

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

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

REPLY BRIEF OF RELATOR-APPELLANT, MARGARITA GLENN

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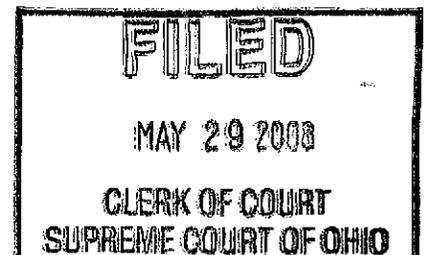


TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY LAW AND ARGUMENT 1

CERTIFICATE OF SERVICE 4

TABLE OF AUTHORITIES

CASES:

State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, 44,
517 N.E.2d 533, 535 1

State ex rel. Crim v. Ohio Bureau of Workers' Comp. (2001) 92 Ohio St.3d 481,
2001-Ohio-1268 1

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

State ex rel. Rockwell International v. Indus. Comm. (1988), 40 Ohio St.3d 44, 46,
531 N.E.2d 678, 680 1

REPLY LAW AND ARGUMENT

Appellee, Industrial Commission of Ohio, argues that this case does not present a question of the voluntary abandonment defense but rather “whether the injury, and not some other factor, caused the inability to work.” This argument clearly illustrates what some humorously call the “Duck Test”: If a bird looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck. In the instant case, the Magistrate noted that the denial of Ms. Glenn’s temporary total disability benefits was supported by the following portion of the *Crim* test (*State ex rel. Crim v. Ohio Bureau of Workers’ Comp.* (2001) 92 Ohio St.3d 481, 2001-Ohio-1268):

...when determining whether an injury qualifies for temporary total disability compensation, the court utilizes a two-part test. “The first part of this test focuses on the disabling aspects of the injury, whereas the later part determines if there are any factors , other than the injury, which would prevent the claimant from returning to [her or] his former position.” *State ex rel. Ashcraft v. Indus. Comm.* (1987, 34 Ohio St.3d 42, 44, 517 N.E.2d 533, 535. However, only a voluntary abandonment will preclude the payment of temporary total disability. *State ex rel. Rockwell International v. Indus. Comm.* (1988), 40 Ohio St.3d 44, 46, 531 N.E.2d 678, 680....

The Court of Appeals’ undisputably applied the voluntary abandonment test. There is no other arguable legal rationale for the denial of Ms. Glenn’s temporary total disability benefits during the summer school breaks.

Appellee’s argument is totally nonsensical. It argues that the “other factors” defense is not the involuntary abandonment defense but then provides court recognized examples of “other factors,” all of which are derivatives of the voluntary abandonment defense. Thus, Appellee clearly bases its argument on the judicially-created voluntary abandonment doctrine.

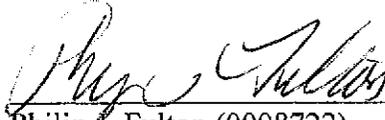
Nonetheless, Appellee’s “other factors” argument creates absurd results in the workers’ compensation system. Under this scenario, employees with a history of annual work breaks, lay-offs

or vacations will be prevented from receiving temporary total disability benefits during subsequent similar periods of the year although prevented from working due to an injury. In fact, under this scenario, Ohio injured workers should not receive temporary total disability compensation on Saturdays or Sundays unless they have shown an intent to work on those days. This unsalutary approach emphasizes the significance and importance that it is the General Assembly who makes workers' compensation policy, and the General Assembly has simply not made the policy choice to adopt the "other factors" argument.

Ms. Glenn was unequivocally temporarily totally disabled due to her psychological injury from the date of her injury to September 13, 2006. Yet the Industrial Commission denied compensation during the 2005 and 2006 summer months because of "other factors." During the summer school breaks of 2005 and 2006, Margarita Glenn wasn't on the job because of her work-related injury. Dr. Pamela Chapman's opinion that she could not work due to her psychological injury was uncontroverted.

It is shameless for Appellees to allege that Ms. Glenn will be receiving a windfall. This was a school teacher who was assaulted twice, leaving her with a serious psychological disability! This Court just recently reaffirmed that it is the role of the legislature, not the judiciary, to carve out exceptions to a claimant's eligibility for temporary total disability. State ex rel. Gross v. Indus. Comm., 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162. "Other reasons" is not a statutory exception to Ms. Glenn's eligibility for temporary total disability. Consequently, she must be awarded temporary total disability benefits during the 2005 and 2006 summer months or the policy decisions of the legislature will be denied.

Respectfully submitted,



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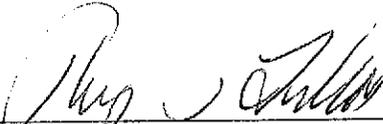
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, "Reply Brief of Relator-Appellant, Margarita Glenn" was mailed by regular U.S. Mail, postage prepaid, on this 29th day of May, 2008, to Sandra E. Pinkerton, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay St., 22nd Flr., Columbus, OH 43215 and to Loren L. Braverman, Columbus Board of Education, 270 East Town Street, Columbus, Ohio 43215.



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