following Mr. Gross’ injury, FFF investigated the incident and learned that Mr. Gross was injured because he refused to follow a written work rule, the instructions of his supervisor and a warning contained on the cooker/fryer, all of which directed him never to “boil water in a cooker to clean it.” (Id. at 13). Specifically, the Food, Folks & Fun Employee Handbook clearly states at page 32, in a section entitled Safety, “Follow all warnings and instructions about the safe operation of all equipment. Never boil water in a cooker to clean it.” (Id. at 15). Through its investigation, FFF learned that at the time he was injured, Mr. Gross was boiling water in a cooker to clean it, in direct contravention of this written work rule. (Id. at 13). FFF further learned that Mr. Gross had been warned at least one time prior to the incident by Adrian LeBlanc, Market Coach, not to fill the cooker/fryer with water for cleaning as this could result in injuries. (Id. at 5). In addition, on the night of the incident, Mr. Gross was instructed by his Supervisor to drain the water from the fryer. (Id. at 3-4). However, even after these warnings, Mr. Gross chose to leave the water in the fryer, close the lid, and heat the fryer. (Id.). Mr. Gross was then warned by a co-worker not to open the lid to the fryer. (Id. at 7). Mr. Gross also ignored a warning label affixed to the fryer that stated “do not close the lid with water or cleaning agents in the cook pot.” (Id.). Mr. Gross ignored all of these warnings, opened the lid

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<sup>1</sup> References to the Supplement to the Briefs is noted as (Supp. \_).

to the fryer, and caused hot water to spray out on both him and two co-employees, injuring all three. (Id. at 3-4).

The FFF Employee Handbook provides that you can lose your job immediately if you commit a “critical violation.” (Id. at 16). Pursuant to the express provisions of the Employee Handbook, as set forth on page 35, critical violations include “violating F.F.F. health, security, or safety guidelines that cause or could cause illness or injury of anyone.” (Id.). It is undisputed that Mr. Gross received the Employee Handbook when he became employed with FFF in August of 2003, and he in fact signed an acknowledgement of receipt of the Handbook. (Id. at 14). Because FFF learned through its investigation that Mr. Gross had knowingly violated a critical safety rule, his employment with FFF was terminated effective February 13, 2004. (Id. at 13).

On these facts, the Industrial Commission of Ohio (hereinafter “Commission”) concluded that 1) according to FFF’s written policy, water should never be used to clean a cooker/fryer; 2) the policy specified that such conduct was a dischargeable offense; 3) Mr. Gross was aware of the policy; and 4) Mr. Gross violated the policy. (Id. at 33-34). As a result, it found that Mr. Gross had voluntarily abandoned his employment pursuant to *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469, and it terminated his temporary total disability effective February 13, 2004, the date of his discharge. (Id.)

In its Decision filed on December 27, 2006 (hereinafter “the Decision”), this Court upheld the Commission’s decision, finding that the agency had not abused its discretion when it found that Mr. Gross voluntarily abandoned his employment due to his knowing violation of FFF’s written work rules.

The matter is now before the Court on Mr. Gross’ Motion for Reconsideration.

## ARGUMENT

Mr. Gross asserts five separate arguments in support of his request that this Court reconsider its Decision. Mr. Gross asserts that this Court's Decision has 1) wrongly introduced fault into Ohio's workers' compensation system; 2) will have a disparate impact on severely injured workers who seek compensation; 3) provides an incentive for employers to violate R.C. 4123.90's prohibition against terminating employees for filing and/or pursuing a workers' compensation claim; 4) conflicts with the purpose of temporary total disability compensation and this Court's decision in *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466; and 5) rests upon a factual determination that Mr. Gross' actions were willful, which was never determined by the Commission. As will be demonstrated below, none of these assertions has merit, and Mr. Gross' Motion should be denied.

In his first argument, Mr. Gross asserts that this Court has injected fault into the workers' compensation system and ignored its prior decision in *Laudato v. Hunkin-Conkey Constr. Co.* (1939), 135 Ohio St. 127, 19 N.E.2d 898. *Amici Curiae* each assert a similar argument to the effect that the Court's Decision creates a "willful negligence standard" for denying temporary total disability compensation on the ground of a voluntary abandonment.

This same argument, however, was previously briefed by the parties and rejected by the Court<sup>2</sup> with the exception of Mr. Gross' novel reliance on *Laudato*. According to the Rules of Practice of the Supreme Court of Ohio, "a motion for reconsideration shall be confined strictly to the grounds for reconsideration and shall not constitute a reargument of the case...."

S.Ct.Prac.R. XI(2)(A). In his Merit Brief submitted to this Court on February 8, 2006, Mr. Gross argued that the Commission's finding that he had voluntarily abandoned his employment injected fault into the workers' compensation system. (Appellee's Merit Brief at 9). This Court

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<sup>2</sup> Decision at ¶31.

rejected this Argument in its Decision (Decision at ¶32), and Mr. Gross' attempt to reargue the issue must be rejected in accordance with S.Ct.Prac.R. X1(2)(A). What is more, the *Laudato* decision is irrelevant to whether the Commission abused its discretion when it terminated Mr. Gross' temporary total disability compensation because *Laudato* stands only for the well-settled principle that a worker's negligence is irrelevant to whether they have sustained a compensable injury. In the aftermath of *Gross*, *Laudato* stands undisturbed and therefore provides no basis for this Court to reconsider its holding that the Commission acted well within its discretion in finding that Mr. Gross voluntarily abandoned his job with FFF.

Mr. Gross next asserts that the Court's Decision will create two "classes" of injured workers with respect to wage loss compensation awards subsequent to a voluntary abandonment under *Louisiana-Pacific*: (1) those claimants ineligible for wage loss compensation because they are too seriously injured to search for work; and (2) those claimants whose injuries are not as severe and remain eligible for wage loss compensation because they are capable of conducting a job search. However, Mr. Gross' comparison ignores a very basic fact shared by both classes of claimants. Members of both classes are ineligible for temporary total compensation awards because their lost earnings, for which temporary total compensation is paid, are not causally related to their industrial injuries, but are instead related to the claimants' voluntary abandonment of their former position of employment.

For nearly twenty years, this Court has employed a two-part test to determine whether an injured worker qualifies for a temporary total disability award. The first part focuses on the disabling aspects of the injury, and the second part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position of employment. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d

533. Stated differently, the injury must not only render the claimant medically unable to perform the functions of the former position of employment, but the injury must also prevent the claimant from returning to the former position. *Id.* at 43 (citing *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 504 N.E.2d 451).

Essentially, Mr. Gross asks that this Court on Reconsideration to overrule the two-part test for temporary total compensation awards established by *Ashcraft* and *Jones & Laughlin* by eliminating the requirement that a claimant's loss of wages have a causal connection to the industrial injury. And it is that result which would subvert the most basic principle of the Ohio Workers' Compensation Act - requiring that all medical and compensation awards have a causal relationship to a compensable injury or occupational disease. See *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.3d 630, 433 N.E.2d 586; *State ex rel. Miller v. Indus. Comm.* (1994), 71 Ohio St.3d 229, 643 N.E.2d 114.

In Mr. Gross' third argument, he asserts that the Decision makes it too easy for employers to seek and obtain a finding of voluntary abandonment under the *Louisiana-Pacific* standard. Again, this argument has no merit. *Louisiana-Pacific* provides strict requirements that an employer must meet before a claimant can be determined to have voluntarily abandoned his employment. An employer must establish the existence of a written work rule prohibiting the conduct, that the claimant violated the work rule, that the work rule clearly defined the prohibited conduct, that it had been previously identified by the employer as a dischargeable offense, and that the work rule was known or should have been known to the employee. *Louisiana-Pacific*, 72 Ohio St.3d at 403.

After an employer establishes that the claimant voluntarily abandoned the employment under the *Louisiana-Pacific* standard and supports its argument with evidence, the claimant is

then afforded an opportunity to present evidence that the employer used the violation of the rule as a pretext to discharge the claimant. *State ex rel. Walters v. Indus. Comm.*, 10<sup>th</sup> Dist. No. 01 AP-1043, 2002-Ohio-3236, ¶38. The *Gross* Decision does not alter these strict evidentiary and procedural requirements, nor does it impact the operation of R.C. 4123.90's prohibition against discharging an employee for pursuing a workers' compensation claim. Indeed, the combination of strict evidentiary and procedural requirements, together with employer liability for discharges prohibited by R.C. 4123.90, provide ample safeguards against the imaginary abuses on which Gross rests his Motion for Reconsideration.

Mr. Gross' fourth argument is that the Decision conflicts with *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466, as well as the purpose of temporary total disability compensation. This argument was previously briefed and argued by the parties, and the Court has rejected Gross' baseless contention that FFF effectively waived its voluntary abandonment defense by deferring its discharge until after his initial receipt of temporary total compensation when a thorough investigation was concluded. (Decision at ¶24). Again, this Court's Rules of Practice specifically state that a motion for reconsideration shall not reargue the case. S.Ct.Prac.R. XI (2)(A). As such, Mr. Gross' argument does not support his Motion, and this Court should deny his Motion for Reconsideration.

In his final Argument, Mr. Gross takes exception to this Court's characterization of his conduct as a "willful" violation of FFF's safety rule. However, the Court's characterization of Mr. Gross' conduct as willful was simply in response to his argument that his conduct was merely negligent, which in his opinion would entitle him as a matter of law to continued temporary total compensation. Both the Industrial Commission<sup>3</sup> and this Court<sup>4</sup> rejected Gross'

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<sup>3</sup> Supp. at 33-34

<sup>4</sup> Decision at ¶32

attempt to attribute his conduct to mere negligence, and his attempt to again re-litigate that issue on Reconsideration must fail.<sup>5</sup> Indeed, implicit in every factual finding of a *Louisiana-Pacific* voluntary abandonment is an element of willfulness by the injured worker because a voluntary abandonment occurs only when the claimant is on written notice that his or her conduct would subject them to discharge. These being more than “some evidence” to support the Commission’s factual findings as to each element of a *Louisiana-Pacific* voluntary abandonment, Gross’ attempt to re-litigate this issue on Reconsideration must fail.

### CONCLUSION

The rationale underlying the *Louisiana-Pacific* doctrine is that in order to insure a causal connection between a claimant’s loss of earnings and his injury, it is necessary to examine a claimant’s dischargeable conduct, and a claimant is held to have voluntarily accepted the consequences of his conduct where: 1) it was known or should have been known prior to the injury that the conduct constituted a dischargeable offense; and 2) the claimant’s conduct was voluntary. *Walters*, 2002-Ohio-3236 at ¶24-25. Based on the record before it, this Court determined that the Commission did not abuse its discretion when it determined that Mr. Gross voluntarily abandoned his employment within the meaning of *Louisiana-Pacific* when he violated FFF’s written work rule. And in doing so, this Court reasonably refused to carve out an exception for Mr. Gross because of his age, or because his dischargeable conduct was the same conduct that gave rise to his injury, or because the employer chose to first investigate Gross’ conduct, as opposed to terminating him immediately and defending his initial receipt of temporary total compensation.

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<sup>5</sup> S.Ct.Prac.R. XI (2)(A)

For the foregoing reasons, FFF respectfully submits there is no basis for this Court to reconsider its Decision, and it therefore urges the Court to Deny Gross' Motion.

Respectfully submitted,

Edna Scheuer, Counsel of Record

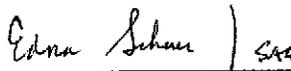
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