

MEMORANDUM

To: Kim Griffin, Manager, Policy and Support
From: Tom Sico, Director, Legal Operations
Subject: Voluntary Abandonment
Date: January 22, 2002

The purpose of this memo is to provide general guidelines for claims personnel to utilize in evaluating issues concerning voluntary abandonment of employment and the payment of temporary total compensation. The memorandum includes examples as illustrations.

Voluntary Abandonment

Generally, the voluntary abandonment of employment bars an injured worker from the receipt of temporary total compensation. Voluntary abandonment arises when a worker leaves the job at which he/she was injured for reasons not related to the injury or otherwise removes himself/herself from the workforce. The rationale is that when a claimant has voluntarily abandoned employment, there is no longer a loss of earnings and therefore, no justification for the continued payment of temporary total compensation.

The courts have determined three ways an injured worker will be considered to have "voluntarily abandoned" employment thereby forfeiting the right to temporary total compensation. They are:

1. retirement,
2. termination for violation of a written work rule or policy, and
3. abandonment of the work force.

RETIREMENT

Retirement: (for reasons not related to the injury) When an injured worker retires from his former position of employment for reasons not related, he/she is barred from receiving temporary total compensation. By contrast, a retirement, which is caused or induced by the injury is not voluntary and does not bar temporary total.

In **State ex rel. Jones Laughlin v. Industrial Commission, 29 Ohio App. 3d 145 (1985)**, the court held that a former employee who has voluntarily "retired" and has no intention of returning to their former position of employment is not entitled to continuing temporary total. In **Jones Laughlin**, the claimant took a regular pension with the employer and voluntarily retired from the workforce. The court reasoned that the retirement makes the worker's own action, rather than the injury, responsible for the inability to return to work. Therefore, if a claimant takes regular retirement and it is not induced or caused by the injury, he/she is no longer entitled to payment of temporary total.

Medical or disability retirement which is related to the injury will not bar temporary total, however, temporary total may still be barred if it can be shown that the medical or disability retirement is caused by other medical conditions or disabilities not connected to the injury.

In State ex rel. Rockwell International v. Industrial Commission, 40 Ohio St. 3d 44 (1998), the court held that when a claimant's retirement is causally related to the industrial injury, the retirement is not considered voluntary, therefore temporary total is not barred.

If retirement is pursuant to a negotiated settlement, it is not considered to be voluntary abandonment and will not foreclose temporary total. By per curiam decision in **State ex rel. Schack v. Industrial Commission (2001) 93 Ohio St. 3d 247**, the court held that leaving employment under a negotiated settlement will not be considered voluntary abandonment. In that case, the claimant resigned and "retired" pursuant to the terms of a negotiated lawsuit between the claimant and the employer. The claimant returned to work at another employer and subsequently filed for temporary total from the previous employer. The court determined that the "retirement" was not voluntary (terms of a negotiated lawsuit) and temporary total was not forfeited.

Standard of Proof

To show or prove "voluntary abandonment" as a defense to the payment of temporary total, it is imperative to review all related pension and retirement documents, social security documents, and of course, all relevant medical documents.

Scenarios

The claimant was 63 years old when he was injured at work in 1991. The claim is allowed for a lumbar sprain and a herniated disc at L5-S1. He received physical therapy and medications. After 1 year on temporary total, the claimant returned to work with lifting restrictions, which are accommodated by the employer. He continues to see the doctor for back pain intermittently. Six months after his return, the employer offers all employees a \$10,000 bonus if they retire at age 65. The claimant accepts the offer and resigns and retires at the age of 65. He begins to receive a small pension from the employer's 401K plan and has applied for Social Security. Six months later, the claimant alleged an exacerbation of his injury, has back surgery and applies for temporary total.

This is "voluntary abandonment" of employment because the claimant retired. He has removed himself from the work force, therefore temporary total is precluded.

Bob Laborer, 48-year-old claimant, left knee surgery, eventually has a total knee replacement, receives temporary total and returns to work. The knee surgery was successful except for occasional pain and stiffness. Bob continues to work and see the doctor. He takes medication and does home exercises. Pain and stiffness cause Bob to miss work at least 4 times a month. His doctor tells him a different and less strenuous job would be better. Bob applies for other jobs as a supervisor with the company and is

unsuccessful. As a 30-year employee, Bob can retire on the company's pension plan at anytime with a full pension. Bob retires and begins to receive his pension; after three months, Bob is bored and broke and gets a job as a night auditor at a local motel. Bob exacerbates his knee injury and files for temporary total from the original employer.

In this case, he "retired" from one job, but returned to work. Therefore, the claimant did not abandon employment; temporary total is not precluded.

TERMINATION (For violation of a written work-rule or policy)

Termination of an employee for violation of a written work-rule or policy will act as a bar to the payment of temporary total.

In **Louisiana Pacific Corp. v. Industrial Commission 72 Ohio St. 3d 401 (1995)**, the Supreme Court held that the injured worker "voluntarily abandoned" his employment because of termination for violation of a written work-rule or policy. That case established a three prong test: (a) there must be a violation of a specific written work-rule or policy; (b) it must be clearly defined by the employer as a dischargeable offense, and (c) the worker must know or should have known that violation of the rule was a dischargeable offense.

The Supreme Court has reaffirmed the **Louisiana Pacific** requirement for "written" rules or policies in the recent case of **State ex rel. McNabb v. Industrial Commission (2001), 92 Ohio St. 3d 559**. The requirement for a "written" rule or policy can not be overcome or substituted by "plant" policy or "verbal" policy. It must be clearly written and defined as a dischargeable offense. Even a termination for those most egregious and common sense infractions, which would normally be expected to lead to discharge is not considered "voluntary abandonment," if there is no "written" rule or policy prohibiting such behavior and designating it as a dischargeable offense.

In **State ex rel. McNabb v. Industrial Commission (2001), 92 Ohio St. 3d 559**, the claimant was terminated for excessive tardiness (late fifteen to twenty times during a six-month period.) The claimant was denied temporary total because of the termination. The employer had no written employment or disciplinary policy. The Supreme Court upheld the requirement for "written" criteria and determined that the termination in this situation was not sufficient to foreclose temporary total.

Standard of Proof

To show or prove "voluntary abandonment" by termination for the violation of a written work-rule or policy, all documents concerning the termination must be reviewed and submitted as appropriate. A personnel or human resources manual showing the rule must be shown, also proof of the injured worker's knowledge or constructive knowledge must be shown such as signed statements of acknowledgement of receipt, and any other evidence which tends to show that the injured worker knew or should have known.

Scenarios

Joe Claimant has a lumbar sprain; he receives temporary total and returns to work. Joe is observed drinking alcohol on the job and is fired. The employer has a written policy which reads in part, "if you drink alcohol on the job you will be fired" at the initial employment, all employees are given a personnel manual which includes the policy on alcohol on the job. Joe Claimant acknowledged receipt of the manual, but says that he was not aware that he could be fired for drinking on the job. After the termination, Joe Claimant obtains another job and files for temporary total for an exacerbation of the original injury.

In this case, temporary total is precluded because the claimant was terminated for violation of a specific work-rule or policy. Even though Joe did not know that he would be fired for drinking alcohol on the job, he was given a book and should have known.

James Truant, a 33-year-old claimant with a cervical strain, is still being treated by a doctor. He received medications, regular office visits and other therapy as appropriate. After a period of temporary total, he returns to work as a cashier and stocker at Mom and Pop Grocery where he was injured. He misses work often. He missed two days one week and late two times. Mom warns Truant "because of your frequent absences and tardiness, I will fire you if you miss work within the next five days." James misses work the next day and is fired. His application for unemployment compensation is denied. James hires on as a car salesman at a local dealership and exacerbates his cervical sprain. He applies for temporary total from the injury at Mom and Pop.

In this case, the claimant was not fired for violating a written rule or policy. Mom and Pop had no written policy. Even though, the claimant knew that he would be fired, there was no written rule; therefore temporary total is not precluded.

ABANDONMENT OF THE WORKPLACE

Abandonment of the workplace with no intention to return will be considered as "voluntary abandonment," precluding the payment of temporary total. The controlling case in this area is **State ex rel. Baker v. Industrial Commission (2000), 89 Ohio St. 3d 376**, now commonly known as **Baker II**.

In **Baker II** reversed an earlier ruling in **Baker I (87 Ohio St. 3d 561)** and held that temporary total is not forfeited when a claimant resigns or quits, and subsequently acquires other employment. The facts in **Baker II** (as in **Baker I**) are as follows:

On July 27, 1989, appellant, Paul W. Baker, suffered an industrial injury to his left knee during his employment as a general laborer for appellee, Stahl-Wooster Division, A Scott Fetzer Company ("Stahl-Wooster"). As a result of his industrial injury, the Industrial Commission allowed Baker's claim for a lateral tear of the meniscus of the left knee, and Baker

subsequently missed work due to arthroscopic knee surgeries that were performed on January 9, 1990 and May 4, 1990. Baker received temporary total disability compensation ("TTD") from January 9, 1990 to July 15, 1990.

On July 15, 1990, Baker's treating physician, James J. Heintz, M.D. released Baker to resume full-time work, restricted to light duty. The following day, Baker returned to Stahl-Wooster and, that same day, signed a termination notice stating that he had "accepted other employment." Thereafter, Baker began his new job as a truck mechanic with Truck Stops of America ("Truck Stops"). On September 24, 1990, Baker left his position with Truck Stops, allegedly due to his original industrial injury.

On Baker's request for temporary total thereafter, the court ruled that Baker was eligible for the temporary total because he accepted other employment and remained in the work force after his resignation from the original injury employment. Therefore, there was no voluntary abandonment of employment.

Before the Supreme Court decided **Baker II**, it was generally held that (as decided in **Baker I**) whenever an injured worker resigned, quit, or otherwise caused himself or herself to be removed from employment where the injury occurred, temporary total was precluded. The Supreme Court in **Baker I** found that the injured worker "voluntarily" abandoned his employment thereby forfeiting temporary total because he resigned.

On Reconsideration, the court reevaluated and reinterpreted long standing principles established in earlier cases such as: **Jones Laughlin, Ashcraft, Brown, and McGraw**, and held that an injured worker does not forfeit the right to temporary total upon resignation from his original employer if he/she returns to other employment.

In this decision, the court also reaffirmed an earlier finding of voluntary abandonment in the case of **State ex rel. McGraw v. I.C. 56 Ohio St. 3d 137**. In that case the claimant quit the job and moved out of state. He did several jobs and left the work force. At the time of his application for temporary total, the claimant was not employed and had not returned to work. The court determined that **McGraw** had "voluntarily" abandoned employment because he resigned from his original injury employment and had not returned to the work force. In **Baker II**, the claimant quit his employment, but returned to the work force.

Therefore, this case has established that temporary total is not precluded under the theory of voluntary abandonment where the claimant remains in the workforce. If a claimant resigns, quits, or otherwise causes him or herself to be removed from his original employment, temporary total is not precluded if there is a return to work. By contrast, a claimant who resigns and does not re-enter the workforce will forfeit temporary total under the theory of voluntary abandonment of employment.

Standard of Proof

In this situation it is important to show that the claimant has not returned to employment.

Scenarios

Mary Martin, a licensed practical nurse has a claim for a lumbar sprain. Her claim is also allowed for HNP at L5-S1. She has surgery and is off work on temporary total for a year. She returns to work for six months and becomes pregnant. She has the baby and returns to work. She misses the baby and resigns her job after one day back and says "I'm going to stay home with my baby for a while." She takes a part-time job at the corner carryout, but quits after three months because she can't stand to be away from the baby. One year later, the claimant applied for temporary total after an exacerbation at home. In this case, the claimant resigned the original employment, resigned subsequent part-time work and has not returned to the work force; therefore, temporary total is precluded under the theory of voluntary abandonment.

Robert Browning, truck mechanic, returned to work after receiving TT for a work related lumbar injury. He has been assigned to light duty as a dispatcher. The job is sedentary and consistent with the physician of record restrictions. Robert wins the Powerball Lottery and resigns. He opens up his own business and serves as the manager. Two years later he exacerbates his old lumbar injury and applies for TT from the original injury employer.

TT is payable in this situation. Even though the claimant resigned after becoming a millionaire, he did not abandon the entire workforce.

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