

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.

In this voluntary abandonment case, the facts were central to the Commission's decision to deny temporary total disability benefits. In fact, the Commission emphasized that it was imperative to carefully examine the totality of the circumstances in making its factual determinations. (Supp. p. 24). On January 6, 2006, an evidentiary hearing was held in front of a Staff Hearing Officer. Seven (7) individuals appeared at that hearing and Upton and a Crown supervisor testified about the facts and circumstances surrounding Upton's termination from Crown. Numerous documents were introduced into evidence and discussed. After this hearing, the Staff Hearing Officer issued a lengthy order which reflected his selection of pertinent facts, his weighing of the evidence (including testimony) and his assessment of the credibility, or lack thereof, of certain witnesses. (Supp., pp.23-26). In challenging the Commission's determination, Upton and the Court of Appeals majority inappropriately omit relevant facts, weigh evidence and assess credibility. For these reasons, the Court of Appeals decision must be overturned.

Perhaps the most blatant example of the Court of Appeals majority substituting its own factual determinations is the majority's "finding of fact" on the central factual issue in this case – the reason for Upton's termination. According to the Court of Appeals majority, "Upton "was fired because, on September 26, 2005, he hit a guardrail." (Appendix, p. 6). This "finding of fact" by the Court of Appeals majority directly contradicts the Commission's specific finding

that Upton was not discharged for merely hitting a guardrail. The Commission specifically found that Upton engaged in “reckless conduct which caused a fifth (5th) motor vehicle accident in a period of approximately two years, while hauling hazardous cargo.” (Supp., pp. 24-25, emphasis added). In fact, the Commission focused on “prior vehicle related mishaps, including damage to both company vehicles and other vehicles which share the public roadways with the company vehicle” and the fact that the force of the September 26, 2005 accident caused “dangerous acid to be spilled out of the truck” and had to be “reported to the federal government as hazardous waste.” (Supp., p. 1). If the actual facts of this case were that Upton was discharged merely for “hitting a guardrail,” then the Commission, in all likelihood, would not have denied temporary total disability benefits. Judge McGrath, writing for the Court of Appeals dissent points out this error by the majority stating:

... 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 the 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.

(Appendix, p. 9.)

Obviously, the entire Court of Appeals majority decision is flawed as it was based upon a “finding of fact” which was erroneously substituted for a Commission finding in direct contravention of Ohio law.

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

The Commission performed a detailed analysis of the totality of the circumstances surrounding Upton's termination and found that "the injured worker's termination from employment was due to this 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 rules and the consequences of violating the rule." (Supp., p. 25).

The Court of Appeals majority and Upton highlight the "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" to support the conclusion that Upton was not "on notice" that another wreck would "automatically be grounds for termination." (Appendix, p. 7). However, the Court of Appeals majority omits from its factual findings the very provisions that clearly demonstrate the Company's ability to terminate Upton for the conduct at issue. The handbook provisions not cited by the Court of Appeals include the following: "other acts of questionable conduct ... may be subject to disciplinary action, including termination" (Supp., pp. 36-37); "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." (Id.) and more serious violations "may result in bypassing one or more steps [of the disciplinary process]." (Supp., p. 36). The Magistrate did include the foregoing relevant sections of the handbook in her statement of facts (Appendix, pp. 12-13) and succinctly rejected Upton's arguments regarding Louisiana-Pacific stating: "Relator, also asserts termination was improper because the employer did not follow the gradual steps. However, as the handbook makes clear, '[a] more serious violation of the plant rules may result in bypassing one or more steps.'" (Appendix, p. 18).

Again, the Court of Appeals majority and Upton ignore the totality of the egregious circumstances surrounding the final accident (force of the accident, property damage, citation of Upton by Ohio Highway Patrol, hazardous waste spill and “I tore it up good this time” comment, etc.) in their recitation of the facts. At the heart of a Louisiana-Pacific inquiry is whether the conduct at issue was known or should have been known by the employee as a dischargeable offense. On this issue, the Court of Appeals majority wrote “[w]e cannot say”...that he was on notice.” (Appendix, p. 7). As Judge McGrath noted in the dissent, “Upton acknowledges to his supervisor that ‘I tore it up good this time’ and inquired as to the whether or not he was going to be fired.” (Appendix, p. 9). This undisputed factual finding, coupled with the prior warnings and the handbook provisions, leave no doubt that Upton knew or should have known that his conduct was grounds for termination and the Commission’s factual finding in this regard cannot be disturbed.

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

The Court of Appeals majority found that “an accident does not equate to an intentional violation of a work rule so as to constitute voluntary abandonment.” (Appendix, p. 7, emphasis added). As Judge McGrath and the Magistrate found, the Commission made a specific factual finding that Upton was not terminated for merely having “an accident.” (Appendix, p. 9).

The Commission took great care to examine the totality of the circumstances to specifically distinguish the facts of this case from other cases where specific facts supported a termination because the employee caused the injury. (Supp., p. 24.).

In this regard, the facts of this case are not analogous to those at issues in Gross I and Gross II where there was a specific factual finding, based upon a termination letter that

Gross' termination was causally related to the injury. Here in stark contrast, the Commission specifically found "the injured worker's termination was not because of the fact that he caused the injury itself. (Supp., p. 24). In fact, there is absolutely no evidence in the record to indicate that the Company knew that Upton was injured at the time of his termination. Instead, the undisputed facts show that Upton did not seek treatment until three days after the accident. (Supp., p. 2) and did not file a workers' compensation claim until four (4) days after his termination. (Supp., p. 1). These facts are also not analogous to those in State, ex rel. Reitter Stucco, Inc. v. Indus. Comm., (2007), 117 Ohio St. 3d 71, 2008-Ohio-499 or State, ex rel. Pretty Products v. Indus. Comm., (1996), 77 Ohio St. 3d 5, 670 N.E. 2d 466. In Reitter, the Court of Appeals noted on several occasions that eligibility for temporary total disability is not surrendered in situations where employees are receiving temporary total disability benefits (or wages in lieu of temporary total) at the time of the termination. As previously noted, at the time of Upton's termination, he had not even filed a First Report of Injury and there was no evidence that the Company had received any information that Upton was disabled at all at the time of the termination. (Supp., pp. 1-4.). If the Pretty Products and Reitter line of reasoning is applicable to the instant facts as Upton contends, then there could never be a voluntary abandonment due to a positive post-accident drug screen as, in those situations, the employee is always injured first and then tested. However, the Louisiana-Pacific rationale has routinely been applied to preclude payment of temporary total disability compensation where a claimant was terminated for violation of an employer's written drug and alcohol policies. See e.g., State ex rel. Cobb v. Indus. Comm. (2000), 88 Ohio St.3d 54, 56-57 (applied Louisiana-Pacific, noting that "[c]laimant's firing in this case was not without cause and could have been avoided by a decision to refrain from drug use"); State ex rel. Kitts v. Mancan, Inc. (2002), 94 Ohio St.3d 245

(affirmed denial of temporary total disability compensation where claimant violated written work rule related to drug testing); State ex rel. Gebhart v. Indus. Comm., 2007 Ohio 1496, P24 (Ohio Ct. App. 2007) (claimant's termination for violation of written drug policy was voluntary and constituted a bar to his receipt of temporary total disability compensation); State ex rel. Hisle v. Indus. Comm. (1999), 140 Ohio App.3d 550, 559-560 (claimant voluntarily abandoned employment by violating written drug and alcohol policy).

Additionally, this line of Pretty Products reasoning has never been brought up by Upton below and cannot now be raised for the first time. Issues that are not raised before the trial court may not be raised for the first time on appeal. State ex rel. Martin v. Cleveland (1993), 67 Ohio St.3d 155, 157, 1993 Ohio 192, 616 N.E.2d 886. If issues are raised for the first time on appeal, the reviewing court need not consider them. State ex rel. Widmer v. Mohney, 2008 Ohio 1028, P55 (Ohio Ct. App. 2008).

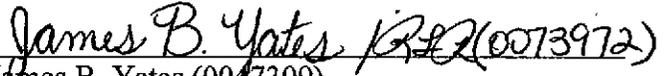
Finally, Upton mistakenly asserts that the Commission should have taken the initiative to raise and address this issue. Obviously, it is not the function of the Commission to entertain all arguments that could possibly be raised at a given hearing. Instead, the parties are obligated to raise the arguments which they deem viable.

CONCLUSION

This case needs to be decided on the specific factual findings of the Commission under the appropriate standard of review. As Judge McGrath and the Magistrate appropriately found, there was some evidence in the form of uncontested factual findings to support the Commission's decision. Therefore, the writ of mandamus should be denied.

Respectfully submitted,

EASTMAN & SMITH LTD.


James B. Yates (0047309)
Mark A. Shaw (0059713)
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Fax: (419) 247-1777

Attorneys for Appellant
Crown Battery

CERTIFICATE OF SERVICE

I certify that a copy of this **Reply Brief of Appellant Crown Battery** was sent this 14th day of May, 2008 to Martha Joyce Wilson, Esq., Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., 3516 Granite Circle, Toledo, Ohio 43617-1172, attorney for Upton; 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.

James B. Upton / RR(0073972)
Attorney for Appellant
Crown Battery