

IN THE SUPREME COURT OF OHIO  
CASE NO. 07-2420

STATE ex rel. MARGARITA GLENN :  
 :  
 Appellant-Relator, : On Appeal from the Franklin  
 : County Court of Appeals  
 : Tenth Appellate District  
 vs. :  
 : Court of Appeals  
 INDUSTRIAL COMMISSION OF OHIO, : Case No. 07AP-89  
 et al. :  
 :  
 Appellee-Respondents. :

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**MERIT BRIEF OF RELATOR-APPELLANT, MARGARITA GLENN**

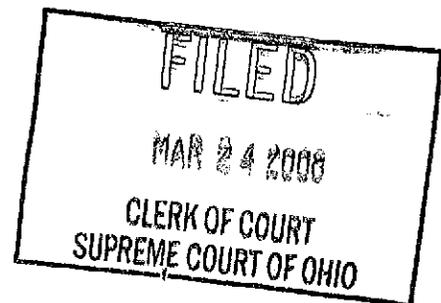
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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE FACTS ..... 1

ARGUMENT ..... 3

**PROPOSITION OF LAW ONE:**

**THE GENERAL ASSEMBLY IS RESPONSIBLE FOR MAKING ALL POLICY JUDGMENTS REGARDING THE WORKERS' COMPENSATION SYSTEM. SINCE THE GENERAL ASSEMBLY HAS NOT ADOPTED THE VOLUNTARY ABANDONMENT DOCTRINE AS A BAR TO THE RECEIPT OF TEMPORARY TOTAL DISABILITY BENEFITS, ALL CASES WHICH IMPLEMENTED THE DOCTRINE ARE HEREBY OVERRULED. .... 3**

**PROPOSITION OF LAW TWO:**

**THE VOLUNTARY ABANDONMENT DOCTRINE IS NOT A BAR TO THE RECEIPT OF TEMPORARY TOTAL DISABILITY BECAUSE CHANGES IN CIRCUMSTANCES NO LONGER JUSTIFY CONTINUED ADHERENCE TO THE DOCTRINE, THE DOCTRINE DEFIES PRACTICAL WORKABILITY, AND ABANDONING THE PRECEDENT WOULD NOT CREATE AN UNDUE HARDSHIP FOR THOSE WHO HAVE RELIED UPON IT. .... 8**

CONCLUSION ..... 12

CERTIFICATE OF SERVICE ..... 13

APPENDIX ..... 14

<u>Appendix</u>	<u>App. Pg.</u>
- Notice of Appeal.....	1
- 10 <sup>th</sup> District Decision.....	4
- Ohio Constitution Article II, Section 35.....	24

- R.C. 4123.54.....	25
- R.C. 4123.56.....	29
- R.C. 4123.58.....	32

**TABLE OF AUTHORITIES**

**CASES:**

*Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201 .....4

*McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1 .....3

*State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 51 N.E.2d 533 .....8, 10

*State ex rel. Baker v. Indus. Comm.* (2000), 87 Ohio St.3d 561, 2000-Ohio-485,  
722 N.E.2d 67 .....10

*State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 2000-Ohio-168,  
732 N.E.2d 355 .....11

*State ex rel. Crim v. Ohio Bur. of Workers' Comp.* (2001),  
92 Ohio St.3d 481, 2001-Ohio-1268, 751 N.E.2d 990 .....1, 2, 6

*State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420,  
2004-Ohio-5585, 816 N.E.2d 588 .....3

*State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500,  
858 N.E.2d 335 .....10

*State ex rel. Gross v. Indus. Comm.*, 115 Ohio St. 3d 249, 2007-Ohio-4916,  
874 N.E.2d 1162 .....2, 4, 6, 8, 11

*State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985),  
29 Ohio App.3d 145, 504 N.E.2d 451 .....8, 10

*State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995),  
72 Ohio St.3d 401, 650 N.E.2d 469 .....6, 8

*State ex rel. McCoy v. Bedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305,  
776 N.E.2d 51 .....5

*State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 433 N.E.2d 506 .....9

*State ex rel. Rockwell International v. Indus. Comm.* (1988),  
40 Ohio St.3d 44, 531 N.E.2d 678 .....5, 8, 10

*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-1502, 797 N.E.2d 1256 .....8, 9, 11

**CONSTITUTIONAL PROVISIONS; RULES; STATUTES:**

Am. Sub. S.B. 307 .....10

Ohio Constitution Article II, Section 35 .....3

R.C. § 4123.54 .....4, 5, 8, 10

R.C. § 4123.56 .....5, 9, 10

R.C. § 4123.58 .....5

135 Ohio Laws H. 417 .....9

143 Ohio Laws H.B. 222 .....5

141 Ohio Laws S.B. 307 .....5

148 v H. 471 .....5

151 v S7 .....6

## STATEMENT OF CASE AND FACTS

Margarita Glenn has taught Spanish in the Columbus Public Schools since 1986. On October 8, 2004, while trying to break up a fight between students, she was assaulted, causing both physical and psychological injuries. The school district recognized her injuries and gave her “assault leave.” Even as her physical wounds were healing, Ms. Glenn realized that she was terrified of being physically assaulted again. She immediately sought counseling. Dr. Pamela Chapman, after noting that Ms. Glenn was suffering flashbacks, depression, anxiousness, and confusion, diagnosed an adjustment reaction with mixed emotional features.

For a few days, Ms. Glenn attempted to return to work, yet her worst fears were realized and she was assaulted again.<sup>1</sup> Ms. Glenn was unequivocally temporarily totally disabled due to her psychological injury from the date of her injury to September 13, 2006. No evidence was ever submitted to rebut or even doubt Dr. Chapman’s findings of injury. Yet the Industrial Commission denied compensation during the 2005 and 2006 summer school recesses, somehow claiming that school teachers voluntarily abandon their jobs each June.

Like other Ohio school teachers, Ms. Glenn worked during nine months of the year but elected to receive her earnings over a prorated twelve month period. Previously, this Court held in *State ex rel. Crim v. Ohio Bur. Of Workers’ Comp.* (2001), 92 Ohio St.3d 481, 2001-Ohio-1268, 75, N.E.2d 990, that the prorated receipt of earnings did not preclude the award of temporary total disability benefits. The *Crim* court also held that the teacher in that case did not voluntarily abandon her position of employment. *Id.* at 483.

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<sup>1</sup>Claim No. 05-806683 was allowed for the conditions of “lumbosacral sprain, prolonged post-traumatic stress disorder.”

Voluntary abandonment is a judicially-created exception to the receipt of temporary total disability benefits applied when the claimant has left her former position for reasons unrelated to the injury. *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St. 3d 249, 2007-Ohio-4916, 874 N.E.2d 1162.

Despite the apparent support from *Crim* for Ms. Glenn to receive temporary total disability compensation during the 2005 and 2006 summary school recesses, the 10<sup>th</sup> District Court of Appeals upheld the Commission denial orders because Ms. Glenn had shown no intent to obtain employment during the summer. The appellate court interpreted *Crim* as requiring that a teacher prove both 1) the intent to obtain employment during the summer, and 2) the intent to resume the teaching position after the summer recess, to refute the application of the voluntary abandonment doctrine.

This Court now must address the case of a public school teacher who was assaulted by students and assailed by a legal system that refuses to recognize her injuries, claiming that teachers abandon their jobs every June.

## ARGUMENT

### PROPOSITION OF LAW ONE:

**THE GENERAL ASSEMBLY IS RESPONSIBLE FOR MAKING ALL POLICY JUDGMENTS REGARDING THE WORKERS' COMPENSATION SYSTEM. SINCE THE GENERAL ASSEMBLY HAS NOT ADOPTED THE VOLUNTARY ABANDONMENT DOCTRINE AS A BAR TO THE RECEIPT OF TEMPORARY TOTAL DISABILITY BENEFITS, ALL CASES WHICH IMPLEMENTED THE DOCTRINE ARE HEREBY OVERRULED.**

After her injury, Margarita Glenn remained in great fear of being reassaulted. Now after the 10<sup>th</sup> District Court of Appeal's decision, every Ohio school teacher ought to be in fear of not being eligible for compensation from the workers' compensation system. Only this court can redress this problem by abandoning the judicially-created voluntary abandonment doctrine before more absurd results occur; results that were never intended by the General Assembly.

It was the General Assembly who made the policy choice in 1912 to amend the Ohio Constitution to create a workers' compensation system to take care of injured Ohio workers. Article II, Section 35. Since that initial policy decision, the General Assembly has made many more policy judgments determining who receives and who does not receive workers' compensation benefits.

Consistent with the proud heritage and philosophy of this Court- rooted not in judicial activism but the constitutional deference owed to the legislative branch- it has been this Court's consensus to defer to the legislature on workers' compensation policy. For example, in *State ex rel. Gen. Elec. Corp. v. Indus. Comm.*, 103 Ohio St.3d 420, 2004-Ohio-5585, 816 N.E.2d 588, at ¶49, this Court said, "if the current statutory scheme is outdated, it is more appropriately the legislature's role to revise it," and in *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, at ¶37, "the General Assembly is the branch of state government charged by the Ohio

Constitution to make public policy choices for the workers' compensation fund.”

More recently, this court held in *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, 879 N.E.2d 201, at ¶24, “it would be inappropriate of the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature,” and in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, at ¶20 that “it is the role of the legislature, not the judiciary, to carve out exceptions to a claimant’s eligibility for temporary total disability.” Accordingly, every justice on this Court has written or joined an opinion that acknowledges that it is the sole role of the General Assembly to set workers’ compensation policy.

The Industrial Commission denied Margarita Glenn’s temporary total disability benefits on the basis of the voluntary abandonment doctrine. The genesis of that doctrine as applied to Margarita’s temporary total disability was put forth- not by the General Assembly- but by this Court in a series of cases. *Id.*

This court should not endorse a doctrine of voluntary abandonment when the General Assembly has expressly refused to. To do so would give the judiciary the ultimate say - the policy choice - over which Ohioans are in and which are out of the workers’ compensation system.

This is certainly not an area where the legislature has deferred or been silent, but rather, has aggressively acted on many occasions to exercise its proper role as policy maker to define the conditions that bar an injured worker from the workers compensation system. These areas as noted below include many of the subjects of the judicially created voluntary abandonment- incarceration, retirement, and drugs.

- 1) In 1986, the General Assembly passed Ohio Revised Code §

4123.54(I), which prohibits compensation to incarcerated injured workers. 141 Ohio Laws S.B. 307 (Eff. 8-22-86) This was the policy choice of the legislature. It is important to emphasize that in making this policy choice the legislature also chose not to place any further bar to injured workers receiving compensation upon release from incarceration. This illustrates the difficulty of permitting courts make policy decisions since that same released prisoner is barred from compensation unless he or she becomes gainfully employed and thereafter becomes disabled pursuant to the judicial policy choice made in *State ex rel. McCoy v. Bedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51.

2) In 1989, the General Assembly passed Ohio Revised Code § 4123.54(A)(2) to deny workers' compensation benefits to those who were injured due to drugs or alcohol. 143 Ohio Laws H.B. 222 (Eff. 11-3-89) This was the policy choice of the legislature.

3) In 2000, the General Assembly again addressed the policy question of who's covered and not covered by the workers' compensation system by passing O.R.C. § 4123.56(D), which reduces temporary total disability benefits to 66 2/3% of the statewide weekly wage when one is also receiving social security retirement benefits. 148 v H. 471 (Eff. 7-1-2000) Again, this was their policy choice and completely different than the judicial policy choice made in *State ex rel. Rockwell International v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 531 N.E.2d 678.

4) Finally, in 2006, the General Assembly passed Ohio R.C. § 4123.58(D)(3) which prohibits retirees and those who have voluntarily abandoned the

workforce from receiving permanent and total disability benefits. 151 v S7 (Eff. 6-30-06) Again, this was a policy choice of the legislature.

This last legislation demonstrates conclusively that the General Assembly is workers' compensation when it comes to determining who's in and who's out under the workers' compensation system. The fact that the General Assembly used the term "voluntary abandonment" indicates that they knew of this doctrine and chose where as a policy matter it should apply. The General Assembly simply has chosen not to apply it to temporary total disability.

During the summary school breaks, Margarita Glenn wasn't on the job because of her work-related injury. This is uncontroverted. According to the legislature, Ms. Glenn should receive temporary total disability benefits when the medical evidence says she cannot return to her former position of employment and has not reached maximum medical improvement. Yet, under the 10<sup>th</sup> District Court of Appeals' interpretation of the judicially created voluntary abandonment doctrine, her benefits have been denied.

This court is not known for judicial activism. This has been a court that understands and respects separation of powers and its important role within our constitutional framework. The General Assembly has declared that Margarita Glenn deserves to be within the protection of the workers' compensation system. This protection is rendered meaningless both by the 10<sup>th</sup> District's judicial activism and this court's voluntary abandonment doctrine.

This Court's decision in *Gross*, supra, raised the issue that *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469 and the voluntary abandonment doctrine were overreaches into the policy arena. The absurd result from the 10<sup>th</sup> District's interpretation of *Crim* confirms that observation. Lawmakers have always believed that the

Margarita Glenn's of this state were in the workers' compensation system under the principle of *expressio unio*, if for no other reason than they never specifically legislated her out. Good or bad, that is their policy choice. It should not be the province of the 10<sup>th</sup> District or any other court to now declare her "out."

The automatic result of this position is not only must Margarita Glenn have her temporary total disability benefits paid during the 2005 and 2006 summer months, but the doctrine of voluntary abandonment, and all cases holding accordingly, applied to temporary total disability must be vacated. In other words, it is time for this court to voluntarily abandon the court-created doctrine of voluntary abandonment for temporary total disability. Otherwise, it is taking away from the policymakers a power that is rightfully theirs and a heritage of this court that is rightfully yours.

**PROPOSITION OF LAW TWO:**

**THE VOLUNTARY ABANDONMENT DOCTRINE IS NOT A BAR TO THE RECEIPT OF TEMPORARY TOTAL DISABILITY BECAUSE CHANGES IN CIRCUMSTANCES NO LONGER JUSTIFY CONTINUED ADHERENCE TO THE DOCTRINE, THE DOCTRINE DEFIES PRACTICAL WORKABILITY, AND ABANDONING THE PRECEDENT WOULD NOT CREATE AN UNDUE HARDSHIP FOR THOSE WHO HAVE RELIED UPON IT.**

Because stare decisis creates consistency and predictability in the law, it is a fundamental element of American jurisprudence. Yet courts must, at times, consider more important factors than consistency and predictability, such as the creation of absurd results inconsistent with the stated will of Ohio's sole policymakers- the General Assembly. We submit that this case is such an instance.

Recognizing these unjust possibilities, this Court held in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-1502, 797 N.E.2d 1256, that a prior decision of the Supreme Court may be overruled where 1) the decision was wrongly decided at the time, or changes in circumstances no longer justify continued adherence to the decision, 2) the decision defies practical workability, and 3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Id.*

The voluntary abandonment doctrine is a judicially created exception to a injured worker's eligibility for temporary total disability benefits. See Justice O'Connor's dissent, *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162. First announced by the 10<sup>th</sup> District court of Appeals in *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App.3d 145, 504 N.E.2d 451, this Court first adopted the voluntary abandonment doctrine in *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 51 N.E.2d 533, when it applied the underlying principle of *Jones* to an incarcerated injured worker. Thereafter, this Court applied the doctrine to other situations such as retirement, *State ex rel. Rockwell International v. Indus. Comm.*

(1988), 40 Ohio St.3d 44, 531 N.E.2d 678, and the violation of work rules, *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St.3d 401, 650 N.E.2d 469. Because the voluntary abandonment doctrine has resulted in such absurd results of denying temporary total disability benefits to school teachers during summer school recesses and because it is clearly inconsistent with the intention of the General Assembly, applying the *Galatis* analysis to the voluntary abandonment doctrine demands the reversal of these judicially created precedents.

**1. Ashcraft, Rockwell and Louisiana-Pacific, et. al. are no longer justified.**

The General Assembly has changed the statute extensively regarding who may and who may not receive temporary total disability benefits since the judicial introduction of the voluntary abandonment doctrine. Thus, this court's precedents regarding the voluntary abandonment doctrine are clearly no longer needed.

Prior to October 5, 1955, R.C. § 4123.56 prohibited the payment of temporary total disability compensation for any period of disability extending beyond six years after the date of injury. As of October 5, 1955, this limitation period was extended from six to ten years. The General Assembly eliminated the limitation period on November 2, 1959, but compensation was still restricted to a maximum award of \$10,750. A 1979 amendment removed the statutory maximum. 135 Ohio Laws H. 417.

Thereafter, this Court defined temporary total disability in *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, 433 N.E.2d 506, as a disability which prevents a worker from returning to the former position of employment. The culminative effect of *Ramirez* and the removal of the monetary restriction on temporary total heightened the fears of the employer community as to the unfettered never ending award of temporary total disability benefits to injured workers. This was

the environment in which *Jones*, *Ashcraft* and *Rockwell* were decided.

However, the General Assembly filled this policy void quickly by passing Am. Sub. S.B. 307. Effective August 22, 1986, R.C. § 4123.56(A) added two circumstances justifying the termination of temporary total disability compensation.

- 1.) Work is made available to the claimant within the claimant's capabilities; or
- 2.) The employee has reached maximum medical improvement.

Am. Sub. S.B. 307 further added a provision (R.C. § 4123.54(I)) prohibiting compensation to incarcerated injured workers, the General Assembly's response to the judicially-created *Ashcraft*. The General Assembly's subsequent enactments responded to the many other subjects of voluntary abandonment. See Proposition of Law One. Thus, the General Assembly filled the possible policy void identified by the courts by placing restrictions on the payment of temporary total disability and making its own policy choices regarding the voluntary abandonment doctrine.

## **2. The Unworkable Nature of the Voluntary Abandonment Precedents**

Courts are deluged by cases arising from the voluntary abandonment precedents. There have been over twenty five cases decided by the Ohio Supreme Court and well over 1000 appellate decisions. This does not even take account the thousands of Industrial Commission hearings where the issue is being raised.

To say that this multitude of cases has caused chaos, and massive and widespread confusion in the workers' compensation system would be an understatement. The voluntary abandonment doctrine may be the only subject matter jurisprudence where this court has granted two requests for reconsideration during the last eight years. In *State ex rel. Baker v. Indus. Comm.* (2000), 87 Ohio St.3d 561, 2000-Ohio-485, 722 N.E.2d 67, and *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d

65, 2006-Ohio-6500, 858 N.E.2d 335, the claimant was found ineligible for temporary total disability compensation because of the voluntary abandonment doctrine. In both cases, the Supreme Court granted a request for reconsideration and found the claimants in *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 732 N.E.2d 355 (Baker II) and *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, (Gross II) eligible for temporary total disability compensation because the court acknowledged it had judicially misinterpreted the judicially created doctrine.

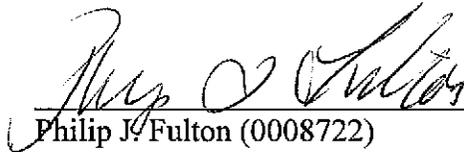
The rationale for the voluntary abandonment doctrine no longer can withstand scrutiny. The patchwork of exceptions and limitations contribute to a continuing morass of litigation. *Galatis*, 100 Ohio St.3d at 230, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶57. Maintaining the doctrine will only continue the chaos in workers' compensation jurisprudence.

### **3. Reliance Interests**

The final part of the *Galatis* test requires an analysis as to whether undue hardship would be visited upon those who have relied on the doctrine. Because the General Assembly has enacted legislation to deal with the very issues the judiciary developed the voluntary abandonment doctrine to solve, overruling the judiciary created voluntary abandonment doctrine will restore order to both our government's system of separation of powers and to the fundamental principles of workers' compensation law. Thus, a reliance on the doctrine will not detrimentally effect employers but actually will restore the compensation bargain between employers and employees.

## CONCLUSION

The General Assembly makes all policy judgments for the workers' compensation system, judgments on which this Court has almost always deferred. Since the General Assembly has clearly directly addressed and developed the exceptions to a claimant's disability for temporary total disability, it is necessary that this Court eliminate the judicially created voluntary abandonment doctrine as a bar to temporary total disability. Only by taking this step, will the Court remove the chaotic, absurd results that are now occurring because of the doctrine.



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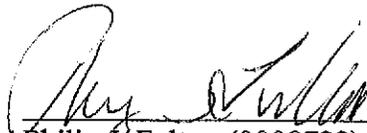
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing, "Merit Brief of Relator-Appellant, Margarita Glenn" was mailed by regular U.S. Mail, postage prepaid, on this 24 day of March, 2008, to Sandra E. Pinkerton, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay St., 22<sup>nd</sup> Flr., Columbus, OH 43215 and to Loren L. Braverman, Columbus Board of Education, 270 East Town Street, Columbus, Ohio 43215.

  
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## **APPENDIX**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. MARGARITA GLENN,

Relator-Appellant,

INDUSTRIAL COMMISSION OF OHIO, and Columbus  
Schools, Columbus Board of Education, et al.,

Respondents-Appellees.

CASE No.: 07-2420

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

Court of Appeals  
Case Number 07 AP-89

NOTICE OF APPEAL OF RELATOR-APPELLANT, MARGARITA GLENN

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SUPREME COURT OF OHIO

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COURT OF APPEALS  
FRANKLIN CO OHIO  
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CLERK OF COURTS

Relator-Appellant, Margarita Glenn, gives notice to the Court and the parties, that she appeals the Judgment and Decision of the Tenth Appellate District Court of Appeals in *State of Ohio ex rel. Margarita Glenn v. Indus. Comm. and Columbus Schools, Columbus Board of Education*, case number 07AP-89, rendered on December 4, 2007.

This is an appeal of right in this mandamus action which originated in the Tenth Appellate District Court of Appeals. A copy of the Judgment Entry and the Decision are attached.

Respectfully Submitted,



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Attorneys for Relator-Appellant,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, Notice of Appeal of Relator-Appellant, Margarita Glenn, was mailed by regular U.S. Mail, postage prepaid, on this 26<sup>th</sup> day of December, 2007, to Sandra E. Pinkerton, Assistant Attorney General, Attorney for Respondent-Appellee, Industrial Commission of Ohio, Workers' Compensation Section, 150 E. Gay Street, 22<sup>nd</sup> Flr., Columbus, OH 43215, and Loren L. Braverman, Attorney for Respondent-Appellee, Columbus Schools, Columbus Board of Education, Columbus Public Schools, 270 East Town Street, Columbus, Ohio 43215.



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William A. Thorman, III  
Supreme Court Number (0040991)

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio ex rel. Margarita Glenn, :  
Relator, :  
v. :  
Industrial Commission of Ohio and :  
Columbus Schools, Columbus Board :  
of Education, :  
Respondents. :

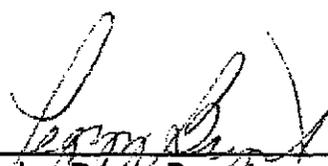
No. 07AP-89

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 4, 2007, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that the requested writ of mandamus is denied. Costs assessed to relator.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

  
\_\_\_\_\_  
Judge Peggy Bryant

  
\_\_\_\_\_  
Judge Lisa L. Sadler, P.J.

  
\_\_\_\_\_  
Judge William A. Klatt

DEC 7 2007

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

COURT OF APPEALS  
FRANKLIN COUNTY  
2007 DEC -4 PM  
CLERK OF COURT

State of Ohio ex rel. Margarita Glenn, :  
Relator, :  
v. : No. 07AP-89  
Industrial Commission of Ohio and : (REGULAR CALENDAR)  
Columbus Schools, Columbus Board :  
of Education, :  
Respondents. :

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D E C I S I O N

Rendered on December 4, 2007

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*Philip J. Fulton Law Office, Philip J. Fulton and William A. Thorman, III, for relator.*

*Marc Dann, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

*Loren L. Braverman, for respondent Columbus Board of Education.*

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IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION

BRYANT, J.

{¶1} Relator, Margarita Glenn, a teacher for respondent Columbus Board of Education, commenced this original action requesting a writ of mandamus that orders

respondent Industrial Commission of Ohio to vacate its order denying her temporary total disability compensation during the 2005 and 2006 summer recesses, and to enter amended orders awarding temporary total disability compensation during those recesses.

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law (attached as Appendix A). In his decision, the magistrate determined the commission properly applied *State ex rel. Crim v. Ohio Bur. of Workers' Comp.* (2001), 92 Ohio St.3d 481 in denying relator's request for temporary total disability compensation during the 2005 and 2006 summer recesses. Accordingly, the magistrate determined the requested writ of mandamus should be denied.

{¶3} Relator filed objections to the magistrate's decision:

1. THE INSERTION OF THE NECESSITY FOR AN INJURED TEACHER TO PROVE AN "INTENT" TO WORK DURING A SUMMER RECESS IS A MISAPPLICATION OF THE SOUND PRINCIPLES OF *STATE EX REL. CRIM V. OHIO BUREAU OF WORKERS COMPENSATION* (2001), 92 OHIO ST.3D 481, 2001-OHIO-1268, AND THE UNDERLYING IDEALS OF R.C. 4123.56 TO COMPENSATE INJURED WORKERS' WHOSE PROXIMATE CAUSE OF INABILITY TO WORK IS THE WORKPLACE INJURY.

2. FAILURE TO CONSIDER A LEGITIMATE ARGUMENT BECAUSE THERE IS NO EXPRESS INDICATION IN ADMINISTRATIVE ORDERS THAT THE ISSUE WAS RAISED IN THE ADMINISTRATIVE PROCEEDINGS, PLACES ALL LITIGANTS IN THE SAME UNTENABLE POSITION REJECTED BY THE SUPREME COURT.

{¶4} Relator's first objection contends the commission and the magistrate improperly required relator to prove an intent to work during the summer recess as a

predicate to receiving temporary total disability compensation. Relator contends *Crim* incorporated no such requirement.

{¶5} *Crim* involved an award of temporary total disability benefits that the commission later vacated because the claimant, a swimming teacher, "could not establish a loss of earnings, since she received prorated earnings during the summer months." *Crim*, at 482. In addressing the matter, the Supreme Court of Ohio noted two issues, one of which is implicated in relator's first objection: "whether a teacher who contracts to teach during a school year is considered to have voluntarily abandoned her or his employment at the end of an academic calendar year for the purposes of temporary total disability compensation." *Id.*

{¶6} The Supreme Court of Ohio initially concluded that "a teacher does not voluntarily abandon her or his position at the end of a school year." Rather, "[i]t is the claimant's intent that determines whether the termination of employment is unrelated to the allowed condition so as to preclude return to former employment." *Id.* Accordingly, the court determined "a teacher is entitled to temporary total disability compensation as a result of the allowed conditions of a claim if the teacher proves an intent to obtain employment during the summer and an intent to resume the teaching position after the summer recess." *Id.* at 485.

{¶7} Relator's objection asks us to ignore the specific language of *Crim* requiring that a teacher prove an intent to obtain employment during the summer and an intent to resume the teaching position after the summer recess. In view of the language of *Crim*, we decline relator's invitation. Relator's first objection is overruled.

{¶8} Relator's second objection contends the magistrate improperly refused to consider relator's "argument that summer breaks are akin to a layoff[.]" (Objections, 3.) Relying on *State ex rel. Barnes v. Indus. Comm.*, 114 Ohio St.3d 444, 2007-Ohio-4557, relator asserts the magistrate was required to address the issue.

{¶9} *Barnes* does not control under the circumstances of this case. In *Barnes*, the Supreme Court of Ohio noted that the commission's "failure to list a particular piece of evidence cannot be interpreted as proof that the evidence was not submitted. This logic applies equally to the larger question of issues raised." *Id.* at ¶20. The magistrate here did not decline to consider the issue because it was not referenced in the commission's order. Rather, the magistrate found nothing in the record to suggest relator raised the issue before the commission. Our review of the stipulated evidence leads us to the same conclusion. Indeed, even relator's motion for reconsideration filed after the staff hearing officer's order, failed to mention the issue of layoff. Had the issue been raised before the commission, the stipulated record at some point should reference it. In the absence of any indication that the issue was raised before the commission, the magistrate properly concluded it should not be raised for the first time in a mandamus action. To hold otherwise would undermine the commission's authority and discretion. Relator's second objection is overruled.

{¶10} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact

and conclusions of law contained in it. In accordance with the magistrate's decision, we deny the requested writ of mandamus.

*Objections overruled;  
writ denied.*

SADLER, P.J., and KLATT, J., concur.

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# APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Margarita Glenn,	:	
	:	
Relator,	:	
	:	
v.	:	No. 07AP-89
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Columbus Schools, Columbus Board	:	
of Education,	:	
	:	
Respondents.	:	

## MAGISTRATE'S DECISION

Rendered on September 21, 2007

*Philip J. Fulton Law Office, Philip J. Fulton and William A. Thorman, III, for relator.*

*Marc Dann, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

*Loren L. Braverman, for respondent Columbus Board of Education.*

### IN MANDAMUS

{¶11} Relator, Margarita Glenn, was employed as a teacher for respondent Columbus Board of Education ("Columbus Public Schools" or "employer"). In this original

action, relator requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate portions of its orders denying her temporary total disability ("TTD") compensation during the 2005 and 2006 summer recesses, and to enter amended orders awarding TTD compensation during those summer recesses.

Findings of Fact:

{¶12} 1. On October 8, 2004, relator sustained an industrial injury while employed as a teacher for the Columbus Public Schools. The industrial claim is allowed for "sprain right hip and thigh; contusion right thigh; contusion of right hip; adjustment reaction with mixed emotional features," and is assigned claim number 04-865133.

{¶13} 2. On August 25, 2005, treating psychologist Pamela Chapman, Ph.D., completed a C-84 on which she certified TTD from October 14, 2004 to an estimated return-to-work date of October 14, 2005. Dr. Chapman reported on the C-84 that May 27, 2005 was the date of last examination or treatment.

{¶14} 3. On September 26, 2005, relator moved for TTD compensation beginning June 29, 2005.

{¶15} 4. On October 19, 2005, citing Dr. Chapman's C-84, the Ohio Bureau of Workers' Compensation ("bureau") issued an order awarding TTD compensation from October 14, 2004 to January 2, 2005. The order found that relator returned to work on January 3, 2005. The order further awarded TTD compensation beginning June 30, 2005.

{¶16} 5. The employer administratively appealed the bureau's order of October 19, 2005. The employer's administrative appeal was heard by a district hearing

officer ("DHO") on December 9, 2005. At the hearing, the employer submitted a letter dated December 5, 2005 from Kenneth R. Stark, an official of the Columbus Public Schools. The letter states:

We have checked our records back through 2002 and find no indication that Ms. Glenn worked during the normal summer breaks. Therefore, we do not believe that she is entitled to temporary total disability payments for the period encompassing summer break 2005.

{¶17} 6. Following the December 9, 2005 hearing, the DHO issued an order stating that the bureau's order was being modified. The DHO's order states:

The District Hearing Officer modifies the BWC order to reflect that Temporary Total Disability Compensation is not properly payable from 06/30/2005 through 08/28/2005. The claimant is a school teacher and customarily did not work during the summer months. Pursuant to applicable case law, she is not entitled to Temporary Total Disability Compensation during her summer break, during which she would not have been working and earning anyway.

Temporary Total Disability Compensation from 08/29/2005 (the first day of school) through 12/09/2005 is ordered to be paid and shall continue upon submission of appropriate proof. The District Hearing Officer finds that the claimant has been temporarily and totally disabled over this period as it relates to the allowed psychological condition. This is based on the reports of the treating psychologist, Dr. Chapman.

The remainder of the BWC's 10/19/2005 order is affirmed.

{¶18} 7. Relator administratively appealed the DHO's order of December 9, 2005.

{¶19} 8. Following a January 24, 2006 hearing, a staff hearing officer ("SHO") issued an order affirming the DHO's order of December 9, 2005. The SHO's order explains:

It is the order of the Staff Hearing Officer that temporary total compensation is granted from 08/29/2005 (the first day of school) through 12/09/2005, and to continue upon submission of medical evidence that supports the payment of temporary total compensation. This decision is based on the C-84 forms signed by Dr. Chapman on 08/25/2005 and 10/10/2005. It is the further order of the Staff Hearing Officer that temporary total compensation is denied from 06/30/2005 through 08/28/2005, closed period. The Staff Hearing Officer finds the injured worker is a school teacher who customarily did not work during the summer months. This finding is supported by Kenneth Stark's letter of 12/05/2005. Payroll records in file document the injured worker received her teacher earnings over a pro-rated twelve month period, not over the nine month school period.

The Court, in State ex rel. Crim v. Ohio Bureau of Workers' Compensation (2001), 92 Ohio St.3d 481, holds "that a teacher is entitled to temporary total disability compensation as a result of the allowed conditions of a claim if the teacher proves an intent to obtain employment during the summer and an intent to resume the teaching position after summer recess." The Staff Hearing Officer finds no evidence that proves an intent to obtain employment during the summer months. The injured worker submitted no evidence that documents she worked over the summer preceding her injury, nor any other evidence that would establish intent. Therefore, temporary total is denied as described.

The Staff Hearing Officer further finds that the Court in Crim held that temporary total compensation cannot be denied on the sole basis that the injured worker received her earnings over a prorated twelve-month period. Although this injured worker received her earnings on a prorated twelve-month period, the Staff Hearing Officer does not find this to be a basis to deny the request for temporary total over the summer break. The injured worker is denied temporary total from 06/30/2005 through 08/28/2005 for the sole reason that there is no evidence of her intent to obtain employment during the summer.

{¶20} 9. On February 23, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of January 24, 2006.

{¶21} 10. On May 22, 2006, Dr. Chapman completed another C-84 certifying TTD from April 14, 2006 to an estimated return-to-work date of October 14, 2006. Dr. Chapman listed May 22, 2006 as the date of last examination or treatment. Apparently, the C-84 was filed on May 26, 2006.

{¶22} 11. Following a June 26, 2006 hearing, a DHO issued an order stating:

It is the order of the District Hearing Officer that the C-84 Request For Temporary Total Compensation filed by Injured Worker on 05/26/2006 is denied.

In accordance with the 01/24/2006 Staff Hearing Officer decision and the cited court case Crim therein, the District Hearing Officer finds that Ms. Glenn is once again not entitled to temporary total disability compensation during the school summer months. As indicated in the Staff Hearing Officer order, Ms. Glenn has not shown any intent to work during summer months of the school year. The Bureau of Workers' Compensation has indicated that the present school year ended on 06/09/2006. Accordingly, temporary total disability compensation is terminated on 06/09/2006 and may resume again on the first day of the school year, provided the evidence continues to support temporary total disability compensation at that time.

{¶23} 12. Relator administratively appealed the DHO's order of June 26, 2006.

{¶24} 13. Following an August 4, 2006 hearing, an SHO issued an order stating:

The order of the District Hearing Officer, from the hearing dated 06/26/2006, is affirmed.

Therefore, payment of temporary total compensation remains correctly denied beginning on the 06/09/2006 date of the start of summer break. Payment of temporary total compensation may be considered upon submission of proof when the school year resumes.

All evidence was considered. The injured worker has not submitted proof of any intent to work during this summer break. Therefore, the requirements of the CRIM case have not been met by the injured worker. This reasoning has been previously applied in the prior final Staff Hearing Officer order dated 01/24/2006, which denied payment of temporary total compensation during last year's summer break.

{¶25} 14. On August 29, 2006, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of August 4, 2006.

{¶26} 15. On January 31, 2007, relator, Margarita Glenn, filed this mandamus action.

Conclusions of Law:

{¶27} The issue is whether the commission misapplied *State ex rel. Crim v. Ohio Bur. of Workers' Comp.* (2001), 92 Ohio St.3d 481, to deny relator TTD compensation during the 2005 and 2006 summer recesses.

{¶28} Finding that the commission did not misapply *Crim*, it is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶29} The syllabus of *Crim* states:

A teacher who is employed for nine months during the academic calendar year, but elects to receive earnings over a prorated twelve-month period, is not, during a summer break, precluded from receiving temporary total disability compensation for a work-related injury on the sole basis that prorated earnings were received over the summer break.

In the *Crim* court's opinion, the facts are set forth as follows:

Tuscarawas County Board of Mental Retardation and Developmental Disabilities ("MRDD") employed appellee, Susan Y. Crim, as a swimming teacher during the 1996-1997 school year. Pursuant to the terms of her employment contract with MRDD, appellee worked from August 1996 through June 5, 1997. Appellee was not required to report to work during summer break. Rather than being paid over a nine-month period that corresponded to the school year, appellee elected to be paid over a prorated, twelve-month period. Thus, appellee received compensation from MRDD during the summer months for work actually performed during the academic calendar year.

On May 29, 1997, appellee was injured in the course of her employment with MRDD, and a workers' compensation claim was allowed. Appellee was paid temporary total disability compensation for the period of time covering the summer break, from June 7 to August 27, 1997. Appellee had intended to work during the summer at the Tuscarawas County YMCA, as she had worked there the previous summer. Appellee, however, was unable to perform her summer job during her period of disability.

The Industrial Commission later vacated the award of temporary total disability benefits that had been awarded to appellee for the period of June 7 through August 27, 1997. The commission determined that appellee was not entitled to temporary total disability compensation because she could not establish a loss of earnings, since she received prorated earnings during the summer months. The commission, therefore, found that appellee had been overpaid disability compensation and ordered the overpayment to be recovered. Appellee filed a complaint in mandamus in the Tenth District Court of Appeals claiming that the commission had abused its discretion when it vacated her award of temporary total disability compensation.

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The court of appeals overruled appellants' objections and adopted the magistrate's findings of fact and conclusions of law. The court of appeals ordered the commission to vacate

its overpayment recovery order and to issue a new order consistent with the court's decision.

Appellants appeal to this court as of right.

Id. at 481-482.

{¶30} Thereafter, the *Crim* court sets forth the issues and its legal analysis. The

*Crim* court states:

There are two issues presented in this case. The first issue is whether a teacher who contracts to teach during a school year is considered to have voluntarily abandoned her or his employment at the end of an academic calendar year for the purposes of temporary total disability compensation. The second issue is whether a teacher who is employed for nine months of the year and elects to receive prorated compensation over twelve months is entitled to temporary total disability compensation for summer employment that she or he is unable to perform because of the allowed conditions of a claim.

We find that a teacher does not voluntarily abandon her or his position at the end of a school year and that, although receiving prorated earnings, she or he is entitled to temporary total disability compensation as a result of the allowed conditions of her or his workers' compensation claim.

\* \* \*

The facts of this case support a finding that appellee had worked at the YMCA the previous summer and that she intended to resume summer employment with the YMCA for the summer of 1997. Appellants agree that appellee was unable to perform the duties of her summer job at the YMCA. Despite appellants' apparent assertions to the contrary, we cannot conceive of a situation where an employer will consider an applicant for employment who is effectively precluded from performing the required duties of the position. Appellee was obviously prevented from engaging, as she had done the previous summer, in summer employment at the YMCA. To require her to seek employment for a position she

was unable to perform would have been an exercise in futility. Based upon appellee's intent and previous history of summer employment, we conclude that appellee did suffer a loss of earnings.

For the foregoing reasons, we hold that a teacher is entitled to temporary total disability compensation as a result of the allowed conditions of a claim if the teacher proves an intent to obtain employment during the summer and an intent to resume the teaching position after the summer recess. We further hold that a teacher who is employed for nine months during the academic calendar year, but elects to receive earnings over a prorated twelve-month period, is not, during a summer break, precluded from receiving temporary total disability compensation for a work-related injury on the sole basis that prorated earnings were received over the summer break.

Id. at 482-483, 485-486.

~~{¶31}~~ Effective May 1, 2002, Rep R 1 states in part:

(B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.

(2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.

Prior to its amendment, Rep R 1 stated:

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

~~{¶32}~~ According to relator, it is problematical that only one of the dual holdings contained in the text of the *Crim* court's opinion is contained in the single paragraph syllabus. The so-called dual holdings are found in the following paragraph of the court's opinion:

\* \* \* [W]e hold that a teacher is entitled to temporary total disability compensation as a result of the allowed conditions of a claim if the teacher proves an intent to obtain employment during the summer and an intent to resume the teaching position after the summer recess. We further hold that a teacher who is employed for nine months during the academic calendar year, but elects to receive earnings over a prorated twelve-month period, is not, during a summer break, precluded from receiving temporary total disability compensation for a work-related injury on the sole basis that prorated earnings were received over the summer break.

Id. at 485-486.

{¶33} Citing Rep R 1(B)(2), effective May 1, 2002, relator claims disharmony between the syllabus and the text of the *Crim* opinion. Relator is incorrect. There is no disharmony between the syllabus and the text simply because the syllabus contains less than all the holdings of the text. Relator's disharmony claim is inconsistent with Rep R 1(B)(1)'s provision that the law is contained within the syllabus and the text of a Supreme Court opinion.

{¶34} The magistrate observes that *Crim* was decided by the Supreme Court of Ohio on August 15, 2001, prior to the May 1, 2002 amendment of the Supreme Court Rules for the Reporting of Opinions. Thus, Rep R 1(B)(2), effective May 1, 2002, cited by relator in support of her claim for disharmony between the syllabus and text, was not in existence when *Crim* was decided and, for that reason, cannot support relator's argument here.

{¶35} Notwithstanding relator's reliance upon a reporting rule that was not in effect when *Crim* was decided, the inquiry initiated by relator here can proceed under the reporting rules in effect when *Crim* was decided.

{¶36} To reiterate, former Rep R 1(B), effective when *Crim* was decided, stated: "The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication."

{¶37} Under former Rep R 1(B), the following holding contained in the text is not a controlling point of law because it is not repeated in the syllabus of *Crim*: "[W]e hold that a teacher is entitled to temporary total disability compensation as a result of the allowed conditions of a claim if the teacher proves an intent to obtain employment during the summer and an intent to resume the teaching position after the summer recess." *Id.* at 485.

{¶38} However, that the above-quoted holding from the text of the opinion is not a controlling point of law under former Rep R 1(B) does not automatically preclude the commission from applying the holding when it is persuasively supported by the authority that the text offers in support of the holding. In *Crim*, the Supreme Court of Ohio persuasively explained the dual holdings of the text. Thus, even if the holding must be deemed noncontrolling because it is not contained in the syllabus, this magistrate, nevertheless, finds persuasive authority for the holding in the *Crim* text itself.

{¶39} The holding at issue here is supported by the following portion of the *Crim* text:

\* \* \* When determining whether an injury qualifies for temporary total disability compensation, the court utilizes a two-part test. "The first part of this test focuses on the disabling aspects of the injury, whereas the later part determines if there are any factors, other than the injury,

which would prevent the claimant from returning to [her or] his former position." *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44, 517 N.E.2d 533, 535. However, *only a voluntary* abandonment will preclude the payment of temporary total disability. *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46, 531 N.E.2d 678, 680.

Appellee satisfies the first part of the *Ashcraft* test, since there is no dispute as to the disabling aspects of her injury. However, appellants contend that appellee voluntarily terminated (abandoned) her employment at the end of the school year by virtue of the terms of her employment contract, thus failing the second part of the *Ashcraft* test. Accordingly, the issue is narrowed to whether appellee's employment contract, which terminated her employment at the end of the school year, was a voluntary act by appellee that prevented her from returning to MRDD.

"[T]he mere fact that [a claimant was] hired for a specific term of employment does not, standing alone, preclude the receipt of temporary total disability benefits for any period beyond the length of that term." *State ex rel. Pittsburgh Plate & Glass Industries, Inc. v. Indus. Comm.* (1991), 71 Ohio App.3d 430, 433, 594 N.E.2d 80, 82. It is the claimant's intent that determines whether the termination of employment is unrelated to the allowed condition so as to preclude return to former employment. *Id.* at 434, 594 N.E.2d at 82. We recognize that an employee/employer agreement for a specific term may be evidence of that employee's intent to voluntarily terminate employment. *Id.* However, the facts of this case and the intention of appellee do not support such a conclusion.

*Id.* at 483-484. (Emphasis sic.)

{¶40} In short, even if former Rep R 1(B) prevents the holding at issue from being treated as controlling law, because the holding is supported by the law as explained in the text and is not inconsistent with current law, it is applicable to the instant case.

{¶41} The magistrate further notes that, citing *State ex rel. B.O.C. Group, General Motors Corp. v. Indus. Comm.* (1991), 58 Ohio St.3d 199, relator claims here that "a teacher's summer break is akin to a layoff."

{¶42} In *B.O.C. Group*, the claimant was laid off by her employer for reasons unrelated to her industrial injury. Nevertheless, the commission awarded TTD compensation for a period subsequent to the layoff. In a mandamus action, the employer contended that the layoff precluded entitlement to TTD compensation. The court disagreed:

Relying on *Rockwell*, B.O.C. asserts that temporary total disability compensation is improper since claimant's departure was not injury-related. This is incorrect. An employer-initiated departure is still considered involuntary as a general rule. *Rockwell* did not narrow the definition of "involuntary," it expanded it. While certain language in *Rockwell* may be unclear, its holding is not. The lack of a causal connection between termination and injury has no bearing where the employer has laid off the claimant.

Id. at 202.

{¶43} There is no evidence in the record that relator ever claimed before the commission that her summer breaks were akin to a layoff. Because issues not raised administratively are not reviewable in mandamus, relator's layoff argument is not before this court. *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78.

{¶44} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

**NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

### § 35 Workmen's [Workers'] compensation.

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 right 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 employes, 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.

**4123.54****Statutes and Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4123: WORKERS' COMPENSATION****4123.54 Compensation in case of injury or death - agreement if work performed in another state.**

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**4123.54 Compensation in case of injury or death - agreement if work performed in another state.**

(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.

(B) For the purpose of this section, provided that an employer has posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described under this division may affect the employee's eligibility for compensation and benefits pursuant to this chapter and Chapter 4121. of the Revised Code, there is a rebuttable presumption that an employee is intoxicated or under the influence of a controlled substance not prescribed by the employee's physician and that being intoxicated or under the influence of a controlled substance not prescribed by the employee's physician is the proximate cause of an injury under either of the following conditions:

(1) When any one or more of the following is true:

(a) The employee, through a qualifying chemical test administered within eight hours of an injury, is determined to have an alcohol concentration level equal to or in excess of the levels established in divisions (A)(1)(b) to (i) of section 4511.19 of the Revised Code;

(b) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels in an enzyme multiplied immunoassay technique screening test and above the levels established in division (B)(1)(c) of this section in a gas chromatography mass spectrometry test:

(i) For amphetamines, one thousand nanograms per milliliter of urine;

(ii) For cannabinoids, fifty nanograms per milliliter of urine;

(iii) For cocaine, including crack cocaine, three hundred nanograms per milliliter of urine;

(iv) For opiates, two thousand nanograms per milliliter of urine;

(v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(c) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have one of the following controlled substances not prescribed by the employee's physician in the employee's system that tests above the following levels by a gas chromatography mass spectrometry test:

(i) For amphetamines, five hundred nanograms per milliliter of urine;

(ii) For cannabinoids, fifteen nanograms per milliliter of urine;

(iii) For cocaine, including crack cocaine, one hundred fifty nanograms per milliliter of urine;

(iv) For opiates, two thousand nanograms per milliliter of urine;

(v) For phencyclidine, twenty-five nanograms per milliliter of urine.

(d) The employee, through a qualifying chemical test administered within thirty-two hours of an injury, is determined to have barbiturates, benzodiazepines, methadone, or propoxyphene in the employee's system that tests above levels established by laboratories certified by the United States department of health and human services.

(2) When the employee refuses to submit to a requested chemical test, on the condition that that employee is or was given notice that the refusal to submit to any chemical test described in division (B) (1) of this section may affect the employee's eligibility for compensation and benefits under this chapter and Chapter 4121. of the Revised Code.

(C)(1) For purposes of division (B) of this section, a chemical test is a qualifying chemical test if it is administered to an employee after an injury under at least one of the following conditions:

(a) When the employee's employer had reasonable cause to suspect that the employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician;

(b) At the request of a police officer pursuant to section 4511.191 of the Revised Code, and not at the request of the employee's employer;

(c) At the request of a licensed physician who is not employed by the employee's employer, and not at the request of the employee's employer.

(2) As used in division (C)(1)(a) of this section, "reasonable cause" means, but is not limited to, evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

(a) Observable phenomena, such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;

(b) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents, that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;

(c) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

(d) A report of use of alcohol or a controlled substance provided by a reliable and credible source;

(e) Repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear attributable to other factors.

(D) Nothing in this section shall be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse.

(E) For the purpose of this section, laboratories certified by the United States department of health and human services or laboratories that meet or exceed the standards of that department for laboratory certification shall be used for processing the test results of a qualifying chemical test.

(F) The written notice required by division (B) of this section shall be the same size or larger than the certificate of premium payment notice furnished by the bureau of workers' compensation and shall be posted by the employer in the same location as the certificate of premium payment notice or the certificate of self-insurance.

(G) If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury.

(H) Whenever, with respect to an employee of an employer who is subject to and has complied with this chapter, there is possibility of conflict with respect to the application of workers' compensation laws because the contract of employment is entered into and all or some portion of the work is or is to be performed in a state or states other than Ohio, the employer and the employee may agree to be bound by the laws of this state or by the laws of some other state in which all or some portion of the work of the employee is to be performed. The agreement shall be in writing and shall be filed with the bureau of workers' compensation within ten days after it is executed and shall remain in force until terminated or modified by agreement of the parties similarly filed. If the agreement is to be bound by the laws of this state and the employer has complied with this chapter, then the employee is entitled to compensation and benefits regardless of where the injury occurs or the disease is contracted and the rights of the employee and the employee's dependents under the laws of this state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment. If the agreement is to be bound by the laws of another state and the employer has complied with the laws of that state, the rights of the employee and the employee's dependents under the laws of that state are the exclusive remedy against the employer on account of injury, disease, or death in the course of and arising out of the employee's employment without regard to the place where the injury was sustained or the disease contracted.

If any employee or the employee's dependents are awarded workers' compensation benefits or

recover damages from the employer under the laws of another state, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited on the amount of any award of compensation or benefits made to the employee or the employee's dependents by the bureau.

If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and the employee's dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state, and the rights of the employee and the employee's dependents under the laws of the other state are the exclusive remedy against the employer on account of the injury, disease, or death.

(I) Compensation or benefits are not payable to a claimant during the period of confinement of the claimant in any state or federal correctional institution, or in any county jail in lieu of incarceration in a state or federal correctional institution, whether in this or any other state for conviction of violation of any state or federal criminal law.

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**4123.56****Statutes and Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4123: WORKERS' COMPENSATION****4123.56 Compensation in case of temporary disability.**

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**4123.56 Compensation in case of temporary disability.**

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing

insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in section 4141.01 of the Revised Code, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B)(1) If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of section 4121.67 Of the Revised Code.

(2) If an employee in a claim allowed under this chapter suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings, not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of fifty-two weeks. The first twenty-six weeks of payments under division (B)(2) of this section shall be in addition to the maximum of two hundred weeks of payments allowed under division (B)(1) of this section. If an employee in a claim allowed under this chapter receives compensation under division (B)(2) of this section in excess of twenty-six weeks, the number of weeks of compensation allowable under division (B)(1) of this section shall be reduced by the corresponding number of weeks in excess of twenty-six, and up to fifty-two, that is allowable under division (B)(1) of this section.

(3) The number of weeks of wage loss payable to an employee under divisions (B)(1) and (2) of this section shall not exceed two hundred and twenty-six weeks in the aggregate.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under sections 4123.56 to 4123.58 of the Revised Code. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to sections 4123.56 to 4123.58 of the Revised Code.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code.

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**4123.58****Statutes and Session Law****TITLE [41] XLI LABOR AND INDUSTRY****CHAPTER 4123: WORKERS' COMPENSATION****4123.58 Compensation for permanent total disability.**

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**4123.58 Compensation for permanent total disability.**

(A) In cases of permanent total disability, the employee shall receive an award to continue until the employee's death in the amount of sixty-six and two-thirds per cent of the employee's average weekly wage, but, except as otherwise provided in division (B) of this section, not more than a maximum amount of weekly compensation which is equal to sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, nor not less than a minimum amount of weekly compensation which is equal to fifty per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code in effect on the date of injury or on the date the disability due to the occupational disease begins, unless the employee's average weekly wage is less than fifty per cent of the statewide average weekly wage at the time of the injury, in which event the employee shall receive compensation in an amount equal to the employee's average weekly wage.

(B) In the event the weekly workers' compensation amount when combined with disability benefits received pursuant to the Social Security Act is less than the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, then the maximum amount of weekly compensation shall be the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code. At any time that social security disability benefits terminate or are reduced, the workers' compensation award shall be recomputed to pay the maximum amount permitted under this division.

(C) Permanent total disability shall be compensated according to this section only when at least one of the following applies to the claimant:

(1) The claimant has lost, or lost the use of both hands or both arms, or both feet or both legs, or both eyes, or of any two thereof; however, the loss or loss of use of one limb does not constitute the loss or loss of use of two body parts;

(2) The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in sustained remunerative employment utilizing the employment skills that the employee has or may reasonably be expected to develop.

(D) Permanent total disability shall not be compensated when the reason the employee is unable to engage in sustained remunerative employment is due to any of the following reasons, whether individually or in combination:

(1) Impairments of the employee that are not the result of an allowed injury or occupational disease;

(2) Solely the employee's age or aging;

(3) The employee retired or otherwise voluntarily abandoned the workforce for reasons unrelated to the allowed injury or occupational disease.

(4) The employee has not engaged in educational or rehabilitative efforts to enhance the employee's employability, unless such efforts are determined to be in vain.

(E) Compensation payable under this section for permanent total disability is in addition to benefits payable under division (B) of section 4123.57 of the Revised Code.

(F) If an employee is awarded compensation for permanent total disability under this section because the employee sustained a traumatic brain injury, the employee is entitled to that compensation regardless of the employee's employment in a sheltered workshop subsequent to the award, on the condition that the employee does not receive income, compensation, or remuneration from that employment in excess of two thousand dollars in any calendar quarter. As used in this division, "sheltered workshop" means a state agency or nonprofit organization established to carry out a program of rehabilitation for handicapped individuals or to provide these individuals with remunerative employment or other occupational rehabilitating activity.

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