

IN THE SUPREME COURT OF OHIO

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

Relator-Appellee,

v.

Pallet Companies Inc.,

Respondent-Appellant,

and

Industrial Commission of Ohio,

Respondent-Appellant.

Case No. 2015-0163

On Appeal from the
Franklin County Court of Appeals
Tenth Appellate District
(Case No. 13-AP-001017)

REPLY BRIEF OF APPELLANT, PALLET COMPANIES, INC.

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I. Reply to Appellee's Brief

Appellee makes the mistaken presumption like the lower court, that pre-injury conduct cannot be used to find voluntary abandonment. This Court has never made that holding, rather in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162 (*Gross II*), the Court in *dicta* stated that the voluntary abandonment doctrine had not been applied to pre-injury conduct. As is well known, *Gross II* did not involve pre-injury conduct, but conduct contemporaneous to the injury. The policy considerations which evolved from *Gross II* are absent here, a fact Appellee does not admit. The concern in *Gross II* was that a voluntary abandonment finding when the misconduct was the reason for the injury was inconsistent with the no fault nature of our workers' compensation system. Those concerns are absent here, as Appellee had violated Appellant's drug-free work policy well before he was hurt. Appellee, therefore, should not enjoy the same protection as Mr. Gross.

Similarly, other than the *dicta* in *Gross II*, Appellee does not provide much in the way of this Court's holdings to support the decision of the lower court. In fact, Appellee's argument is that the decision of the lower court should be affirmed is because it is consistent with other decisions from that Court. Appellant, obviously, is asking that the lower court decisions be reversed, and along with that, the holdings cited therein be similarly reversed. These decisions again are based upon the erroneous premise that *Gross II* precludes a finding of voluntary abandonment for pre-injury conduct. Appellant did cite cases in its merit brief when this Court did indeed support a finding of voluntary abandonment for pre-injury conduct, including a positive post-injury

drug test. See Appellant's Brief, pages 6-7. Yet, Appellee ignores these cases in its merit brief.

The implication in Appellee's brief and the lower court's decision is that the only way for an employer to prevail in a case like this is to prove that the employer was intoxicated, in other words, the employees can take drugs on the job and as long as they do not exceed the legal limit, they will be fully compensated if they are hurt. Again, this ignores other pre-injury conduct which is violative of company policy. Consider the situation where a theft of company property is discovered after an injury or when an employee verbally assaults a co-employee or supervisor, then is injured before the disciplinary process can begin. In all of these instances, the employees forfeited this right to employment before an injury. The timing of the termination should have no impact upon a finding of voluntary abandonment.

It must be remembered that temporary total compensation is awarded only for an inability to return to the former position of employment. Employers frequently make accommodations after an injury to return an employee to restricted duty. Thus, if the reasoning of Appellee is adopted, an employee unable to return to his former position of employment, but who does in fact return to light duty, only to be terminated as the result of a post-injury drug test whose results are not released until after the return to light duty, will be paid temporary total compensation despite the termination because he cannot return to his former position of employment. In that case, it is the violation of the drug-free workplace policy which is the proximate cause of the loss of earnings, not the injury. It would indeed be unfair and contrary to public policy to award temporary total compensation to that person.

Appellee asserts that an employer can never use a violation of its drug-free workplace policy to preclude temporary total compensation. This is contrary to public policy and cannot have been the intent of this Court when it issued *Gross II*. Appellant agrees that strict scrutiny be given to each and every case where a termination for pre-injury conduct is sought to bar temporary total compensation. That being said, it is the responsibility of the Industrial Commission to make these inquiries and determine whether or not said termination is pretextual or retaliatory. As the resolution of factual disputes is within the sole province of the Industrial Commission, a reviewing court should not disturb these factual findings. In the case at bar, as there is no evidence that Appellee's termination was retaliatory or pretextual, the finding of voluntary abandonment must stand.

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

II. Reply to Brief of Amicus

Amicus, as Appellee, erroneously assumes that *Gross II* is dispositive of this case. As set forth above, *Gross II* did not involve pre-injury conduct as the ground for termination, it was the act contemporaneous with the injury which precipitated the termination. Again, the rationale in *Gross II* had nothing to do with pre-injury conduct, as it involved the preservation of the workers' compensation system as a no fault one. A finding of voluntary abandonment for conduct which is contrary to company policy before an injury occurs does not threaten the no fault nature of this system.

Amicus' reliance upon *State ex rel. Haddox v. Indus. Comm.* (2013), 2013-Ohio-794, 135 Ohio St.3d 307 is similarly misplaced as the Court held that because the

discharge was “for the same misconduct that caused his industrial injury, the discharge was not tantamount to a voluntary abandonment.” *Id.* at 34. No such conduct occurred here as the misconduct had nothing to do with the injury. This highlights the actual holding in *Gross II*, not the *dicta* set forth therein. The lower court obviously misinterpreted *Gross II* to create a rule of law which was never set forth in that decision. Appellant asserts that a finding of voluntary abandonment is proper for *any* pre-injury misconduct, whether or not it involves a post-accident drug test.

Amicus is correct when it cites that OAC 4123.54(B)(1) and (C)(1) set forth an exception to *Gross II* if a claimant’s intoxication is the proximate cause of the injury. This case, however, does not involve this statute and contrary to Amicus’ assertion, does not require legislative action in order for Appellant to prevail. This statute affects the compensability of the entire claim, not the payment of temporary total compensation. In this case, all of Appellee’s medical bills were paid and future temporary total compensation can be paid pursuant *State ex rel. McCoy v. Dedicated Transport*, 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51 (2002), if Appellee returns to work and while working becomes disabled again as the result of the allowed conditions. Thus, Appellee is no worse off than any other claimant who was found to have voluntarily abandoned his employment.

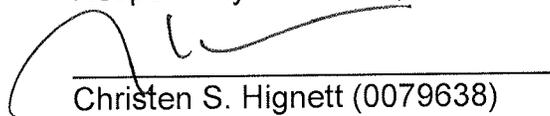
This case should not focus on the timing of the termination. A positive drug test is not the only misconduct which could come to light following an injury. An employee who steals or misuses company property before an injury, yet whose misconduct remains undiscovered until after an injury would similarly be subject to termination and therefore ineligible for temporary total compensation. Thus, the decision to be made by

the Industrial Commission is whether or not the termination is pretextual or retaliatory. If not, then the factual determination that a voluntary abandonment occurred should not be disturbed by a court sitting in mandamus.

It is contrary to public policy for a person who takes drugs contrary to an established company rule which mandates termination for a violation of this rule, to receive temporary total compensation. In this situation, the employee has forfeited all rights to compensation at the time of the rule violation, thus a subsequent workplace injury is not the proximate cause of any loss of earnings as there was no entitlement to those earnings at the time the employee knowingly violated the company rule. Appellee lost all right to compensation the minute he smoked marijuana before going to work.

Appellee voluntarily abandoned his employment; therefore, the decision of the Court of Appeals should be reversed.

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 December 22, 2015, upon:

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