IN THE SUPREME COURT OF OHIO

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

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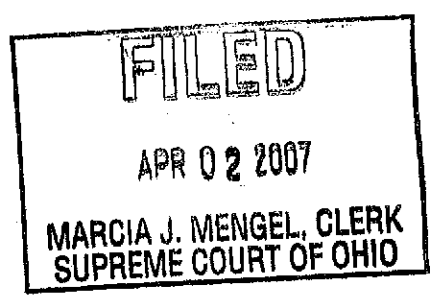

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STATEMENT OF FACTS

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).[1] 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; emphasis original). 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

[1] 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 (sic) 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 Order, 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 and subsequent discharge.

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

ARGUMENT

Mr. Gross asserts five separate arguments in urging the Court to reconsider its Decision. Mr. Gross claims 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.

Proposition of Law I:

Mr. Gross' negligence arguments are irrelevant to a temporary total disability compensation award under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469, were previously rejected by the Court in its Decision, and therefore provide no basis for the Court to reconsider its Decision.

In his first argument, Mr. Gross, as well as *Amici Curiae*, assert that the Court's Decision injects fault into the workers' compensation system by creating a "willful negligence standard" for denying temporary total disability compensation. However, whether Mr. Gross was negligent in performing his job duties was never at issue before the Commission when it addressed the narrow issue of his entitlement to temporary total disability compensation subsequent to his discharge. Instead, the Commission appropriately addressed only whether Mr.

Gross' lost wages, for which temporary total disability compensation is payable, resulted from his industrial injury. The Commission examined the facts of Mr. Gross' termination against the elements of a voluntary abandonment set forth in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469. And it determined that he violated a written work rule that defined his prohibited conduct, identified the violation as a dischargeable offense, and was known by Mr. Gross. These are the essential elements of a voluntary abandonment for the violation of a written work rule that preclude a temporary total disability award pursuant to *Louisiana-Pacific.* As such, he was not entitled to temporary total disability compensation because his loss of wages did not result from his injury but from his termination. Mr. Gross' alleged negligence played no role in this determination.

In addition, this same argument was previously briefed by the parties and rejected by the Court. 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). However, this Court rejected this Argument in its Decision when it held that:

> Gross offers a thought provoking argument, but we do not find that these particular facts are conducive to further discussion of that proposition. Gross *willfully* ignored *repeated* warnings not to engage in the proscribed conduct, yet still wishes to ascribe his behavior to simple negligence or inadvertence. To address his argument further is to validate that categorization – something we decline to do.

(Decision at ¶32; emphasis original). Because this Court has already considered and rejected Mr. Gross' novel and entirely irrelevant attempt "to ascribe his behavior as simple negligence," it cannot serve as a basis for this Court to grant reconsideration under its Rules of Practice.

Mr. Gross also argues that this Court ignored its prior decision in *Laudato v. Hunkin-Conkey Constr. Co.* (1939), 135 Ohio St. 127, 19 N.E.2d 898, but the *Laudato* decision is irrelevant to whether the Commission abused its discretion when it terminated Mr. Gross' temporary total disability compensation. *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.

Proposition of Law II:

The purported inadequacies of wage loss compensation in compensating injured workers provide no legal or logical basis for the Court to reconsider its Decision involving only well-settled law applicable to temporary total disability compensation awards.

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 or her 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* R.C. 4123.54; *see also 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.

Proposition of Law III:

Mr. Gross' argument that the Court's Decision invites employers to abuse the voluntary abandonment doctrine under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469 is without merit and serves as no basis for the Court to reconsider its Decision.

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 or her 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 his or her 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.*, 10th 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, provides ample safeguards against the imaginary abuses on which Mr. Gross rests his Motion for Reconsideration.

Proposition of Law IV:

Mr. Gross' argument that the Court's Decision conflicts with *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 670 N.E.2d 466 has no merit, was previously rejected by the Court in its Decision and therefore provides no basis for the Court to reconsider its Decision.

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. Neither argument has merit.

At issue in *Pretty Products* was whether an injured worker voluntarily abandoned her employment when she did not return to work on the Friday her physician certified she could return, did not produce an excuse slip extending disability, and did not report to work on the following Monday or Tuesday. *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, 5, 670 N.E.2d 466. Her employment was terminated pursuant to a provision in the union/management agreement. *Id.* This Court determined only that the Commission's Order, that the claimant did not voluntarily abandon her employment, was susceptible to several different interpretations and remanded the case to the Commission for clarification. *Id.* at 7-8. This Court noted that 1) all firings are not per se involuntary; and 2) voluntary abandonment can be found when a claimant is discharged for violating a written work rule pursuant to *Louisiana-Pacific*. *Id.* Nothing in the decision supports the proposition that the voluntary abandonment doctrine cannot act to terminate a claimant's temporary total disability compensation.

Furthermore, even if this Court accepted Mr. Gross' argument that an injured worker can abandon the former position only if he or she has the physical capacity for employment at the time of the abandonment, the facts of Mr. Gross' voluntary abandonment satisfy this standard. At the time Mr. Gross engaged in the conduct that led to his termination (i.e. boiling water in a cooker to clean it), he had the physical capacity for employment. Although he was not terminated until after FFF conducted a complete and thorough investigation, Mr. Gross had the physical capacity for employment when he chose to violate the written work rules which caused the injury. At the time he violated the written work rules, Mr. Gross tacitly accepted the possibility that he would lose his job and wages.

In addition, several cases directly contradict Mr. Gross' claim that the voluntary abandonment doctrine cannot act to terminate an injured worker's temporary total disability compensation. In *State ex rel. Hisle v. Indus. Comm.* (2000), 140 Ohio App.3d 550, 748 N.E.2d 558, the injured worker fell from a cherry picker on April 9, 1997 while working. *State ex rel. Hisle v. Indus. Comm.* (2000), 140 Ohio App.3d 550, 551, 748 N.E.2d 558. In accordance with the company's drug and alcohol policy, the injured worker underwent a post-accident drug screen, which was positive for marijuana. *Id.* Based on these results, his employment was terminated on April 14, 1997. *Id.* Unable to immediately return to work, the injured worker requested temporary total disability compensation, which was denied by the Commission based on the voluntary abandonment of his employment resulting from the termination. *Id.*

The Tenth District Court of Appeals rejected the argument now advanced by Mr. Gross. Specifically, the Court stated "we are unpersuaded by relator's argument that, as a matter of law, he cannot be found to have abandoned his employment due to the fact that he was injured. Stated alternatively, we do not believe that an injury precludes, as a matter of law, a finding of

voluntary abandonment under circumstances such as those set forth in this case." *Id.* at 552. The court therefore agreed that the injured worker's inability to return to work was not causally related to the allowed condition in his claim but due to his voluntary abandonment, and temporary total disability compensation was appropriately denied. *Id.*

In *McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51, one of the claimants suffered a work-related hernia on September 3, 1999. *McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, ¶5, 2002-Ohio-5305, 776 N.E.2d 51. The following day, he was given a drug test at the hospital, which was positive for cocaine. *Id.* Based on these results, the claimant was fired on September 10, 1999. *Id.* While not directly addressing the issue, this Court stated the injured worker "voluntarily abandoned his former position of employment at America's Body Co. on September 10, 1999, when he was justifiably fired after testing positive for cocaine." *Id.* at ¶43. Thus, the claimant was not entitled to temporary total disability compensation. *Id.* at ¶47.

Louisiana-Pacific sets forth the circumstances when a termination is deemed a voluntary abandonment of employment. As the Commission correctly found in Mr. Gross' claim, FFF proved that he had voluntarily abandoned his employment in accordance with *Louisiana-Pacific* and its progeny.

In addition, Mr. Gross' argument was previously briefed and argued by the parties, and the Court has rejected Mr. 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). Because this Court has reviewed and rejected Mr. Gross' argument, it cannot serve as a basis for reconsideration under this Court's Rules of Practice.

Proposition of Law V:

The Court's characterization of Mr. Gross' conduct as "willful" is entirely consistent with the facts and law of the case and therefore provides no basis for this Court to reconsider its Decision.

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[2] and this Court[3] rejected Mr. Gross' attempt to characterize his conduct as mere negligence, and his attempt to again re-litigate that issue on Reconsideration must fail.[4] 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. There being more than "some evidence" to support the Commission's factual findings as to each element of a *Louisiana-Pacific* voluntary abandonment, Mr. Gross' attempt to re-litigate this issue on Reconsideration must fail.

[2] Supp. at 33-34
[3] Decision at ¶32
[4] S.Ct.Prac.R. XI (2)(A)

CONCLUSION

A termination may constitute a voluntary abandonment of employment where the claimant violated a written work rule or policy that 1) clearly defined the prohibited conduct; 2) identified the violation as an offense for which the claimant could be discharged; and 3) was known or should have been known to the claimant. *Louisiana-Pacific*, 72 Ohio St.3d at 403. 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 Mr. Gross' conduct, as opposed to terminating him immediately.

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 Mr. Gross' Motion.

Respectfully submitted,

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