

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 :

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BRIEF OF AMICUS OHIO AFL-CIO AND OHIO STATE BUILDING AND  
CONSTRUCTION TRADES COUNCIL, AFL-CIO IN SUPPORT OF RELATOR GROSS

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I. STATEMENT OF THE CASE

This Court has granted oral argument on the issue of whether to reconsider its initial decision in this case.

Because there are a number of problems with the *per curiam* decision in this case, amicus Ohio AFL-CIO and the Ohio State Building and Construction Trades Council, AFL-CIO<sup>1</sup>, urge the Court to grant reconsideration and vacate its initial decision. This Court should reconsider its *per curiam* decision because of the harm that decision does to the workers of this state and to the workers' compensation system which was designed to protect workers such as David Gross, who were injured in the course of, and arising out of, their employment.

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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.

## II. STATEMENT OF FACTS

David Gross was a 16 year old employee who had been working for his employer for only a few months when he was injured in the course of, and arising out of, his employment on November 26, 2003. [Magistrate's op. para. 16, 20.]<sup>2</sup> David Gross suffered serious injuries and his industrial claim was allowed for

Right second degree burn abdominal wall;  
right second degree burn back; right second  
degree burn thigh; right second degree burn  
back; right second degree burn forearm; right  
ten to nineteen percent, third degree body  
burn. [Magistrate's op. para. 16.]

OSHA issued two citations against the employer as a result of the November 26, 2003 injury. OSHA found

On November 26, 2003, kitchen employees cleaning and working around the Henny Penny Gas Pressure Fryer, were not provided with, nor required to wear, all the appropriate personal protective equipment (PPE), such as gloves, aprons, and goggles, thereby exposing them to hot water spraying out of the pressure fryer. [Magistrate's op. para. 18 (emphasis added).]

OSHA also found that

some of the employees cleaning and working around the Henny Penny Gas Pressure Fryer, had not been provided with adequate training on what personal protective equipment (PPE) to wear, and when and how to wear it, when cleaning the fryers. [Magistrate's op. para. 18 (emphasis added).]

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<sup>2</sup> This statement of facts is based on the findings of fact contained in the opinion of the Magistrate of the Tenth District Court of Appeals.

### III. ARGUMENT

#### PROPOSITION OF LAW I:

**THE WORKERS' COMPENSATION SYSTEM IS A NO-FAULT SYSTEM AND THERE IS NO BASIS FOR THE COURT TO DENY COMPENSATION TO AN INJURED WORKER BASED ON FAULT. THE LEGISLATURE HAS NOT PROVIDED FOR THE EXCLUSION FROM COMPENSATION CREATED BY THE COURT IN ITS INITIAL DECISION IN THIS CASE.**

The purpose of the workers' compensation system created by Oh. Const. Art. II, Sec. 35 is 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 are not supposed to be arguments about negligence or who was at fault - the only question which is supposed to be asked is whether the injury occurred in the course of, and scope of, the employment.

However, if the Court does not reconsider its decision, the Industrial Commission will be required to make fault determinations when determining whether an injured worker is entitled to temporary total compensation for injuries which they, like David Gross, received in the course and scope of their employment.

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."

This Court's *per curiam* decision in the present case should be reconsidered because it imports the notion of fault into the no-fault workers' compensation system. Issues of fault should not be considered when determining whether an injured worker such as David Gross is eligible to receive temporary total compensation for the harm caused by an industrial injury. If the Court does not reconsider the *per curiam* decision in this case, it will provide an incentive to employers to seek employee fault as a means of saving money.

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.

This Court should reconsider its initial decision because the initial decision's finding that "wilfully" ignoring "repeated" warnings bars David Gross from temporary total 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.

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.

In R.C. 4123.54(A), the legislature has indicated what workers' activities will serve to bar workers' compensation. R.C. 4123.54(A) 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.

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. David Gross' injuries in this case occurred in the course and scope of his employment. Workers' compensation exists to provide compensation for all injuries which occur in the course and scope of employment; therefore David Gross should not be denied workers' compensation benefits based on a claim that his actions unintentionally contributed to his injury.

This Court (not the Commission) has made a factual determination that 16 year old David Gross suffered his injuries because he "wilfully" ignored "repeated" warnings. In making the factual finding that David 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 should be reconsidered because it permits the employer to profit from its failure to properly train David Gross by finding that the accident was his fault and further finding that as a result he is barred from temporary total.

#### IV. CONCLUSION

David Gross is a 16 year old who acted unwisely and suffered an industrial injury. He was temporarily and totally disabled because of that injury.

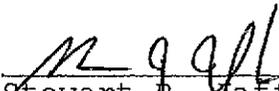
The workers' compensation system exists to provide compensation for such workplace injuries. The legislature has not provided that an injured worker is barred from receipt of workers' compensation because of an unwise act.

Injured workers suffer enough merely by being injured. Yet this Court's *per curiam* decision, if not reconsidered, would give employers an incentive to seek out reasons to fire injured workers because of their injury - thereby saving money for the employer. Such an incentive is contrary to the purpose of the workers' compensation system.

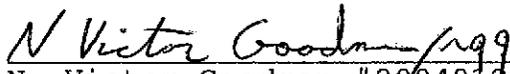
This Court's *per curiam* decision is contrary to the purpose of workers' compensation. It enacts an exclusion which was not created by the legislature, which is contrary to the purpose of the people in adopting Article II, Sec. 35 of the Ohio Constitution, and which harms the injured workers of this state.

Therefore, this Court should reconsider its decision.

Respectfully submitted,

  
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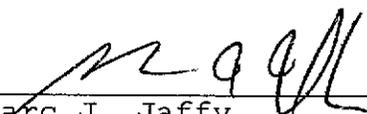
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served upon the following this 2<sup>d</sup> day of April 2007, by depositing a copy in the United States Mail, postage pre-paid, addressed to: [1] Andrew Alatis, ASSISTANT ATTORNEY GENERAL, 150 E. Gay St., 22d Floor, Columbus, OH 43215, Attorney for Appellant, Industrial Commission; [2] Edna Scheuer, Salvator A. Gilene, SCHEUER, MACKIN & BRESLIN LLC, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Attorney for Appellant Food, Folks & Fun, Inc.; [3] Gary Plunkett, Brett Bissonnette, Todd Miller, HOCHMAN & PLUNKETT CO., LPA, Suite 650, Talbott Tower, Dayton, OH 45402, Attorneys for Appellee David Gross; [4] Preston Garvin, Michael Hickey, GARVIN & HICKEY, LLC, 181 East Livingston Avenue, Columbus, OH 43215, Attorneys for Amicus Ohio Chamber of Commerce, et al.; [5] Paul C. Cox, Chief Counsel of the Fraternal Order of Police of Ohio, Inc., 222 E. Town Street, Columbus, OH 43215, Attorney for Amicus Fraternal Order of Police of Ohio, Inc.; [6] Philip J. Fulton, PHILIP J. FULTON LAW OFFICE, 89 E. Nationwide Blvd., Suite 300, Columbus, OH 43215, Attorney for Amicus Ohio Academy of Trial Lawyers; and [7] Stephen E. Mindzak, Shareef S. Rabaa, STEPHEN E. MINDZAK LAW OFFICES, LLC, 51 N High Street, Suite 888, Columbus, Oh 43215, Attorneys for Amicus Curiae, United Auto Aerospace & Agricultural Implement Workers of America, Region 2-b

  
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Appendix A

Ohio Consitution Art. II, Sec. 35

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law

for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

Appendix B

R.C. 4123.01(C)

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity.

Appendix C

R.C. 4123.54 (A)

Every employee, who is injured or who contracts an occupational disease, and the dependents of each employee who is killed, or dies as the result of an occupational disease contracted in the course of employment, wherever such injury has occurred or occupational disease has been contracted, provided the same were not:

(1) Purposely self-inflicted; or

(2) Caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician where the intoxication or being under the influence of the controlled substance not prescribed by a physician was the proximate cause of the injury, is entitled to receive, either directly from the employee's self-insuring employer as provided in section 4123.35 of the Revised Code, or from the state insurance fund, the compensation for loss sustained on account of the injury, occupational disease, or death, and the medical, nurse, and hospital services and medicines, and the amount of funeral expenses in case of death, as are provided by this chapter.