



To: Kim Robinson, Director of Policy, BWC
From: Tom Sico, Assistant General Counsel, BWC
McDonald Anderson, Staff Counsel, BWC
Subject: Voluntary Abandonment: Update to January 2, 2002 memorandum
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This memorandum is an update of the January 2, 2002 Legal Division memorandum on voluntary abandonment. It contains information on the major developments and court decisions on Voluntary abandonment since 2002. The courts have continued to clarify and refine the concept of voluntary abandonment as established in previous cases.

1. Temporary Total after Termination

An injured worker, who is terminated or voluntarily departs the former position of employment, will be eligible for Temporary Total if he or she returns to the workforce and is working at the time the period of disability begins.

In 2002, the Supreme Court of Ohio decided the case of *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25 (2002), 2002-Ohio-5305. On March 3, 1998, the plaintiff (McCoy) was injured in the course of employment as a truck driver with Dedicated Transport, a self-insuring employer. The claim was certified for "contusion of left elbow; contusion to lumbar." The injured worker was released to return to work on March 9, 1998, but four days later, the injured worker was fired for insubordination and tardiness. Subsequent to the termination, the injured worker's claim was expanded to include an additional allowance for a herniated disc and surgery for the condition. The injured worker underwent surgery on June 28, 1999 and requested temporary total beginning on the date of the surgery.

The Industrial Commission ultimately denied the request stating that the claimant's termination from employment on March 13, 1998 constituted a "voluntary abandonment" of his employment under *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995), 1995-Ohio-153. The court held that the *Baker* precedent controlled and that a claimant fired consistent with *Louisiana Pacific* would not be eligible for temporary total compensation if he or she has not reentered the workforce and was not working at the time the disability began. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000), 2000-Ohio-485. This is an expansion of the *Baker* doctrine, because in *Baker*, the injured worker voluntarily left his job and accepted another; there was no termination. In *McCoy*, the claimant was terminated and was not employed during the period for which temporary total was requested. In affirming the denial of temporary total to McCoy, the court determined that "a claimant who voluntarily abandoned his or her employment or who was fired under circumstances that amount to voluntary abandonment of the former position of employment will not be eligible for temporary total disability compensation pursuant to R.C. 4123.56 if he or she is not employed at the time the disability began."

The court has consistently denied temporary total where the injured worker was terminated or otherwise quit employment and did not return to any job. In *State ex rel. Jennings v. Indus. Comm.*, the court applied the holding in *McCoy* and denied temporary total to an injured worker who was fired and did not return to any kind of work for seven months and then sought temporary total disability following surgery for an allowed condition. 98 Ohio St.3d 288 (2003), 2003-Ohio-737. In the *Daniels* case, the court applied the *McCoy* test, and denied temporary total to a claimant who was released to return to work at full duty but never reported.

State ex rel. Daniels v. Indus. Comm., 99 Ohio St.3d 282 (2003), 2003-Ohio-3857. The injured worker was fired and did not return to work at any job.

In *State ex rel. Eckerly v. Indus. Comm.*, the claimant argued that a return to the workforce after an abandonment is all that is necessary to restore temporary total eligibility. 105 Ohio St.3d 428 (2005), 2005-Ohio-2587. In applying the *McCoy* test, the court rejected this argument, holding that an injured worker must be employed at the time the period of disability began. In *Eckerly*, the injured worker was fired for unexcused absenteeism, and the Industrial Commission (I.C.) ultimately determined that the claimant's discharge constituted a voluntary abandonment of his former position of employment. Consequently, the injured worker's application for temporary total was denied because he failed to return to work. The injured worker was not working at the time of the requested period of disability and could only show \$804.98 on a 1099 form for the year prior. The court held that when an injured worker is not employed at the time of the disabling injury, he is not eligible for temporary total.

Therefore, if a claimant resigns, quits, or is terminated under circumstances that amount to *Louisiana Pacific* type termination, does not return to work, and is not working at the time of the disability, temporary total will be denied.

2. Part-time Employment

A return to part-time work has been deemed to be sufficient to restore an injured worker's right to temporary total after a voluntary abandonment. In *State ex rel. Hassan v. Indus. Comm.*, an injured worker who was found to have voluntarily abandoned his former position of employment and then later returned to the workforce on a part-time basis was eligible to receive temporary total compensation. 100 Ohio St.3d 300 (2002), 2002-Ohio-6564. It was noted that the length of the post-abandonment employment does not matter as long as the injured worker is working when he or she is disabled by the allowed conditions.

3. Termination and Causal Relationship

The court has also determined that voluntary abandonment will not apply where the termination is causally related to the injury. In *State ex rel. Gross v. Indus. Comm.*, the 16-year-old claimant worked at Kentucky Fried Chicken. 112 Ohio St.3d 65. (2006), 2006-Ohio-6500. A specific written rule prohibited workers from cleaning pressure cookers with water, and the claimant had also been warned verbally by the employer. The claimant used water to clean the pressure cooker and was severely burned. The claim was allowed and temporary total commenced. The claimant was fired after three months for having violated the written rule, and the employer sought to terminate temporary total as of the date of the firing. The Commission complied and terminated temporary total as of the date of the firing.

The case ultimately made it to the Supreme Court, which ruled in favor of the employer. On reconsideration in 2007, however, the Court reversed itself, stating that the main focus in voluntary abandonment is causal relationship. If the termination is causally related to the injury, voluntary abandonment will not apply. This principle is also illustrated in an earlier 10th District case, *State ex rel. Nifco LLC v. Woods*, 10th District No. 02AP-1095, 2003 Ohio 5468, in which the claimant was fired for accumulating too many points for absences and tardiness. Some of the points accrued due to time missed from work because of the injury. The court determined that the firing was related to the injury, and, therefore, voluntary abandonment would not apply.

4. Light Duty

The Court has held that refusal of a light duty job is not voluntary abandonment. In *State ex rel. Ellis Super Valu Inc. v. Indus. Comm.*, the claimant was offered a light duty job for the night shift. 115 Ohio St.3d 224 (2007), 2007-Ohio-4920. The claimant argued that the employer knew she could not perform that job

because she had to be home with her kids at night while her husband worked third shift. The claimant offered a compromise where she would work some days and some nights. The employer never responded, and the claimant sought temporary total. The employer argued voluntary abandonment. The Court stated that the defense of a failure to accept a job offer and voluntary abandonment are not the same thing, and specifically held that “a finding that a claimant has unjustifiably refused an offer of suitable employment does not translate into a finding that a claimant voluntarily abandoned the former position of employment. In fact, they are mutually exclusive.”

5. Long Latency Occupational Diseases

Voluntary abandonment does not apply in claims involving long latency occupational diseases. In *State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm.*, the injured worker took a regular retirement after 32 years as a foundry casting inspector. 112 Ohio St.3d 85 (2006), 2006-Ohio-6504. Sixteen years later, he was diagnosed with asbestosis, a long latency occupational disease. The claimant was awarded PTD and the employer appealed arguing that there should not be an exception for long latency occupational disease. The court rejected the employer appeal.

However, this exception does not apply to Chronic Obstructive Pulmonary Disease. In a 10th District case, *State ex rel. Riley v. Indus. Comm.*, the claimant failed to show that COPD is a long latency disease. No. 04AP- 953, (2005), 2005-Ohio-4453.

6. Subsequent Events

If a claimant is already disabled and a subsequent event occurs which causes termination, that termination will not be sufficient to establish voluntary abandonment. In *State ex rel. Omnisource Corp. v. Indus. Comm.*, the injured worker, a truck driver, sustained a knee injury and underwent surgery for the allowed conditions. 113 Ohio St.3d 303 (2007), 2007-Ohio-1951. While on temporary total, the injured worker was arrested for DUI. He received occupational driving privileges and returned to work “light duty.” The employer did not honor the claimant’s restrictions. He fell down a flight of stairs and injured his neck. Even though new C-84s were filed, the claimant was fired, because he lost his commercial drivers license to expiration. The self insured employer refused to pay temporary total beyond the date of the termination arguing voluntary abandonment. The court, in rejecting the voluntary abandonment argument, noted that once a claimant is disabled, it is of “no consequence” that subsequent events arise that might impair the claimant’s ability to work, because such events do not negate the causal relationship between the disability and the injury.

7. Strikes

A worker’s participation in a strike does not constitute voluntary abandonment. In *State ex rel. Angell Mfg. Co. v. Indus. Comm.*, the claimant was unable to perform duties of the former position of employment but was working light duty when her union went on strike. 10 District No. 02AP- 1389 (2003), 2003- Ohio- 6469. When the strike was over, the claimant tried to go back to work but the employer replaced her. Temporary total was denied by the industrial commission; however, the court vacated, and noted that no one is abandoning the entire workforce by going on strike. The employer’s argument on voluntary abandonment failed.

8. Pretextual Return To Employment

If a claimant has abandoned the workforce and reenters the workforce as a “pretext” to remove the bar against compensation, temporary total should be denied. In *State ex. rel. Akers v. Custom Works Autobody Inc.*, the claimant was injured and, after a short period of temporary total, returned to work at light duty. 10th District No. 05AP-1329, 2006-Ohio-6144. The claimant requested that the employer lay him off so that he

could receive unemployment benefits. He later sought temporary total over the period of the layoff. The Industrial Commission denied the request for temporary total citing voluntary abandonment. Several months later, the injured worker allegedly worked for three days for a new employer, but no pay stubs or other proof of wages were provided. When the injured worker sought temporary total for a period to begin after the “three day return to work,” the Industrial Commission denied temporary total on the basis the alleged return to work effort was not made in “good faith” and was undertaken solely to circumvent the prior finding of voluntary abandonment. The court also stressed the fact that the claimant asked for the lay-off, as distinguishable from an earlier case, *Diversitech*, in which the employer initiated the layoff. *Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989). *Diversitech* has been interpreted to mean that voluntary abandonment will not apply when the employer initiates the lay-off.

9. Termination While On Temporary Total

If a claimant is fired while on temporary total, voluntary abandonment will not apply to bar continued payment of temporary total. In *State ex rel. Reitter-Stucco v. Indus. Comm.* the injured worker was fired after making threats against his employer while in a psychological consultation. 10th District, No. 06AP-37, 2006- Ohio-6260. The claimant was on temporary total at the time he made the threats. After attempting vocational rehabilitation, the claimant requested temporary total again. The employer argued voluntary abandonment. The Industrial Commission awarded temporary total finding that the claimant could not have abandoned his job because he was physically unable to perform his former job duties at the time he made the threats against the employer. The Tenth District upheld the decision of the I.C., noting that the claimant was receiving temporary total, and there was no medical evidence that the claimant was physically capable of performing the job duties of his former position of employment at the time he made the threatening remarks.

Therefore, a claimant whose departure from employment is deemed voluntary does not lose eligibility for temporary total disability compensation if at the time of departure the claimant was temporarily and totally disabled.