Supreme Court of Ohio Clerk of Court - Filed December 23, 2015 - Case No. 2015-0163

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
vs.	:	from the Court of Appeals,
	:	Tenth Appellate District,
PALLET COMPANIES, INC., et al.,	:	Franklin County, Ohio
	:	Case No. 13AP-1017
Respondents/Appellants.	:	

REPLY BRIEF OF APPELLANT, INDUSTRIAL COMMISSION OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LAW AND ARGUMENT 1

Appellant's Proposition of Law No. 1:

Reliance on *State ex rel. Gross v. Indus. Comm*., 115 Ohio St.3d 249, 2007-Ohio-4916 without considering the decision in *State ex rel. PaySource v. Indus. Comm*., 10th Dist. Franklin No. 08AP-677, 2009 WL 3246775 (June 30, 2009), creates bad public policy that rewards illegal behavior……..... ……1

Appellant's Proposition of Law No. 2:

When the Industrial Commission had some evidence to support its order that a claimant violated a written work rule thereby barring his receipt of TTD compensation, a writ of mandamus is not appropriate.. 3

CONCLUSION.....5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Cases: **Page(s)**

State ex rel. Gross v. Indus. Comm.
115 Ohio St.3d 249, 2007-Ohio-4916.....1, 3, 4

State ex rel. Louisiana-Pacific v. Indus. Comm.
72 Ohio St.3d 401, 650 N.E.2d 469 (1995) 2, 4

State ex rel. PaySource v. Indus. Comm.
10th Dist. Franklin No. 08AP-677, 2009 WL 3246775 (June 30, 2009) 1, 3, 4

State ex rel. Pretty Products, Inc. v. Indus. Comm.
77 Ohio St.3d 5, 670 N.E.2d 466 (1996) 1

State ex rel. Reitter Stucco v. Indus. Comm.
117 Ohio St.3d 71, 881 N.E.2d 861 (2008) 1

LAW AND ARGUMENT

Appellant's Proposition of Law No. 1:

Reliance on *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, without considering the decision in *State ex rel. PaySource v. Indus. Comm.*, 10th Dist. Franklin No. 08AP-677, 2009 WL 3246775 (June 30, 2009), creates bad public policy that rewards illegal behavior.

The court of appeals erred in applying the holding of *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") to this case, as *Gross II* is distinguishable and, therefore, is not applicable. In *Gross II*, the termination of the claimant from the workplace was causally related to the claimant's injury. The entire point of *Gross II* was to reiterate that Ohio's workers' compensation scheme is "no fault" in nature. Thus, the claimant's actions, which caused his injury, could not preclude TTD compensation, even if they were in violation of the employer's rules. In the present case, however, Cordell's violation of the work rule was not the cause of his injury. As such, the application by the court of appeals of *Gross II* to the facts of this case represents an unwarranted extension of the holding in *Gross II* to situations where the violation of the work rule was not the cause of the injury.

The evolution of the voluntary abandonment doctrine does not support the court of appeals' legal conclusion that a knowing violation of a workplace rule prohibiting the use of illegal substances will not preclude eligibility for TTD compensation if the violation occurred prior to any industrial injury or disability and was not the cause of the industrial injury. In both *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5, 670 N.E.2d 466 (1996) and *State ex rel. Reitter Stucco v. Indus. Comm.*, 117 Ohio St.3d 71, 88 N.E.2d 861 (2008), the claimant was temporarily and totally disabled prior to the time of his workplace violation and termination and was found eligible for TTD compensation. Neither is applicable here, as Cordell's violation occurred prior to the injury and disability.

In this case, the evidence indicates that, prior to his industrial injury or disability, Cordell was using marijuana in violation of Pallet's written work rule. There is no indication that such use caused the injury. Thus, even absent the industrial injury, Cordell violated the employer's work rule and would have been terminated. For the courts to look only to the time of Cordell's actual removal, and not to when the violation occurred, creates bad public policy as pre-injury illegal behavior is rewarded. The commission had some evidence and was in conformance with law in determining that Cordell had voluntarily abandoned his employment and was not eligible for TTD compensation.

The commission correctly followed *State ex rel. Louisiana-Pacific v. Indus. Comm.*, 72 Ohio St.3d 401, 650 N.E.2d 469 (1995), as this Court looked to the timing of the abandonment and noted that, although the employer formalized the separation, it was the claimant who had initiated it when he chose to engage in the misconduct that caused the termination. This was an application of the long-held principle that "'one may be presumed to tacitly accept the consequences of his voluntary acts.'" *Louisiana-Pacific*, 72 Ohio St.3d at 403, 650 N.E.2d at 469. Here, Cordell's actions prior to his injury and termination resulted in his termination.

The court of appeals, by failing to apply the voluntary abandonment doctrine to pre-injury conduct, creates bad public policy that rewards illegal behavior. In cases where the claimant has ingested drugs and then had an accident, the drug testing will always occur after the injury. As such, in these cases, the termination will also always be after the injury occurred and most likely after the disability arose. If TTD cannot be denied in these circumstances, the claimant is being rewarded for violating a policy that forbids illegal behavior only because, by the time the results of the drug test are received and the termination occurs, the claimant is disabled.

The commission, in its decision in this case, considered this exact scenario and specifically stated that it questioned whether "*Gross II* 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. If that is the Court's holding in *Gross II*, then in the State of Ohio, a post-accident drug test is irrelevant and has no effect on eligibility for temporary total disability compensation." (Stipulation of Evidence, pp. 69-70; "S. __"). Therefore, there is a compelling public policy argument that a shift in the application of the voluntary abandonment doctrine should be considered, as the current rationale will never support a basis for finding voluntary abandonment in cases where terminations are based on a failed drug test. The focus should be on the claimant's action in committing a violation of the written work rule, not the time of the employer's action in terminating the claimant.

Here, Cordell voluntarily abandoned his position of employment, due to his ingestion of drugs and knowingly in violation of the employer's work rules. As such, the court of appeals erred in failing to apply *State ex rel. PaySource v. Indus. Comm.*, 10th Dist. Franklin No. 08AP-677, 2009 WL 3246775 (June 30, 2009).

Appellant's Proposition of Law No. 2:

> **When the Industrial Commission had some evidence to support its order that a claimant violated a written work rule thereby barring his receipt of TTD compensation, a writ of mandamus is not appropriate.**

The commission did not abuse its discretion or act contrary to law in this matter. In finding that Cordell voluntarily abandoned his employment and was, therefore, not entitled to receive TTD compensation, the commission explained that it relied upon the decision in *PaySource*, supra. The facts in *PaySource* are similar to this case as the use of marijuana, which was the violation of the work rule, was prior to the injury and resulting disability. (S. 68).

In *PaySource*, Shoemaker was fired from PaySource for a positive post-injury drug test, but at the time he was fired, Shoemaker had not yet been released to return to his former position of employment. The court of appeals found that the claimant did voluntarily abandon his employment and, therefore, was not entitled to TTD compensation. As in *PaySource*, the commission found here that Cordell had voluntarily abandoned his employment under the terms of the *Louisiana-Pacific* test, as Cordell's ingestion of drugs, prior to the injury and resulting disability, was a knowing violation of Pallett's written work rule. (S. 69).

The commission further explained its reasoning by distinguishing its holding from that in *Gross II* on the basis that Cordell's use of marijuana was not causally related to his injury.

> In *Gross (II)*, the work rule violation *was the cause* of the injury. The Commission further questions whether the Court's direction in *Gross (II)* 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. If that is the Court's holding in *Gross (II)*, then in the State of Ohio, a post-accident drug test is irrelevant and has no effect on eligibility for temporary total disability compensation. The Commission rejects this position as *Gross (II)* did not contemplate or consider the effect of a positive drug test on eligibility for temporary total disability compensation.

(Emphasis in original) (Stip. 70). The commission, in its decision, properly determined that *Gross II* was limited to situations where the work-rule violation was the *cause* of the injury. In the present case, Cordell's violation of the work rule was not the cause of his injury and therefore *Gross II* is inapplicable. Thus, it is clear that the commission not only relied upon some evidence to support its decision, but it also explained its reasoning to support its decision to deny Cordell TTD compensation. In this mandamus action, the court of appeals impermissibly reweighed the evidence. The commission, as the trier of fact, had some evidence to deny Cordell TTD compensation.

CONCLUSION

The commission did not abuse its discretion nor act contrary to law. The court of appeals committed error in issuing a writ of mandamus ordering the commission to vacate its finding of voluntary abandonment when the decision is in conformance with law and evidence of record supports the commission's decision. For these reasons, this Court should reverse the decision and judgment of the court of appeals and deny the requested writ of mandamus.

Respectfully submitted,

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I hereby certify that a copy of the foregoing was served on this 23rd day of December, 2015, to:

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