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STATEMENT OF FACTS

This case, like most voluntary abandonment cases, is fact intensive. The Industrial Commission's decision cannot be reversed if there is some evidence in the record supporting it. Therefore, the significance of the following facts cannot be understated.

Crown Battery (hereinafter "Crown" or "the Company") hired Robert Upton (hereinafter "Upton") in October, 1999. Upon hire, Upton was provided a handbook and he acknowledged, in writing, receiving it. (Supplement, hereinafter "Supp.", p. 31) Upton also acknowledged, in writing, that he received training regarding Company rules of conduct. (Supp., p. 32.) At all times relevant to this matter, Upton was a semi-truck driver for Crown. According to his job description, he was responsible for, among other things: 1) following a "pre-established weekly schedule in delivering batteries/miscellaneous to warehouses and/or customers on time and in a safe manner,"; 2) "reporting violations, fines, and accidents to the Fremont office immediately"; and 3) "understanding and following policies, procedures and instructions." (Supp., p. 33, emphasis added.) Minimum requirements of the job included a valid commercial driver's license with a hazardous materials endorsement and being knowledgeable about Federal Motor Carrier safety regulations. (Id.)

Crown's handbook delineates twenty-eight (28) specific work rules but states that "[o]ther acts of questionable conduct will be judged accordingly and may be subject to disciplinary action, including termination" and that the list "does not in any way limit the Company's right to discipline for just cause." (Supp., pp. 36-37.) Although the handbook contains guidelines for types of discipline, "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." (Supp., p. 36.) More serious violations "may result in

bypassing one or more steps [of the disciplinary process].” (Supp., p. 36.) Prior verbal and written warnings will be cleared from an employee’s record if specific time periods have elapsed since those warnings were issued. (Id.)

Upton was terminated on September 30, 2005 for violating Company work rule #27 prohibiting safety rules violations. (Supp., pp. 57-58.) More specifically, Upton was terminated after a Company investigation into a September 26, 2005 highway accident revealed that:

1. The Ohio State Highway Patrol (Motor Carrier Enforcement) cited Upton for “improper lane change, drove off the right side of the roadway against a guardrail for apprx. 35 ft.” (Supp., p. 53);
2. Upton called his supervisor to report that a skid had shifted in the back of the truck causing a spill but failed to report that an accident had occurred that totally disabled the truck (Supp., p. 56);
3. Upton hit a guardrail at speed in contrast to his version of the incident (Id.);
4. No attempt was made to prevent hazardous materials (battery acid) from spilling out of the truck (Id.);
5. The accident was caused by operator error (Id.);
6. The accident was so serious that it completely disabled the truck, caused significant damage to the vehicle, destroyed the transported product and caused damage to public property (the guardrail) (Supp., pp. 38-40, 54-55, 58-59; Supp., pp. 23-25); and
7. Upton’s comment to his supervisor following the serious incident was “I tore it up good this time.” (Supp., p. 25).

The investigation also revealed that the September 26, 2005 incident was Upton’s fifth vehicle-related incident or accident in less than three (3) years. (Supp., p. 58.) The prior incidents included the following:

1. Hitting a toll booth on February 23, 2004 for which he received a written warning for a safety violation for violating work rule #27 (Supp., pp. 51-52);
2. Hitting another truck while backing into the Company's loading dock on September 29, 2003 and not reporting the incident. The incident report indicated that the Company "will not except [sic] any more incidents while operating our vehicle." (Supp., p. 48);
3. Hitting a parked pick-up truck adjacent to an exit ramp after running over the hazard triangles on September 2, 2003. (Supp., pp. 46-47); and
4. Driving his truck into a ditch on March 5, 2003 which required the assistance of the sheriff to direct traffic while a wrecker removed the truck from the ditch. (Supp., pp. 41-42.) His supervisor indicated: "Any more incidents will lead to disciplinary action." (Supp., p. 42.)

After the September 26, 2005 highway accident, Upton did not seek medical treatment of any type until three (3) days later, at which time he was diagnosed with a right knee contusion and cervical strain. (Supp., p. 23.) A First Report Of Injury was completed by Upton and filed on October 3, 2005 – three (3) days after his termination. (Supp., p. 1.)

A district hearing officer allowed the claim for sprain of neck and contusion of right knee and awarded temporary total disability compensation ("TTD") from September 27, 2005 through November 12, 2005 and to continue upon submission of medical evidence. (Appendix, pp. 25-26.) Crown appealed the district hearing order (Supp., p. 19), and a staff hearing officer allowed the claim for cervical strain and right knee contusion but denied Upton's request for temporary total disability compensation. (Appendix, pp. 21-23.) The staff hearing officer found that Upton's conduct which led to his termination constituted a bar to the payment of temporary total disability compensation under this Court's decision in State, ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St. 3d 401, 650 N.E.2d 469. (Appendix, p. 23.) Upton's subsequent appeal was refused by the Industrial Commission. (Appendix, p. 19.) On June 12, 2006, Upton filed a mandamus action. On November 15, 2006, Magistrate Stephanie

Bisca Brooks issued a decision finding that the Commission's determination did not constitute an abuse of discretion and that the request for writ of mandamus should be denied. (Appendix, p. 18.) On June 28, 2007, in a split decision, the Tenth District Court of Appeals declined to follow the Magistrate's recommendations and granted the writ of mandamus. (Appendix, p. 8.) Crown appealed to this Court from that decision. (Appendix, pp. 2-3.)

ARGUMENT

Proposition of Law No. I:

The Industrial Commission Properly Exercises its Discretion in Denying a Claimant's Request For Temporary Total Disability Compensation When the Claimant Has Voluntarily Abandoned His Former Position of Employment.

1. A reviewing court cannot weigh evidence and make credibility determinations.

The Commission decided that Upton voluntarily abandoned his employment under State, ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St. 3d 401, 650 N.E.2d 469 and was, therefore, not eligible for temporary total disability benefits. The Magistrate appropriately framed the issue in this case in the following manner: "the question to be determined is whether there is 'some evidence' to support the commission's determination." (Appendix, p. 18.) Likewise, in the dissenting opinion, Judge McGrath admonishes: "[w]e 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." (Appendix, pp. 9-10.) In stark contrast, Judge Tyack, writing for the majority, states: "[t]he case now comes before the court for a full, independent review." (Appendix, p. 6.) The majority opinion does not note the abuse of discretion standard and does not explicitly state that there is not "some evidence" in the record to support the Commission's decision. In fact, the majority adopts the Magistrate's findings of fact (but not her conclusions) and selects, weighs and

evaluates the credibility of what the majority characterizes as “additional facts” which ultimately support its conclusion. (Appendix, p. 8.) This case illustrates the importance of what should be a reviewing court’s laser-like focus on the abuse of discretion standard so as to resist the temptation to fact-find, weigh evidence, and evaluate credibility. A review of the abuse of discretion standard is, therefore, in order and central to the analysis of this matter.

To establish entitlement to a writ of mandamus, Upton must demonstrate (1) a clear legal right to the relief prayed for, (2) a clear legal duty on the part of the Commission to perform the requested act, and (3) no plain and adequate remedy in the ordinary course of the law. State, ex rel. Westchester Estates, Inc. v. Bacon (1980), 61 Ohio St. 2d 42, 399 N.E.2d 81. If any one of these criteria is not satisfied, Upton is not entitled to the requested writ. State, ex rel. Berger v. McMonagle (1983), 6 Ohio St. 3d 28, 451 N.E.2d 225.

Upton has the burden of showing a clear legal right to a writ of mandamus as a remedy from the determination of the Commission. State, ex rel. Pressley v. Indus. Comm. (1967), 11 Ohio St. 2d 141, 228 N.E.2d 631. A clear legal right to a writ of mandamus exists where Upton can show that the Commission abused its discretion by issuing an order that is not supported by any evidence in the record. State, ex rel. Hutton v. Indus. Comm. (1972), 29 Ohio St. 2d 9, 278 N.E.2d 34. It is well settled that where the record contains some evidence to support the findings and determination of the Commission, there is no abuse of discretion and mandamus is not appropriate. State, ex rel. G.F. Business Equipment, Inc. v. Indus. Comm. (1981), 66 Ohio St. 2d 446, 423 N.E.2d 99; State, ex rel. Lewis v. Diamond Foundry Co. (1987), 29 Ohio St. 3d 56, 505 N.E.2d 962.

Reviewing courts do not weigh the sufficiency and credibility of the evidence presented to the Commission, but rather determine whether there is any evidence in the

Commission's file upon which it based its decision. The Commission is the exclusive evaluator of evidentiary weight and has the power to interpret the evidence and draw reasonable inferences. State, ex rel. McClain v. Indus. Comm. (2000), 89 Ohio St. 3d 407, 408, emphasis added (“[t]he commission alone is responsible for evaluating evidentiary weight and credibility”, citation omitted). See also, State, ex rel. Mobley v. Indus. Comm. (1997), 78 Ohio St. 3d 579, 583-84, 679 N.E.2d 300. The determination of disputed factual issues is within the Commission's final jurisdiction. State, ex rel. Sorrells v. Mosier Tree Serv. (1982), 69 Ohio St. 2d 341, 432 N.E.2d 197; State, ex rel. Humble v. Mark Concepts, Inc. (1979), 60 Ohio St. 2d 77, 397 N.E.2d 403.

Thus, in reviewing a Commission order, the Court must defer to the Commission's expertise in evaluating evidence and cannot substitute its judgment for that of the Commission. Mobley, supra, at 584. Where some evidence exists, the Commission's judgment will not be disturbed, and it is irrelevant whether other evidence, even if greater in quality and/or quantity, supports a contrary decision. State, ex rel. Pass v. C.S.T. Extraction Co. (1996), 74 Ohio St. 3d 373, 376, 658 N.E.2d 1055. An abuse of discretion will be found only where there is no evidence upon which the Commission could have based its decision. An abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. State, ex rel. Morris v. Indus. Comm. (1984), 14 Ohio St. 3d 38, 471 N.E.2d 465; State, ex rel. Shafer v. Ohio Turnpike Comm. (1953), 159 Ohio St. 581, 590-591, 113 N.E.2d 14.

Here, the majority inappropriately injected itself into the fact finding process reserved for the Commission. The majority boldly states that “[c]ertain facts are not in debate” (Appendix, p. 6) and that one of these facts is that “[Upton] was fired because, on September 26,

2005, he hit a guardrail.” (Appendix, p. 6.) This “finding of fact” of the majority is in direct contrast to the Commission’s finding that “the injured worker’s termination was not because of the fact that he had caused the injury itself ... 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” (Appendix, pp. 22-23) and “his wanton disregard for the employer’s workplace rules and policies.” (Appendix, p. 23.)

Next, the majority issues another “finding of fact” that “[i]n 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.” (Appendix, p. 6, emphasis added.) In so finding, the majority relied upon a March 5, 2003 incident report but omitted the author’s admonition that “drivers must be aware of all conditions.” (Supp., p. 42.) Significantly, the majority rejected another incident report of the same date which stated: “we could not find any slick spots on the road” (Supp., p. 41) which could certainly indicate driver error as opposed to a “slide.” That incident report also stated that “[t]he Sheriff had to direct traffic while we had a towing company pull him out.” (Supp., p. 41.) Apparently, the majority concluded, after weighing the evidence and assessing credibility to one incident report while rejecting another, that the removal of a semi-truck from a ditch after having to call a wrecker and arrange for the sheriff to direct traffic on a public highway is “without incident.” Many fact-finders (and many employers) would dispute this factual characterization and may have assigned credibility to the incident report rejected by the majority – which is exactly the reason the Commission’s authority as the fact-finder must be preserved.

The majority then highlights an alleged “implied promise” and the “progressive disciplinary action rule” and concludes that Upton was not “on notice” that another wreck would

“automatically be grounds for termination.” (Appendix, p. 7.) In so finding, the majority rejects the handbook language expressly permitting the Company to bypass “one or more steps” of the disciplinary process as well as the handbook language indicating that disciplinary action will be based on the severity of the offense and the employee’s total job performance. (Supp., p. 36.) Here again, the majority inappropriately selects and weighs specific evidence. Most significantly, these findings by the majority fly in the face of the specific Commission finding that Upton “knew of the rule and the consequences of violating the rule” and that Upton specifically inquired about being terminated after the incident. (Supp., p. 23.) Again, the Commission had the benefit of witness testimony and assessing witness demeanor and credibility and was charged with drawing inferences from the evidence. How could a reviewing court possibly determine that Upton was not “on notice” when the Commission listened to Upton’s testimony and the testimony of others and arrived at the exact opposite conclusion? Again, these factual determinations are the exclusive province of the Commission and the majority inappropriately weighed evidence and evaluated credibility.

2. A reviewing court cannot overturn a Commission decision which is supported by some evidence.

The majority opinion contends that every employee injured is entitled to workers’ compensation “unless the injury is purposely self-inflicted or caused by an employee’s intoxication by drugs or alcohol.” (Appendix, pp. 7-8.) However, the majority fails to discuss the significant body of common law which has recognized that voluntary abandonment may also bar receipt of certain workers’ compensation benefits such as temporary total disability compensation. In State, ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm. (1985), 29 Ohio App. 3d 145, 147, 505 N.E.2d 965, the Court concluded that not only must an industrial injury

“render the claimant unable to perform the functions of his former position of employment, but it also must prevent him from returning to that position.” Thus, the Court held, in relevant part:

. . . A worker is prevented by an industrial injury from returning to his former position of employment where, but for the industrial injury, he would return to such former position of employment. However, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment. . . .

Id., emphasis added.

Terminating an employee can constitute a voluntary abandonment of the former position of employment because, although not generally consented to, it “is often a consequence of behavior that the claimant willingly undertook, and may thus take on a voluntary character.” State, ex rel. Watts v. Schottenstein Stores Corp. (1993), 68 Ohio St. 3d 118, 121, 623 N.E.2d 1202. A claimant’s voluntary abandonment of the former position of employment, including discharge from that position as a consequence of voluntary behavior, precludes entitlement to TTD compensation. State, ex rel. Louisiana-Pacific Corp. v. Indus. Comm., 72 Ohio St. 3d at 402-03. “[A]n employee must be presumed to intend the consequences of his or her voluntary acts.” Id. at 403. In Louisiana-Pacific, the Court set forth a three-part test for determining whether a claimant’s discharge from employment constitutes a voluntary abandonment of that employment. A discharge is “voluntary” if it is “generated by the claimant’s violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.” Id.

In the present case, Upton was fired after numerous violations of the written work rules contained in the Company's handbook. His reckless actions demonstrated a wanton disregard for the Company's safety rules as the Commission specifically, and correctly, found. (Appendix, p. 23.) In less than three (3) years, Upton drove his truck into a ditch, hit a toll booth, hit another truck on the Company's loading dock, hit a parked pick-up truck on an exit ramp after driving over the hazard triangles and hit a guardrail at speed causing significant damage to the vehicle and creating a hazardous materials spill. Regarding his most recent incident, the evidence establishes that Upton failed to immediately report a serious accident involving a hazardous material spill, failed to attempt to prevent the spill from leaking onto public property (Supp., p. 56) and he demonstrated a reckless attitude toward safety when he stated to his supervisor that he "tore it up good this time" after the serious incident. (Supp., p. 25.) The handbook specifically warned that the violation of any of the rules including the safety rules could result in disciplinary action, including immediate discharge, and that the severity of the incident and an employee's overall record would be assessed in determining appropriate discipline. (Supp., p. 36.) Upton's written job description also required safe transportation of goods and safety training. (Supp., p. 33.) Upton knew of these rules and responsibilities because he acknowledged receipt of the Company's handbook (Supp., pp. 31-32) and he was warned on several occasions that failure to abide by Company safety rules would result in further disciplinary action up to and including discharge. (Supp., pp. 42, 48, 52.) He even asked his supervisor if he was going to be terminated immediately following the incident which led to his termination. (Appendix, p. 23.)

In State, ex rel. Walters v. Indus. Comm., Franklin App. No. 01AP-1043, 2002-Ohio-3236, in the magistrate's decision adopted by the Tenth District Court of Appeals, the issue

of the requisite intent for application of Louisiana-Pacific was addressed. The magistrate stated, in pertinent part:

... The rationale of Louisiana-Pacific and related decisions is that a worker will be held to accept the consequences of his actions when the consequences were known to him ahead of time or should have been, and where the worker's actions were voluntary, *i.e.*, not caused by the industrial injury.

To hold a worker accountable for his own choices is fair and reasonable, and the commission's task is to determine what may fairly be inferred from each claimant's conduct at the time he engaged in the conduct....

... [T]he focus should be on the inferences that may reasonably be drawn from claimant's conduct....

...

... The crucial question for the commission is the causation of the loss of wages – whether the loss resulted from claimant's exercise of free choice or from his allowed conditions.

Walters at ¶ 28, emphasis in original.

3. The Commission's specific factual finding that a claimant's termination was not because he caused the injury was supported by some evidence.

As the Magistrate and the dissenting opinions correctly note, post-injury terminations are carefully scrutinized to determine if the totality of the circumstances demonstrates a causal connection between the injury and whether the termination was merely a pretext to terminate the employee and avoid disability payments. (Appendix, pp. 8, 17.) The Commission carefully analyzed this critical issue in a lengthy and well-reasoned opinion, specifically distinguishing the facts of this matter from other cases where claimants were terminated because of their actions caused the injury. (Appendix, pp. 22-23.)

In contrast to the facts in State, ex rel. Gross v. Indus. Comm. (2006), 112 Ohio St. 3d 65, 858 N.E.2d 335 and State, ex rel. Gross v. Indus. Comm. (2007), 115 Ohio St. 3d 249, 874 N.E.2d 1162. (Gross I and Gross II), Upton was not terminated because he caused the injury. Here, after examining the totality of the circumstances surrounding Upton's discharge, the Commission specifically rejected the allegation that relator was terminated because his actions caused injury. (Appendix, pp. 22-23.) In fact, Upton did not immediately seek treatment and initially denied an injury and sought workers' compensation benefits only after he was terminated. (Supp., pp. 1-2.) The Commission had ample evidence upon which to base its conclusion which included the following:

1. Unlike the facts in Gross I and II, supra, an injury was not even alleged by Upton at the time of Upton's most recent traffic incident and a FROI was not completed by Upton or filed until after Upton's discharge (Supp., p. 1);
2. The load being transported contained hazardous materials (Supp., p. 24);
3. The guardrail was hit by the tractor-trailer driven by Upton with such force that "it bent the axle back and pulled the right front tire off the rim" and "caused an extremely large tow motor battery, weighing over 2000 pounds, to be catapulted and land upside-down on top of a skid of other batteries. This, in turn, caused the cells to come out of the damaged upside-down battery and dangerous acid to be spilled out of the truck into the ditch. Therefore, the clean-up of the accident had to be considered as a hazardous waste clean-up and reported to the federal government." (Id.);
4. Numerous prior incidents of reckless conduct while driving a Company vehicle containing hazardous cargo in approximately a two-year period (Id.);
5. A reckless attitude toward safety as evidenced by Upton's comments following a serious accident that he "tore it up good this time." (Id. at 25);
6. Citation issued against Upton for his fault in the incident for improper lane change and driving against guardrail for approximately 35 feet (Supp., p. 53);
7. Substantial damage caused by incident (Supp., pp. 38-40, 54-55, 59);

8. Failure to immediately report the accident as mandated by Company policy and Upton's job description (Supp., p. 33), "Responsible for reporting violations, fines, and accidents to the Fremont office immediately." (Emphasis added.) About this, his supervisor stated, "Bob phoned me at home and told me a skid had shifted and cells spilled. He did not mention he was involved in an accident." (Supp., p. 56, emphasis added); and
9. Upton's wanton disregard for safety as evidenced by the fact that he failed to correct his behavior after being instructed to do so after numerous safety violations (Supp., pp. 41-42, 47-48, 51-52, 56-58).

The majority's reasoning for its opinion is: "... 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." (Appendix, p. 7.) However, as Judge McGrath correctly noted, the Commission specifically found evidence over and above "an accident." (Appendix, p. 9.) In fact, the Commission carefully reviewed the totality of circumstances and found that the nature and degree of Upton's conduct rose to the level of indifference or disregard for Crown's workplace rules to support a finding of voluntary abandonment and the Commission agreed. (Appendix, p. 23.) This determination is clearly supported by some evidence and, therefore, cannot be reversed. The staff hearing officer appropriately cited State, ex rel. Feick v. Wesley Community Services, 10th Dist. No. 04AP-166, 2005 Ohio 3986, for the proposition that an employee's actions can rise to such a level of indifference or disregard for the employer's work place rules to support a finding of voluntary abandonment (Supp., pp. 24-25) and the majority opinion cites Feick for the proposition that these cases are to be determined on a case-by-case basis. In Feick, the Tenth District Court of Appeals granted a writ of mandamus reversing the denial of temporary total compensation when the Commission had made a factual determination that the conduct at issue was solely negligent. (Appendix, p. 8.) Therefore, the Court of Appeals relied on the factual findings of the Commission. Here, the Commission made a factual

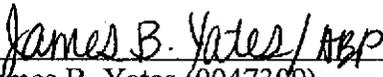
determination that the conduct at issue went beyond negligence, there is ample evidence in the record to support that determination and those factual findings should be relied upon.

CONCLUSION

The Commission's determination that Upton was not entitled to TTD compensation did not constitute an abuse of its discretion. The evidence shows that Upton committed multiple violations of the Company's written work rule that ultimately resulted in his termination. These rules identified Upton's violations as a dischargeable offenses and Upton was aware of that fact. Thus, the Commission properly found that Upton's discharge constituted a voluntary abandonment of his employment, thus disqualifying him from TTD eligibility. The Commission further found that the nature and degree of the totality of Upton's conduct constituted reckless conduct and wanton disregard for the employer's workplace rules and policies as opposed to an isolated negligent act. Judge McGrath and Magistrate Bisca Brooks found that there was "some evidence" to support the Commission's determination. Accordingly, for all of the above reasons, the Magistrate's decision should be adopted in toto and Upton's request for a writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this **Merit Brief of Appellant Crown Battery** was sent this 25th day of March, 2008 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 Kevin J. Reis, Esq., Assistant Attorney General, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, attorney for Industrial Commission of Ohio.

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APPENDIX

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07 - 1467

State *ex rel.*, Robert Upton,

Appellee,

Industrial Commission of Ohio,

Appellee,

and

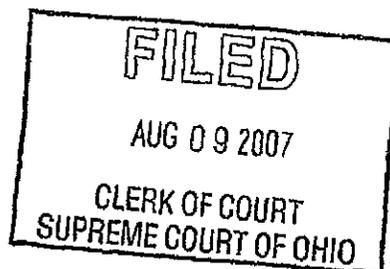
Crown Battery,

Appellant.

OH Sup. Ct. Case No. _____

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate District
Court of Appeals Case No. 06AP-594

NOTICE OF APPEAL OF
APPELLANT CROWN BATTERY



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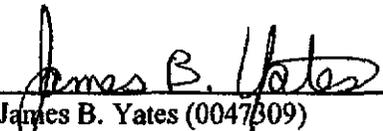
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EASTMAN & SMITH LTD.
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Attorney for Appellant
Crown Battery

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,

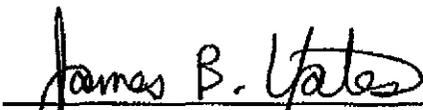
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James B. Yates (0047309)
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Fax: (419) 247-1777
Attorneys for Appellant
Crown Battery

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

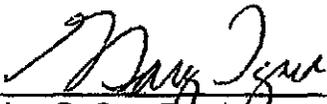
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FILED
COURT OF APPEALS
FRANKLIN CO OHIO
2007 JUN 28 PM 1:46
CLERK OF COURTS

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

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 28, 2007, the objections to the magistrate's decision are sustained, we adopt the findings of fact in the magistrate's decision supplemented by the additional facts set forth in the decision; we do not adopt the conclusions of law. As a result, we grant the relief sought by Robert Upton and order the commission to pay relator temporary total disability compensation. Costs are assessed against respondent Industrial Commission of Ohio.

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 G. Gary Tyack



Judge Susan Brown

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

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 05-867385 Claims Heard: 05-867385
 LT-ACC-OSIF-COV
PCN: 2053051 Robert W. Upton JR

EASTMAN & SMITH LTD
PO BOX 10032
TOLEDO OH 43699

Date of Injury: 9/26/2005 Risk Number: 307222-0

APPEAL filed by Injured Worker on 01/26/2006.
Issue: 1) Injury Or Occupational Disease Allowance

Pursuant to the authority of the Industrial Commission under Ohio Revised Code 4123.511(E), it is ordered that the Appeal filed 01/26/2006 by the Injured Worker from the order issued 01/13/2006 by the Staff Hearing Officer be refused and that copies of this order be mailed to all interested parties.

ANY PARTY MAY APPEAL AN ORDER OF THE COMMISSION, OTHER THAN A DECISION AS TO EXTENT OF DISABILITY, TO THE COURT OF COMMON PLEAS WITHIN 60 DAYS AFTER RECEIPT OF THE ORDER, SUBJECT TO THE LIMITATIONS CONTAINED IN OHIO REVISED CODE 4123.512.

Date Reviewed: 02/01/2006
Typed By: lcs
Date Typed: 02/01/2006
Findings Mailed: 02/03/2006

B. Smith
Staff Hearing Officer

Signed copy contained in claim file.

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

05-867385
Robert W. Upton JR
2451 SR 412
Fremont OH 43420

ID No: 20511-91
Gallon Takacs Boissoneault & Schaff
3516 Granite Circle
Toledo OH 43617-1172

Risk No: 307222-0
Crown Battery Mfg Co
PO Box 990
Fremont OH 43420-0990

ID No: 370-80
Sheakley Uniservice
P O Box 42212
Cincinnati OH 45242

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 05-867385

ID No: 1649-80
Eastman & Smith Ltd
PO Box 10032
Toledo OH 43699

BWC, LAW DIRECTOR

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=====

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 05-867385
LT-ACC-OSIF-COV
PCN: 2053051 Robert W. Upton JR

Claims Heard: 05-867385

FINDINGS MAILED
JAN 13 2006
I.C. TOLEDO

Tel. 611/13/2006

ROBERT W. UPTON JR
2451 SR 412
FREMONT OH 43420

Date of Injury: 9/26/2005

Risk Number: 307222-0

This claim has been previously allowed for: **SPRAIN OF NECK; CONTUSION RIGHT KNEE.**

This matter was heard on 01/06/2006 before Staff Hearing Officer Charles Anderson pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

IC-12 Notice Of Appeal of DHO order from the hearing dated 11/23/2005, filed by Employer on 12/12/2005.
Issue: 1) Injury Or Occupational Disease Allowance

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker, Robert W. Upton, Jr., and Edward Felter, and Wayne W. Biggert, atty.
APPEARANCE FOR THE EMPLOYER: Alex Burkett, Manager for Traffic Distribution, Deb Mollen, and James Yates, atty.
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The order of the District Hearing Officer, from the hearing of November 23, 2005, mailed November 26, 2005, is hereby MODIFIED to the following extent. Therefore, the injured worker's FROI-1 First Report of Injury and Application for Allowance of Claim, filed October 3, 2005, is hereby GRANTED to the extent of this order.

The injured worker was employed as a truck driver for Crown Battery Manufacturing Company. On September 26, 2005, he was eastbound on the Ohio Turnpike, near mile marker 128.5. He was driving a tractor-trailer rig loaded with various types of batteries, including tow motor batteries weighing over 2000 pounds. The tractor-trailer hit the guard rail, with such force that it bent the axle back and pulled the right front tire off the rim. Initially, the injured worker did not seek medical treatment. However, two days later, his neck started "tightening up"; so, he then sought medical treatment. He saw his family physician, David DeFrance, M.D., on September 29, 1995, and was diagnosed with a "contusion with ecchymosis to a mild degree above the right knee and a cervical strain."

Therefore, it is the order of this Staff Hearing Officer that this claim is hereby ALLOWED for a CERVICAL STRAIN (847.0), and a CONTUSION, WITH ECCHYMOSIS TO A MILD DEGREE, ABOVE THE RIGHT KNEE (924.11).



RECORD OF PROCEEDINGS

Claim Number: 05-867385

90923/ST/101

The real dispute is whether or not the injured worker is entitled to the payment of Temporary Total Disability Compensation, as the injured worker was terminated, as September 30, 2005. The employer asserts that the injured worker's termination, effective September 30, 2005, constituted a "voluntary abandonment" of employment, so as to bar the payment of Temporary Total Disability Compensation, pursuant to the Ohio Supreme Court's holding in the case of State ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995), 72 Ohio St. 3d 401 and its progeny. In support of its position, the employer submitted evidence that the injured worker had been involved in four (4) vehicle-related accidents in a one year period, in 2003 and early 2004, as well as copies of the written work rules which supported the employer's termination of the injured worker.

The injured worker cited a case from the Court of Appeals of Franklin County, State ex rel. NIFCO v. Woods, which granted a writ of mandamus and stated that the Industrial Commission abused its discretion in determining that the injured worker had voluntarily abandoned his employment, since the termination was directly related to the injury sustained in that claim. In reviewing that case, the Court noted that it is imperative to carefully exam 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. It is noted that, in the NIFCO v. Woods case the injury occurred at a Kentucky Fried Chicken on November 26, 2003, but the injured worker was not fired until February 13, 2004, nearly three months later. This long time lapse would certainly lead one to believe that the termination was a mere "pretext". Furthermore, in the NIFCO v. Woods case the Court specifically stated that "we can only conclude that relators termination was causally related to his injury ...the employer is firing relator for his actions because they caused injury" (emphasis in original). This Staff Hearing Officer does not find the facts in this case to be analogous to the NIFCO v. Woods facts.

It is the finding of this Staff Hearing Officer that the facts and circumstances of this case are more analogous to the facts in the case of State ex rel. Emily Feick, relator v. Wesley Community Services and the Industrial Commission of Ohio, decided by the 10th Appellate District Court of Appeals for Franklin County, on August 4, 2005. In that case, the injured worker was terminated following a third motor vehicle accident violation. She had previously negligently backed a company van into another vehicle and, in the third incident, she drove a company vehicle through an intersection against a red traffic light. 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." In the instant case, the employer submitted documentation of prior vehicle-related mishaps, including damage to both company vehicles and other vehicles which shared the public roadways with the company vehicle. Furthermore, it is noted that the goods being transported by the injured worker were batteries containing acid and that, therefore, the load was considered to be hazardous materials. In fact, the impact of the accident, which forms the basis of this claim, on September 26, 2005, caused an extremely large tow motor battery, weighing over 2000 pounds, to be catapulted and land upside-down on top of a skid of other batteries. This, in turn, caused the cells to come out of the damaged upside-down battery and dangerous acid to be spilled out of the truck into the ditch. Therefore, the clean-up of the accident had to be considered as a hazardous waste clean-up and reported to the federal government. Furthermore, in the instant claim, the injured worker was terminated within four (4) days of the incident (not nearly 3 months later, as in the NIFCO case).

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

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 05-867385

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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 Louisiana-Pacific holding.

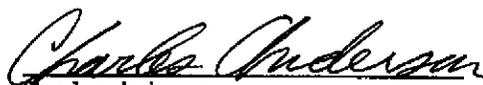
Therefore, it is the order of this Staff Hearing Officer that Temporary Total Disability Compensation is not payable for the requested period, from September 27, 2005, through the date of this hearing of January 6, 2006.

Future Temporary Total Disability Compensation, subsequent to January 6, 2006, may be considered by the Administrator of the Bureau of Workers' Compensation, at such time as the injured worker re-enters the workforce and, once again, becomes temporarily and totally disabled due the residuals of the allowed conditions in this claim, pursuant to the Ohio Supreme Court's holding in the case of State ex rel. McKnabb v. Industrial Commission (2001), 92 Ohio St. 3d 559 and its progeny.

The remainder of the District Hearing Officer's order, from the hearing November 23, 2005, mailed November 26, 2005, is hereby AFFIRMED in all other respects.

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Toledo District Office, One Government Center, Suite 1500, Toledo OH 43604.

Typed By: mlg
Date Typed: 01/11/2006


Charles Anderson
Staff Hearing Officer

Findings Mailed:

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

The Industrial Commission of Ohio
RECORD OF PROCEEDINGS

Claim Number: 05-867385

9806/13/2006
POL 01/13/2006

05-867385
Robert W. Upton JR
2451 SR 412
Fremont OH 43420

ID No: 20511-91
Gallon Takacs Boissoneault & Schaff
3516 Granite Circle
Toledo OH 43617-1172

Risk No: 307222-0
Crown Battery Mfg Co
PO Box 990
Fremont OH 43420-0990

ID No: 370-80
Sheakley Uniservice
P O Box 42212
Cincinnati OH 45242

ID No: 1649-80
Eastman & Smith Ltd
PO Box 10032
Toledo OH 43699

BWC, LAW DIRECTOR

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 05-867385
LT-ACC-OSIF-COV
PCN: 2053051 Robert W. Upton JR

Claims Heard: 05-867385

FINDINGS MAILED
NOV 26 2005
I.C. TOLEDO

ROBERT W. UPTON JR
2451 SR 412
FREMONT OH 43420

FINDINGS MAILED
NOV 26 2005
I.C. TOLEDO

Date of Injury: 9/26/2005 Risk Number: 307222-0

This claim has been previously allowed for: SPRAIN OF NECK; CONTUSION RIGHT KNEE.

This matter was heard on 11/23/2005, before District Hearing Officer David McGill, pursuant to the provisions of Ohio Revised Code Section 4121.34 and 4123.511 on the following:

APPEAL filed by the employer on 10/28/2005 from the Order of the Administrator dated 10/17/2005.
Issue: 1) Injury or Occupational Disease Allowance

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured worker; Ms. Wilson, atty.; and Mr. Felter
APPEARANCE FOR THE EMPLOYER: Mr. Yates, atty.; Mr. Burkett; and Ms. Mollen
APPEARANCE FOR THE ADMINISTRATOR: N/A

The Order of the Administrator, dated 10/17/2005, is AFFIRMED.

It is the order of this District Hearing Officer that the injured worker's FROI-1 Application, filed 10/3/2005, is GRANTED.

The injured worker sustained a compensable injury on 9/26/2005 after loosing control of his truck and striking a guard rail.

There is competent medical evidence from Fremont Memorial Hospital on the date of injury and Doctor DeFrance commencing 9/29/2005 to support the claim.

The Bureau of Workers' Compensation has properly ALLOWED the claim for: SPRAIN OF NECK; CONTUSION RIGHT KNEE.

The injured worker was terminated after this incident as a sequelae of prior accidents, as well as significant monetary damage to the truck and product from this accident. There is no question under Ohio law that the employer may hire or fire individuals at will. However, Ohio remains a no-fault system for purposes of Workers' Compensation law. This District Hearing Officer is unaware of any precedential case law involving involuntary abandonment wherein the "bad act" resulting in termination is, in fact, the industrial injury. There is a tsunami of cases involving termination subsequent to an industrial claim that deny Temporary Total Disability Compensation based on affirmative action subsequent to the industrial injury ranging from criminal activity to basic attendance and/or

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tardiness policy. The denial of benefits arising from a compensable incident based solely on facts surrounding the compensable injury would unnecessarily impose a fault-based system on the compensability of the claim.

The Bureau of Workers' Compensation has properly AWARDED Temporary Total Disability Compensation from 9/27/2005 through 11/12/2005, and to continue upon submission of medical evidence.

The parties fail to address the Full Weekly Wage setting of \$780.09 also contained in the Bureau of Workers' Compensation Order. This setting is, therefore, adopted by default with the same language with regard to reconsideration of wages based upon additional information.

In all other respects, the Administrator's Order of 10/17/2005, is hereby AFFIRMED.

An Appeal from this Order may be filed within 14 days of the receipt of the Order. The Appeal may be filed online at www.ohioic.com or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Toledo District Office, One Government Center, Suite 1500, Toledo OH 43604.

Typed By: kes
Date Typed: 11/23/2005
Date Received: 10/31/2005
Findings Mailed:



David McGill
District Hearing Officer

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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