

State *ex rel.*, Robert Upton,

Appellee,

Industrial Commission of Ohio,

Appellee,

and

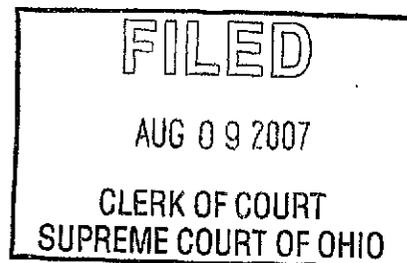
Crown Battery,

Appellant.

OH Sup. Ct. Case No. **07-1467**

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate District
Court of Appeals Case No. 06AP-387

NOTICE OF APPEAL OF
APPELLANT CROWN BATTERY



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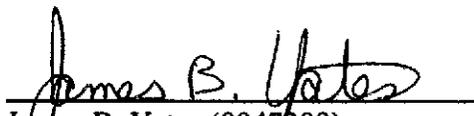
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Appellant, Crown Battery, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No, 06AP-594 on June 28, 2007.

This case originated in the court of appeals and, therefore, is an appeal of right pursuant to S.Ct. Prac. R. II§1(A)(1).

Respectfully submitted,

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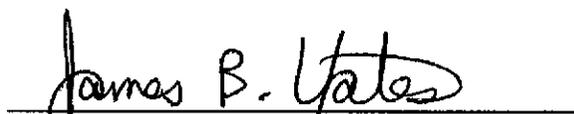
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Attorneys for Appellant

Crown Battery

PROOF OF SERVICE

This is to certify that a copy of the foregoing Appellant Crown Battery's Notice of Appeal has been mailed this 8th day of August, 2007 to Martha Joyce Wilson, Esq., Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., 3516 Granite Circle, Toledo, Ohio 43617-1172, attorney for appellee; and to Dennis H. Behm, Esq., Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, attorney for appellee Industrial Commission of Ohio.



Attorney for Appellant
Crown Battery

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN COUNTY, OHIO
2007 JUN 28 PM 1:26
CLERK OF COURTS

State ex rel. Robert Upton, :
Relator, :
v. : No. 06AP-594
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Crown Battery, :
Respondents. :

D E C I S I O N

Rendered on June 28, 2007

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Martha Joyce Wilson, for relator.

Marc Dann, Attorney General, and Dennis H. Behm, for respondent Industrial Commission of Ohio.

Eastman & Smith Ltd., James B. Yates and Mark A. Shaw, for respondent Crown Battery.

IN MANDAMUS
ON OBJECTIONS TO MAGISTRATE'S DECISION

TYACK, J.

{¶1} Robert Upton filed this action in mandamus seeking a writ to compel the Industrial Commission of Ohio ("commission") to vacate its order denying him temporary total disability ("TTD") compensation and to enter a new order granting the compensation.

{¶2} In accord with the local rules, the case was referred to a magistrate to conduct appropriate proceedings. The parties stipulated to pertinent evidence and filed briefs. The magistrate then prepared and filed a magistrate's decision which contains detailed findings of fact and conclusions of law. (Attached as Appendix A.) The magistrate's decision includes a recommendation that we refuse to grant the requested relief.

{¶3} Counsel for Robert Upton has filed objections to the magistrate's decision. Counsel for the commission and counsel for Crown Battery have each filed a memorandum in response. The case now comes before the court for a full, independent review.

{¶4} Certain facts are not in debate. Robert Upton was injured while within the scope of his employment with Crown Battery. Mr. Upton's injuries would normally entitle him to receive TTD compensation because he is temporarily totally disabled. The compensation was denied to him because the commission decided that the doctrine of voluntary abandonment of employment applied.

{¶5} Mr. Upton drove trucks for Crown Battery. He delivered batteries day after day. He did not choose to stop his employment. He was fired because, on September 26, 2005, he hit a guardrail. This was his fifth wreck in less than three years.

{¶6} In the first wreck, Mr. Upton had his truck slide into a ditch. A wrecker was called and the truck was removed from the ditch without incident.

{¶7} In the second incident, Mr. Upton hit a truck with his truck, with minimal damage to both. The company and the insurance company paid \$782 to resolve the damage claim.

{¶8} In the third incident, Mr. Upton backed his truck into another truck with little damage to either truck. The third incident led Crown Battery to send Mr. Upton a written notice which included "we will not except any more incidents while operating our vehicle."

{¶9} The fourth incident occurred on February 23, 2004, when Mr. Upton hit a toll booth with the right front bumper of his truck. This led Crown Battery to send to him a "first written warning," which said Mr. Upton had violated safety rules of the company. This "first written warning" includes "[a]dditional accidents within the next year will result in disciplinary action including removal from driving up to and including termination." (Stipulation of Record, at 52.)

{¶10} After he received this warning, Mr. Upton went for over a year with no incidents. Then, on September 26, 2005, Mr. Upton hit a guardrail. Despite the at least implied promise in his "first written warning" that he faced disciplinary action only if he had another collision within a year, Robert Upton was fired. Also, despite a written progressive disciplinary action rule under Safety Rule 27 which called for a verbal warning, a first written warning, a second written warning and then termination, Mr. Upton was fired after his first official written warning.

{¶11} We cannot say that Robert Upton's having a wreck under these circumstances constituted a violation of written work rules such that he was on notice that another wreck would automatically be grounds for termination. Additionally, while termination may have been justified, an accident does not equate to an intentional violation of a work rule so as to constitute voluntary abandonment.

{¶12} Workers' compensation statutes are to be liberally construed in favor of injured workers. R.C. 4123.54(A) states "[e]very employee, who is injured or who

contracts an occupational disease" is entitled to workers' compensation unless the injury is purposely self-inflicted or caused by an employee's intoxication by drugs or alcohol. Mr. Upton's case does not present the kind of situation where the doctrine of voluntary abandonment should be applied. These types of cases are to be determined on a case-by-case basis. *State ex rel. Feick v. Indus. Comm.*, Franklin App. No. 04AP-166, 2005-Ohio-3986.

{¶13} As a result, we sustain the objections filed on behalf of Robert Upton. We adopt the findings of fact in the magistrate's decision, supplemented by the additional facts above. Based upon our findings of fact and conclusions of law, we grant the relief sought and order the commission to pay relator TTD compensation.

Objections sustained; writ granted.

BROWN, J., concurs.
McGRATH, J., dissents.

McGRATH, J., dissenting.

{¶14} Because I am unable to agree with the majority's conclusion that the commission abused its discretion in determining that relator's termination from his employment constitutes a voluntary abandonment so as to preclude an award of disability compensation, I respectfully dissent.

{¶15} As indicated in the magistrate's decision, it is well established that post-injury firings must be carefully scrutinized, and it is necessary to carefully examine the totality of the circumstances to determine whether a discharge was causally related to the injury and whether or not the rule violation was a mere pretext to terminate the employee to avoid payment of disability benefits. Here, the commission did as required and

concluded that relator's termination was *not* because of the fact that he caused injury, but rather was due to his reckless conduct, i.e., five motor vehicle accidents in a period of less than three years while hauling hazardous cargo. As recognized by this court in *Feick*, supra, "there may be situations in which the nature or degree of the conduct, though not characterized as willful (e.g., repeated acts of neglect or carelessness by an employee), may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment." *Id.* at ¶6. The commission, within its discretion, found that relator's conduct did constitute such an indifference and/or disregard of the employer's policies to support a finding of voluntary abandonment.

{¶16} While I would agree with the majority's statement that "an accident does not equate to an intentional violation of a work rule so as to constitute voluntary abandonment" here the SHO specifically found that relator's termination was "due to his reckless conduct which caused a fifth (5th) motor vehicle accident in a period of approximately two years, while hauling hazardous cargo." In other words, there was not a single accident but a finding by the SHO that relator's conduct rose to such a level of indifference or disregard for the employer's workplace rule/policies to support a finding of voluntary abandonment. Relator acknowledged to his supervisor that "I tore it up good this time" and inquired as to whether or not he was going to be fired. Moreover, the record does not indicate that these accidents were *not* relator's fault, and the uncontested findings of the SHO were that relator was at fault in each of the accidents.

{¶17} We are not to substitute our judgment for that of the commission, but instead are to review the record to determine whether there is "some evidence" to support

the commission's determination. Because the record does indeed contain "some evidence," in the form of uncontested findings to support the commission's determination, I am unable to conclude that the commission abused its discretion, and find that mandamus is not appropriate. Consequently, I would overrule relator's objections to the magistrate's decision, adopt the magistrate's decision in toto, and deny the requested writ of mandamus.

APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert Upton,	:	
	:	
Relator,	:	
	:	
v.	:	No. 06AP-594
	:	
Industrial Commission of Ohio	:	(REGULAR CALENDAR)
and Crown Battery,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on November 15, 2006

Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Martha Joyce Wilson, for relator.

Jim Petro, Attorney General, and Dennis H. Behm, for respondent Industrial Commission of Ohio.

Eastman & Smith Ltd., James B. Yates and Mark A. Shaw, for respondent Crown Battery.

IN MANDAMUS

{¶15} Relator, Robert Upton, has filed this original action requesting that this court issue a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order which denied relator's request for temporary total

disability ("TTD") compensation on the grounds that relator had voluntarily abandoned his employment with Crown Battery ("employer"), and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶16} 1. Relator was hired by the employer in October 1999. At that time, relator was provided a handbook which he acknowledged that he received. Relator was employed as a truck driver.

{¶17} 2. On September 26, 2005, relator was involved in an accident. The truck relator was driving left the highway and struck a guardrail. The truck and cargo were damaged in the accident. Relator was hauling several large batteries which shifted during the accident causing them to overturn and spill. Hazardous materials were released onto the roadway.

{¶18} 3. Prior to this accident, relator had been involved in four other accidents while driving for the employer.

{¶19} 4. In a letter dated September 30, 2005, the employer terminated relator's employment for violating work rule number 27, involving the violation of any safety rules.

That letter specifically provides as follows:

***** Violation work rule #27, Safety – Termination**

On September 26, while driving Crown's vehicle, you hit a guardrail causing significant damage to the truck and an acid spill. Additionally, the product you were carrying was destroyed.

Bob, you have had 5 vehicle related mishaps or accidents in less than 3 years. This is an unacceptable safety record and performance; therefore, you are being terminated from

Crown Battery. Per Crown policy, you may submit a written appeal of this action within 3 days.

{¶20} 5. The relevant work rules provide as follows:

It is in the best interest of all to maintain high standards of conduct, to protect the safety and general health of all, and to maintain the general effectiveness of plant operations. The following plant rules are established for these [illegible]. This list is intended only as a guideline. Other acts of questionable conduct will be judged accordingly and may be subject to disciplinary action, including termination.

* * *

Violation of any safety rules[.]

* * *

The foregoing examples of causes for disciplinary action do not in any way limit the Company's right to discipline an employee for just cause.

Disciplinary action will occur when plant rules have been violated by employees and shall be based upon the severity of the offense and the employee's total job performance. * * *

Such action will generally occur as follows:

First Step - Verbal Warning
Second Step - 1st Written Warning
Third Step - 2nd Written Warning
Fourth Step - Termination.

A more serious violation of plant rules may result in bypassing one or more steps

Once the second step has been reached in any of the above work rules, the disciplinary process becomes cumulative, i.e. the next incident of any violation of a work rule will require the next step in the disciplinary process[.] (Exception: violation of a serious nature, which deems immediate termination.)

{¶21} 6. Relator filed an FROI form alleging that he sustained certain injuries as a result of the accident. Relator also submitted a C-84 form completed by his doctor David T. DeFrance, M.D., who certified relator as being totally disabled from September 26 through November 13, 2005.

{¶22} 7. Relator's motions were heard before the Ohio Bureau of Workers' Compensation ("BWC") and, in an order mailed October 17, 2005, relator's claim was allowed for the following conditions: "Sprain of neck[;] Contusion of knee Right," and TTD compensation was ordered paid beginning September 27, 2005.

{¶23} 8. The employer appealed and the matter was heard before a district hearing officer ("DHO") on November 23, 2005. The DHO affirmed the prior BWC order in all respects.

{¶24} 9. Upon further appeal by the employer, the matter was heard before a staff hearing officer ("SHO") on January 6, 2006. At that time, the SHO determined that additional conditions should be allowed in relator's claim. As such, the SHO concluded that relator's claim should be allowed for the following conditions: "cervical strain (847.0), and a contusion, with ecchymosis to a mild degree, above the right knee (924.11)." However, with regard to the payment of TTD compensation, the SHO concluded that no TTD compensation should be awarded because relator had voluntarily abandoned his employment with the employer when he violated written work rule number 27 and had sustained his fifth motor vehicle accident in a period of approximately two years. The SHO reviewed two cases from this court: *State ex rel. Nifco, LLC v. Woods*, Franklin App. No. 02AP-1095, 2003-Ohio-6468, and *State ex rel.*

Feick v. Wesley Community Servs., Franklin App. No. 04AP-166, 2005-Ohio-3986. In citing the *Nifco* case, the SHO noted that this court had made the following point:

* * * [I]t is imperative to carefully exam[in]e the totality of the circumstances to determine whether a discharge was causally related to the injury and whether or not the rule violation was a mere pretext to terminate the employee, to avoid the payment of Temporary Total Disability Compensation. * * *

(Emphasis sic.) In citing the *Feick* case, the SHO emphasized the following from this court's decision:

* * * The Court held that repeated acts of neglect or carelessness by an employee may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of "voluntary abandonment." * * *

The SHO concluded as follows:

Therefore, it is the finding of this Staff Hearing Officer that the injured worker's termination was not because of the fact that he had caused the injury itself, as in the NIFCO v. Woods case, but rather due to his reckless conduct which caused a fifth (5th) motor vehicle accident in a period of approximately two years, while hauling hazardous cargo. Therefore, it is the finding of this Staff Hearing Officer that the injured worker's termination was due to his violation of a written work rule, which clearly defined the prohibited conduct, was previously identified by the employer as a dischargeable offense, and the worker knew of the rule and the consequences of violating the rule. In fact, at the time that his supervisor picked him up, at the scene of the motor vehicle accident, he stated that "I tore it up good this time" and he specifically asked whether or not he was going to be terminated. Therefore, it is the finding of this Staff Hearing Officer that the injured worker is deemed to have accepted the consequences of being without wages, for a period of time, due to his wanton disregard for the employer's workplace rules and policies, which led to his termination, so as to constitute a bar to the payment of compensation,

pursuant to the [*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401] holding.

(Emphasis sic.)

{¶25} 10. Relator appealed and, by order mailed February 3, 2006, the commission refused his appeal.

{¶26} 11. Thereafter, relator filed the instant mandamus action in this court.

Conclusions of Law:

{¶27} For the reasons that follow, it is this magistrate's conclusion that this court should deny relator's request for a writ of mandamus as more fully explained below.

{¶28} In order for this court to issue a writ of mandamus as a remedy from a determination of the commission, relator must show a clear legal right to the relief sought and that the commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the relator shows that the commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986), 26 Ohio St.3d 76. On the other hand, where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

{¶29} It is undisputed that voluntary abandonment of the former position of employment can preclude payment of TTD compensation. *State ex rel. Rockwell*

Internatl. v. Indus. Comm. (1988), 40 Ohio St.3d 44. In *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St.3d 118, 121, the court stated as follows:

* * * [F]iring can constitute a voluntary abandonment of the former position of employment. Although not generally consented to, discharge, like incarceration, is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character. * * *

{¶30} Therefore, where a claimant has voluntarily relinquished employment, either by resisting or abandoning employment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, the claimant is deemed to have accepted the consequence of being without wages for a period of time and is not eligible to receive TTD compensation. See, for example, *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559. However, in *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5, the Supreme Court of Ohio distinguished *Louisiana-Pacific*, determining that where the employee's conduct is causally related to the industrial injury, the termination of employment is not voluntary.

{¶31} Both the Supreme Court of Ohio and this court have reiterated that post-injury firings must be carefully scrutinized. In *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), 76 Ohio St.3d 408, 411, the court recognized "the great potential for abuse in allowing a simple allegation of misconduct to preclude temporary total disability compensation." Further, the court has noted that the nature of departure has remained the pivotal question. *Id.*; *Rockwell*.

{¶32} In the present case, the commission examined the totality of the circumstances surrounding relator's discharge and the commission determined that his discharge was due to his violation of the employer's written work rule and that it was not

related to the fact that relator had sustained an injury. As such, the question to be determined is whether there is "some evidence" to support the commission's determination. In the present case, as the SHO noted, this was relator's fifth motor vehicle accident within a two-year period. At the time of this accident, relator was hauling hazardous cargo. Because there is some evidence in the record to support the commission's determination, mandamus is not appropriate.

{¶33} Relator also asserts that his termination was improper because the employer did not follow the gradual disciplinary steps. However, as the handbook makes clear, "[a] more serious violation of plant rules may result in bypassing one or more steps."

{¶34} Based on the foregoing, it is this magistrate's conclusion that relator has not demonstrated that the commission abused its discretion when, after examining the totality of the circumstances surrounding relator's termination, the commission determined that his termination from employment was due to his violation of the employer's written work rule and was not due to his injury. As such, the commission's determination that relator is not entitled to TTD compensation because he voluntarily abandoned his employment with the employer does not constitute an abuse of discretion and relator's request for a writ of mandamus should be denied.

/s/Stephanie Bisca Brooks
STEPHANIE BISCA BROOKS
MAGISTRATE