
IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Robert Upton	*	Case No. 2007 1467
Appellee,	*	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	*	
Industrial Commission of Ohio	*	Court of Appeals Case No. 06AP- 594
Appellee,	*	
Crown Battery	*	
Appellant.	*	

MERIT BRIEF OF APPELLEE ROBERT UPTON

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STATEMENT OF FACTS

This case arises from a workers' compensation claim filed by Robert Upton against his employer, Crown Battery, as the result of injuries sustained on September 26, 2005, in the course of a motor vehicle accident. The employer did not contest the allowance of the claim and the Industrial Commission issued an order recognizing Mr. Upton's injuries as work related. The allowed medical conditions in the claim include cervical sprain, right knee contusion, and aggravation of pre-existing cervical spondylosis with myelopathy at C4-5 and C5-6, and Mr. Upton has treated for these conditions and has been disabled as a result of these conditions under the claim since the injury. Mr. Upton's employer, Crown Battery, contests his entitlement to temporary total disability benefits following this injury, arguing that Mr. Upton "voluntarily abandoned" his employment on September 30, 2005, when he was terminated by Crown Battery. His termination was the result of the motor vehicle accident that gave rise to this claim.

Mr. Upton began employment with Crown Battery in October 1999 as a driver. Prior to the motor vehicle accident on September 30, 2005, Mr. Upton was involved in four other accidents in the three years preceding, while employed by Crown Battery as a truck driver. (Supp. 58.) On March 5, 2003, Mr. Upton's truck slid across Highway 20 and into a ditch, at a time when the road conditions were slippery and wet, according to the company's incident file. (Supp. 42.) No disciplinary action was taken at the time. (Supp. 42.) On



September 2, 2003, Mr. Upton's truck accidentally clipped the rear bumper of a disabled vehicle on a jack on the side of the road. (Supp. 43-45.) The Pennsylvania State Police did not cite Mr. Upton, nor was any disciplinary action taken by Crown Battery. (Supp. 43-46). On September 29, 2003, Mr. Upton accidentally backed into a truck while backing into a dock area. (Supp. 48.) No damage was caused to either vehicle, and no disciplinary action was taken. (Supp. 48.)

On February 23, 2004, Mr. Upton hit a toll booth while he was attempting to back up, after the toll booth operator told him that he had to back up and get into another toll line. (Supp. 50.) This incident resulted in a First Written Warning for violating Safety Rule #27 on March 3, 2004. (Supp. 51.) In the employer's handbook, Safety Rule #27 states, "Violation of any safety rules, including housekeeping." (Supp. 35.) Mr. Upton's warning on March 3, 2004, specifically placed him on notice that "Additional accidents within the next year will result in disciplinary action including removal from driving up to and including termination." (Supp. 52.) Mr. Upton was not involved in any additional accidents during the ensuing year.

Crown Battery's Employee Handbook has 28 written work rules, and employs a progressive disciplinary process. (Supp. 34-37.). The first step in the progressive disciplinary process is a verbal warning; the second step is a first written warning; the third step is a second written warning; and the fourth step is termination. (Supp. 36). The Employee Handbook continues:

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.)

An employee's total job performance record shall be considered clear if: 1) Six months have elapsed since the occurrence of any verbal warning; 2) Nine months have elapsed since the occurrence of any first written warning; 3) Twelve months have elapsed since the occurrence of second written warning. (Supp. 36.)

Mr. Upton received a copy of this handbook at the time he was hired in 1999. At the time of his work-related injury on September 26, 2005, more than nine months had elapsed since his first "First Written Warning" in March, 2004, and his total job performance record would have been considered clear according to these provisions.

On September 26, 2005, Mr. Upton was involved in the motor vehicle accident that resulted in his industrial injury and his termination from Crown Battery. (Supp. 58.) Mr. Upton contacted his employer immediately following the incident. At the scene, Mr. Upton was cited by the Ohio State Highway Patrol for an improper lane change; Crown Battery subsequently conducted its own investigation of the incident. (Supp. 53-58.) As a result of this investigation, Mr. Upton was notified on September 30, 2005, that he was terminated from his job at Crown Battery (Supp. 57, 58.) His termination notice referenced "Work Rule #27, Safety" as the reason for termination. (Supp. 58.) As noted above, Work Rule #27 is implicated when an employee violates "any safety rules." (Supp. 35)

Mr. Upton sustained injury as a result of this accident, and, prior to his termination, sought treatment from his family physician on September 29, 2005. (Supp. 2.) His doctor recommended physical therapy, cervical xrays, and prescribed a muscle relaxer and anti-inflammatories. (Supp. 2.) The following day, the doctor faxed to Crown Battery, a disability slip, certifying Mr. Upton off work from September 26, 2005 through October 9, 2005. (Supp. 4.) Mr. Upton began the prescribed physical therapy on October 4, 2005, but



the treatment was suspended briefly in order for him to obtain additional testing as he continued to have neck pain. (Supp. 2, 8.) He returned to therapy thereafter. (Supp. 9, 10.)

Mr. Upton filed his claim application with the Bureau of Workers' Compensation (BWC) on October 3, 2005, alleging injury to his right knee and neck. (Supp. 1). The BWC allowed the claim and granted payment of temporary total disability from September 27, 2005, forward in an order dated October 17, 2005, noting the injury as described by Mr. Upton: "TW states that his load shifted and it was raining and he did not feel comfortable to drive the speed limit, so he set the cruise control and was in the right lane and the truck went right and hit a guard rail." (Supp. 11.)

Upon appeal by Crown Battery, the Industrial Commission, at District Hearing on November 23, 2005, affirmed the allowance of the claim and the award of temporary total disability, stating, in pertinent part:

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 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. (Emphasis in original).

(Supp. 15.)

At a Staff Hearing, the Commission modified the District Hearing Officer's order on January 6, 2006, noting that the "real dispute" regarded Mr. Upton's termination and its

effect on his entitlement to temporary total disability, and stating, “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.” (Supp. 23.)

The Industrial Commission denied any further appeal by Mr. Upton in its decision dated February 1, 2006. (Supp. 29.) Mr. Upton subsequently filed this Action in Mandamus on June 12, 2006, seeking a Writ of Mandamus to the Industrial Commission to vacate its order dated February 1, 2006 and to award Temporary Total Disability, or in the alternative, to issue a Writ of Mandamus to the Commission to vacate its order dated February 1, 2006 and to conduct further proceedings in this cause. (Appx. 1.) The magistrate denied Mr. Upton’s request, but upon objections, the Court of Appeals issued an opinion on June 28, 2007, granting the relief sought by Mr. Upton and ordering the Commission to pay temporary total disability benefits. (Appx. 8.) The Court of Appeals acknowledged that the facts were not in dispute that Mr. Upton’s injuries rendered him temporarily and totally disabled from his employment with Crown Battery, that he was fired because he struck a guardrail in the incident on September 26, 2005, that he had five wrecks in a three year period, and that “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.” (Appx. 10.) The court ultimately concluded that the undisputed facts did not equate to a finding of voluntary abandonment under State ex rel. Louisiana-Pacific Corp. v. Industrial Commission, as “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.” (Appx. 10.) The court specifically noted that “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.” (Appx. 10.)

ARGUMENT

Proposition of Law No. I:

Termination only constitutes a voluntary abandonment of the work force the termination was “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,” as set forth in State ex rel. Louisiana-Pacific Corp. v. Industrial Commission (1995), 72 Ohio St.3d at 403, 650 N.E.2d 469.

The Industrial Commission abused its discretion in finding that Mr. Upton’s termination on September 30, 2005, constituted voluntary abandonment, under the three part test set forth in State ex rel. Louisiana-Pacific Corp. v. Industrial Commission. Appellant Crown Battery argues that the Writ of Mandamus must be denied because there is some evidence to support the Industrial Commission’s finding that Mr. Upton voluntarily abandoned his employment on September 30, 2005, when he was terminated. While the facts of the case do not appear to be in dispute, the Commission’s application of those facts to the prevailing law is flawed, necessitating the court of appeals decision to vacate the order denying Mr. Upton’s benefits.

Crown Battery’s Employee Handbook, its list of offenses and its hierarchy of discipline do not “clearly define” the occurrence of a motor vehicle accident as a grounds for

termination. Mr. Upton's noted offense at the time of his termination was Safety Rule #27 which states "Violation of any safety rules, including housekeeping." (Supp. 35.) Nowhere does this handbook define "any safety rules." It is a catchall provision, and generates no clear definition of safety rules by which Mr. Upton could know what constituted a violation. The company obviously has taken the position that Mr. Upton's accident on September 26, 2005, was the result of a safety violation on his part, and that his prior accidents support that contention, but there is no evidence in the handbook that an accident would automatically result in termination. The handbook does note that the list of work rules is "intended only as a guideline. Other acts of questionable conduct will be judged accordingly and may be subject to disciplinary action, including termination." This vague terminology protects the employer and allows them to terminate an employee almost under any circumstance, but it does not arise to a "clear definition" of a motor vehicle accident being a dischargeable offense. The issue addressed by Louisiana-Pacific's first test is not whether the employer was justified in terminating the claimant, but whether the claimant had knowledge that the specific conduct itself was a violation of company rules. This language cannot be found to pass that test.

In fact, the company's response to previous accidents would suggest that termination was not, in fact, the usual disciplinary response to the occurrence of a motor vehicle accident. Mr. Upton had not even been disciplined for any previous accidents, let alone terminated, with the exception of his accident on March 3, 2004, when he was issued his first "Written Warning." The company notified Mr. Upton at that time to expect discipline, up to and including termination, if he was in accident over the course of the next year; but there was no accident in that time period. (Supp. 52.) Mr. Upton had every reason to believe that



record was clear as of March 3, 2005, and that any additional safety violations would be addressed according to the progressive disciplinary policy set forth in his Employee Handbook, just as the company had done in the past. The company's precedent fails the second part of the Louisiana-Pacific test, requiring that the employer had previously identified the conduct as a dischargeable offense. Quite to the contrary, Mr. Upton's employer treated his previous accidents as not even worthy of discipline, with the exception of the March, 2004 accident, which warranted a written warning, the first step in the disciplinary procedure. The employer has argued that the termination was not due to this particular accident, but due to Mr. Upton's history of accidents. If that is indeed the case, then the company violated its own policy in its zeal to discharge Mr. Upton from employment. According to the plain language of the Employee Handbook, Mr. Upton's record was clear from his previous accidents as of nine months later, or on January 3, 2005. (Supp. 36). And according to the plain language of his written warning, Mr. Upton could be terminated upon the occurrence of another accident before March 3, 2005 (one year from the write-up). (Supp. 52.) At the very most, Mr. Upton had reason to expect his accident on September 26, 2005, warranted a second written warning.

The third part of the Louisiana-Pacific test goes to the heart of the matter: did the claimant knowingly and intentionally act in such a way that his termination can be characterized as "voluntary?" As the court of appeals pointed out in this particular case, "an accident does not equate to an intentional violation of a work rule so as to constitute voluntary abandonment." (Appx. 10.) There is no evidence in the record that Mr. Upton intended to be terminated. The Industrial Commission relied upon State ex rel. Feick v. Indus. Comm. (2005), Franklin App. No. 04AP-166, 2005-Ohio-3986, to find that the series

of accidents in Mr. Upton's case translated to a "voluntary abandonment" on the principle 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.'" (Supp. 24.) Despite acknowledging this possibility in the law, the court in Feick ultimately found that the employee had not demonstrated such indifference for her employer's rules where she was involved in three motor vehicle accidents while working, where the first accident was due to her negligence, and the second due to her having gone through a red light. Applying the principle to Mr. Upton's case, the Commission cited to the severity of the accident, the cost to the employer of the accident, the clean up after the accident--but none of these details inform the trier of fact about Mr. Upton's intention. There is simply no evidence to support the employer's contention that Mr. Upton acted purposely or with wanton disregard for the employer's rules to cause this accident to happen with the knowledge that it would result in his termination. For this reason, the Court of Appeals granted the requested Writ of Mandamus, ordering the Commission to vacate its finding and pay temporary total disability.

Proposition of Law No. II:

A termination does not constitute voluntary abandonment nor does it bar payment of temporary total disability where that termination is causally related to the industrial injury giving rise to the claimant's disability.

An analysis under Louisiana-Pacific is not the final step in the process of determining whether a departure from employment bars payment of temporary total disability under a "voluntary abandonment" theory. In State ex rel. Gross v. Indus. Comm. (2007), 115 Ohio



St.3d 249, 2007-Ohio-4916, this Court noted that until then “the voluntary-abandonment doctrine has been applied only in postinjury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and the loss of earning that justified his or her TTD benefits. . . . The doctrine has never been applied to preinjury conduct or conduct contemporaneous with the injury.”

Where the conduct prompting the termination is contemporaneous with the injury, Gross provides the proper legal considerations beyond Louisiana-Pacific. In Gross, the employee was injured as a result of conduct that “violated a workplace safety rule and repeated verbal warnings.” Id. at 250. He was subsequently terminated. In spite of the fact that the Court felt that the termination was justified, the Court also felt that the facts demonstrated that Gross had been terminated because of his accident, based upon the plain language of his termination notice. Similar to Mr. Upton’s case, “Gross had violated the same rules on prior occasions without repercussion. However, according to the termination letter, it was Gross’s latest violation resulting in injury that triggered KFC’s investigation and subsequent termination.” Id. at 254. The Court held that temporary total disability was properly payable despite the termination.

The details of Mr. Upton’s termination lead to the same conclusion. Mr. Upton’s termination letter referenced his other motor vehicle accidents but it cited “Violation work rule #27, Safety” and specifically referenced all of the details of the September 26, 2005 accident. The employer’s evidence outlining the termination includes not just the letter citing his other accidents, but the police report from this accident, the bills for repairs to the truck from this accident, the cost of the damaged product from this accident, the towing charges from this accident, and the accident investigation report from this accident. (Supp.



53-59.) Gross, too, had violated the rule previously, had not been disciplined for those violations, but had been terminated as a result of the final incident and investigation. Mr. Upton's case is virtually identical to these facts. Based upon the court's reasoning, Mr. Upton's termination should be found to be related to his industrial injury, and, that being the case, "it is not voluntary and should not preclude the employee's eligibility for TTD compensation." Gross at 254, citing State ex rel. Rockwell International v. Indus. Comm. (1988), 40 Ohio St.3d 46, 531 N.E.2d 678, State ex rel. McCoy v. Dedicated Transport, Inc. (2005), 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51.

Proposition of Law. No. III:

A termination does not constitute voluntary abandonment, nor does it bar temporary total disability where the claimant is already disabled from his former position of employment at the time of the termination.

In addition to the circumstance where termination is contemporaneous with the injury, or where termination is the result of the injury itself, the case law requires additional inquiry beyond Louisiana-Pacific where separation of employment occurs at a time when the claimant is already disabled from his former position of employment. This court recently clarified in State ex rel. Reitter Stucco, Inc. v. Indus. Comm. (2007), 117 Ohio St.3d 71, 2008-Ohio-499, "If the Louisiana-Pacific three-part test is satisfied, however, suggesting that the termination is voluntary, there must be consideration of whether the employee was still disabled at the date of termination." Id. at 73.

In a separate, though not mutually exclusive, line of cases, this Court has recognized that the timing of a termination has bearing on whether a severance of employment can be



characterized as voluntary or involuntary. In State ex rel. Pretty Products v. Indus. Comm. (1996), 77 Ohio St.3d 5, 670 N.E.2d 466, the Court held that "a claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal." Id. at syllabus. Citing to State ex rel. Brown v. Indus. Comm. (1993), 68 Ohio St.3d 45, 48, 623 N.E.2d 55, 58, this Court explained, "The timing of a claimant's separation from employment can, in some cases, eliminate the need to investigate the character of departure. For this to occur, it must be shown that the claimant was already disabled when the separation occurred. '[A] claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal.'" Pretty Products. at 6.

In Mr. Upton's case it is undisputed that he sustained injury as a result of his motor vehicle accident on September 26, 2005. It is also undisputed that he was disabled from his former position of employment as a driver as a result of his motor vehicle accident. He did not work again after the accident, and sought treatment from his family physician on September 29, 2005, at which time his doctor diagnosed his conditions, recommended treatment, and prepared a disability slip, certifying Mr. Upton as unable to work from September 26 forward. (Supp. 2.) His doctor subsequently completed the paperwork necessary for the filing of his workers' compensation claim and the payment of his workers' compensation benefits, i.e. causation statements and disability forms. (Supp. 1-4.) The employer has not provided any contrary evidence to the diagnosis of Mr. Upton's physical condition and the fact that he was medically disabled from employment upon the occurrence and because of the occurrence of this injury. If at the time of his termination on September



30, 2005, Mr. Upton was disabled because of his injury, then the case falls squarely within the legal analysis set forth in Pretty Products, and temporary total disability cannot be denied—regardless of whether his termination constituted voluntary abandonment or not. Mr. Upton was disabled from September 26 forward based upon his doctor’s medical evaluation and opinion beginning September 29. Mr Upton was terminated on September 30, after he had already been disabled as a result of this injury. No other conclusion can be reached but that Mr. Upton’s termination did not remove him from the work force, because his injury already had removed him from the work force, and thus temporary total disability is properly payable. In this Court’s most recent decision on this very issue, it found in State ex rel. Reitter Stucco, Inc. v. Indus. Comm., “No one disputes that Mayle was medically incapable of returning to his former position of employment at the time of his discharge. Mayle’s eligibility for temporary total disability compensation accordingly remains intact.” Id. at 73.

CONCLUSION

As the Appellant properly points out at the outset of its Merit Brief, cases involving voluntary abandonment are fact intensive. This Court has long acknowledged that, stating “the underlying facts and circumstances of each case determine whether a departure by firing may be voluntary or involuntary.” State ex rel. Smith v. Superior's Brand Meats, Inc. (1996), 76 Ohio St. 3d 408, 411, 667 N.E.2d 1217, 1219. There are, however, established legal principles set forth for the analysis of the facts of each case; and in this case, the facts result in only one conclusion: that Mr. Upton’s termination does not constitute voluntary abandonment.

As outlined in the preceding argument, the evidence offered by Crown Battery does



not satisfy the three-part test of Louisiana-Pacific. The rule that Mr. Upton violated is not set forth clearly, and the employer had not employed termination as a means of discipline in similar circumstances previously but instead had employed its own progressive disciplinary procedure. Most significantly, Mr. Upton was not shown to have known that his accident, or even the actions causing his accident, would result in termination. The Commission and the employer have cited in various places to Mr. Upton's statements after the accident and his inquiry to his employer at the time of the accident as to whether or not he would be fired. These facts do not prove what he knew; to the contrary, they demonstrate that he had not idea whatsoever whether he would be terminated or not, even after the accident occurred. If he did not know the consequences of his actions after the fact, then he certainly cannot be presumed to know them before the accident occurred.

But even if the Court finds that the Commission had "some evidence" upon which to find that the facts comport with the rule under Louisiana-Pacific, and that Mr. Upton's departure from employment was voluntary, there is additional analysis to be done by the trier of fact. If the termination is found to be causally connected to the injury itself, it cannot serve to bar temporary total disability as set forth in State ex rel. Gross v. Indus. Comm. If the termination is found to occur after Mr. Upton was disabled from employment by the injury, it cannot serve to bar temporary total disability as set forth in State ex rel. Pretty Products. v. Indus. Comm. The Commission failed to address these two additional steps in spite of the fact that the evidence was there to prompt the additional inquiry. With the appropriate legal inquiry into the facts and timing of events in this case, only one conclusion can be reached. Mr. Upton's termination stemmed from this injury and the employer's own investigation of this injury, and it occurred on September 30, three days after the accident



causing his disabling injuries.

The case law regarding voluntary abandonment in the workers' compensation context is replete with references to liberal construction in the favor of employees and concern for preservation of the workers' compensation's "no fault" quality. The facts of Mr. Upton's case and the Commission's legal analysis of Mr. Upton's case bring us dangerously close to the use of "fault" in the determination of eligibility for workers' compensation benefits. Crown Battery has argued from the outset that the accident was his "fault" and that somehow this translates to a voluntary abandonment of the work force. Mr. Upton was terminated from his employment as a consequence of this injury, which the employer clearly decided was his fault. To allow this termination, however justified within the employment context, to block him from receiving his workers' compensation benefits, is contrary to all of the case law set forth above, which strives to preserve the most basic element of the system. It is significant that in closing its opinion in this matter, the Court of Appeals cited to Ohio Revised Code Section 4123.54(A), which sets forth the simple and clear mandate of the workers' compensation system: "Every employee, who is injured or who contracts an occupational disease . . . 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 . . . is entitled to receive . . . the compensation for loss sustained on account of the injury." Case law may expand upon the meaning of this language, but it does not change the underpinnings of this system. Mr. Upton did not voluntarily abandon his job with Crown Battery; he was terminated as a result of his injury, after he had already been disabled from doing his job. These facts do not support the denial of his temporary total disability benefits, and to interpret them in such a way that they do support denial of compensation is contrary



to the guiding principles of this system and this Court.

CERTIFICATE OF SERVICE

I certify that a copy of this MERIT BRIEF was sent by ordinary U.S. Mail to Attorney for Appellant, Crown Battery, James Yates and Mark Shaw, Eastman & Smith, One SeaGate, 24th Floor, PO Box 10032, Toledo OH 43699-0032 and to Attorney for Appellee, Industrial Commission of Ohio, Kevin J. Reis, Assistant Attorney General, 150 E. Gay Street, 22nd Floor, Columbus OH 43215-3130 this 23rd day of April, 2008.



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Attorney for Appellee
Robert Upton



APPENDIX

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Decision of the Tenth Appellate District Court of Appeals
(June 28, 2007) 8



IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

Robert Upton
2451 State Route 412
Fremont, Ohio 43420

Relator,

v.

Industrial Commission of Ohio, et al.,
30 West Spring Street
Columbus, Ohio 43215

and

Crown Battery
P.O. Box 990
Fremont, Ohio 43420

Respondents.

* Claim No. 05-867385

* Case No.

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*

ORIGINAL ACTION IN
MANDAMUS AND REQUEST
FOR ORAL ARGUMENT

Martha Joyce Wilson #0068803
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Now comes the Relator, Robert Upton, in the name of the State of Ohio, and respectfully petitions this Court to issue a Writ of Mandamus to the Respondent, Industrial Commission of Ohio. In support of this petition, the Relator alleges the following:

1. The Respondent, Industrial Commission of Ohio, is a board established pursuant to the

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provisions of Article II, Section 35, of the Constitution of the State of Ohio, and the provisions of the Workers' Compensation Law of Ohio, R.C. 4123.01, et seq. The Industrial Commission of Ohio is authorized and empowered inter alia to collect, administer, and distribute the State Insurance Fund, to determine all rights of claimants thereto, to hear and determine the extent of the claimant's disability and the amount of compensation to be awarded thereto.

2. The Respondent, Crown Battery, is an "employer" as defined by the R.C. 4123.01(B) and at all times material to this petition was fully amenable to the Workers' Compensation Laws of the State of Ohio. R.C. 4123.01 et seq.
3. Relator in the course of and arising out of his employment with Respondent, Crown Battery, injured his neck and right knee on September 26, 2005.
4. Relator filed an application for workers' compensation benefits as a result of the accident described in Paragraph 3. His claim was assigned claim number 05-867385 and originally allowed for the condition of "Sprain of Neck" and "Contusion Right Knee."
5. On November 23, 2005, Employer filed an appeal on October 28, 2005 from the Order of the Administrator dated October 17, 2005 for the Injury or Occupational Disease Allowance. This issue came before the District Hearing Officer on or about November 23, 2005 who issued an order which states in pertinent part:

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 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 injury 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 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.

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

6. The Employer appealed the order of the District Hearing Officer and the issue came before the Staff Hearing Officer on or about January 6, 2006, who issued an order which states in pertinent part:

The order of the District Hearing Officer, from the hearing of November 23, 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, 2005, 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 ECCHYMOSES TO A MILD DEGREE, ABOVE THE RIGHT KNEE (924.11).

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 the 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 fro 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 inured 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 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.

7. The Relator appealed the decision of the Staff Hearing Officer and on or about February 1, 2006, the Industrial Commission issued an order which states in pertinent part:

Pursuant to the authority of the Industrial Commission under Ohio Revised Code, Section 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.

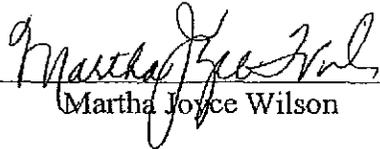
8. The Order in Paragraph 7 of this Complaint is not supported by the evidence in the record or by the law as it presently exists, and therefore, constitutes an abuse of discretion by the Respondent, Industrial Commission of Ohio.
9. The Order in Paragraph 7 of this Complaint operates to deny Relator relief to which he has a clear legal right.
10. The Relator has no plain and adequate remedy in the ordinary course of law.

11. The Relator has exhausted all his administrative remedies.

WHEREFORE, the Relator prays that this Court issue a Writ of Mandamus to the Respondent, Industrial Commission of Ohio, to vacate its order dated February 1, 2006 and to award Temporary Total Disability Compensation to Relator, Robert Upton, or in the alternative, to issue a limited writ directing Respondent to vacate its order dated February 1, 2006 and to conduct further proceedings in this cause.

Respectfully submitted,

Gallon, Takacs, Boissoneault & Schaffer
Co., L.P.A.

by 
Martha Joyce Wilson

REQUEST FOR ORAL ARGUMENT

Now comes the Relator, Robert Upton, in the name of the State of Ohio and respectfully requests that oral arguments before the Court of Appeals of Franklin County, Tenth Appellate District, be granted in this matter pursuant to Rule 11, Section 12 of the Tenth District Local Appellate Rules.



Martha Joyce Wilson
Attorney for Relator

PRAECIPE

TO THE CLERK:

Please serve a copy of the Complaint in Mandamus together with a summons on each of the Respondents in the above action at their respective addresses as set forth in the caption.



Martha Joyce Wilson
Attorney for Relator

JUL 03 2007

FILED
COURT OF APPEALS
FRANKLIN CO OHIO
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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
Crown Battery, :

(REGULAR CALENDAR)

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.

{9[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