

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.
David M. Gross,

Appellee,

v.

The Industrial Commission
of Ohio, et al.,

Appellants.

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Case No. 05-1689

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

APPELLEE DAVID M. GROSS' BRIEF IN SUPPORT OF MOTION FOR
RECONSIDERATION

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BRIEF IN SUPPORT OF RECONSIDERATION

Appellee David Gross submits this brief in support of his motion for reconsideration.¹ Regardless of whether this Court deems a worker to have voluntarily abandoned his employment by a formulaic application of *State ex rel Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469, or by the creation of a fault-based compensation system, the result is the same: the injured worker, too disabled to find other employment, must subsist during his period of convalescence without compensation benefits. The effect of the decision of this Court is contrary to the plain language of the Workers' Compensation Act as well as the intent behind the Act as articulated by the General Assembly. Moreover, this decision gives every employer in the State of Ohio the opportunity to eliminate the right to compensation whenever a claimant has any degree of culpability for the cause of a work-related accident. Such power and dominance in our system should never be given to any side, be it employer or claimant. There is no support for this result in the Workers' Compensation Act or any of the prior decisions of this Court.

There are two ways to interpret the *Gross* decision. Both interpretations lead to disastrous and problematic results. Both inject injured worker culpability into the compensation equation without statutory support. Both interpretations run contrary to the foundation of our workers' compensation system: a system where the Act is liberally construed in favor of the claimant.

¹ Appellee Gross, on January 8, 2007, submitted an extensive memorandum on the issue of why this Court should reconsider its decision. Appellee was joined by amicus curiae Ohio Academy of Trial Lawyers, AFL-CIO, Fraternal Order of Police, and the U.S. Auto Aerospace & Agricultural Implement Workers. Appellee incorporates into this Brief his previous arguments, as well as the arguments of all amicus curiae.

In the *Gross* decision, this Court uses the terms “willful and wanton conduct” to describe Gross’ behavior. Appellee assumes that this is mere dicta, as suggested by the Industrial Commission rulings that did not base its decision on any finding that Gross had engaged in “willful and wanton” conduct, and also that this Court did not remand this matter back to the Industrial Commission to determine whether Gross’ behavior rose to this level. Assuming, *arguendo*, that this is the new standard for voluntary abandonment, it introduces fault into the compensation equation, a result contrary to the Workers’ Compensation Act.

Workers’ compensation is a creature of statute, not common law. R.C. Chapter 4123. The Workers’ Compensation Act abolished the common law defenses of assumption of risk and comparative negligence. *Phelps v. Positive Action Tool Co.* (1986), 26 Ohio St.3d 142, 497 N.E.2d 969. The General Assembly did not intend for injured workers to be ineligible for temporary total disability compensation through the application of a fault-based system, yet this is the result the *Gross* decision creates.

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} “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. Yapple v. Creamer*, 85 Ohio St. 349, 97 N.E. 602. *Id.* (Emphasis added)

In examining the culpability of an injured worker, the decision in *Gross* conflicts with this Court's prior holding 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:

"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 (Emphasis added).

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, or willful and wanton, 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 without explaining how the *Gross* case is different from these other decisions. The *Gross* decision runs contrary to the General Assembly's policy requiring "liberal construction" in favor of injured workers. R.C. Section 4123.95.

Creating a system in which fault is relevant to disability compensation is practically unworkable, as well. The administrative system at the Industrial Commission was not created to determine "fault." In requiring hearing officers to determine where

fault exists, predictability is lost. The employee loses the benefit of the bargain of the workers' compensation system. While the employer cannot be held accountable for "willful and wanton" conduct, the employee loses the right to benefits for engaging in the same class of behavior. *See* R.C. Sections 4123.74 and 2745.01.

Assuming the *Gross* decision does not create a "willful and wanton" standard, then it can only be based upon a formulaic application of *Louisiana-Pacific*, which is just as problematic. In the *Gross* decision, this Court is clearly allowing employers to privately and unilaterally inject 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.²

This decision allows employers to retain the benefits of the common law defenses of assumption of the risk and contributory negligence, as well as allows employers to unilaterally create new standards for the injured worker's behavior that would preclude temporary total disability compensation where the injured worker fails, at some point prior to his period of disability, from meeting those standards. All that is required of employers is some degree of forethought and planning in crafting detailed and meticulous employment handbooks. Under this decision, employers retain the benefits of these common law defenses simply by defining prohibited behavior within their employment handbook that would formulate the basis of the assumption of the risk and contributory negligence defenses at common law. This is not the purpose of the Workers' Compensation Act.

² This Court strongly adheres to principles of statutory construction that requires the Court to apply the plain language of clearly written statutes, and to interpret only those portions of a statute which are ambiguous. *See Sherwin Williams Co. v. Dayton Freight Lines (2006), 112 Ohio St.3d 52, 858 N.E.2d 324, 2006-Ohio-6498.* There is absolutely no ambiguity in Ohio's compensation Act to support a fault-based compensation system.

Not only is this decision unfair to injured workers, it is unfair to honest businesses. This decision creates an uneven playing field between categories of businesses who employ workers in Ohio – employers who plan ahead and define as many possible categories of prohibited behavior and then terminate injured workers for violating them are rewarded at the expense of employers who choose to fulfill their obligations to their injured workers. Economically, the businesses who harshly deal with injured workers will be in a better position due to lower cost scales from decreased workers' compensation premiums. Not only do injured workers suffer under this scenario, but other businesses are forced to engage in such tactics to compete. What viable and competitive business would not exercise its option to eliminate every lost time claim when an employee has some culpability in causing his injury or making the injury worse? Moreover, there are no safeguards to prevent employers from engaging in this conduct.³ This decision is decidedly anti-employment.

As a result of this decision, an extra burden will be placed on the social support systems as well. By planning ahead and detailing as many possible violations of company policy as possible within their employment handbooks, employers may simply “shift the risk” for disabling injuries to organizations such as social security, the Ohio Department of Jobs and Family Services, charities, and families of injured workers merely by being proactive in drafting their employment handbooks. The overall costs of disabling injuries will be shifted away from employers and onto these organizations, but most of all, to the injured workers themselves. This is not a result in which anyone wins. This is a

³ R.C. Section 4123.90 only prevents workers from being terminated due to their pursuit or filing of a workers' compensation claim, not other actions which may lead to termination. Moreover, injured workers who are terminated before filing a workers' compensation claim are not allowed to seek relief under R.C. Section 4123.90. *Roseborough v. N.L. Industries* (1984), 10 Ohio St.3d 142, 10 OBR 478, 462 N.E.2d 384, syllabus.

disastrous result for the citizens of the State of Ohio, the majority of whom want to do the right thing when it comes to injured workers.

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.

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. In *Ashcraft*, the claimant was denied eligibility for temporary total disability benefits because he was in prison for first degree murder. This Court's decision extends the voluntary abandonment line of cases beginning with *Ashcraft* to unfortunate results.

While this Court claims that Gross' 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 claim which does not provide temporary total disability compensation 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.”

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*.) *Baker II* is helpful to understanding this policy, yet this Court ignored its rationale in reaching the decision in the case at bar. In *Baker II*, this Court granted reconsideration in the 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. (Emphasis added).

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 451⁴). 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. (Emphasis added).

In the *Gross* 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 physically unable to perform his former duties. 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 temporary total disability compensation 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, TTD eligibility was reviewed 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.

⁴ *Jones & Laughlin* was decided by the Tenth District Court of Appeals.

This Court first distinguished *Jones & Laughlin* from *Baker II*. 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. In the case at bar, no finding was made 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.

Importantly, the *Jones & Laughlin* Court, in creating the voluntary abandonment doctrine, noted that an issue of causation is raised when deciding whether a claimant is unable to earn wages because of his injuries or because of his lack of employment. The *Gross* decision forecloses the possibility that both may be a cause of his loss of wages, and conflicts with principles of “dual causation” long approved by this Court. *See Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.2d 66, 67, 548 N.E.2d 304 (“Where two factors combine to produce damage, each is a proximate cause, *citing Garbe v. Halloran* (1948), 150 Ohio St. 476, 38 O.O. 325, 83 N.E.2d 217).

Under *Baker II*, it would seem this Court determined that voluntary abandonment should apply only where there is retirement, incarceration, or where a claimant truly removes himself from the workforce. *Baker II* cannot be reconciled with the result in the

Gross case, and justification for this decision should not be based on the nature of how the employment relationship was terminated (resigning from employment in *Baker II* versus being terminated for violating company policy in *Gross*).

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 temporary total disability compensation 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. This analysis is appropriate where both the termination and the claimant's medical condition are causes of the loss of earnings. To simply determine that the loss of one's job is the sole cause of a loss of earnings is to ignore the disabilities of injured workers.

The "voluntary abandonment" doctrine is a judicially created doctrine rooted in R.C. Section 4123.56. Like all provisions of the Workers' Compensation Act, it should be liberally construed in favor of the injured worker. A simplistic and rote application of *Louisiana-Pacific*, however, leads to results that are devastating to injured workers when the Industrial Commission is required to examine pre-disability behavior. This Court should amend this judicially created doctrine to dictate when *Louisiana-Pacific* should be applied, as this would create predictability in the law without jeopardizing the temporary total disability compensation scheme created by the General Assembly.

Louisiana-Pacific is clearly distinguishable from the facts of this case. In *Louisiana-Pacific*, the claimant was denied temporary total disability compensation

benefits after he violated the employer's "no call, no show" rule. *State ex rel Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469. It is important to note that the claimant in *Louisiana-Pacific* engaged in prohibited behavior after he had been released to go back to work. *Id.* at 403. In *Louisiana-Pacific*, this Court determined that the claimant was ineligible for subsequent periods of temporary total disability compensation due to his actions, but this Court never indicated that the voluntary abandonment doctrine could be invoked to terminate an already existing period of temporary total disability compensation. The claimant in *Louisiana-Pacific* received over one year of temporary total disability compensation benefits prior to his release to work. *Id.* at 401.

At the time of his termination, the injured worker in *Louisiana-Pacific* was released to return to work by his treating physician. *Id.* This is factually distinguishable from the instant case, which represents a dramatic shift in the application of the voluntary abandonment doctrine. The General Assembly never intended for an entire group of injured workers to be ineligible for temporary total disability immediately following their injury, and they especially did not intend that group of workers to be denied coverage at the whim of their employers, who have the most to gain from the application of this doctrine. Yet, this is the scenario the *Gross* decision creates.

The *Gross* decision also 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 contrary to the distinctions made in the Workers' Compensation Act. Nowhere in the Workers' Compensation Act does the General Assembly provide the opportunity for claimants who are less injured to get more benefits than those claimants who are more seriously injured.

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.

CONCLUSION

This decision turns the workers' compensation system upside down. This decision injects fault into a system that was designed to be a no-fault system, an idea repugnant to compensation law in Ohio. Whether this Court intends claimant fault to be relevant to compensation merely because it deems Gross's behavior to meet a new “willful and wanton” standard, or whether it intends his fault to be relevant to compensability merely because his employer had a well-crafted handbook, the result is the same – the temporary total disability statute loses its meaning.

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 unfortunate results if applied in other circumstances. In doing so, this Court overlooks the fact that the General Assembly intended that the Workers' Compensation Act should be liberally construed in favor of injured workers.

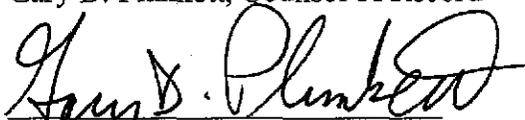
The result of this decision is to create a two-tiered system among those groups of workers whose terminations result from violating safety rules. The irony is that the less seriously injured end up with wage loss benefits that are denied to their more seriously

injured counterparts. This is an idea that is against the very nature of workers' compensation and has no legislative basis in the Act.

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.

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 March 30, 2007.



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