

**In the
Supreme Court of Ohio**

STATE OF OHIO, ex rel.	:	Case No. 2015-0163
JAMES F. CORDELL,	:	
	:	
Relator-Appellee,	:	On Appeal as of Right
	:	from the Court of Appeals,
vs.	:	Tenth Appellate District,
	:	Franklin County, Ohio
PALLET COMPANIES, INC., et al.,	:	Case No. 13-AP-001017
	:	
Respondents/Appellants.	:	

BRIEF OF APPELLEE, JAMES F. CORDELL

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INTRODUCTION

Relator, James F. Cordell (“James”), sustained a serious work injury on February 16, 2012 and he thereafter applied for and was granted temporary total disability (“TTD”) by the Administrator, the Ohio Bureau of Workers’ Compensation (“BWC”) for the conditions of fracture tibia nos – closed, right and fracture shaft fibula – closed, right.

James’ employer, Pallet Companies, Inc. (“Employer”) appealed the BWC’s decision on the grounds that James’ alleged pre-injury drug use resulted in James voluntarily abandoning his employment because James was fired for violating the Employer’s written policy barring drug use.

James was terminated six (6) days after his industrial injury occurred while he was physically incapable of performing his job. An injured worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment and James remains entitled to TTD compensation if fired while temporarily and totally disabled. Additionally, case law dictates that pre-injury misconduct does not foreclose compensation.

Thus, the Staff Hearing Officer (SHO) of the Industrial Commission of Ohio (ICO) acted within the law and within their discretion by awarding James TTD compensation. However, when the ICO granted the Employer’s Request for Reconsideration and denied the award of TTD compensation, the ICO acted outside of the law and its discretion, in contradiction of their prior rulings. The Tenth Appellate District’s decision in this case appropriately issued a writ of mandamus ordering the ICO to vacate its order denying James TTD compensation and issue an order finding that James is entitled to that compensation.

STATEMENT OF FACTS AND CASE

On February 16, 2012, James was seriously injured in the course of and arising out of his employment when a third-party truck driver caused James to fall off of a loading dock, landing between the dock and the truck. (Supplement (hereinafter, "Supp."), p. 1). The accident resulted in a closed fracture of the fibula with tibia and pilon fracture of the right ankle. (Supp. 2). During James' initial emergency treatment, his doctor ordered a urine screening as well as a toxicology report. (Supp. 10-11).

The results were positive for marijuana metabolites and opiates. *Id.* As a result of this positive test, James was fired on February 22, 2012. James applied for, and was granted, workers' compensation benefits. His claim was allowed by the BWC for the conditions of "fracture tibia nos-closed, right" and "fracture shaft fibula-closed." (Supp. 4). James' request for TTD compensation was also granted by the BWC. *Id.*

The Employer appealed the TTD award and a district hearing officer (DHO) found that James was not eligible for TTD compensation, based on his violation of the Employer's drug free workplace policy. (Supp. 14-15). James then appealed the order of the DHO. (Supp. 16-18). A SHO vacated the DHO's order and TTD compensation was ordered paid from February 17, 2012, through July 2, 2012 and to continue upon the submission of medical proof. (Supp. 16). The SHO order cited this Court's holding in *State ex rel. Pretty Products, Inc. v. Industrial Commission* (1996), 77 Ohio St.3d 5, which states that an injured worker who is unable to return to work at his former position of employment cannot voluntarily abandon his former position of employment. (Supp. 17).

Moreover, the SHO specifically found that because James was terminated on February 22, 2012, after he was disabled by the injury in this claim, his termination does not amount to

voluntary abandonment of employment and does not preclude James from the payment of TTD compensation. *Id.* Following this order, the Employer appealed the order to the ICO. (Supp. 24). The Employer's appeal was refused by the ICO. (Supp. 45). The Employer then filed for Reconsideration of the SHO order, which the ICO granted finding that a clear mistake of the law was made by not applying *State ex rel. Paysource USA, Inc. v. Indus. Comm.* (June 30, 2009), Franklin App. No. 08AP-677. The ICO then vacated the SHO order and denied James TTD compensation due to a finding that his conduct prior to his injury constituted a voluntary abandonment of his employment. (Supp. 68). The ICO's Order was decided by a two to one vote and, in the dissent, the dissenting Commissioner cites to the case law which has been previously followed by the Tenth District Court of Appeals and the ICO in previous decisions and orders.

As a result of this finding, the BWC issued an Order declaring an overpayment of TTD compensation in the amount of \$22,081.88. (Supp. 74). This decision was upheld by the ICO. (Supp. 84-85, 99-102). In addition, the BWC is exercising its subrogation rights due to James' injury being caused by a third person. (Supp. 76). As of November 18, 2013, the BWC indicated its subrogation rights amounted to \$69,856.48 and its rights also include entitlement to future costs of the claim. (Supp. 80).

James filed a complaint in mandamus following the ICO's order in the Tenth District Court of Appeals asking that the court vacate the ICO's order that James had voluntarily abandoned his employment for two reasons: 1) because even though a termination could otherwise amount to a TTD-precluding voluntary abandonment, the claimant remains entitled to compensation if terminated while temporarily and totally disabled; and 2) because unlike post-injury misconduct, pre-injury misconduct does not preclude temporary total disability

compensation under a voluntary abandonment analysis. The Magistrate determined that the ICO's actions were unsupportable and directed the ICO to pay James TTD. *State ex rel. Cordell v. Indus. Comm.*, 2014-Ohio-5561 at ¶51. The Employer and the ICO objected to the Magistrate's decision, but were overruled when the Tenth District Court of Appeals sustained the decision. *Id.*

The Employer and the ICO appealed the decision of the Tenth District Court of Appeals to this Court.

LAW AND ARGUMENT

I. The character of an employee's departure is not the only important element when determining eligibility for TTD compensation; timing of the termination is equally relevant.

In determining whether TTD compensation is warranted, the ICO normally applies a two-part test. "The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position." *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 44. A factor that plays into the second-half of the equation is whether the claimant abandoned his or her former position of employment. It is clear that voluntary abandonment of employment can preclude payment of TTD compensation, *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio St.3d 44, however a "voluntary departure from the former position can preclude eligibility for TTD compensation only so long as it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss." *State ex rel. McCoy v. Dedicated Transp., Inc.*, 97 Ohio St.3d 25, 34, 2002-Ohio-5305.

Traditionally, the ICO has examined the voluntary nature of the departure in light of the timing of the departure. For example, a termination, because it is often a consequence of a claimant's voluntary act, is considered a voluntary departure, which may preclude TTD compensation. *State ex rel. Watts v. Schottenstein Stores Corp.* (1980), 68 Ohio St.3d 118, 122; *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 1995-Ohio-153. However, despite that a termination would otherwise amount to a voluntary abandonment of the employment, the claimant may continue to receive compensation presuming the claimant is disabled at the time of firing. *State ex rel. Reitter Stucco, Inc.*, 117 Ohio St.3d at 73; *State ex rel. Pretty Products*, 77 Ohio St.3d at 7.

In *Reitter*, this Court found that *Louisiana-Pacific* and *Pretty Products* were not mutually exclusive, and applied the *Pretty Products* rule to find that, "a claimant whose departure is deemed to be voluntary does not surrender eligibility for temporary total disability compensation if at the time of the departure the claimant is still temporarily and totally disabled." *State ex rel. Reitter Stucco, Inc.*, 117 Ohio St.3d at 73. Therefore, "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). The Tenth District noted an exemplary case in its nunc pro tunc decision, "See also *State ex rel. OmniSource Corp. v. Indus. 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)." *State ex rel. Cordell v. Indus. Comm.*, 2014-Ohio-5561, ¶ 29

The *Reitter* court then went on to state that, “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.” *State ex rel. Reitter Stucco, Inc.*, 117 Ohio St.3d at 73. Accordingly, TTD eligibility hinges on both the departure’s voluntary nature and timing.

II. Although violating company policy may be grounds for termination of the offending employee, Ohio Law is clear that the infraction cannot be grounds for concluding that the claimant abandoned his employment so as to preclude TTD compensation.

Although the ICO and the Employer have argued that the decision in *PaySource* was made in the employer’s favor on similar facts, but more recently, the Tenth District decided *State ex rel. Ohio Decorative Products, Inc. v. Indus. Comm.*, (September 15, 2011), Franklin App. No. 10AP-498, and *State ex rel. Ohio State Univ. Cancer Research Hosp. v. Indus. Comm.*, Franklin App. No. 08AP-772, 2010-Ohio-3839, which relied on *State ex rel. Ohio Welded Blank v. Indus. Comm.*, Franklin App. No. 09AP-1027, 2009-Ohio-4646.

Similar to James, in *Ohio Welded Blank* and *Ohio Decorative Products*, the claimants, Steven Farr (Farr) and Randy Herron (Herron) respectively, each took drugs in the days before their respective injury, suffered a work injury, underwent drug testing, and the results came back positive. *State ex rel. Ohio Welded Blank*, 2009-Ohio-4646 at ¶¶24-27; *State ex rel. Ohio Decorative Products*, 2010-Ohio-_____ at ¶¶5-7. Subsequently, Farr and Herron were each terminated by their employer for violating a written work rule barring drug use, and both Farr and Herron knew they could be terminated for that behavior. *State ex rel. Ohio Welded Blank*, 2009-Ohio-4646 at ¶29; *State ex rel. Ohio Decorative Products*, 2010-Ohio-_____ at ¶10. On reasoning similar to this case, the ICO granted both Farr’s and Herron’s request for TTD compensation and rejected each respective employer’s argument that Farr and Herron voluntarily

abandoned their respective employment. The employers later filed suit in mandamus arguing that the behavior resulting in termination occurred pre-injury, and amounted to a TTD-precluding voluntary abandonment under *Louisiana-Pacific*.

The *Ohio Welded Bank* court found that no abuse of discretion occurred in the ICO's awarding of TTD compensation. Specifically, the court found that *Reiter* controlled, meaning that the timing of Farr's termination was key to the analysis. Simply put, because Farr was disabled at the time he was fired, he remained entitled to TTD compensation. *Id.* at ¶18. In this case, James was disabled and remained entitled to TTD when he was fired. In fact, James has been TTD since the date of the injury as reflected in the overpayment orders. (Supp. 99). Moreover, since the initial allowance of this claim, James' claim has been recognized for five additional conditions which shows the severity of this injury which was caused by a third party. *Id.*

Notably, the Tenth District made the following observation about *Gross II*'s application regarding an award of TTD compensation regarding pre-injury conduct:

[r]elator nonetheless contends this case is distinguishable from the noted decisions because claimant committed the act on which the termination occurred prior to the date of his injury: he ingested marijuana sometime during the week preceding his No. 08AP-77210 injury. As a result, relator asserts, claimant's situation is unlike those in *Pretty Products* and *Reitter Stucco* where the claimant violated the work rule subsequent to the injury.

Gross II, however, undermines relator's contention. *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.

Ohio Welded Bank at ¶¶19-20 referencing *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 (emphasis added). As this Court and all parties are aware, the present injury was not caused by James' actions and was, in fact, caused by a third party's actions, which makes this case even more troubling. The ICO, for unknown reasons, is now completely ignoring long-standing case law in finding that James is not entitled to TTD compensation as its entire Order is premised on James' pre-injury conduct. The ICO's Order is an abuse of discretion and contrary to law. *Gross II* undermines the Respondents' contentions in this case.

Further, the Tenth District Court of Appeals ruled the exact same way in *Ohio Decorative Products*, stating that they would continue to follow this Court's pronouncement in *Gross II*. *State ex rel. Ohio Decorative Products*, 2010-Ohio-_____ at ¶34. This Court has stated that the doctrine of voluntary abandonment has never been applied to violations of work rules that precede or are contemporaneous to an injury. *Id.* at ¶34. The Tenth District Court of Appeals has also maintained in its ruling in *Ohio Decorative Products* that although pre-injury conduct may be a reason to terminate an employee, it is not a valid or legal reason to deny an employee TTD compensation. *Id.* at ¶17. Unfortunately, the ICO has now changed course and ignored its prior decisions, the Tenth District's decision, and this Court's decisions. The Commission seems to now want to make new case law and is now ignoring not only their own prior decisions but decisions from the Tenth District and this Court without any explanation as to its about-face.

In *Ohio Decorative Products*, the facts are exactly the same as this matter. In *Ohio Decorative Products*, the Tenth District and namely its Magistrate stressed that the claimant and the ICO urged the Tenth District to continue applying the reasoning of the this Court in *Gross II* and its progeny. Now, in an obvious flip-flop of its prior position and case law, the ICO has now

changed direction and ignored case law. The Magistrate in *Ohio Decorative Products* stated quite unequivocally that the Tenth District would continue to following *Gross II* and its progeny. In addressing the Employer's argument in *Ohio Decorative Products*, then Magistrate then quoted *Gross II* indicating the this Court held that "[u]ntil the present case, the voluntary-abandonment doctrine has applied only in postinjury 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 Magistrate then continued and held that this Court found that the "doctrine has never been applied to preinjury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to apply to create to such an exception." *Id.*

Here, the Employer and the ICO do not dispute that James was medically incapable of performing the duties of his former position at the time that he was terminated. Rather, they argue that James voluntary abandoned his employment before his industrial injury. However, as set forth above, James' pre-injury activities do not preclude his eligibility for TTD compensation. Moreover, it is irrelevant that James was fired because of pre-injury drug use, rather than the post-injury positive drug test. Admittedly, in *PaySource*, the court adopted the magistrate's recommendation to grant the employer's request for a writ where the magistrate had found that the claimant's pre-injury drug use, which gave rise to a termination, occurred before the claimant was temporarily and totally disabled. *State ex rel. PaySource*, at ¶¶2, 4, 43. The timing of the termination was not the deciding factor, but rather the fact that the actions giving rise to the termination occurred before the claimant became disabled. Although that was a deciding factor in *PaySource*, the later-rendered *Ohio Welded Blank* decision is equally persuasive and the Tenth District seems to have rejected its own decision in *PaySource* as not

controlling and no longer the controlling law in Ohio. In *Ohio Welded Blank*, the court specifically noted that *Gross II* does not permit the ICO to withhold TTD compensation for pre-injury misconduct that would otherwise amount to a TTD-precluding abandonment. *State ex rel. Ohio Welded Blank*, 2009-Ohio-4646, at ¶20. In this case, the ICO was specifically ignoring the case law as its Order italicizes the word “prior” several times. James would ask this Court to follow the *Ohio Welded Blank* line of cases, and find that the ICO abused its discretion contrary to long-established law in denying TTD compensation to James and that the Tenth District’s writ of mandamus was proper.

III. Reliance on *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 does not create bad public policy that rewards illegal behavior.

It is acknowledged by both parties that James was injured at work on February 16, 2012 and was immediately rendered temporarily totally disabled. 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.” *State ex rel. Cordell v. Indus. Comm.*, 2014-Ohio-5561, ¶ 47.

The ICO’s argument that reliance on *Gross II* rewards illegal behavior, in this case smoking marijuana, surrounds the idea that finding in favor of James would reward him with TTD benefits even though he broke company rules and the law by smoking marijuana at some point before his work injury. The only way that the Employer discovered the rule breaking was through testing after the work injury. The Tenth District discusses at length in its decision on this case why this is immaterial and does not create bad public policy.

[Respondent has asserted] 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 argue[d] that the causal connection between the allowed conditions and the resulting loss of wages was severed. 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.

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.

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.

State ex rel. Cordell v. Indus. Comm., 2014-Ohio-5561 at 47-50. The Tenth District’s decision is on point with good public policy. The workers’ compensation system should be construed in favor of the injured workers as that was and continues to be its design. It is good public policy that workers injured in the course of and arising out of their employment are not denied TTD when they were not impaired at the time of their injury.

CONCLUSION

The Relator, James F. Cordell is entitled to a writ of mandamus because the Respondent’s, the Industrial Commission of Ohio, order denying TTD compensation is not supported by the evidence and case law. For the foregoing reasons, the Relator

hereby respectfully requests that this Court find in favor of the Relator and validate the Tenth District Court of Appeals' writ ordering the Industrial Commission of Ohio to award TTD compensation to the Relator.

Respectfully submitted,

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REQUEST FOR SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by Electronic

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