

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, <i>ex rel.</i> , James F. Cordell	:	Case No. 2015-0163
	:	
Relator-Appellee,	:	
	:	
v.	:	On Appeal from the
	:	Franklin County Court of Appeals
Pallet Companies Inc.,	:	Tenth Appellate District
	:	(Case No. 13-AP-001017)
	:	
Respondent-Appellant,	:	
	:	
and	:	
	:	
Industrial Commission of Ohio,	:	
	:	
Respondent-Appellant.	:	

MERIT BRIEF OF APPELLANT, PALLET COMPANIES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

I. STATEMENT OF FACTS 1

II. ARGUMENT 5

FIRST PROPOSITION OF LAW 5

AN INJURED WORKER WHO FAILS A POST ACCIDENT DRUG TEST WHICH RESULTS IN HIS TERMINATION BASED UPON A VIOLATION OF THE EMPLOYER’S DRUG FREE WORKPLACE POLICY VOLUNTARILY ABANDONS HIS EMPLOYMENT, AND THUS IS NOT ELIGIBLE FOR TEMPORARY TOTAL COMPENSATION.

SECOND PROPOSITION OF LAW 9

STATE EX REL. GROSS V. INDUS. COMM., 115 OHIO ST.3D 749, 2007-OHIO-1916, 874 N.E2D 1162, (*GROSS II*) DOES NOT PRECLUDE A FINDING OF VOLUNTARY ABANDONMENT WHEN THE ACT WHICH RESULTS IN THE INJURED WORKER’S TERMINATION IS NOT CONTEMPORANEOUS WITH THE INJURY.

THIRD PROPOSITION OF LAW 13

THE INDUSTRIAL COMMISSION HAS THE EXCLUSIVE AUTHORITY TO RESOLVE FACTUAL ISSUES AND, TO THAT EXTENT, ITS DETERMINATION THAT THE INJURY WORKER’S CONDUCT WHICH IS NOT CONTEMPORANEOUS WITH HIS INJURY, CONSTITUTES A VOLUNTARY ABANDONMENT OF HIS EMPLOYMENT, SHOULD NOT BE DISTURBED ABSENT A SHOWING OF AN ABUSE OF DISCRETION.

III. CONCLUSION..... 17

CERTIFICATE OF SERVICE 19

APPENDIX

- App. A: Date-stamped notice of appeal
- App. B: Judgment from which appeal taken
- App. C: Opinion relating to judgment from which appeal taken

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Akron Paint and Varnish v. Gullotta</i> , 131 Ohio St.3d 231, 2012-Ohio-542, 963 N.E.2d 1266	11
<i>State ex rel. Ashcraft v. Indus. Comm.</i> , 34 Ohio St.3d 42, 517 N.E.2d 533 (1987).....	5, 6
<i>State ex rel. Cobb v. Indus. Comm.</i> , 88 Ohio St.3d 54, 2000-Ohio-273, 723 N.E.2d 573 (2000)	7
<i>State ex rel. Gross v. Indus. Comm.</i> , 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162.....	3, 9, 10
<i>State ex rel. Hildebrand v. Wingate Transport</i> , 141 Ohio St.3d 533, 2015-Ohio-167, 26 N.E.3d 798.....	15
<i>State ex rel. Hisle v. Indus. Comm.</i> , 140 Ohio App.3d 550, 2000-Ohio-1734, 748 N.E.2d 558 (10th Dist. 2000)	7
<i>State ex rel. Louisiana Pacific Corp. v. Indus. Comm.</i> , 72 Ohio St.3d 401, 1995-Ohio-153, 650 N.E.2d 469 (1995).....	6, 13
<i>State ex rel. Luther v. Ford Motor Company</i> , 113 Ohio St.3d 144, 2007-Ohio-1250, 863 N.E.2d 151	14
<i>State ex rel. McCoy v. Dedicated Transport</i> , 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51 (2002).....	6, 7
<i>State ex rel. Morris v. Indus. Comm.</i> , 14 Ohio St.3d 38, 471 N.E.2d 465 (1984).....	13
<i>State ex rel. Paysource USA, Inc. v. Indus. Comm.</i> , 10th Dist., Franklin No. 08-AP-677 (June 30, 2009).....	3, 7
<i>State ex rel. Pressley v. Indus. Comm.</i> 11 Ohio St.2d 141, 228 N.E.2d 631(1967).....	14
<i>State ex rel. Pretty Products v. Indus. Comm.</i> , 77 Ohio St.3d 5, 1996-Ohio-132, 670 N.E.2d 466 (1996).....	14, 15
<i>State ex rel. Reiter Stucco, Inc. v. Indus. Comm.</i> , 117 Ohio St.3d 71, 2008-Ohio-71, 881 N.E.2d 861	15
<i>State ex rel. Rouch v. Eagle Tool & Mach. Co.</i> , 26 Ohio St.3d 197, 498 N.E.2d 464 (1986)	13

State ex rel. Smith v. Superior Brand Meats, Inc., 76 Ohio St.3d 408, 1996-Ohio-166, 667 N.E.2d 1217(1996)..... 14, 15

State ex rel. Teece v. Indus. Comm. 68 Ohio St.2d 165, 429 N.E.2d 433 (1981)..... 13

I. STATEMENT OF FACTS

Relator-Appellee, James Cordell (hereinafter, "Appellee"), was injured while working for Appellant, Pallet Companies, Inc. (hereinafter, "Appellant"), on February 16, 2012. (Supplement (hereinafter, "Supp."), pp. 1-3, 69). As part of his regular job duties, Appellee was loading a tractor trailer with a tow motor (*Id.*). The tractor trailer unexpectedly pulled away from the loading dock which caused the tow motor to become stuck between the loading dock and the tractor trailer. (*Id.*). Appellee jumped off the tow motor in order to find assistance, but the tractor trailer truck kept moving forward, causing Appellee to fall several feet down to the ground. (*Id.*).

Appellee sought immediate medical attention and was found to have suffered injury to his right ankle and leg. (*Id.*, pp. 1-3). Appellee promptly filed a workers' compensation claim, to which claim number 12-307800, was assigned. (*Id.*, pp. 1, 4). Initially, the claim was allowed for the conditions of right fracture of the tibia and a right fracture of the shaft fibula. (*Id.*, pp. 4, 69). Appellant did not contest the allowance of the workers' compensation claim for those conditions, and in fact, over the next several years, Appellee's workers' compensation claim has been expanded to include several more conditions: disruption of trauma right wound repair, right malunion fracture, open wound right ankle, right ankle ulcer, and right ankle osteomyelitis. (*Id.*, pp. 90-91, 99).

Appellant did, however, contest payment of temporary total disability compensation. (*Id.*, pp. 14-46, 68-73). Appellant asserted a voluntary abandonment defense to payment of temporary total disability compensation which was premised on a positive post-accident drug test. (*Id.*). Appellee was administered a post-accident drug test on the date of injury, February 16, 2012, while at the emergency room. (*Id.*, pp. 10-

11, 103). On or about February 22, 2012, it was determined that Appellee had tested positive for marijuana and opiates - morphine (attributable to medication administered after the injury). (*Id.*). In compliance with Appellant's Alcohol and Drug-Free Workplace Policy, Appellee was terminated from his employment on February 22, 2012. (*Id.*, p. 13).

Appellant's Alcohol and Drug-Free Workplace Policy specifically prohibited use of illegal drugs ("controlled substances"), provided grounds for testing for use of such illegal drugs, and also set forth the discipline to be imposed in the event of a positive drug test. (*Id.*, pp. 6-9). Appellee's post-accident drug test, which was positive for an "illegal controlled substance," subjected him to immediate termination pursuant to the terms of that policy. (*Id.*, pp. 6-11). Therefore, Appellant terminated Appellee on that basis. (*Id.*, p. 13).

Procedurally, Appellant, The Industrial Commission of Ohio (hereinafter, "Commission"), heard this issue initially. The District Hearing officer allowed the claim but denied Appellee temporary total disability. (*Id.*, pp. 14-15). The District Hearing Officer found Appellee was ineligible for temporary total disability because of his termination of employment which was predicated upon violation of the drug free workplace policy. (*Id.*). Appellee appealed that determination, and the Staff Hearing Officer granted the request for temporary total disability. (*Id.*, pp. 16-17). The Staff Hearing Officer concluded that because Appellee was already disabled at the time of his termination on February 22, 2012, that he was, in fact, eligible for temporary total disability from the date of injury and to continue upon submission of proof. (*Id.*). Appellant appealed that decision, but the appeal was refused. (*Id.*, pp. 19-46).

Appellee then requested the Commission reconsider the decision of the Staff Hearing Officer, and the Commission granted that request. (*Id.*, pp. 47-49). Appellant's position that temporary total disability was inappropriate was premised upon the Magistrate's Decision in *State ex rel. Paysource USA, Inc. v. Indus. Comm.* 10th Dist. Franklin No. 08AP-677 (June 30, 2009). (*Id.*, pp. 26-43). The Magistrate decided (and the Tenth District later adopted that decision through Judgment Entry) that a voluntary abandonment finding can be supported based on a *post-accident termination* and even when an injured worker is otherwise incapable medically of returning to his former position of employment. (*Id.*). More specifically, the decision permits a post-injury termination for violation of a work policy based upon *pre-injury* conduct that was only discovered *after* and *by virtue of* the injury to support a finding of voluntary abandonment. (*Id.*).

The Commission followed the rationale employed by the Magistrate (and accepted by the Tenth District) in the *Paysource* case and denied Appellee temporary total disability. (*Id.*, pp. 69-70). Importantly, the Commission distinguished these types of cases from those discussed in the Supreme Court's decision in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162. (*Id.*). The Commissioners noted that in the *Gross* case, the violative conduct was tied to and the cause of the injury itself; in the *Paysource* case and Appellee's case, however, the violative conduct had *nothing* to do with the workers' compensation injury, and in fact, occurred *prior* to the injury. (*Id.*). The Commission felt that distinction was of critical importance and resulted in the Commission declaring Appellee to have voluntarily

abandoned his employment. (*Id.*). Appellee was, therefore, ineligible for payment of temporary total from February 17, 2012 and continuing. (*Id.*).

Based upon that finding, the Commission held hearings regarding an overpayment of temporary total disability compensation that had been paid from February 17, 2012 through the issuance of the Commissioners order, mailed on May 11, 2013. (*Id.*, pp. 74-85, 99-102). That overpayment was calculated and ordered to be \$22,081.88. (*Id.*).

Appellee then filed a complaint in mandamus in late 2013 in the Tenth District Court of Appeals, alleging that the Commission's denial of temporary total disability and the associated orders declaring an overpayment of that compensation was legally erroneous. The Magistrate decided that the Commission's actions were legally unsupportable and ordered a writ be issued directing the Commission to order temporary total disability paid. (Appendix, hereinafter "App.," pp. 48-61). Appellant and Commission objected to that decision, but the Tenth District Court of Appeals overruled those objections and sustained the Magistrate's decision. (App., pp. 44-47)

Both Appellee and the Commission appealed the decision of the Tenth District Court of Appeals as a matter of right and respectfully request this Court to decide the issues of this case. (App., pp. 1-22; 23-43).

II. ARGUMENT

PROPOSITION OF LAW NO. 1.:

AN INJURED WORKER WHO FAILS A POST ACCIDENT DRUG TEST WHICH RESULTS IN HIS TERMINATION BASED UPON A VIOLATION OF THE EMPLOYER'S DRUG FREE WORKPLACE POLICY VOLUNTARILY ABANDONS HIS EMPLOYMENT, AND THUS IS NOT ELIGIBLE FOR TEMPORARY TOTAL COMPENSATION.

In this case, it is undisputed that Appellee had violated the company's Drug Free Workplace policy when he tested positive for marijuana. Clearly, Appellee knew he was in violation of that policy the minute he clocked into work that day. There is no dispute that Appellant had the right to terminate his employment on that day. Nor is there any suggestion that Appellee's termination was retaliatory or a pretext to avoid a workers' compensation claim. Indeed, the allowance of the claim was not contested. As the result of that termination, Appellee had no right to receive any wages from Appellant. The issue then becomes whether or not Appellee is entitled to temporary total compensation despite the termination for his knowing violation of the company policy. Appellant asserts that Appellee's violative conduct and subsequent termination must preclude the payment of temporary total compensation.

This Court has followed the doctrine of voluntary abandonment for decades. This doctrine has its roots in *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42, 517 N.E.2d 533 (1987), when the Court found that an involuntary act (being sent to prison) was, in truth, a voluntary act which severed the causal link between the injury and loss of wages. In *Ashcraft*, it was apparent that the injury prevented the client from performing his former job duties, but the Court found that his own actions precluded the payment of any temporary total compensation.

The next relevant case regarding a finding of voluntary abandonment was *State ex rel. Louisiana Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153, 650 N.E.2d 469 (1995). In this case, the Court adopted the now well-known three-step test to determine whether or not an injured worker's violation of company rules precluded the payment of temporary total compensation. That test requires a written 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.* at 403. As in *Ashcraft*, the Court deemed the action of the injured worker to be voluntary even though there was no express intention established by the injured worker to abandon his job. Moreover, a finding of voluntary abandonment was adopted even though the injured worker could not resume his former job duties.

The next significant case where this Court approved a voluntary abandonment finding was *State ex rel. McCoy v. Dedicated Transport*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51 (2002). *McCoy* was actually two cases consolidated by the Court. While Mr. McCoy was terminated for tardiness and insubordination, the other claimant, Mr. Brandgard, was fired because he tested positive for cocaine while in the hospital. He sought temporary total compensation for a period of time when he was recovering from surgery. He argued that he was entitled to temporary total compensation because he did not abandon the entire workforce.

The Court examined the history of the voluntary abandonment doctrine and applied the three-step set forth in *Louisiana Pacific*, *supra*, to find that the causal link between the injury and loss of earnings was severed by the voluntary abandonment. The Court did find that this link could be restored if the injured worker did return to

another job and while working, became disabled. *Id.* at 38. The Court did consider “certain policy considerations ... that do not apply where a claimant is fired for testing positive for cocaine or otherwise violating the employer’s written work rules.” *Id.* at 26. The Court found that Mr. Brandgard voluntarily abandoned his former position of employment “when he was justifiably fired after testing positive for cocaine.” *Id.* at 43.

The Court referenced many cases in *McCoy*, one of which was *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54; 2000-Ohio-273, 723 N.E.2d 573 (2000). Mr. Cobb was fired after failing a drug test, which the Court unanimously found that this constituted a voluntary abandonment which precluded the award of any temporary total compensation. *Id.*

The Tenth District Court of Appeals did follow this precedent in *State ex rel. Paysource v. Indus. Comm.*, 10th Dist. No. 08AP-677 (March 26, 2009) (memorandum decision) and declared a voluntary abandonment finding after a post-injury drug test. *See also State ex rel. Hisle v. Indus. Comm.*, 140 Ohio App.3d 550, 2000-Ohio-1734, 748 N.E.2d 558 (10th Dist. 2000). In both cases, the court determined it was the violation of company policy which was the cause of the loss of earnings, not the injury, irrespective of the timing of the violation.

In the present case, the lower court however, not only disregarded its own precedent but also the prevailing authority from this Court and found that a positive post-injury drug test no longer was the basis for a voluntary abandonment finding, because the violative conduct was pre-injury. As will be discussed in Proposition of Law Two, *infra*, there is no basis in law for such a finding. The law set forth above

demonstrates that a post-injury drug test is the basis for a finding of voluntary abandonment.

Thus, if the law of voluntary abandonment as it relates to post-accident drug tests as dictated by this Court is applied, it is clear, beyond a doubt, that Appellee is not entitled to temporary total compensation. As a result, the decision of the lower court must be reversed and the writ of mandamus must be denied.

PROPOSITION OF LAW NO. 2.

STATE EX REL. GROSS V. INDUS. COMM., 115 OHIO ST.3D 749, 2007-OHIO-1916, 874 N.E2D 1162, (GROSS II) DOES NOT PRECLUDE A FINDING OF VOLUNTARY ABANDONMENT WHEN THE ACT WHICH RESULTS IN THE INJURED WORKER'S TERMINATION IS NOT CONTEMPORANEOUS WITH THE INJURY.

The lower court performed a quantum leap of logic when it concluded, without any authority from this Court, that a post-injury positive drug test could *never* be the basis for a finding of voluntary abandonment when the injured worker was unable to return to his former position of employment. As set forth above, the law on this issue has not changed, therefore, there is no basis for the lower court's holding. As will be illustrated below, the lower court's analysis creates, and indeed fabricates, rather than interprets, the law regarding voluntary abandonment.

The lower court has construed this Court's decision in *State ex rel. Gross v. Indus. Comm.* (2007), 115 Ohio St.3d 249, 2007-Ohio-4916 (*Gross II*) to bar a finding of voluntary abandonment in this case, and in any case where an injured worker is fired for failing a post-accident drug test. This case, however, is easily distinguishable. In *Gross II*, the injury occurred because the employee was violating company policy; in other words, he was hurt because he was doing something he was expressly told not to do. The injury and the violative act were inseparable. The Court noted that the voluntary abandonment doctrine "has never been applied to pre-injury conduct or conduct contemporaneous with the injury." *Id.* at 19. The Court then engaged in a discussion to clarify that it did not intend to inject fault (the violative act) into the analysis of voluntary abandonment.

The Court found that because workers' compensation was a no fault system, the deprivation of temporary total compensation to an employee whose own fault caused

his injury would be inconsistent with the intent of that system. Thus, because his departure was causally related to his injury, his termination was involuntary. *Id.* at 23-25.

The message from *Gross II* is that an act which violates company policy and is causally related to the injury cannot support a voluntary abandonment defense. While the Court in *dicta* indicated that voluntary abandonment had never been applied to pre-injury or contemporaneous conduct, *Gross II* only involved contemporaneous conduct, not pre-injury conduct. The lower court, therefore, erred when it relied on *Gross II* to vacate the voluntary abandonment finding.

In the case at bar, it is undisputed that Appellee's intentional violation of the drug-free workplace policy did not cause his injury. His intentional violation of the rules occurred when he set foot on company property that day. By all accounts, he should have been fired at the time he ingested those illegal substances. He had no right to any earnings that day because of his intentional conduct. That link was, in fact, severed, yet not discovered until after his injury. His injury did not repair the breach between his injury and his loss of earnings, it just brought it to light. He had no expectations to future earnings because each day he came to work after using drugs, he was forfeiting his right to earn.

Appellee, because of his status as a workers' compensation claimant, is in fact being treated better than any of his fellow workers, who suffer no occupational injuries. If a co-worker who sustains an idiopathic and non-compensable injury at work, then tests positive for the same drugs taken by Appellee, that employee's termination results in his loss of earnings despite the severity of his injury. Similarly, a co-worker involved

in a property damage accident who tests positive for the same drugs ingested by Appellee would forfeit his earnings as well for his violation of company policy. There is no reason why Appellee should be entitled to compensation when other drug users would be left without any benefits.

Similarly, Appellee's intentional act deprives him from being able to return to light duty when he is recovering from his injury. As reflected in several other voluntary abandonment cases, light duty was made available if the injury prevented a return to the regular job duties, but did not preclude a return to the entire workforce. A voluntary abandonment such as the one that occurred in the case at bar, prevents the employer from being able to place an injured worker in a light duty position either immediately or after the acute phase of the recovery process. A refusal to accept a light duty job will bar an injured worker from being able to seek temporary total compensation. See *State ex rel. Akron Paint and Varnish v. Gullotta*, 131 Ohio St.3d 231, 2012-Ohio-542, 963 N.E.2d 1266. In this case, had Appellee not violated the company drug free workplace policy, he would have been eligible for a light duty job offer, if not immediately, soon after his injury. His intentional act, however, not the injury, prevented this. It makes no difference whether his separation from employment involved a violation of company policy or the literal act of him walking off his job. The result is the same: the lack of earnings is the result of the intentional act of the Appellee, not related to the injury. Even where there is no dispute that the injured worker cannot return to his former position of employment, an act which results in the abandonment of any light duty opportunity, must preclude the award of any temporary total compensation.

In this case, but for the intentional act of Appellee, he would have been able to return to work with Appellant in some capacity. Therefore, he did voluntarily abandon his employment and as such, is barred from receiving temporary total compensation.

Based upon the above, the decision of the lower court must be reversed and the writ of mandamus must be denied.

PROPOSITION OF LAW NO. 3.

THE INDUSTRIAL COMMISSION HAS THE EXCLUSIVE AUTHORITY TO RESOLVE FACTUAL ISSUES AND TO THAT EXTENT, ITS DETERMINATION THAT THE INJURY WORKER'S CONDUCT WHICH IS NOT CONTEMPORANEOUS WITH HIS INJURY, CONSTITUTES A VOLUNTARY ABANDONMENT OF HIS EMPLOYMENT, SHOULD NOT BE DISTURBED ABSENT A SHOWING OF AN ABUSE OF DISCRETION.

Obscured in the legal analysis is the fact that the Industrial Commission did hear this case administratively and weighing the facts, determined that Appellee violated the policy and that the *Louisiana Pacific* test was met. (Supp. 69-70). Moreover, the Commission determined that this termination was not retaliatory or pretextual. The conclusion was that his violative conduct was not related to his injury, therefore, Appellee voluntarily abandoned his employment. This finding is supported by facts and law. As such, no writ of mandamus should be issued.

Naturally, this Court is well aware of the standard of review that applies in mandamus cases such as this one: an abuse of discretion. *State ex rel. Morris v. Indus. Comm.*, 14 Ohio St.3d 38, 471 N.E.2d 465 (1984). Orders of the Industrial Commission are deemed appropriate and not subject to a writ of mandamus from this Court when there is "some evidence" in the record to support the order. *State ex rel. Rouch v. Eagle Tool and Mach. Co.*, 26 Ohio St.3d 197, 198, 498 N.E.2d 464 (1986). Therefore, by corollary, an order of the Industrial Commission may be subject to a writ of mandamus from this Court when there essentially is a finding that there is "no" evidence in the records that supports the order. Additionally, it has consistently been held that issues such as the credibility of the evidence and the weight to be given to the evidence falls within the sole purvey of the Industrial Commission. *See State ex rel. Teece v. Indus. Comm.*, 68 Ohio St.2d 165, 429 N.E.2d 433 (1981). A re-weighing of

the evidence by this Court is not appropriate as the Industrial Commission is the sole finder of fact. *Id.* Finally, Relator must also establish that there is a clear “legal right” to the relief being sought and further, that there was a clear “legal duty” of the Industrial Commission to provide said relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967).

In the lower court, Appellee suggested that it was improper to find voluntary abandonment when the injured worker was “disabled.” It is important to note that in these cases, the conduct which led to the termination of employment was after the injury, thus, raising the issue of whether the termination was retaliatory or pretextual. This court recognized this problem in *State ex rel. Smith v. Superior Brand Meats, Inc.*, 76 Ohio St.3d 408, 1996-Ohio-166, 667 N.E.2d 1217 (1996), and indicated that it is “imperative to carefully examine the totality of the circumstances when such a situation exists.” *Id.* In fact, if *State ex rel. Pretty Products v. Indus. Comm.*, 77 Ohio St.3d 5, 1996-Ohio-132, 670 N.E.2d 466 (1996) is considered, it is clear that the Court does not adopt a hard and fast rule that voluntary abandonment is precluded when the employee is disabled. Rather, consistent with *Smith, supra*, the Court stated that “inquiry into the character of the departure is the norm.” *Pretty Products, supra*, at 6. Moreover, the Court did not find that a finding of voluntary abandonment was improper as the case was sent back to the Commission for clarification, of its reasoning, including whether the termination was because the employee was injured. *Id.* at 7-8. See also *State ex rel. Luther v. Ford Motor Company*, 113 Ohio St.3d 144, 2007-Ohio-1250, 863 N.E.2d 151 (the Court adopted *Smith, supra*, examined the totality of the circumstances and found

further inquiry was necessary to determine if the discharge was potentially due to the injury).

Consistent with this line of cases, which left to the discretion of the Commission to determine if the facts warranted the finding of voluntary abandonment, the Court in *State ex rel. Reiter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-71, 881 N.E.2d 861, held that the employee's post-injury conduct while he was receiving compensation could not support a voluntary abandonment defense. The Court upheld the findings of fact made by the Commission.

Most recently, the Court addressed this issue in *State ex rel. Hildebrand v. Wingate Transport*, 141 Ohio St.3d 533, 2015-Ohio-167, 26 N.E.2d 798. The Court reaffirmed that the issue was whether the employer's departure was causally related to the injury. *Id.* at 26. It found the *Pretty Products, supra*, did not apply because that employee was already receiving temporary total compensation at the time of his discharge, therefore, the subsequent discharge was irrelevant. The Commission further found that *Pretty Products* did not apply to a voluntary quit for reasons unrelated to the injury. *Id.* at 24.

These cases demonstrate that it is within the discretion of the Industrial Commission to decide if a voluntary abandonment has been demonstrated. Consistent with the *Smith* decision, a careful scrutiny of the facts must be made to determine whether or not the discharge is pretextual or retaliatory; that is, whether the policy is applied consistently to all injuries or illnesses. There is no bright line test that would automatically reject this defense if the violative conduct occurred before the injury. That is a fact to be considered by the Industrial Commission. Similarly, the mere fact that the

employee cannot return to his former position of employment is not determinative. The Commission, as finders of fact, must be given the discretion to determine whether the employment policy was applied fairly and whether or not the discharge was causally related to the injury. In the case at bar, the Commission found that Appellee did violate its drug-free workplace policy the day he was injured and that his discharge was related to his undeniable, intentional violation of that policy. As such, this Court should not interfere with the exercise of this discretion in this case.

It is respectfully requested that the decision of the lower court be reversed and that the writ of mandamus be denied.

III. CONCLUSION

It has been well settled that an Ohio employee whose conduct unrelated to any workplace injury, which leads to his termination because it violates company policy, is not entitled to temporary total compensation. It is inconceivable that this Court could carve an exception to this rule if the termination is based upon a positive post-accident drug test. Many employers in this state have adopted a drug-free workplace policy, and admirably so. Appellant has followed suit. The intent and purpose of such a policy is unassailable, yet the lower court's decision, if adopted by this Court, would certainly give an Ohio employer doubts as to whether this policy should continue, if an employee like Appellee intentionally violates this policy, yet is awarded compensation after being fired, simply because his intentional violation of this policy comes to light after an industrial injury.

This Court has never found that pre-injury conduct cannot be the basis of a voluntary abandonment. While conduct which is contemporaneous with the injury cannot bar temporary total compensation, pre-injury conduct does not infringe upon the well-known concept of workers' compensation as a no fault system. Appellee's intentional drug abuse, and his termination therefore, does not impact the no fault nature of the system, as he could have been fired when he came to work on the day he was hurt. Just like an employee whose accumulation of points before an injury leads to termination or an employee whose pre-injury theft from the company is discovered after the injury, Appellee must be found to have voluntarily abandoned his employment.

The timing of the violation shall not be determinative of the voluntary abandonment finding. Rather, every case must be decided based upon the set of facts which are presented. While post-injury terminations can be viewed with suspicion, a bright line test based on the timing of the infraction is not practical or fair. Rather, it should be left to the discretion of the Industrial Commission to weigh the facts to determine whether or not the termination is retaliatory or pretextual. It should not be left to the courts to interfere with the exclusive authority of the Industrial Commission to resolve these issues. In this case, no pretext or retaliation was alleged; therefore, the finding of the Industrial Commission that Appellee voluntarily abandoned his employment should not be disturbed.

As set forth above, there are huge policy implications which will stem from the lower court's decision, if upheld. Appellee took a drug, which is presently an illegal substance in this state, in contravention with a policy he willfully acknowledged as a condition of his employment. He intentionally violated that policy, knowing that, if discovered, the consequences would include the loss of his job. The injury, regardless of its severity, brought to light this violation. The employer was justified when it terminated Appellee. An employer should not be forced to pay any lost time compensation to an employee fired for violating the drug free workplace policy just because the injury was work related. The health, safety and welfare of the citizens of Ohio are certainly not enhanced by the decision of the lower court.

It is respectfully requested that the decision of the lower court be reversed and the writ of mandamus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular U.S. mail, on October 26, 2015, upon:

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APPENDIX

App. A:	Date-stamped notice of appeal	
	Respondent-Appellant, Pallet Companies, Inc.	1
	Respondent-Appellant, Industrial Commission of Ohio.....	23
App. B:	Judgment from which appeal taken	
	Tenth Appellate District Judgment Entry, December 29, 2014	44
App. C:	Opinion relating to judgment from which appeal taken	
	Tenth Appellate District Decision, December 18, 2014.....	45

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-0163

STATE OF OHIO, *ex rel.*,
James F. Cordell

Relator-Appellee,

vs.

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

Pallet Companies Inc.,

Respondent-Appellant,

and

Court of Appeals
Case No. 13-AP-001017

Industrial Commission of Ohio

Respondent.

NOTICE OF APPEAL OF
RESPONDENT, PALLET COMPANIES, INC.

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FILED
JAN 29 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF APPEAL OF
RESPONDENT, PALLET COMPANIES, INC.

Respondent, Pallet Companies, Inc., hereby gives notice of appeal to the Supreme Court of Ohio and all parties from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in the Court of Appeals case *State of Ohio ex rel. James F. Cordell v. Pallet Companies, Inc. and Industrial Commission of Ohio*, Case No. 13-AP-001017, on December 29, 2014 (attached hereto and incorporated herein by reference). Said case originated in the Court of Appeals.

Respectfully submitted



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CERTIFICATE OF SERVICE

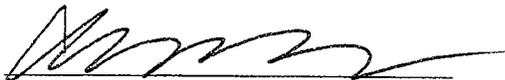
The undersigned hereby certifies that a copy of the foregoing was served by regular U.S. mail, postage prepaid this ^{29th} day of January, 2015, upon:

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Christen S. Hignett

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,

:

Relator,

:

v.

:

No. 13AP-1017

Pallet Companies, Inc. and
Industrial Commission of Ohio,

:

(REGULAR CALENDAR)

:

Respondents.

:

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 18, 2014, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we issue a writ of mandamus ordering the commission to vacate its order which denied relator temporary total disability compensation and issue an order finding that relator is entitled to that compensation. Costs assessed against respondents.

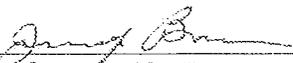
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge William A. Klatt



Judge Julia L. Dorrian



Judge Jennifer Brunner

Franklin County Ohio Court of Appeals Clerk of Courts - 2014 Dec 29 10:12 AM -13AP001017

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
	:	
Relator,	:	
v.	:	No. 13AP-1017
Pallet Companies, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

D E C I S I O N

Rendered on December 18, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, James F. Cordell, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying temporary total disability ("TTD") compensation and to enter an order granting said compensation.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

No. 13AP-1017

2

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. Relying principally upon *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, the magistrate found that the doctrine of voluntary abandonment did not apply to bar receipt of TTD compensation in a case involving a pre-injury infraction undetected until after the injury. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus and order the commission to enter an order granting relator TTD compensation.

{¶ 3} Respondent, Pallet Companies, Inc., has filed objections to the magistrate's decision. In its first objection, Pallet argues that the magistrate erred by failing to apply the legal principles discussed in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305; *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000); and *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (June 30, 2009) (memorandum decision). We disagree.

{¶ 4} As indicated in the magistrate's decision, the issue raised in Pallet's first objection is resolved by *Gross II* and this court's decision in *Ohio Welded Blank*. Relying on *Gross II*, this court expressly held that:

Gross II indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits.

Ohio Welded Blank at ¶ 20.

{¶ 5} As noted by the Supreme Court in *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, "even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the

discharge occurred." *Id.* at ¶ 10. Therefore, Pallet's argument that *Louisiana-Pacific* and *McCoy* preclude relator's receipt of TTD compensation lacks merit.

{¶ 6} Nor does *Cobb* require a different result. As noted by the magistrate, the application of the voluntary-abandonment doctrine to a pre-injury infraction undetected until after injury is controlled by *Gross II* and *Ohio Welded Blank*, not *Cobb*. *Cobb* did not involve a pre-injury infraction. Lastly, we are unpersuaded by Pallet's reliance on this court's decision in *PaySource*. Although *PaySource* does support Pallet's argument, we note that *PaySource* was a memorandum decision that adopted a magistrate's decision to which there were no objections. It does not appear that the applicability of *Gross II* was even raised in *PaySource*. Moreover, in *Ohio Welded Blank* and *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011) (memorandum decision), this court did not follow the magistrate's legal analysis in *PaySource* based upon *Gross II*. For these reasons, we overrule Pallet's first objection.

{¶ 7} In its second objection, Pallet contends that the magistrate's decision runs contrary to public policy. Although Pallet's argument highlights a public policy issue, that issue is best addressed in the General Assembly or in the Supreme Court of Ohio. As an intermediate appellate court, this court is bound by decisions of the Supreme Court of Ohio. As previously discussed, *Gross II* is dispositive of the issue presented here. Therefore, we overrule Pallet's second objections.

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus.

Objections overruled; writ of mandamus granted.

DORRIAN and BRUNNER, JJ., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1017
	:	
Pallet Companies, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	

MAGISTRATE'S DECISION

Rendered on July 25, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} Relator, James F. Cordell, 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 his request for temporary total disability ("TTD") compensation based on a finding that he voluntarily abandoned his employment

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

No. 13AP-1017

5

with his employer Pallet Companies, Inc. ("employer"), and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on February 16, 2012 when a third-party truck driver pulled away from the loading dock on which relator was positioned on a tow motor resulting in a fall from the dock plate to the ground. Relator's workers' compensation claim is allowed for the following conditions:

Fracture tibia nos - closed, right; fracture shaft fibula - closed, right.

{¶ 11} 2. While at the emergency room, a post-accident drug screen was ordered, and the results were available on February 22, 2012. Relator tested positive for marijuana metabolites and opiates, specifically morphine.

{¶ 12} 3. The employer terminated relator effective February 22, 2012 for his "Violation of Company Policy[;] Failed Post Accident Drug Screen."

{¶ 13} 4. In an order mailed March 5, 2012, the Ohio Bureau of Workers' Compensation ("BWC") allowed relator's claim and granted him TTD compensation beginning February 17, 2012.

{¶ 14} 5. The employer appealed and the matter was heard before a district hearing officer ("DHO") on May 1, 2012. The DHO concluded that relator was not eligible to receive TTD compensation finding that he had violated the employer's drug-free work place policy when he tested positive for marijuana and morphine.

{¶ 15} 6. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on July 2, 2012. The SHO determined that TTD compensation was payable despite the fact that relator had tested positive for marijuana and morphine after the work-related injury. The SHO stated:

The Staff Hearing Officer notes the Employer's challenge to the payment of temporary total compensation based on the Injured Worker's termination from unemployment on 02/22/2012 due to a positive drug screen. The Staff Hearing Officer was persuaded by the Injured Worker's testimony at hearing that the urine sample taken at Wadsworth-Rittman Hospital on the date of injury was performed in an unusual manner and may have been contaminated. The Injured Worker has been submitting to, and passing, monthly urine

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

drug screenings for years and knows the protocol for such testing. The Injured Worker testified he did not provide his sample to sterile container opened in his presence. Rather, his sample was placed in an open, hand-held urinal and transferred out of his presence to another container. The Staff Hearing Officer finds the validity of the drug testing has been brought into question.

Pursuant to the holding in State ex rel. Pretty Products, Inc. v. Industrial Commission (1996), 77 Ohio St.3d 5, an Injured Worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment. The Injured Worker was terminated on 02/22/2012, after he was disabled by the injury in this claim. Therefore, the termination does not amount to a voluntary abandonment of employment and does not preclude the payment of temporary total compensation.

{¶ 16} 7. The employer appealed on two grounds: (1) the SHO improperly relied on relator's testimony to find that the drug test was flawed, and (2) the SHO's reliance on *State ex rel. Pretty Prods. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), was inappropriate given the March 26, 2009 magistrate's decision in *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (Mar. 26, 2009) (memorandum decision), recommending that this court find that the violation of an employer's drug-free policy occurs prior to any work-related injury and constitutes proper grounds not only for terminating an employee, but for denying payment of TTD compensation as well.

{¶ 17} 8. In an order mailed July 26, 2012, the commission refused the employer's appeal.

{¶ 18} 9. The employer filed a request for reconsideration and, in an interlocutory order mailed September 22, 2012, the commission determined that the employer had presented sufficient probative evidence to warrant adjudication, vacated the July 26, 2012 SHO order, and set the matter for hearing.

{¶ 19} 10. The matter was heard before the commission on October 23, 2012. At that time, the commission determined the employer met its burden of proving that the SHO order contained a clear mistake of law by not applying this court's decision in *PaySource USA, Inc.* Thereafter, the commission applied this court's decision in *PaySource*, adopting the decision of its magistrate, and found that relator's ingestion of or

No. 13AP-1017

7

use of marijuana was the offense for which he was terminated, and that offense occurred prior to his termination on February 22, 2012. The commission discussed *PaySource* noting that this court refused TTD compensation to an injured worker who tested positive for drugs as a result of a post-accident drug screen because the court found that it was the injured worker's ingestion of drugs prior to the injury that gave rise to the injured worker's positive drug test and that the prohibited conduct could not have occurred during any period of disability. The commission distinguished the facts from *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 (*Gross II*), solely on grounds that relator's ingestion of marijuana was not causally related to his injury. The commission specifically found that *Gross II* was limited to situations where the work-rule violation was the cause of the injury.

{¶ 20} 11. Since then, the BWC has issued an order declaring an overpayment of TTD compensation.

{¶ 21} 12. Relator has filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} For the reasons that follow, it is this magistrate's decision that this court should issue a writ of mandamus, and TTD compensation should be awarded to relator.

{¶ 23} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

{¶ 24} 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.

{¶ 25} In *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993), the court determined that a firing can constitute a voluntary abandonment of the former position of employment because, although discharge is not necessarily consented to, it often is a consequence of behavior that the claimant willingly undertook and may take on a voluntary character.

{¶ 26} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), the Supreme Court of Ohio was asked to determine whether an employee's termination for violating work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

{¶ 27} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from employment. However, the court found it difficult to characterize as "involuntary" a termination 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.

{¶ 28} The principal set forth in *Louisiana-Pacific Corp.* concerning voluntary abandonment is potentially implicated any time TTD compensation is requested by a claimant who is no longer employed in a position held when the injury occurred. *Gross II* at ¶ 16 citing *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶ 38. Nevertheless, a voluntary departure from the former position of employment can preclude eligibility for TTD compensation only if it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss. *Id.*

{¶ 29} At the same time the commission and courts were applying the principles from *Louisiana-Pacific*, courts began considering the implication of *Pretty Prods.*, and the cases which followed. *Pretty Prods.* explained that: "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." *Id.* at ¶ 7. As such, " '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.* quoting *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48 (1993). See also *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951 (concluding that a truck driver who was already disabled when terminated for losing his driver's license as a result of a subsequent drunk driving conviction was not disqualified from TTD compensation).

{¶ 30} When the Supreme Court of Ohio applied the above principles to the facts in *Gross II*, the court noted that the employee's violation of the work rule in that case actually caused the employee's injury. In reconsidering its decision from *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("*Gross I*"), where the voluntary-abandonment doctrine was applied to deny TTD benefits, the court clarified that "*Gross I* was not intended to expand the voluntary-abandonment doctrine." *Gross II* at ¶ 19. The Supreme Court explained that: "Until the present case, the voluntary-abandonment doctrine has been applied only in post-injury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her [temporary total disability] benefits." *Id.* "The doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception." *Id.*

{¶ 31} In *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, the Supreme Court had the opportunity to address the two lines of cases. The Supreme Court observed that the parties considered the two cases to be mutually exclusive. The employer argued that *Louisiana-Pacific* was dispositive, while the claimant relied on *Pretty Prods.* However, the Supreme Court determined that *Pretty Prods.* clarified *Louisiana-Pacific* so that the character of an employee's departure,

voluntary or involuntary, is not the only relevant element; instead, the timing of the termination may be equally pertinent. *Id.* at ¶10. As the court explained:

Louisiana-Pacific and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. 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 ¶ 11.

{¶ 32} Because the claimant in *Reitter Stucco* was medically incapable of returning to his former position of employment at the time of his termination, the court concluded that he was eligible to receive TTD compensation. As the court explained: "[A] claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled." *Id.* at ¶10. Accordingly, even if the termination satisfies all three criteria from *Louisiana-Pacific* and is considered voluntary, the claimant's eligibility for TTD compensation remains if the claimant was still disabled at the time the termination occurred. *Id.*

{¶ 33} In 2009, within three months of each other, this court released two decisions, *PaySource* and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, each of which dealt with factual situations similar to those present in this case. William A. Shoemaker ("Shoemaker") and Steven Farr ("Farr") both sustained work-related injuries. Pursuant to their employers' drug-free workplace policies, both Shoemaker and Farr submitted to drug testing. Shoemaker's test was positive for cocaine, and Farr's test was positive for marijuana. Both Shoemaker and Farr were terminated from their employment for having violated their employers' policies, and their employers argued that their violations constituted a voluntary abandonment of their employment precluding their eligibility for TTD compensation. In both cases, the commission awarded the employees TTD compensation, and the employers filed mandamus actions in this court.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

{¶ 34} In *PaySource*, decided June 30, 2009, the record indicates that Shoemaker was "verbally notified * * * that he had tested 'positive for cocaine' and that 'under our Drug-Free workplace policy he would have to be terminated.' The February 5, 2008 verbal notification was later memorialized in a March 14, 2008 letter." In the SHO order under review, the SHO stated:

Counsel for the employer indicated that the drug screen was performed as a result of the injured worker being involved in the workplace fall from the scaffold accident. The results of the drug screen apparently became available and published on 02/04/2008. As a result, the employer fired the injured worker on 02/05/2008. Counsel for the employer indicated that the employer fired the injured worker because he tested positive for cocaine on the drug screen.

The employer argues that the injured worker therefore voluntarily abandoned his former position of employment when he ingested cocaine approximately three days prior to the fifteen foot fall [sic] off of the scaffold while working.

The SHO rejected the employer's argument and stated as follows:

The employer admits that it fired the injured worker as a result of testing positive on a drug screen. That drug screen was performed after the injured worker had sustained his compensable workplace injury, and after the injured worker had become physically unable to return to his former position of employment in fact; the employer admits that the post accident drug screen was performed only because the injured worker had sustained an on the job injury. The drug screen and resultant firing arose out of the compensable work injury.

Upon review, this court accepted the magistrate's argument to the contrary:

Because it was found that the "drug screen" and the resultant job termination occurred after the industrial injury prevented claimant from returning to his former position of employment, the commission concluded that the job departure was involuntary.

The commission's analysis of the timing of the termination is seriously flawed because the commission inappropriately viewed testing positive on the drug screen as the offense for which claimant was terminated. Clearly, it was claimant's ingestion or "use" of cocaine that was the offense for which

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

claimant was terminated. The drug screen was only the means employed to detect the use of the illegal substance. Clearly, claimant's use of the prohibited substance occurred prior to the industrial injury, and thus the prohibited conduct could not have occurred during any period of disability resulting from the industrial injury.

Page 22 of the employee handbook states that: "Employees need to be aware that certain offenses, including but not limited to use, possession, sale of illegal drugs * * *, will normally result in immediate termination." That portion of page 22 put claimant on notice that his admitted ingestion or use of cocaine could result in job termination if the ingestion or use were ever detected by a drug screen required at the time of an industrial injury.

The magistrate further recognizes that Brosnan's March 14, 2008 letter memorializing the February 5, 2008 notification of termination does not specify that claimant was being terminated for "use." However, the letter does state that claimant was being terminated "under our Drug-Free workplace policy."

It is unreasonable under the circumstances to infer from Brosnan's letter that use of cocaine as determined by the drug screen was not the conduct that the policy prohibits and for which Omni terminated employment.

{¶ 35} As a result, this court determined that Shoemaker was not entitled to TTD compensation. However, the court never addressed the applicability of *Gross II* or its effect on the outcome.

{¶ 36} By comparison, in *Ohio Welded Blank*, decided September 8, 2009, after receiving the positive results from the drug test, the employer met with Farr and informed him that he was going to be terminated because he tested positive for marijuana. Later, the employer sent Farr a letter indicating, in part:

[O]n October 24, 2007, you tested positive for an illicit substance on a drug screen on September 28, 2007. This positive drug screen is a violation of the Company's Substance Abuse Policy and in accordance with this policy the Company is terminating your employment effective September 28, 2007.

Id. at 30.

{¶ 37} At the commission level, the employer argued that Farr had voluntarily abandoned his employment; however, the commission applied the rationale from *Gross II* and found that TTD compensation was payable:

A positive marijuana metabolite level was discovered during routine post-accident testing which caused claimant to be terminated after the disability due to the injury had begun. As soon as he was physically able, claimant returned to work with a different employer. This would rebut the contention that claimant had abandoned the work force or otherwise removed himself from employment voluntarily and unrelated to the claim. The presence of a prohibited drug level was discovered subsequent to the injury and after disability from the injury existed independent of any drug policy violation. Staff Hearing Officer finds no legal precedent which would apply an abandonment of the workplace theory to pre-injury behavior, discovered after the injury, where the injury has caused disability independent of the dischargeable defense. *Pretty Products v. Industrial Commission*, (1996), 77 Ohio St.3d 5, and *State ex rel. Reitter Stucco, Inc. v. Industrial Commission*, slip Opinion no. 2008-Ohio-499-No.2007-0060-submitted Nov. 27, 2007-decided Feb. 13, 2008, are followed. Claimant was disabled due to the injury at the time of termination. The cause of the termination is unrelated to the injury claim. Since claimant was medically incapable of returning to his former position of employment at the time of his discharge, Staff Hearing Officer concludes that he is eligible to receive the temporary total disability compensation as ordered.

Id. at 34.

{¶ 38} Despite of the fact that the employer continued to argue that Farr ingested marijuana sometime during the week preceding his injury and obviously violated the written work rule before his injury, this court applied *Gross II* and stated:

Gross II stated the voluntary abandonment doctrine had not been applied to work rule violations preceding or contemporaneous with the injury. Here even if we adopt relator's position that the date of the infraction, not the date of termination, determines application of the voluntary abandonment doctrine, *Gross II* indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

for concluding claimant abandoned his employment so as to preclude temporary total benefits. The result is especially compelling here, where the employer presented no evidence to suggest the injury resulted from relator's being under the influence of drugs or alcohol.

Id. at 20.

{¶ 39} In *PaySource*, this court departed from the principles established by the Supreme Court of Ohio. Because this court did not address the applicability of *Gross II* and its effect on the outcome, this magistrate is unable to address and/or explain the reasons why this decision is contrary to other decisions addressing the same issue. However, this court has not followed *PaySource*.

{¶ 40} In a decision rendered in September 2011, two years after both *PaySource* and *Ohio Welded Blank*, this court followed *Ohio Welded Blank* and determined that the injured worker who tested positive for marijuana during a post-accident drug test was entitled to an award of TTD compensation. In *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011), Randy S. Herron sustained serious injuries when his ponytail was caught onto a rotating shaft of a grinding machine. Herron tested positive for opiates and cannabinoids, and his employer argued that his claim should be barred under R.C. 4123.54 because there was a rebuttable presumption that Herron was intoxicated or under the influence of a controlled substance, not prescribed by his physician, and the fact that he was intoxicated or under the influence of a controlled substance was the proximate cause of his injury. A DHO found that R.C. 4123.54 did not apply and determined that TTD compensation was payable.

{¶ 41} Herron's employer appealed and, at that time, conceded that the requirements of R.C. 4123.54 had not been met. However, the employer continued to argue that Herron's termination for violating the drug-free workplace policy constituted a voluntary abandonment of his employment and rendered him ineligible to receive TTD compensation. The SHO disagreed and, citing *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, concluded that TTD compensation was payable. Despite the fact that the SHO found that the employer did establish all three requirements of *Louisiana-Pacific*, by applying *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, the SHO concluded that Herron's pre-injury behavior did not foreclose the payment of TTD compensation.

{¶ 42} In arguing otherwise, the employer contends that *Ohio Welded Blank, Ohio Decorative Prods.*, and *State ex rel. Ohio State Univ. Cancer Research Hosp. v. Indus. Comm.*, 10th Dist. No. 09AP-1027, 2010-Ohio-3839, are in contravention of *Louisiana-Pacific* and the Supreme Court of Ohio's decision in *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000). Relator points out that, in *Cobb*, the Supreme Court held that a post-injury termination based upon a violation of an employer's drug policy can preclude the payment of TTD compensation provided the three-prong test from *Louisiana-Pacific* is demonstrated. For the reasons that follow, the magistrate finds that relator's argument is not well-taken.

{¶ 43} First, *Ohio Welded Blank, Ohio Decorative Prods.* and *Ohio State Univ. Cancer Research Hosp.* are not in contravention of *Louisiana-Pacific*. Instead, both this court and the Supreme Court of Ohio have been very clear in explaining that *Louisiana-Pacific* and *Pretty Prods.* can both be applied in certain circumstances. As such, even where an employer demonstrates that the *Louisiana-Pacific* test has been met, the injured worker may still be entitled to receive TTD compensation. In explaining how the two lines of cases are to be applied, the Supreme Court specifically noted that both *Louisiana-Pacific* and *Pretty Prods.* may factor into the analysis. If the requirements of *Louisiana-Pacific* are met, suggesting that the termination is voluntary, the commission and courts must still consider whether the employee was disabled at the date of termination.

{¶ 44} Second, the employer's reliance on *Cobb* is misplaced. The *Cobb* case was decided seven years before the Supreme Court of Ohio rendered its decision in *Gross II* and has not been applied in these circumstances since then. As such, it appears the holding in *Cobb* has been rejected by the Supreme Court of Ohio in *Ohio Welded Blank* and *Ohio Decorative Prods.*

{¶ 45} The magistrate specifically notes that the *PaySource* case is the only case since *Gross II* was decided in which an injured worker has been denied TTD compensation because the injured worker tested positive for drugs during post-injury drug tests. However, this court did not address the applicability of *Gross II* to the facts in *PaySource*. As such, the magistrate cannot address and/or explain the reasons why the decision in *PaySource* was reached. As this magistrate noted in *Ohio Decorative Prods.*,

No. 13AP-1017

16

this court should continue to apply the law as pronounced by the Supreme Court in *Gross II*. As the Supreme Court stated, the voluntary abandonment doctrine has never been applied to violations of written work rules which precede or are contemporaneous with the injury. If ingesting marijuana actually is a violation of the written work rule, the only employees at risk for being terminated for violating this offense are employees who sustain compensable work-related injuries while working for their employer. Any other employee who also ingested marijuana at the same time will not be terminated because their "violation" will not be brought to light.

{¶ 46} The employer emphasizes that TTD compensation can only be awarded when the disability arising from the allowed conditions causes the employee to suffer a loss of wages. The employer asserts here that relator's termination from employment for violating the written work rule is the reason relator is without wages. In other words, employer asserts that the violation of the written work rule and subsequent termination break the causal connection between the disability arising from the allowed conditions and relator's lack of wages. For the reasons that follow, the magistrate disagrees.

{¶ 47} It is undisputed that relator was injured at work on February 16, 2012. Further, it is also undisputed that relator was immediately rendered temporarily totally disabled. In other words, the allowed conditions resulting from the work-related injury immediately prevented relator from working and caused him to suffer a loss of wages. But for the injury, relator would have been able to continue working. Relator asserts that it could have administered a random drug test that same day and, had relator tested positive, he would have been terminated. Therefore, the employer argues that the causal connection between the allowed conditions and the resulting loss of wages was severed.

{¶ 48} The magistrate finds that it is immaterial that relator would have been terminated if the employer had subjected him to a random drug test, which he would have failed. The employer did not subject relator to a random drug test. Here, the allowed conditions which resulted from the workplace injury rendered relator unable to return to his former position of employment and caused him to be without wages. Employers can show a break in the causal connection if they can meet the burden of proof under R.C. 4123.54 and demonstrate that an injured worker was actually impaired by the drugs at the time the injury occurred.

No. 13AP-1017

17

{¶ 49} In *State ex rel. Smith v. Superior's Brand Meats, Inc.*, 76 Ohio St.3d 408, 411 (1996), the Supreme Court of Ohio recognized the possible abuse that may occur where the termination of employment may result in the denial of TTD compensation for the injured worker and stressed that it is "imperative to carefully examine the totality of the circumstances when such a situation exists." Especially here, where there is no evidence that relator was under the influence of the drugs he ingested, the magistrate finds that, while the employer certainly could terminate relator, the commission abused its discretion when it found a voluntary abandonment and denied relator TTD compensation.

{¶ 50} This conclusion also follows the reasoning of other cases, including *Ohio State Univ. Cancer Research Hosp.* (claimant returned to modified duty and while working modified duty was terminated for his pre-injury violation of the employer's policy against harassment—TTD payable); and *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St.3d 173, 2005-Ohio-1386 (while claimant was off from work following his work-related injury, the employer learned that, pre-injury, he had violated the employer's policy by falsifying his job application—TTD payable). Under the employer's theory, these pre-injury cases would also need to be reevaluated.

{¶ 51} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order which denied relator TTD compensation and issue an order finding that relator is entitled to that compensation.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

NOTICE TO THE PARTIES

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
JAMES F. CORDELL,

Relator/Appellee,

vs.

PALLET COMPANIES, INC.,
and INDUSTRIAL COMMISSION OF
OHIO,

Respondents/Appellants.

CASE NO. 15-0163

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

Court of Appeals
Case No. 13AP-1017

**NOTICE OF SECOND APPEAL OF APPELLANT,
INDUSTRIAL COMMISSION OF OHIO**

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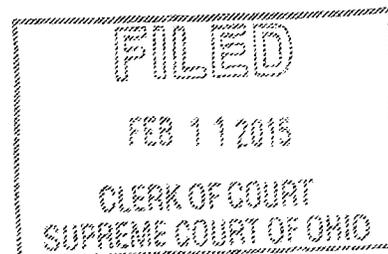
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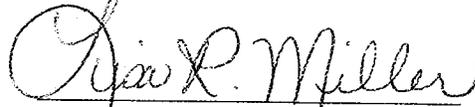
**NOTICE OF SECOND APPEAL OF APPELLANT,
INDUSTRIAL COMMISSION OF OHIO**

Appellant, Industrial Commission of Ohio, hereby gives notice of second 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. 13AP-1017 on December 29, 2014.

This case originated in the Court of Appeals in mandamus. This is an appeal as of right. Appellant, Pallet Companies, Inc., filed its notice of appeal herein on January 29, 2015.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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Assistant Attorneys General
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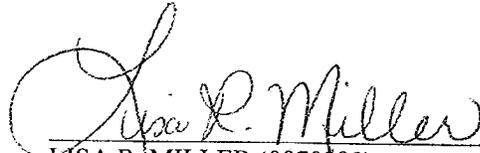
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by U.S. Mail, postage prepaid, on this 11th day of February 2015, to:

CRAIGG E. GOULD
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LISA R. MILLER (0070398)
Assistant Attorney General

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell, :
 Relator, :
 v. : No. 13AP-1017
 Pallet Companies, Inc. and : (REGULAR CALENDAR)
 Industrial Commission of Ohio, :
 Respondents. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 18, 2014, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we issue a writ of mandamus ordering the commission to vacate its order which denied relator temporary total disability compensation and issue an order finding that relator is entitled to that compensation. Costs assessed against respondents.

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.

William A. Klatt
 Judge William A. Klatt

Julia L. Dorrian
 Judge Julia L. Dorrian

Jennifer Brunner
 Judge Jennifer Brunner

THE STATE OF OHIO }
 Franklin County, ss }
 I, MARVELLEN O'SHAUGHNESSY, Clerk
 OF THE COURT OF APPEALS
 WITHIN AND FOR SAID COUNTY,
 HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
 AND COPIED FROM THE ORIGINAL
 NOW ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID
 COUNTY THIS 20th DAY OF Dec. A.D. 2014
 MARVELLEN O'SHAUGHNESSY, Clerk
 By [Signature] Deputy

INDUSTRIAL COMMISSION
 OF OHIO
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Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 29 10:12 AM-13AP001017

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1017
	:	
Pallet Companies, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

D E C I S I O N

Rendered on December 18, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, James F. Cordell, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying temporary total disability ("TTD") compensation and to enter an order granting said compensation.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
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No. 13AP-1017

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. Relying principally upon *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, the magistrate found that the doctrine of voluntary abandonment did not apply to bar receipt of TTD compensation in a case involving a pre-injury infraction undetected until after the injury. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus and order the commission to enter an order granting relator TTD compensation.

{¶ 3} Respondent, Pallet Companies, Inc., has filed objections to the magistrate's decision. In its first objection, Pallet argues that the magistrate erred by failing to apply the legal principles discussed in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305; *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000); and *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (June 30, 2009) (memorandum decision). We disagree.

{¶ 4} As indicated in the magistrate's decision, the issue raised in Pallet's first objection is resolved by *Gross II* and this court's decision in *Ohio Welded Blank*. Relying on *Gross II*, this court expressly held that:

Gross II indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits.

Ohio Welded Blank at ¶ 20.

{¶ 5} As noted by the Supreme Court in *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, "even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the

Franklin County Ohio Court of Appeals Clerk of Courts-2014 Dec 18 12:31 PM-13AP001017

2015 JAN -6 AM 11:00
INDUSTRIAL COMMISSION
CUSTOMER SERVICE L-1

No. 13AP-1017

3

discharge occurred." *Id.* at ¶ 10. Therefore, Pallet's argument that *Louisiana-Pacific* and *McCoy* prelude relator's receipt of TTD compensation lacks merit.

{¶ 6} Nor does *Cobb* require a different result. As noted by the magistrate, the application of the voluntary-abandonment doctrine to a pre-injury infraction undetected until after injury is controlled by *Gross II* and *Ohio Welded Blank*, not *Cobb*. *Cobb* did not involve a pre-injury infraction. Lastly, we are unpersuaded by Pallet's reliance on this court's decision in *PaySource*. Although *PaySource* does support Pallet's argument, we note that *PaySource* was a memorandum decision that adopted a magistrate's decision to which there were no objections. It does not appear that the applicability of *Gross II* was even raised in *PaySource*. Moreover, in *Ohio Welded Blank* and *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011) (memorandum decision), this court did not follow the magistrate's legal analysis in *PaySource* based upon *Gross II*. For these reasons, we overrule Pallet's first objection.

{¶ 7} In its second objection, Pallet contends that the magistrate's decision runs contrary to public policy. Although Pallet's argument highlights a public policy issue, that issue is best addressed in the General Assembly or in the Supreme Court of Ohio. As an intermediate appellate court, this court is bound by decisions of the Supreme Court of Ohio. As previously discussed, *Gross II* is dispositive of the issue presented here. Therefore, we overrule Pallet's second objections.

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus.

Objections overruled; writ of mandamus granted.

DORRIAN and BRUNNER, JJ., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

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APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1017
	:	
Pallet Companies, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 25, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} Relator, James F. Cordell, 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 his request for temporary total disability ("TTD") compensation based on a finding that he voluntarily abandoned his employment

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE (14)

2015 JAN -6 AM 11:01

No. 13AP-1017

5

with his employer Pallet Companies, Inc. ("employer"), and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on February 16, 2012 when a third-party truck driver pulled away from the loading dock on which relator was positioned on a tow motor resulting in a fall from the dock plate to the ground. Relator's workers' compensation claim is allowed for the following conditions:

Fracture tibia nos - closed, right; fracture shaft fibula - closed, right.

{¶ 11} 2. While at the emergency room, a post-accident drug screen was ordered, and the results were available on February 22, 2012. Relator tested positive for marijuana metabolites and opiates, specifically morphine.

{¶ 12} 3. The employer terminated relator effective February 22, 2012 for his "Violation of Company Policy[;] Failed Post Accident Drug Screen."

{¶ 13} 4. In an order mailed March 5, 2012, the Ohio Bureau of Workers' Compensation ("BWC") allowed relator's claim and granted him TTD compensation beginning February 17, 2012.

{¶ 14} 5. The employer appealed and the matter was heard before a district hearing officer ("DHO") on May 1, 2012. The DHO concluded that relator was not eligible to receive TTD compensation finding that he had violated the employer's drug-free work place policy when he tested positive for marijuana and morphine.

{¶ 15} 6. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on July 2, 2012. The SHO determined that TTD compensation was payable despite the fact that relator had tested positive for marijuana and morphine after the work-related injury. The SHO stated:

The Staff Hearing Officer notes the Employer's challenge to the payment of temporary total compensation based on the Injured Worker's termination from unemployment on 02/22/2012 due to a positive drug screen. The Staff Hearing Officer was persuaded by the Injured Worker's testimony at hearing that the urine sample taken at Wadsworth-Rittman Hospital on the date of injury was performed in an unusual manner and may have been contaminated. The Injured Worker has been submitting to, and passing, monthly urine

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
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2015 JAN -6 AM 11:01

drug screenings for years and knows the protocol for such testing. The Injured Worker testified he did not provide his sample to sterile container opened in his presence. Rather, his sample was placed in an open, hand-held urinal and transferred out of his presence to another container. The Staff Hearing Officer finds the validity of the drug testing has been brought into question.

Pursuant to the holding in *State ex rel. Pretty Products, Inc. v. Industrial Commission* (1996), 77 Ohio St.3d 5, an Injured Worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment. The Injured Worker was terminated on 02/22/2012, after he was disabled by the injury in this claim. Therefore, the termination does not amount to a voluntary abandonment of employment and does not preclude the payment of temporary total compensation.

{¶ 16} 7. The employer appealed on two grounds: (1) the SHO improperly relied on relator's testimony to find that the drug test was flawed, and (2) the SHO's reliance on *State ex rel. Pretty Prods. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), was inappropriate given the March 26, 2009 magistrate's decision in *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (Mar. 26, 2009) (memorandum decision), recommending that this court find that the violation of an employer's drug-free policy occurs prior to any work-related injury and constitutes proper grounds not only for terminating an employee, but for denying payment of TTD compensation as well.

{¶ 17} 8. In an order mailed July 26, 2012, the commission refused the employer's appeal.

{¶ 18} 9. The employer filed a request for reconsideration and, in an interlocutory order mailed September 22, 2012, the commission determined that the employer had presented sufficient probative evidence to warrant adjudication, vacated the July 26, 2012 SHO order, and set the matter for hearing.

{¶ 19} 10. The matter was heard before the commission on October 23, 2012. At that time, the commission determined the employer met its burden of proving that the SHO order contained a clear mistake of law by not applying this court's decision in *PaySource USA, Inc.* Thereafter, the commission applied this court's decision in *PaySource*, adopting the decision of its magistrate, and found that relator's ingestion of or

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE

2015 JAN -6 AM 11:01

No. 13AP-1017

7

use of marijuana was the offense for which he was terminated, and that offense occurred prior to his termination on February 22, 2012. The commission discussed *PaySource* noting that this court refused TTD compensation to an injured worker who tested positive for drugs as a result of a post-accident drug screen because the court found that it was the injured worker's ingestion of drugs prior to the injury that gave rise to the injured worker's positive drug test and that the prohibited conduct could not have occurred during any period of disability. The commission distinguished the facts from *State ex. rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 (*Gross II*), solely on grounds that relator's ingestion of marijuana was not causally related to his injury. The commission specifically found that *Gross II* was limited to situations where the work-rule violation was the cause of the injury.

{¶ 20} 11. Since then, the BWC has issued an order declaring an overpayment of TTD compensation.

{¶ 21} 12. Relator has filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} For the reasons that follow, it is this magistrate's decision that this court should issue a writ of mandamus, and TTD compensation should be awarded to relator.

{¶ 23} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
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2015 JAN -6 AM 11:01

No. 13AP-1017

8

{¶ 24} 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.

{¶ 25} In *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993), the court determined that a firing can constitute a voluntary abandonment of the former position of employment because, although discharge is not necessarily consented to, it often is a consequence of behavior that the claimant willingly undertook and may take on a voluntary character.

{¶ 26} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), the Supreme Court of Ohio was asked to determine whether an employee's termination for violating work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

{¶ 27} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from employment. However, the court found it difficult to characterize as "involuntary" a termination 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.

{¶ 28} The principal set forth in *Louisiana-Pacific Corp.* concerning voluntary abandonment is potentially implicated any time TTD compensation is requested by a claimant who is no longer employed in a position held when the injury occurred. *Gross II* at ¶ 16 citing *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶ 38. Nevertheless, a voluntary departure from the former position of employment can preclude eligibility for TTD compensation only if it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss. *Id.*

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

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2015 JAN -6 AM 11:01

{¶ 29} At the same time the commission and courts were applying the principles from *Louisiana-Pacific*, courts began considering the implication of *Pretty Prods.*, and the cases which followed. *Pretty Prods.* explained that: "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." *Id.* at ¶ 7. As such, " '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.* quoting *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48 (1993). See also *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951 (concluding that a truck driver who was already disabled when terminated for losing his driver's license as a result of a subsequent drunk driving conviction was not disqualified from TTD compensation).

{¶ 30} When the Supreme Court of Ohio applied the above principles to the facts in *Gross II*, the court noted that the employee's violation of the work rule in that case actually caused the employee's injury. In reconsidering its decision from *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("Gross I"), where the voluntary-abandonment doctrine was applied to deny TTD benefits, the court clarified that "*Gross I* was not intended to expand the voluntary-abandonment doctrine." *Gross II* at ¶ 19. The Supreme Court explained that: "Until the present case, the voluntary-abandonment doctrine has been applied only in post-injury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her [temporary total disability] benefits." *Id.* "The doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception." *Id.*

{¶ 31} In *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, the Supreme Court had the opportunity to address the two lines of cases. The Supreme Court observed that the parties considered the two cases to be mutually exclusive. The employer argued that *Louisiana-Pacific* was dispositive, while the claimant relied on *Pretty Prods.* However, the Supreme Court determined that *Pretty Prods.* clarified *Louisiana-Pacific* so that the character of an employee's departure,

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE UNIT

2015 JAN -6 AM 11:01

voluntary or involuntary, is not the only relevant element; instead, the timing of the termination may be equally pertinent. *Id.* at ¶10. As the court explained:

Louisiana-Pacific and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. 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 ¶11.

{¶ 32} Because the claimant in *Reitter Stucco* was medically incapable of returning to his former position of employment at the time of his termination, the court concluded that he was eligible to receive TTD compensation. As the court explained: "[A] claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled." *Id.* at ¶10. Accordingly, even if the termination satisfies all three criteria from *Louisiana-Pacific* and is considered voluntary, the claimant's eligibility for TTD compensation remains if the claimant was still disabled at the time the termination occurred. *Id.*

{¶ 33} In 2009, within three months of each other, this court released two decisions, *PaySource* and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, each of which dealt with factual situations similar to those present in this case. William A. Shoemaker ("Shoemaker") and Steven Farr ("Farr") both sustained work-related injuries. Pursuant to their employers' drug-free workplace policies, both Shoemaker and Farr submitted to drug testing. Shoemaker's test was positive for cocaine, and Farr's test was positive for marijuana. Both Shoemaker and Farr were terminated from their employment for having violated their employers' policies, and their employers argued that their violations constituted a voluntary abandonment of their employment precluding their eligibility for TTD compensation. In both cases, the commission awarded the employees TTD compensation, and the employers filed mandamus actions in this court.

INDUSTRIAL COMMISSION
CUSTOMER SERVICE (1)

2015 JAN -6 AM 11:01

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

No. 13AP-1017

11

{¶ 34} In *PaySource*, decided June 30, 2009, the record indicates that Shoemaker was "verbally notified * * * that he had tested 'positive for cocaine' and that 'under our Drug-Free workplace policy he would have to be terminated.' The February 5, 2008 verbal notification was later memorialized in a March 14, 2008 letter." In the SHO order under review, the SHO stated:

Counsel for the employer indicated that the drug screen was performed as a result of the injured worker being involved in the workplace fall from the scaffold accident. The results of the drug screen apparently became available and published on 02/04/2008. As a result, the employer fired the injured worker on 02/05/2008. Counsel for the employer indicated that the employer fired the injured worker because he tested positive for cocaine on the drug screen.

The employer argues that the injured worker therefore voluntarily abandoned his former position of employment when he ingested cocaine approximately three days prior to the fifteen foot fell [sic] off of the scaffold while working.

The SHO rejected the employer's argument and stated as follows:

The employer admits that it fired the injured worker as a result of testing positive on a drug screen. That drug screen was performed after the injured worker had sustained his compensable workplace injury, and after the injured worker had become physically unable to return to his former position of employment in fact; the employer admits that the post accident drug screen was performed only because the injured worker had sustained an on the job injury. The drug screen and resultant firing arose out of the compensable work injury.

Upon review, this court accepted the magistrate's argument to the contrary:

Because it was found that the "drug screen" and the resultant job termination occurred after the industrial injury prevented claimant from returning to his former position of employment, the commission concluded that the job departure was involuntary.

The commission's analysis of the timing of the termination is seriously flawed because the commission inappropriately viewed testing positive on the drug screen as the offense for which claimant was terminated. Clearly, it was claimant's ingestion or "use" of cocaine that was the offense for which

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE 11

2015 JAN -6 AM 11:01

claimant was terminated. The drug screen was only the means employed to detect the use of the illegal substance. Clearly, claimant's use of the prohibited substance occurred prior to the industrial injury, and thus the prohibited conduct could not have occurred during any period of disability resulting from the industrial injury.

Page 22 of the employee handbook states that: "Employees need to be aware that certain offenses, including but not limited to use, possession, sale of illegal drugs * * *, will normally result in immediate termination." That portion of page 22 put claimant on notice that his admitted ingestion or use of cocaine could result in job termination if the ingestion or use were ever detected by a drug screen required at the time of an industrial injury.

The magistrate further recognizes that Brosnan's March 14, 2008 letter memorializing the February 5, 2008 notification of termination does not specify that claimant was being terminated for "use." However, the letter does state that claimant was being terminated "under our Drug-Free workplace policy."

It is unreasonable under the circumstances to infer from Brosnan's letter that use of cocaine as determined by the drug screen was not the conduct that the policy prohibits and for which Omni terminated employment.

{¶ 35} As a result, this court determined that Shoemaker was not entitled to TTD compensation. However, the court never addressed the applicability of *Gross II* or its effect on the outcome.

{¶ 36} By comparison, in *Ohio Welded Blank*, decided September 8, 2009, after receiving the positive results from the drug test, the employer met with Farr and informed him that he was going to be terminated because he tested positive for marijuana. Later, the employer sent Farr a letter indicating, in part:

[O]n October 24, 2007, you tested positive for an illicit substance on a drug screen on September 28, 2007. This positive drug screen is a violation of the Company's Substance Abuse Policy and in accordance with this policy the Company is terminating your employment effective September 28, 2007.

Id. at 30.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE UNIT
2015 JAN -6 AM 11:02

{¶ 37} At the commission level, the employer argued that Farr had voluntarily abandoned his employment; however, the commission applied the rationale from *Gross II* and found that TTD compensation was payable:

A positive marijuana metabolite level was discovered during routine post-accident testing which caused claimant to be terminated after the disability due to the injury had begun. As soon as he was physically able, claimant returned to work with a different employer. This would rebut the contention that claimant had abandoned the work force or otherwise removed himself from employment voluntarily and unrelated to the claim. The presence of a prohibited drug level was discovered subsequent to the injury and after disability from the injury existed independent of any drug policy violation. Staff Hearing Officer finds no legal precedent which would apply an abandonment of the workplace theory to pre-injury behavior, discovered after the injury, where the injury has caused disability independent of the dischargeable defense. *Pretty Products v. Industrial Commission*, (1996), 77 Ohio St.3d 5, and *State ex rel. Reitter Stucco, Inc. v. Industrial Commission*, slip Opinion no. 2008-Ohio-499-No.2007-0060-submitted Nov. 27, 2007-decided Feb. 13, 2008, are followed. Claimant was disabled due to the injury at the time of termination. The cause of the termination is unrelated to the injury claim. Since claimant was medically incapable of returning to his former position of employment at the time of his discharge, Staff Hearing Officer concludes that he is eligible to receive the temporary total disability compensation as ordered.

Id. at 34.

{¶ 38} Despite of the fact that the employer continued to argue that Farr ingested marijuana sometime during the week preceding his injury and obviously violated the written work rule before his injury, this court applied *Gross II* and stated:

Gross II stated the voluntary abandonment doctrine had not been applied to work rule violations preceding or contemporaneous with the injury. Here even if we adopt relator's position that the date of the infraction, not the date of termination, determines application of the voluntary abandonment doctrine, *Gross II* indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds

Franklin County Ohio Court of Appeals Clerk of Courts-2014 Dec 18 12:31 PM-13AP001017

2015 JAN -6 AM 11:02
INDUSTRIAL COMMISSION
CUSTOMER SERVICE L-1

for concluding claimant abandoned his employment so as to preclude temporary total benefits. The result is especially compelling here, where the employer presented no evidence to suggest the injury resulted from relator's being under the influence of drugs or alcohol.

Id. at 20.

{¶ 39} In *PaySource*, this court departed from the principles established by the Supreme Court of Ohio. Because this court did not address the applicability of *Gross II* and its effect on the outcome, this magistrate is unable to address and/or explain the reasons why this decision is contrary to other decisions addressing the same issue. However, this court has not followed *PaySource*.

{¶ 40} In a decision rendered in September 2011, two years after both *PaySource* and *Ohio Welded Blank*, this court followed *Ohio Welded Blank* and determined that the injured worker who tested positive for marijuana during a post-accident drug test was entitled to an award of TTD compensation. In *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011), Randy S. Herron sustained serious injuries when his ponytail was caught onto a rotating shaft of a grinding machine. Herron tested positive for opiates and cannabinoids, and his employer argued that his claim should be barred under R.C. 4123.54 because there was a rebuttable presumption that Herron was intoxicated or under the influence of a controlled substance, not prescribed by his physician, and the fact that he was intoxicated or under the influence of a controlled substance was the proximate cause of his injury. A DHO found that R.C. 4123.54 did not apply and determined that TTD compensation was payable.

{¶ 41} Herron's employer appealed and, at that time, conceded that the requirements of R.C. 4123.54 had not been met. However, the employer continued to argue that Herron's termination for violating the drug-free workplace policy constituted a voluntary abandonment of his employment and rendered him ineligible to receive TTD compensation. The SHO disagreed and, citing *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, concluded that TTD compensation was payable. Despite the fact that the SHO found that the employer did establish all three requirements of *Louisiana-Pacific*, by applying *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, the SHO concluded that Herron's pre-injury behavior did not foreclose the payment of TTD compensation.

2015 JAN -6 AM 11:02
INDUSTRIAL COMMISSION
CUSTOMER SERVICE UNIT

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

{¶ 42} In arguing otherwise, the employer contends that *Ohio Welded Blank, Ohio Decorative Prods.*, and *State ex rel. Ohio State Univ. Cancer Research Hosp. v. Indus. Comm.*, 10th Dist. No. 09AP-1027, 2010-Ohio-3839, are in contravention of *Louisiana-Pacific* and the Supreme Court of Ohio's decision in *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000). Relator points out that, in *Cobb*, the Supreme Court held that a post-injury termination based upon a violation of an employer's drug policy can preclude the payment of TTD compensation provided the three-prong test from *Louisiana-Pacific* is demonstrated. For the reasons that follow, the magistrate finds that relator's argument is not well-taken.

{¶ 43} First, *Ohio Welded Blank, Ohio Decorative Prods.* and *Ohio State Univ. Cancer Research Hosp.* are not in contravention of *Louisiana-Pacific*. Instead, both this court and the Supreme Court of Ohio have been very clear in explaining that *Louisiana-Pacific* and *Pretty Prods.* can both be applied in certain circumstances. As such, even where an employer demonstrates that the *Louisiana-Pacific* test has been met, the injured worker may still be entitled to receive TTD compensation. In explaining how the two lines of cases are to be applied, the Supreme Court specifically noted that both *Louisiana-Pacific* and *Pretty Prods.* may factor into the analysis. If the requirements of *Louisiana-Pacific* are met, suggesting that the termination is voluntary, the commission and courts must still consider whether the employee was disabled at the date of termination.

{¶ 44} Second, the employer's reliance on *Cobb* is misplaced. The *Cobb* case was decided seven years before the Supreme Court of Ohio rendered its decision in *Gross II* and has not been applied in these circumstances since then. As such, it appears the holding in *Cobb* has been rejected by the Supreme Court of Ohio in *Ohio Welded Blank* and *Ohio Decorative Prods.*

{¶ 45} The magistrate specifically notes that the *PaySource* case is the only case since *Gross II* was decided in which an injured worker has been denied TTD compensation because the injured worker tested positive for drugs during post-injury drug tests. However, this court did not address the applicability of *Gross II* to the facts in *PaySource*. As such, the magistrate cannot address and/or explain the reasons why the decision in *PaySource* was reached. As this magistrate noted in *Ohio Decorative Prods.*,

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
POSTOFFICE SERVICE L-1

2015 JAN -6 AM 11:02

this court should continue to apply the law as pronounced by the Supreme Court in *Gross II*. As the Supreme Court stated, the voluntary abandonment doctrine has never been applied to violations of written work rules which precede or are contemporaneous with the injury. If ingesting marijuana actually is a violation of the written work rule, the only employees at risk for being terminated for violating this offense are employees who sustain compensable work-related injuries while working for their employer. Any other employee who also ingested marijuana at the same time will not be terminated because their "violation" will not be brought to light.

{¶ 46} The employer emphasizes that TTD compensation can only be awarded when the disability arising from the allowed conditions causes the employee to suffer a loss of wages. The employer asserts here that relator's termination from employment for violating the written work rule is the reason relator is without wages. In other words, employer asserts that the violation of the written work rule and subsequent termination break the causal connection between the disability arising from the allowed conditions and relator's lack of wages. For the reasons that follow, the magistrate disagrees.

{¶ 47} It is undisputed that relator was injured at work on February 16, 2012. Further, it is also undisputed that relator was immediately rendered temporarily totally disabled. In other words, the allowed conditions resulting from the work-related injury immediately prevented relator from working and caused him to suffer a loss of wages. But for the injury, relator would have been able to continue working. Relator asserts that it could have administered a random drug test that same day and, had relator tested positive, he would have been terminated. Therefore, the employer argues that the causal connection between the allowed conditions and the resulting loss of wages was severed.

{¶ 48} The magistrate finds that it is immaterial that relator would have been terminated if the employer had subjected him to a random drug test, which he would have failed. The employer did not subject relator to a random drug test. Here, the allowed conditions which resulted from the workplace injury rendered relator unable to return to his former position of employment and caused him to be without wages. Employers can show a break in the causal connection if they can meet the burden of proof under R.C. 4123.54 and demonstrate that an injured worker was actually impaired by the drugs at the time the injury occurred.

Franklin County Ohio Court of Appeals Clerk of Courts-2014 Dec 18 12:31 PM-13AP001017

INDUSTRIAL COMMISSION
CUSTOMER SERVICE L-1

2015 JAN -6 AM 11:02

No. 13AP-1017

17

{¶ 49} In *State ex rel. Smith v. Superior's Brand Meats, Inc.*, 76 Ohio St.3d 408, 411 (1996), the Supreme Court of Ohio recognized the possible abuse that may occur where the termination of employment may result in the denial of TTD compensation for the injured worker and stressed that it is "imperative to carefully examine the totality of the circumstances when such a situation exists." Especially here, where there is no evidence that relator was under the influence of the drugs he ingested, the magistrate finds that, while the employer certainly could terminate relator, the commission abused its discretion when it found a voluntary abandonment and denied relator TTD compensation.

{¶ 50} This conclusion also follows the reasoning of other cases, including *Ohio State Univ. Cancer Research Hosp.* (claimant returned to modified duty and while working modified duty was terminated for his pre-injury violation of the employer's policy against harassment—TTD payable); and *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St.3d 173, 2005-Ohio-1386 (while claimant was off from work following his work-related injury, the employer learned that, pre-injury, he had violated the employer's policy by falsifying his job application—TTD payable). Under the employer's theory, these pre-injury cases would also need to be reevaluated.

{¶ 51} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order which denied relator TTD compensation and issue an order finding that relator is entitled to that compensation.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

NOTICE TO THE PARTIES

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

2015 JAN -6 AM 11:02
INDUSTRIAL COMMISSION
CUSTOMER SERVICE 1-1

THE STATE OF OHIO
Franklin County, ss
I, MARVELLEN O'NEAL, DEPUTY CLERK
OF THE COURT OF APPEALS
WITHIN AND FOR SAID COUNTY,
DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
AND COPIED FROM THE ORIGINAL
FILED IN CASE NO. 13AP-1017
DATE OF DECISION: 12-22-14
By: MARVELLEN O'NEAL, DEPUTY CLERK
Clerk

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,

:

Relator,

:

v.

:

No. 13AP-1017

Pallet Companies, Inc. and
Industrial Commission of Ohio,

:

(REGULAR CALENDAR)

:

Respondents.

:

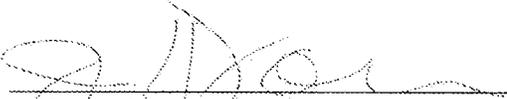
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 18, 2014, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we issue a writ of mandamus ordering the commission to vacate its order which denied relator temporary total disability compensation and issue an order finding that relator is entitled to that compensation. Costs assessed against respondents.

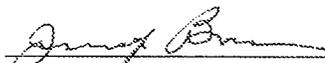
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge William A. Klatt



Judge Julia L. Dorrian



Judge Jennifer Brunner

duf

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 29 10:12 AM-13AP001017

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
Relator,	:	
v.	:	No. 13AP-1017
Pallet Companies, Inc. and Industrial Commission of Ohio,	:	(REGULAR CALENDAR)
Respondents.	:	
	:	

D E C I S I O N

Rendered on December 18, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, James F. Cordell, commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order denying temporary total disability ("TTD") compensation and to enter an order granting said compensation.

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. Relying principally upon *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, the magistrate found that the doctrine of voluntary abandonment did not apply to bar receipt of TTD compensation in a case involving a pre-injury infraction undetected until after the injury. Therefore, the magistrate has recommended that we grant relator's request for a writ of mandamus and order the commission to enter an order granting relator TTD compensation.

{¶ 3} Respondent, Pallet Companies, Inc., has filed objections to the magistrate's decision. In its first objection, Pallet argues that the magistrate erred by failing to apply the legal principles discussed in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305; *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000); and *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (June 30, 2009) (memorandum decision). We disagree.

{¶ 4} As indicated in the magistrate's decision, the issue raised in Pallet's first objection is resolved by *Gross II* and this court's decision in *Ohio Welded Blank*. Relying on *Gross II*, this court expressly held that:

Gross II indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits.

Ohio Welded Blank at ¶ 20.

{¶ 5} As noted by the Supreme Court in *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, "even if a termination satisfies all three *Louisiana-Pacific* criteria for being a voluntary termination, eligibility for temporary total disability compensation remains if the claimant was still disabled at the time the

No. 13AP-1017

3

discharge occurred." *Id.* at ¶ 10. Therefore, Pallet's argument that *Louisiana-Pacific* and *McCoy* prelude relator's receipt of TTD compensation lacks merit.

{¶ 6} Nor does *Cobb* require a different result. As noted by the magistrate, the application of the voluntary-abandonment doctrine to a pre-injury infraction undetected until after injury is controlled by *Gross II* and *Ohio Welded Blank*, not *Cobb*. *Cobb* did not involve a pre-injury infraction. Lastly, we are unpersuaded by Pallet's reliance on this court's decision in *PaySource*. Although *PaySource* does support Pallet's argument, we note that *PaySource* was a memorandum decision that adopted a magistrate's decision to which there were no objections. It does not appear that the applicability of *Gross II* was even raised in *PaySource*. Moreover, in *Ohio Welded Blank* and *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011) (memorandum decision), this court did not follow the magistrate's legal analysis in *PaySource* based upon *Gross II*. For these reasons, we overrule Pallet's first objection.

{¶ 7} In its second objection, Pallet contends that the magistrate's decision runs contrary to public policy. Although Pallet's argument highlights a public policy issue, that issue is best addressed in the General Assembly or in the Supreme Court of Ohio. As an intermediate appellate court, this court is bound by decisions of the Supreme Court of Ohio. As previously discussed, *Gross II* is dispositive of the issue presented here. Therefore, we overrule Pallet's second objections.

{¶ 8} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus.

Objections overruled; writ of mandamus granted.

DORRIAN and BRUNNER, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. James F. Cordell,	:	
	:	
Relator,	:	
	:	
v.	:	No. 13AP-1017
	:	
Pallet Companies, Inc. and	:	(REGULAR CALENDAR)
Industrial Commission of Ohio,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on July 25, 2014

Craig E. Gould, for relator.

Dinsmore & Shohl, LLP, Christen S. Hignett and Michael L. Squillace, for respondent Pallet Companies, Inc.

Michael DeWine, Attorney General, *Lisa R. Miller* and *Cheryl J. Nester*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶ 9} Relator, James F. Cordell, 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 his request for temporary total disability ("TTD") compensation based on a finding that he voluntarily abandoned his employment

No. 13AP-1017

5

with his employer Pallet Companies, Inc. ("employer"), and ordering the commission to find that he is entitled to that compensation.

Findings of Fact:

{¶ 10} 1. Relator sustained a work-related injury on February 16, 2012 when a third-party truck driver pulled away from the loading dock on which relator was positioned on a tow motor resulting in a fall from the dock plate to the ground. Relator's workers' compensation claim is allowed for the following conditions:

Fracture tibia nos - closed, right; fracture shaft fibula - closed, right.

{¶ 11} 2. While at the emergency room, a post-accident drug screen was ordered, and the results were available on February 22, 2012. Relator tested positive for marijuana metabolites and opiates, specifically morphine.

{¶ 12} 3. The employer terminated relator effective February 22, 2012 for his "Violation of Company Policy[;] Failed Post Accident Drug Screen."

{¶ 13} 4. In an order mailed March 5, 2012, the Ohio Bureau of Workers' Compensation ("BWC") allowed relator's claim and granted him TTD compensation beginning February 17, 2012.

{¶ 14} 5. The employer appealed and the matter was heard before a district hearing officer ("DHO") on May 1, 2012. The DHO concluded that relator was not eligible to receive TTD compensation finding that he had violated the employer's drug-free work place policy when he tested positive for marijuana and morphine.

{¶ 15} 6. Relator appealed and the matter was heard before a staff hearing officer ("SHO") on July 2, 2012. The SHO determined that TTD compensation was payable despite the fact that relator had tested positive for marijuana and morphine after the work-related injury. The SHO stated:

The Staff Hearing Officer notes the Employer's challenge to the payment of temporary total compensation based on the Injured Worker's termination from unemployment on 02/22/2012 due to a positive drug screen. The Staff Hearing Officer was persuaded by the Injured Worker's testimony at hearing that the urine sample taken at Wadsworth-Rittman Hospital on the date of injury was performed in an unusual manner and may have been contaminated. The Injured Worker has been submitting to, and passing, monthly urine

drug screenings for years and knows the protocol for such testing. The Injured Worker testified he did not provide his sample to sterile container opened in his presence. Rather, his sample was placed in an open, hand-held urinal and transferred out of his presence to another container. The Staff Hearing Officer finds the validity of the drug testing has been brought into question.

Pursuant to the holding in State ex rel. Pretty Products, Inc. v. Industrial Commission (1996), 77 Ohio St.3d 5, an Injured Worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment. The Injured Worker was terminated on 02/22/2012, after he was disabled by the injury in this claim. Therefore, the termination does not amount to a voluntary abandonment of employment and does not preclude the payment of temporary total compensation.

{¶ 16} 7. The employer appealed on two grounds: (1) the SHO improperly relied on relator's testimony to find that the drug test was flawed, and (2) the SHO's reliance on *State ex rel. Pretty Prods. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), was inappropriate given the March 26, 2009 magistrate's decision in *State ex rel. PaySource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (Mar. 26, 2009) (memorandum decision), recommending that this court find that the violation of an employer's drug-free policy occurs prior to any work-related injury and constitutes proper grounds not only for terminating an employee, but for denying payment of TTD compensation as well.

{¶ 17} 8. In an order mailed July 26, 2012, the commission refused the employer's appeal.

{¶ 18} 9. The employer filed a request for reconsideration and, in an interlocutory order mailed September 22, 2012, the commission determined that the employer had presented sufficient probative evidence to warrant adjudication, vacated the July 26, 2012 SHO order, and set the matter for hearing.

{¶ 19} 10. The matter was heard before the commission on October 23, 2012. At that time, the commission determined the employer met its burden of proving that the SHO order contained a clear mistake of law by not applying this court's decision in *PaySource USA, Inc.* Thereafter, the commission applied this court's decision in *PaySource*, adopting the decision of its magistrate, and found that relator's ingestion of or

No. 13AP-1017

7

use of marijuana was the offense for which he was terminated, and that offense occurred prior to his termination on February 22, 2012. The commission discussed *PaySource* noting that this court refused TTD compensation to an injured worker who tested positive for drugs as a result of a post-accident drug screen because the court found that it was the injured worker's ingestion of drugs prior to the injury that gave rise to the injured worker's positive drug test and that the prohibited conduct could not have occurred during any period of disability. The commission distinguished the facts from *State ex. rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 (*Gross II*), solely on grounds that relator's ingestion of marijuana was not causally related to his injury. The commission specifically found that *Gross II* was limited to situations where the work-rule violation was the cause of the injury.

{¶ 20} 11. Since then, the BWC has issued an order declaring an overpayment of TTD compensation.

{¶ 21} 12. Relator has filed the instant mandamus action in this court.

Conclusions of Law:

{¶ 22} For the reasons that follow, it is this magistrate's decision that this court should issue a writ of mandamus, and TTD compensation should be awarded to relator.

{¶ 23} 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.*, 11 Ohio St.2d 141 (1967). 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.*, 26 Ohio St.3d 76 (1986). 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.*, 29 Ohio St.3d 56 (1987). 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.*, 68 Ohio St.2d 165 (1981).

{¶ 24} 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.

{¶ 25} In *State ex rel. Watts v. Schottenstein Stores Corp.*, 68 Ohio St.3d 118 (1993), the court determined that a firing can constitute a voluntary abandonment of the former position of employment because, although discharge is not necessarily consented to, it often is a consequence of behavior that the claimant willingly undertook and may take on a voluntary character.

{¶ 26} In *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), the Supreme Court of Ohio was asked to determine whether an employee's termination for violating work rules could be construed as a voluntary abandonment of employment that would bar the payment of TTD compensation. In that case, the employer was notified that the claimant had been medically released to return to work following a period where TTD compensation was paid. When the claimant failed to report to work for three consecutive days, he was automatically terminated for violating the employer's absentee policy as set forth in the company's employee handbook.

{¶ 27} Thereafter, the claimant requested additional TTD compensation and argued that his termination constituted an involuntary departure from employment. However, the court found it difficult to characterize as "involuntary" a termination 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.

{¶ 28} The principal set forth in *Louisiana-Pacific Corp.* concerning voluntary abandonment is potentially implicated any time TTD compensation is requested by a claimant who is no longer employed in a position held when the injury occurred. *Gross II* at ¶ 16 citing *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, ¶ 38. Nevertheless, a voluntary departure from the former position of employment can preclude eligibility for TTD compensation only if it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss. *Id.*

{¶ 29} At the same time the commission and courts were applying the principles from *Louisiana-Pacific*, courts began considering the implication of *Pretty Prods.*, and the cases which followed. *Pretty Prods.* explained that: "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." *Id.* at ¶ 7. As such, "'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.* quoting *State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 48 (1993). See also *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951 (concluding that a truck driver who was already disabled when terminated for losing his driver's license as a result of a subsequent drunk driving conviction was not disqualified from TTD compensation).

{¶ 30} When the Supreme Court of Ohio applied the above principles to the facts in *Gross II*, the court noted that the employee's violation of the work rule in that case actually caused the employee's injury. In reconsidering its decision from *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 65, 2006-Ohio-6500 ("Gross I"), where the voluntary-abandonment doctrine was applied to deny TTD benefits, the court clarified that "*Gross I* was not intended to expand the voluntary-abandonment doctrine." *Gross II* at ¶ 19. The Supreme Court explained that: "Until the present case, the voluntary-abandonment doctrine has been applied only in post-injury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and loss of earnings that justified his or her [temporary total disability] benefits." *Id.* "The doctrine has never been applied to pre-injury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception." *Id.*

{¶ 31} In *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, the Supreme Court had the opportunity to address the two lines of cases. The Supreme Court observed that the parties considered the two cases to be mutually exclusive. The employer argued that *Louisiana-Pacific* was dispositive, while the claimant relied on *Pretty Prods.* However, the Supreme Court determined that *Pretty Prods.* clarified *Louisiana-Pacific* so that the character of an employee's departure,

voluntary or involuntary, is not the only relevant element; instead, the timing of the termination may be equally pertinent. *Id.* at ¶10. As the court explained:

Louisiana-Pacific and *Pretty Prods.* may each factor into the eligibility analysis. If the three requirements of *Louisiana-Pacific* regarding voluntary termination are not met, the employee's termination is deemed involuntary, and compensation is allowed. 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 ¶ 11.

{¶ 32} Because the claimant in *Reitter Stucco* was medically incapable of returning to his former position of employment at the time of his termination, the court concluded that he was eligible to receive TTD compensation. As the court explained: "[A] claimant whose departure is deemed voluntary does not surrender eligibility for temporary total disability compensation if, at the time of departure, the claimant is still temporarily and totally disabled." *Id.* at ¶10. Accordingly, even if the termination satisfies all three criteria from *Louisiana-Pacific* and is considered voluntary, the claimant's eligibility for TTD compensation remains if the claimant was still disabled at the time the termination occurred. *Id.*

{¶ 33} In 2009, within three months of each other, this court released two decisions, *PaySource* and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, each of which dealt with factual situations similar to those present in this case. William A. Shoemaker ("Shoemaker") and Steven Farr ("Farr") both sustained work-related injuries. Pursuant to their employers' drug-free workplace policies, both Shoemaker and Farr submitted to drug testing. Shoemaker's test was positive for cocaine, and Farr's test was positive for marijuana. Both Shoemaker and Farr were terminated from their employment for having violated their employers' policies, and their employers argued that their violations constituted a voluntary abandonment of their employment precluding their eligibility for TTD compensation. In both cases, the commission awarded the employees TTD compensation, and the employers filed mandamus actions in this court.

{¶ 34} In *PaySource*, decided June 30, 2009, the record indicates that Shoemaker was "verbally notified * * * that he had tested 'positive for cocaine' and that 'under our Drug-Free workplace policy he would have to be terminated.' The February 5, 2008 verbal notification was later memorialized in a March 14, 2008 letter." In the SHO order under review, the SHO stated:

Counsel for the employer indicated that the drug screen was performed as a result of the injured worker being involved in the workplace fall from the scaffold accident. The results of the drug screen apparently became available and published on 02/04/2008. As a result, the employer fired the injured worker on 02/05/2008. Counsel for the employer indicated that the employer fired the injured worker because he tested positive for cocaine on the drug screen.

The employer argues that the injured worker therefore voluntarily abandoned his former position of employment when he ingested cocaine approximately three days prior to the fifteen foot fell [sic] off of the scaffold while working.

The SHO rejected the employer's argument and stated as follows:

The employer admits that it fired the injured worker as a result of testing positive on a drug screen. That drug screen was performed after the injured worker had sustained his compensable workplace injury, and after the injured worker had become physically unable to return to his former position of employment in fact; the employer admits that the post accident drug screen was performed only because the injured worker had sustained an on the job injury. The drug screen and resultant firing arose out of the compensable work injury.

Upon review, this court accepted the magistrate's argument to the contrary:

Because it was found that the "drug screen" and the resultant job termination occurred after the industrial injury prevented claimant from returning to his former position of employment, the commission concluded that the job departure was involuntary.

The commission's analysis of the timing of the termination is seriously flawed because the commission inappropriately viewed testing positive on the drug screen as the offense for which claimant was terminated. Clearly, it was claimant's ingestion or "use" of cocaine that was the offense for which

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Dec 18 12:31 PM-13AP001017

claimant was terminated. The drug screen was only the means employed to detect the use of the illegal substance. Clearly, claimant's use of the prohibited substance occurred prior to the industrial injury, and thus the prohibited conduct could not have occurred during any period of disability resulting from the industrial injury.

Page 22 of the employee handbook states that: "Employees need to be aware that certain offenses, including but not limited to use, possession, sale of illegal drugs * * *, will normally result in immediate termination." That portion of page 22 put claimant on notice that his admitted ingestion or use of cocaine could result in job termination if the ingestion or use were ever detected by a drug screen required at the time of an industrial injury.

The magistrate further recognizes that Brosnan's March 14, 2008 letter memorializing the February 5, 2008 notification of termination does not specify that claimant was being terminated for "use." However, the letter does state that claimant was being terminated "under our Drug-Free workplace policy."

It is unreasonable under the circumstances to infer from Brosnan's letter that use of cocaine as determined by the drug screen was not the conduct that the policy prohibits and for which Omni terminated employment.

{¶ 35} As a result, this court determined that Shoemaker was not entitled to TTD compensation. However, the court never addressed the applicability of *Gross II* or its effect on the outcome.

{¶ 36} By comparison, in *Ohio Welded Blank*, decided September 8, 2009, after receiving the positive results from the drug test, the employer met with Farr and informed him that he was going to be terminated because he tested positive for marijuana. Later, the employer sent Farr a letter indicating, in part:

[O]n October 24, 2007, you tested positive for an illicit substance on a drug screen on September 28, 2007. This positive drug screen is a violation of the Company's Substance Abuse Policy and in accordance with this policy the Company is terminating your employment effective September 28, 2007.

Id. at 30.

{¶ 37} At the commission level, the employer argued that Farr had voluntarily abandoned his employment; however, the commission applied the rationale from *Gross II* and found that TTD compensation was payable:

A positive marijuana metabolite level was discovered during routine post-accident testing which caused claimant to be terminated after the disability due to the injury had begun. As soon as he was physically able, claimant returned to work with a different employer. This would rebut the contention that claimant had abandoned the work force or otherwise removed himself from employment voluntarily and unrelated to the claim. The presence of a prohibited drug level was discovered subsequent to the injury and after disability from the injury existed independent of any drug policy violation. Staff Hearing Officer finds no legal precedent which would apply an abandonment of the workplace theory to pre-injury behavior, discovered after the injury, where the injury has caused disability independent of the dischargeable defense. *Pretty Products v. Industrial Commission*, (1996), 77 Ohio St.3d 5, and *State ex rel. Reitter Stucco, Inc. v. Industrial Commission*, slip Opinion no. 2008-Ohio-499-No.2007-0060-submitted Nov. 27, 2007-decided Feb. 13, 2008, are followed. Claimant was disabled due to the injury at the time of termination. The cause of the termination is unrelated to the injury claim. Since claimant was medically incapable of returning to his former position of employment at the time of his discharge, Staff Hearing Officer concludes that he is eligible to receive the temporary total disability compensation as ordered.

Id. at 34.

{¶ 38} Despite of the fact that the employer continued to argue that Farr ingested marijuana sometime during the week preceding his injury and obviously violated the written work rule before his injury, this court applied *Gross II* and stated:

Gross II stated the voluntary abandonment doctrine had not been applied to work rule violations preceding or contemporaneous with the injury. Here even if we adopt relator's position that the date of the infraction, not the date of termination, determines application of the voluntary abandonment doctrine, *Gross II* indicates that a pre-injury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds

for concluding claimant abandoned his employment so as to preclude temporary total benefits. The result is especially compelling here, where the employer presented no evidence to suggest the injury resulted from relator's being under the influence of drugs or alcohol.

Id. at 20.

{¶ 39} In *PaySource*, this court departed from the principles established by the Supreme Court of Ohio. Because this court did not address the applicability of *Gross II* and its effect on the outcome, this magistrate is unable to address and/or explain the reasons why this decision is contrary to other decisions addressing the same issue. However, this court has not followed *PaySource*.

{¶ 40} In a decision rendered in September 2011, two years after both *PaySource* and *Ohio Welded Blank*, this court followed *Ohio Welded Blank* and determined that the injured worker who tested positive for marijuana during a post-accident drug test was entitled to an award of TTD compensation. In *State ex rel. Ohio Decorative Prods., Inc. v. Indus. Comm.*, 10th Dist. No. 10AP-498 (Sept. 15, 2011), Randy S. Herron sustained serious injuries when his ponytail was caught onto a rotating shaft of a grinding machine. Herron tested positive for opiates and cannabinoids, and his employer argued that his claim should be barred under R.C. 4123.54 because there was a rebuttable presumption that Herron was intoxicated or under the influence of a controlled substance, not prescribed by his physician, and the fact that he was intoxicated or under the influence of a controlled substance was the proximate cause of his injury. A DHO found that R.C. 4123.54 did not apply and determined that TTD compensation was payable.

{¶ 41} Herron's employer appealed and, at that time, conceded that the requirements of R.C. 4123.54 had not been met. However, the employer continued to argue that Herron's termination for violating the drug-free workplace policy constituted a voluntary abandonment of his employment and rendered him ineligible to receive TTD compensation. The SHO disagreed and, citing *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, concluded that TTD compensation was payable. Despite the fact that the SHO found that the employer did establish all three requirements of *Louisiana-Pacific*, by applying *Gross II*, *Pretty Prods.*, and *Reitter Stucco*, the SHO concluded that Herron's pre-injury behavior did not foreclose the payment of TTD compensation.

{¶ 42} In arguing otherwise, the employer contends that *Ohio Welded Blank, Ohio Decorative Prods.*, and *State ex rel. Ohio State Univ. Cancer Research Hosp. v. Indus. Comm.*, 10th Dist. No. 09AP-1027, 2010-Ohio-3839, are in contravention of *Louisiana-Pacific* and the Supreme Court of Ohio's decision in *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St.3d 54 (2000). Relator points out that, in *Cobb*, the Supreme Court held that a post-injury termination based upon a violation of an employer's drug policy can preclude the payment of TTD compensation provided the three-prong test from *Louisiana-Pacific* is demonstrated. For the reasons that follow, the magistrate finds that relator's argument is not well-taken.

{¶ 43} First, *Ohio Welded Blank, Ohio Decorative Prods.* and *Ohio State Univ. Cancer Research Hosp.* are not in contravention of *Louisiana-Pacific*. Instead, both this court and the Supreme Court of Ohio have been very clear in explaining that *Louisiana-Pacific* and *Pretty Prods.* can both be applied in certain circumstances. As such, even where an employer demonstrates that the *Louisiana-Pacific* test has been met, the injured worker may still be entitled to receive TTD compensation. In explaining how the two lines of cases are to be applied, the Supreme Court specifically noted that both *Louisiana-Pacific* and *Pretty Prods.* may factor into the analysis. If the requirements of *Louisiana-Pacific* are met, suggesting that the termination is voluntary, the commission and courts must still consider whether the employee was disabled at the date of termination.

{¶ 44} Second, the employer's reliance on *Cobb* is misplaced. The *Cobb* case was decided seven years before the Supreme Court of Ohio rendered its decision in *Gross II* and has not been applied in these circumstances since then. As such, it appears the holding in *Cobb* has been rejected by the Supreme Court of Ohio in *Ohio Welded Blank* and *Ohio Decorative Prods.*

{¶ 45} The magistrate specifically notes that the *PaySource* case is the only case since *Gross II* was decided in which an injured worker has been denied TTD compensation because the injured worker tested positive for drugs during post-injury drug tests. However, this court did not address the applicability of *Gross II* to the facts in *PaySource*. As such, the magistrate cannot address and/or explain the reasons why the decision in *PaySource* was reached. As this magistrate noted in *Ohio Decorative Prods.*,

No. 13AP-1017

16

this court should continue to apply the law as pronounced by the Supreme Court in *Gross II*. As the Supreme Court stated, the voluntary abandonment doctrine has never been applied to violations of written work rules which precede or are contemporaneous with the injury. If ingesting marijuana actually is a violation of the written work rule, the only employees at risk for being terminated for violating this offense are employees who sustain compensable work-related injuries while working for their employer. Any other employee who also ingested marijuana at the same time will not be terminated because their "violation" will not be brought to light.

{¶ 46} The employer emphasizes that TTD compensation can only be awarded when the disability arising from the allowed conditions causes the employee to suffer a loss of wages. The employer asserts here that relator's termination from employment for violating the written work rule is the reason relator is without wages. In other words, employer asserts that the violation of the written work rule and subsequent termination break the causal connection between the disability arising from the allowed conditions and relator's lack of wages. For the reasons that follow, the magistrate disagrees.

{¶ 47} It is undisputed that relator was injured at work on February 16, 2012. Further, it is also undisputed that relator was immediately rendered temporarily totally disabled. In other words, the allowed conditions resulting from the work-related injury immediately prevented relator from working and caused him to suffer a loss of wages. But for the injury, relator would have been able to continue working. Relator asserts that it could have administered a random drug test that same day and, had relator tested positive, he would have been terminated. Therefore, the employer argues that the causal connection between the allowed conditions and the resulting loss of wages was severed.

{¶ 48} The magistrate finds that it is immaterial that relator would have been terminated if the employer had subjected him to a random drug test, which he would have failed. The employer did not subject relator to a random drug test. Here, the allowed conditions which resulted from the workplace injury rendered relator unable to return to his former position of employment and caused him to be without wages. Employers can show a break in the causal connection if they can meet the burden of proof under R.C. 4123.54 and demonstrate that an injured worker was actually impaired by the drugs at the time the injury occurred.

{¶ 49} In *State ex rel. Smith v. Superior's Brand Meats, Inc.*, 76 Ohio St.3d 408, 411 (1996), the Supreme Court of Ohio recognized the possible abuse that may occur where the termination of employment may result in the denial of TTD compensation for the injured worker and stressed that it is "imperative to carefully examine the totality of the circumstances when such a situation exists." Especially here, where there is no evidence that relator was under the influence of the drugs he ingested, the magistrate finds that, while the employer certainly could terminate relator, the commission abused its discretion when it found a voluntary abandonment and denied relator TTD compensation.

{¶ 50} This conclusion also follows the reasoning of other cases, including *Ohio State Univ. Cancer Research Hosp.* (claimant returned to modified duty and while working modified duty was terminated for his pre-injury violation of the employer's policy against harassment—TTD payable); and *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St.3d 173, 2005-Ohio-1386 (while claimant was off from work following his work-related injury, the employer learned that, pre-injury, he had violated the employer's policy by falsifying his job application—TTD payable). Under the employer's theory, these pre-injury cases would also need to be reevaluated.

{¶ 51} Based on the foregoing, it is this magistrate's decision that this court should issue a writ of mandamus ordering the commission to vacate its order which denied relator TTD compensation and issue an order finding that relator is entitled to that compensation.

/S/ MAGISTRATE
STEPHANIE BISCA BROOKS

NOTICE TO THE PARTIES

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