

Voluntary Abandonment

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I. Causal Relationship

- A. There must be a causal connection between the injury and the disability. *State ex rel. Thompson v. Roadway Express, Inc.* (1986), 12 Ohio St.3d 76.
- B. When the employee has taken action that would preclude return to work, the causal connection is broken since it is the employee's own action, rather than the injury, which prevents return to employment.
- C. One who has voluntarily retired and has no intention of ever returning to his former position of employment is not prevented from returning to that former position of employment by the industrial injury. A worker is prevented by an industrial injury from returning to his former position of employment where, but for the industrial injury, he would return to such former position of employment.
- D. Focus is on abandonment of the entire workforce, not a specific employment.

II. Voluntary v. Involuntary

- A. **Definition:** If the injured worker abandons the former position of employment for reasons other than the industrial injury, the abandonment is voluntary.
- B. **Incarceration**
 - 1. An employee is presumed to intend the consequences of his/her voluntary act. Therefore, incarceration is considered to be voluntary. *State ex rel. Ashcraft v. Industrial Commission* (1987), 34 Ohio St.3d 42
 - 2. However, if an injured worker is already receiving PTD and is subsequently incarcerated, "it is of no consequence" and does not break the causal link between the injury and the and the inability to work. *State ex rel. Brown v. Industrial commission* (1993), 68 Ohio St.3d 45.

C. Termination under Louisiana Pacific

1. Three requirements: (1) written work rule that clearly defines the prohibited conduct; (2) the prohibited conduct is identified by the employer as a dischargeable offense; (3) the employer knew or should have known that the offense was a dischargeable offense. *State ex rel. Louisiana Pacific Corp. v. Industrial Commission* (1995), 72 Ohio St.3d 401
2. Emphasizes the importance of a well crafted handbook which outlines as much prohibited conduct as possible. Case law makes no exceptions to the Louisiana Pacific requirements even in situations where common sense would dictate termination.
 - a. *State ex rel. Saunders v. Cornerstone Foundation Systems* (2009), 123 Ohio State 3d 40: Insubordination and revised work rule not communicated to employee
 - b. *State ex rel. McKnabb v. Indus. Comm.* (2001), 92 Ohio St.3d 559: Employee was fired for being tardy.
 - c. *State ex rel. Honey Baked Ham of Ohio Inc. v. Indus. Comm.*, 2004-Ohio-2496, employee terminated for insubordination
 - d. *State, ex rel. Vaught v. Indus. Comm.* 2015-Ohio-1228, failure to return to work or make any contact with employer
3. IC hearings may become mini discharge hearings and documentation is a must, particularly if the injured worker was terminated post-injury.
 - a. “Because of the potential for abuse, a post injury firing must be carefully scrutinized.” *State ex rel. McKnabb v. Industrial Commission* (2001), 92 Ohio St.3d 559
 - b. IC was directed to consider whether a light duty job was offered in good faith. Injured worker refused to accept offer of work on evening shift because she had two teenage children at home. IC was to consider whether employer offered the position knowing that the injured worker would not accept it. *State ex rel. Ellis Super Valu, Inc. v. Industrial Commission* (2007) 115 Ohio St.3d 224
 - c. Injured worker was terminated for being “grossly incompetent” and because there were “financial discrepancies.” Handbook listed “theft of company property” as a dischargeable offense and that appeared to be the actual basis for the termination. Court held that the employer “mischaracterized inefficiency as dishonesty and failed to substantiate allegations of “theft.” *State ex rel. Gordon v. Industrial Commission* (2008-Ohio-299)

- e. An omission on a job application, in order to constitute falsification, must be deliberate and motivated by intent to deceive in order to preclude temporary total compensation. *State ex rel. Nick Strimbu, Inc. v. Industrial Commission* (2005), 106 Ohio St.3d 173
 - f. IC is required to examine the details of the termination to make an appropriate determination. *State, ex rel. Brown v Hoover Universal Inc.*, 132 Ohio St.3d 520 (2012). Injured worker was terminated for violating the company's absence policy. This termination was the basis for denial of TTD. Injured worker claimed (1) that he did not understand the policy and (2) the employer had improperly calculated his "bank of hours" withdrawals. IC and Court rejected his first argument since he signed a statement that he read and understood the policy. IC held that injured worker's termination met the *Louisiana – Pacific* criteria and that the injured worker violated the written work rule. Evidence showed that injured worker had grieved his termination but did not prevail. Court ruled that IC was required to reexamine the issue of the employer's calculation of the absentee hours.
- 4. Termination must not arise out of misconduct arising out of activity which led to the injury. *State ex rel. Gross v. Industrial Commission* (2007), 115 Ohio St.3d 249
 - 5. Termination must not arise while injured worker is unable to return to work. *State ex rel. Pretty Products v. Industrial Commission* (1996), 77 Ohio St.3d 5; *State ex rel. OmniSource Corp. v. Industrial Commission* (2007), 113 Ohio St.3d 303.
 - 6. Doctrine of voluntary abandonment does not apply to termination for a pre-injury violation which is not detected until after the injury. *State ex rel. Cordell v. Pallet Companies, Inc.*, 2014-Ohio-5561 – Relying on principles from *State ex rel. Gross v. Indus. Comm.*, 2007-Ohio-4916 and *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 2009-Ohio-4646; *State ex rel. Ohio State University Cancer Research Hospital v. Industrial Commission*, 2010-Ohio-3839. See also *State ex rel. Tolle v. Spherion of Mid-Ohio, Inc.*, 2015-Ohio-3593 (positive post-accident drug test)

D. Departure to perform other work

- 1. An injured worker who leaves the employer of record to work for a different employer is eligible for employment. *State ex rel. Baker v. Industrial Commission* (2000), 89 Ohio St.3d 376
- 2. An injured worker who leaves the employer of record and is terminated under conditions that satisfy *Louisiana Pacific* by a subsequent employer

may be considered to have voluntarily abandoned the workforce if no subsequent employment is obtained. *State of Ohio ex rel. Rhenium Alloys, Inc. v. Industrial Commission*, 2010-Ohio-1379

3. An injured worker must have a job at the time of the alleged disability. *State ex rel. Eckerly v. Industrial Commission* (2005), 105 Ohio St.3d 428
4. An injured worker can abandon a light duty job. *State ex rel. Santiago v. Industrial Commission*, 2010-Ohio-1020
5. A teacher does not voluntarily abandon employment at the end of a school year. The injured worker's intent is what determines whether the termination of employment is a voluntary abandonment. *State ex rel. Glenn v. Industrial Commission* (2007-Ohio-6536)

E. Retirement

1. An employee who retires prior to becoming PTD is not eligible for compensation if the retirement is voluntary and constitutes an abandonment of the entire job market. *State ex rel. CPC Group, General Motors Corp. v. Industrial Commission* (1990), 53 Ohio St.3d 209; *State, ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202 (1994)
2. An employee who retires after becoming PTD is eligible for compensation regardless of the nature of the retirement. *State ex rel. Brown v. Industrial Commission* (1993), 68 Ohio St.3d 45
3. A voluntary retirement will not become involuntary if the condition worsens after the voluntary retirement. *State ex rel. Smith v. Industrial Commission* (1990) 50 Ohio St.3d 45
4. Forced retirement unrelated to the injury does not entitle an injured worker to temporary total compensation. *State ex rel. Williams v. Coca Cola, Inc.* (2006), 111 Ohio St.3d 491
5. The voluntary nature of abandonment of the workforce is a factual question within the IC's final jurisdiction. At the time or her decision to retire IW had been released to return to work with restrictions. She withdrew from her rehabilitation program because she was retiring. She admitted that there was not medical advice that she should retire due the industrial injury. She made no subsequent to re-enter the workforce. The Court sustained objections to the magistrate's decision and held that there was substantial evidence to uphold the IC's determination that the IW voluntarily abandoned the workforce and thus was not entitled to PTD.

The Court distinguished *Pretty Products* because the case did not involve violation of a written work rule or TT. *State ex rel. Washington v. Indus. Comm.*, 2015-Ohio-3897

6. The IC must determine whether retirement is voluntary or involuntary when that issues is raised because this determination is critical to eligibility for PTD. *Mackey v. Ohio Dept. of Educ.* (2011), 130 Ohio St.3d 108.
7. The IC may rely upon the testimony of the injured worker. In this case injured worker testified that she would not have retired except for the shoulder injury. The IC may also consider the financial implications in determining the motivation for retirement. *AT&T v. Indus. Comm.*, 2012-Ohio-3380
8. The IC may rely on contemporaneous medical records to determine whether a departure was due to the allowed conditions in the claim. *Black v. Indus. Comm.*, 2012-Ohio-2589
9. There is a two-step analysis involved in the process of determining voluntary abandonment in connection with a request for PTD. The first step requires the IC to determine if the job departure/retirement was voluntary or involuntary. If the departure was involuntary, the inquiry ends. If the IC determines the departure was voluntary, the IC must consider whether the job departure is an abandonment of the workforce in addition to an abandonment of the job. *Black v. Indus. Comm.*, 2012-Ohio-2589
10. Because voluntary job abandonment is an affirmative defense, the burden of proof with respect to demonstrating voluntary abandonment/job departure falls upon the employer or the administrator. *Black v. Indus. Comm.*, 2012-Ohio- 2589

F. Drug Use

1. Temporary total compensation may be denied where an employee is terminated for violating an employer's drug policy. *State ex rel. Cobb v. Industrial Commission* (2000), 88 Ohio St.3d 54
2. However, if at the time of the termination the injured worker is incapable of returning to work, *Pretty Products* controls and the employee is entitled to compensation. *State ex rel. Ohio Welded Bank v. Industrial Commission*

3. IC may reject affidavit from employer regarding employee's refusal to give sufficient urine for a sample. *State ex rel. Cherryhill Management, Inc. v. Industrial Commission* (2007), 116 Ohio St.3d 27

III. Other Cases

- A. *State ex rel. Apostolic Christian Home, Inc. v. King*, 2009-Ohio-5670: Injured worker returned to work with restrictions in a light duty position. She was terminated for alleged violation of written work rule. IC held that Omni-Source case was controlling and that injured worker could not abandon her position because she was not capable of performing her former position of employment. Court held that IC needed to adjudicate the issue of voluntary abandonment and that injured worker's voluntary abandonment of light duty position would preclude payment of TTD.
- B. *State, ex rel. Scott v. Industrial Commission*, 2009-Ohio-6769: Injured worker signed voluntary retirement papers while he was receiving TTD. IC terminated TTD with finding that he had voluntarily abandoned his employment. Court vacated IC order and applied Pretty Products analysis, stating IC needed to consider the medical evidence to determine if injured worker is entitled to TTD.
- C. *State ex rel. Lackey v. Industrial Commission*, 2009-Ohio-4208: IC did not abuse its discretion in determining that injured worker's retirement was a voluntary retirement and rendered him ineligible for TTD. Injured worker was not receiving TTD at the time he retired and there was no contemporaneous medical evidence that he was unable to work or experiencing significant problems from the allowed conditions. Attorney's letter to TPA stating that the retirement was due to increasing severity of pain in the knee was not medical evidence. The fact that injured worker did not seek any other employment following his retirement and the lack of contemporaneous medical evidence supporting a causal relationship between the injury and the retirement was sufficient to support the IC decision.
- D. *State ex rel. Ohio Welded Bank v. Industrial Commission*, 2009-Ohio-4646: IW sustained significant work injuries. He was drug tested in the ER and found positive for marijuana. Employer terminated him for violation of its policy and argued that since the ingestion of marijuana occurred before the injury, the injured worker had abandoned his employment and was not eligible for TTD. Court disagreed. The date of the infraction was not controlling. On the date of the termination, injured worker was not capable of working and Pretty Products, and Gross require payment of TTD. Employer never argued that the drug use caused the injury.

State ex rel. Adkins v. Industrial Commission, 2009-Ohio-5777: IC determined that IW had voluntarily abandoned his employment and denied TTD. Court carefully examined the employer's policies and determined that IC incorrectly

denied TTD. Policy supported discharge after three consecutive absences. There was evidence that the policies were inconsistently applied. There was indication that employer initially stated it would give IW a written warning first but then terminated him. IW actually only missed 2 days and came in late on the third day. Writ was granted.

- E. *State ex rel. Saunders v. Cornerstone Foundation Systems* (2009), 123 Ohio State 3d 40, 2009-Ohio-4083: One month after his injury IW was terminated for refusing to run a bulldozer as ordered by his supervisor. IC denied TTD based upon belief that rule permitting discharge for subordination was part of the handbook received by IW. In fact, the handbook IW received did not contain a specific rule on insubordination. Court granted writ since *Louisiana-Pacific* criteria was not met.
- F. *State ex rel. Santiago v. Industrial Commission*, 2010-Ohio-1020: Employer had offered light duty work which IW worked within his restrictions for several weeks. He then quit his job because of a scheduling conflict. IC decision was not dependent upon the offer of employment since IW had been working the job. *See also State ex rel. Clevenger v. Ohio Staff Leasing, Inc.*, 2009-Ohio-3085
- G. *State of Ohio ex rel. Rhenium Alloys, Inc. v. Industrial Commission*, 2010-Ohio-1379: In September 2005, IW was terminated from his position Rhenium due to verbal abuse of co-workers. He was subsequently diagnosed with CTS and filed a claim against Rhenium in late September 2007. In January 2006 IW began employment with another employer. He was terminated from that employment in October 2007 due to a positive drug test. In March 2008 a request was made for CT surgeries which were performed 4/2/08 and 6/2/08. In October 2008 request made for TTD commencing 4/2/08. BWC awarded TTD and Rhenium appealed. SHO granted TTD without addressing issue of voluntarily abandonment issue. Court granted writ of mandamus. There was no dispute that IW had abandoned his employment with Rhenium, however there was also an issue of whether IW had abandoned his employment at second employer. Court found no evidence that IW had re-entered the workforce after his termination with second employer and further found that IW's termination could have been viewed as voluntary abandonment. Accordingly, the IC should have considered this issue.
- State ex rel. Galligan v. Industrial Commission* (2010), 124 Ohio St.3d 233, 2010-Ohio-3: Employer's failure to enter its employee handbook into the record does not automatically defeat a claim of voluntary abandonment. Other records in the file established that injured worker had been advised in writing that any further violation of any further company work rule would result in termination.
- H. *State, ex rel. Sanderson v. Indus. Comm.* 2011-Ohio-5285: Injured worker was released to return to work with restrictions. She returned to work and performed light duty work. The following day she attempted to call off work and was told

she had to speak to a particulate person, which she refused to do. She worked approximately 5 hours and then left work without speaking to anyone. She was terminated for violating a work rule against leaving work without permission. Magistrate ruled that IC should have determined whether injured worker was ill when she left work and if so, whether she needed to leave work quickly and without a supervisor's permission. Court disagreed. It was clear she left work without permission and there was no evidence that the departure had anything to do with her work-related injuries.

- I. *State, ex rel. Mackey v. Ohio Dept. of Edn.* 130 Ohio St.3d 108 (2011). IC acted within its right by invoking continuing jurisdiction to correct a clear mistake of law. In this case the SHO order regarding PTD did not address the issue of voluntary/involuntary retirement which had been argued extensively at the hearing. The order denied PTD. The employer filed for reconsideration. The IC granted the motion for reconsideration and set the claim for hearing on the merits. Thereafter, the IC ruled that the retirement was voluntary. Injured worker argued that the IC abused its discretion in re-opening the issue of PTD and in denying the PTD application. Court denied mandamus relief.
- J. *State, ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119 (2011): Injured workers sustained a knee injury in 2001. He returned to work for 15 months and moved to have additional conditions allowed in his knee. He filed retirement papers in July 2004 without any mention of his knee condition. He continued to work full time until his retirement in October 2004. In August 2004, his attorney wrote a letter to the employer's third-party benefits administrator stating that he was retiring because of his injury. There was no contemporaneous medical evidence that his ability to work was compromised by his knee conditions. In December 2004 surgery was performed based upon newly allowed conditions. IC denied TTD based upon a finding that injured worker voluntarily retired and also finding that this was a voluntary abandonment of the entire job market. Court relied upon a number of factors, including (1) fact that in 17 months after retirement, injured worker make no attempt to seek other work; (2) injured worker had continued to work full time for a year before submitting his retirement notice; (3) there was no contemporaneous medical records to suggest that his ability to work was compromised. Court was not persuaded by his affidavit or the letter from his attorney.
- K. *State, ex rel. Hunt v. Roadway Express, Inc.* 2012-Ohio-5191: Prior decision from IC determined that injured worker was barred from receiving TTD because he had voluntarily resigned from employment. Injured worker then filed for PTD. IC did not reexamine the issue of voluntary abandonment. Court held that TTD is barred if injured worker voluntarily resigned from his current employer. In order to bar PTD, the employer must show that the injured worker abandoned the entire workforce, not just his current employment. The claim was remanded to IC to address the issue of whether injured worker abandoned the entire workforce.

- L. *State, ex rel. Jacobs v. Indus. Comm.* 2012-Ohio-3763: Injured worker reported to work a light duty position. She worked one hour and left work complaining of pain and insinuating that she would follow up with her physician that week. Employer did not hear from injured worker and learned that she never made an appointment with her physician. Employer sent an “absent without notification” letter. Injured worker did not respond. Employer mailed a second letter (after she had been out more than two weeks) giving her one more chance to respond. After no response was received, injured worker was terminated. Court held this was a voluntary abandonment of employment, precluding TTD. Court overruled the magistrate’s decision. No written job offer was required, because injured worker actually reported for work.
- M. *State, ex rel. Kelsey Hayes Co. v. Grashel*, 138 Ohio St.3d 297 (2013): Ohio Supreme Court overruled the Court of Appeals decision and ruled that since the IC, in 2005, had conclusively established that the exacerbation of injured worker’s symptoms which forced him to stop working was due to smoking, not the allowed conditions, the IC abused its discretion in finding that his decision to stop working was not an voluntary abandonment when considering his PTD application. In making this ruling the IC had relied upon medical evidence which it had previously rejected.
- N. *State ex rel. Washington v. Industrial Commission*, 2015-Ohio-3897: Court denied injured worker’s request for mandamus. Following a back surgery and various periods of TTD, injured worker’s physician returned her to work with restrictions, and that the restrictions were temporary. She then submitted a retirement application. Following that her physician submitted a C-84 certifying TTD and she underwent a third low back surgery. Based on a state examination report, BWC later terminated TTD based upon MMI. Injured worker then filed for PTD compensation. IC found she voluntarily abandoned her employment and the workplace. The court of appeals denied mandamus, reversing the magistrate’s decision, finding she had withdrawn from her rehabilitation program because she was retiring, and she admitted she did not receive any medical advice that she should retire from the workforce due to her industrial injury. The court also found that the fact she was receiving wage continuation at the time of her retirement did not require a different result. Receipt of wage continuation or TTD compensation does not preclude a finding that a claimant has voluntarily abandoned the workforce for reasons unrelated to his or her injury. Finally, the court distinguished this case from *Pretty Products. v. Indus. Comm.* on the grounds that *Pretty Products* involved TTD compensation and voluntary abandonment based on termination due to a post-injury work rule violation.
- O. *State, ex rel. Eddy v. Indus. Comm.*, 2016-Ohio-387: Employee sustained an injury but was released to work without restrictions four days later. Thereafter, employee was on vacation and while on vacation discovered that she had breast cancer. IC denied TT, finding that employee’s absence from work was voluntary. There was some question as to whether the employee had been terminated from

employment based upon employer's statement that employee was not going to be put on the schedule because of her cancer treatments. Court ruled that this was a temporary medical discharge. Employee's physician certified a period of TT, however nothing in the doctor's records showed any change in employee's allowed conditions. Court held there was evidence in the record to support the IC's determination that employee's absence from work was not due to the allowed conditions but was voluntary in nature.

- P. *State ex rel. Frank Strahin v. Indus. Comm.*, 2016-Ohio-1323: Court of Appeals affirmed denial of a writ of mandamus and denied a request for TTD. Injured worker was released to work full-duty and continued to work full-duty with no restrictions for approximately three years and admitted to "looking into" retirement during this period. His retirement forms indicated his reason for separation was "retirement." He did not check the provided box for "health" as a reason. Injured worker argued that there was evidence that his retirement was medically-induced and relied on a note from his physician indicating increased pain due to a "flare-up of his meniscus tear." The Commission and 10th district found this to be insufficient evidence. The Court noted that he testified at the IC hearings that he was contemplating retirement while he was working full duty with no restrictions. He also admitted that his retirement was motivated at least in part by upcoming changes to the PERS system. Court noted that there were no records in the parties' stipulation of evidence which would indicate that he was having any problems with his knee or receiving any supportive care at the time he retired.