

IN THE SUPREME COURT OF OHIO

CASE NO. 2015-0163

**STATE OF OHIO, ex. rel.
JAMES F. CORDELL
Relator-Appellee**

-vs-

**PALLET COMPANIES INC., et. al.
Respondent-Appellants.**

**ON APPEAL FROM THE FRANKLIN COUNTY
COURT OF APPEALS, TENTH APPELLATE DISTRICT**

**BRIEF OF *AMICI CURIAE*,
OHIO ASSOCIATION OF CLAIMANTS' COUNSEL AND
OHIO ASSOCIATION FOR JUSTICE
URGING AFFIRMANCE ON BEHALF OF RELATOR-APPELLEE**

Chelsea Fulton Rubin (0086853)
Philip J. Fulton Law Office
89 East Nationwide Blvd., Suite 300
Columbus, OH 43215
(614) 224-3838 FAX (614) 224-3933
chelsea@fultonlaw.com
Counsel for *Amici Curiae*,
Ohio Association of Claimants' Counsel
Ohio Association for Justice

Christen S. Hignett (0079638)
Michael L. Squillace (001684)
Dinsmore & Shohl LLP
191 West Nationwide Blvd., Suite 300
Columbus, OH 43215
(614) 628-6880 FAX (614) 628-2890
Counsel for Respondent-Appellant,
Pallett Companies Inc.

Craigg Gould (0061630)
341 S. Third Street, Suite 300
Columbus, OH 43215
(614) 445-6123 FAX (614) 586-4012
craigg@gould-law.net
Counsel for Relator-Appellee,
James F. Cordell

Lisa Miller (0070398)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, OH 43215
(614) 466-6696 FAX (866) 500-2779
lisa.miller@ohioattorneygeneral.gov
Counsel for Respondent-Appellant
Industrial Commission of Ohio

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The National Association of Claimants' Counsel (NACCA), Ohio Chapter, was founded in 1954. It was an organization created with the purpose "to help injured persons, especially in the field of workers' compensation."

In 1963, the NACCA was changed to the Ohio Academy of Trial Lawyers. Now known as the Ohio Association for Justice (OAJ), it is an organization with over 1,500 lawyers dedicated to the protection of Ohio's consumers, workers, and families.

In 2008, the Ohio Association of Claimants' Counsel (OACC) was created to advance the founding ideals of the NACCA and to educate the public and legal community on workers' compensation issues. The OACC is a statewide organization of workers' compensation attorneys.

Amici curiae adopt the statement of facts set forth in Relator-Appellee, James F. Cordell's, merit brief.

LAW AND ARGUMENT

PROPOSITION OF LAW: THE INDUSTRIAL COMMISSION ABUSED ITS DISCRETION WHEN IT FAILED TO FOLLOW *GROSS II*, INCORRECTLY APPLYING THE VOLUNTARY ABANDONMENT DOCTRINE TO PREINJURY CONDUCT.

The Industrial Commission’s abuse of discretion is evident in this case: rather than adhere to Ohio Supreme Court precedent, the Commission utilized an unpublished memorandum decision from the Tenth District where no objections were filed to find that Mr. Cordell voluntarily abandoned his employment and was therefore not eligible for temporary total disability benefits. Because *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 (“*Gross II*”) stands for the proposition that voluntary abandonment cannot be applied to preinjury conduct, the Commission failed to follow precedent when it found that Mr. Cordell’s ingestion of marijuana before his work injury equated to voluntary abandonment. As Mr. Cordell was already disabled at the time of his termination, there was no causal break between his disability and loss of earnings. Accordingly, *amici curiae* respectfully request that this Court affirm the decision of the Court of Appeals decision granting Relator-Appellee’s request for a writ of mandamus.

“To qualify for temporary total disability compensation, an injured worker must demonstrate that he or she is medically unable to return to the former position and that the industrial injury is the reason for the loss of earnings.” *State ex. rel. Haddox v. Indus. Comm.*, 135 Ohio St.3d 307, 2013-Ohio-794, ¶ 22, quoting *State ex rel. McCoy* at ¶ 35. This Court has repeatedly emphasized that “the voluntary abandonment doctrine has been applied only in postinjury circumstances in which the claimant, by his or her own volition, severed the causal connection between the injury and post loss of earnings that justified his or her TTD benefits.” *Gross II* at ¶ 19. “The doctrine has never been applied to preinjury conduct or conduct contemporaneous with the injury. *Gross I* did not intend to create such an exception.” *Id.*

Despite this clear rule of law, the Industrial Commission applied the voluntary abandonment doctrine to preinjury conduct in the instant case:

[T]he Staff Hearing Officer made a clear mistake of law by not applying *State ex rel. Paysource v. Indus. Comm.* 10th Dist. No. 08 AP-677 (June 30, 2009). . . . Therefore, the Commission finds the work rule violation occurred prior to the industrial injury. The injured worker ingested the marijuana, leading to his termination prior to the workplace accident on 02/16/2012. The Commission further distinguishes this claim from that in Gross, because the injured worker's ingestion of marijuana was not causally related to his injury. . . . The Industrial commission further questions whether the Court's direction in Gross contemplated its holding being interpreted that an employee who tests positive for a drug test following a work injury is still eligible for temporary total disability compensation.

(Industrial Commission Order at 3).

But the Commission's decision is contrary to this Court's precedent. First, even if Mr. Cordell ingested marijuana, it was before the work injury and the voluntary abandonment doctrine does not apply to preinjury conduct. *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 2007-Ohio-4916, ¶ 19; *see also State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-449, ¶ 10 ("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.").

Moreover, the Commission incorrectly distinguished the instant case from *Gross II* because "the ingestion of marijuana was not causally related to his injury." However, *Gross II* clearly states that the voluntary abandonment doctrine does not apply to any preinjury conduct or conduct contemporaneous with the injury, regardless if the conduct causally relates to the injury. In fact, if the ingestion of marijuana was causally related to the injury, R.C. 4123.54(B) applies and can deprive a claimant of their eligibility for the receipt of temporary total disability benefits. R.C. 4123.54(B)(1)(c)(ii) and (C)(1) and (2) establish the rebuttable presumption that an employee under the influence of a controlled substance not prescribed by the employee's physician is the

proximate cause of his injury. Accordingly, the General Assembly has already enacted an exception to a claimant's eligibility for TTD benefits if an employer can show that the illegal substance was the proximate cause of the claimant's injury; there is no reason for the Industrial Commission to now utilize the voluntary abandonment doctrine to deprive claimants of compensation if employers cannot meet this burden.

Last, this Court has made clear that it is the role of the General Assembly, and not the Court or the Industrial Commission, to make policy changes:

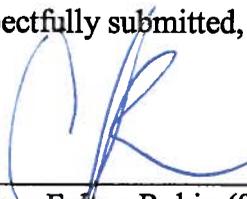
Because *Gross II* remains the law of Ohio, we are duty-bound to follow it until this court overrules it or the General Assembly acts to vitiate its holding. In light of this court's opinion here, there should be no mistake that the remedy for *Gross II*, if there is to be one, must come from the legislative branch.

State ex. rel. Haddox v. Indus. Comm., 135 Ohio St.3d 307, 2013-Ohio-794, ¶ 43 (O' Connor, concurring). The legislature has not changed the holding of *Gross II*. Accordingly, the Commission abused its discretion by exercising continuing jurisdiction to correct an alleged mistake of law when a staff hearing officer simply adhered to this Court's precedent and found that the voluntary abandonment doctrine did not apply to preinjury conduct and that Mr. Cordell was entitled to temporary total disability benefits.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court follow *Gross II*, affirm the decision of the Court of Appeals, and grant Relator-Appellee's request for a writ of mandamus.

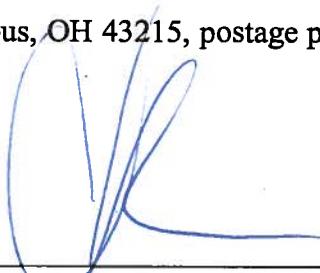
Respectfully submitted,



Chelsea Fulton Rubin (0086853)
PHILIP J. FULTON LAW OFFICE
89 E. Nationwide Blvd., Suite 300
Columbus, OH 43215
(614) 224-3838 FAX (614) 224-3933
chelsea@fultonlaw.com
Counsel for *Amici Curiae*,
Ohio Association of Claimants' Council
Ohio Association for Justice

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. Mail, postage prepaid, to Christen S. Hignett and Michael L. Squillace, Dinsmore & Shohl LLP, 191 West Nationwide Blvd., Suite 300, Columbus, OH 43215; Craigg Gould, 341 S. Third Street, Suite 300, Columbus, OH 43215, and Lisa Miller, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, OH 43215, postage prepaid, the 14th day of December, 2015.



Chelsea Fulton Rubin (0086853)