

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel. George H. Haddox, :
Relator, :
v. : No. 10AP-152
Industrial Commission of Ohio and : (REGULAR CALENDAR)
Forest City Technologies, Inc., :
Respondents. :
:

D E C I S I O N

Rendered on August 9, 2011

David W. Goldense and Libert Pinto, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for
respondent Industrial Commission of Ohio.

Calfee, Halter & Griswold, and *William Ross*, for respondent
Forest City Technologies, Inc.

IN MANDAMUS
ON OBJECTION TO MAGISTRATE'S DECISION

BRYANT, P.J.

{¶1} Relator, George H. Haddox, commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate orders denying him temporary total disability compensation on eligibility grounds, and to enter

new orders awarding temporary total disability compensation beginning on December 20, 2005.

I. Facts and Procedural History

{¶2} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, appended to this decision. Although the facts are set forth more fully in the magistrate's decision, they essentially disclose that relator sustained an industrial injury in the course of his employment on December 20, 2005. Following an August 31, 2006 hearing on relator's request for temporary total disability compensation, the commission's staff hearing officer issued an order on September 8, 2006 that vacated the district hearing officer's award of temporary total disability compensation beginning December 21, 2005 and denied said compensation because relator's discharge for cause constituted a voluntary abandonment of employment. The commission refused relator's administrative appeal.

{¶3} Relator's claim subsequently was allowed for additional conditions, following which relator again requested temporary total disability compensation for the time period of September 4, 2007 through the present. Although the district hearing officer denied the request, the staff hearing officer's order mailed December 12, 2007 vacated the district hearing officer's order and granted compensation based on the Supreme Court of Ohio's decision in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*").

{¶4} On December 18, 2007, relator requested temporary total disability compensation from the date of injury to the present "and to continue," citing the staff

hearing officer's order mailed December 12, 2007 that granted temporary total disability compensation based on *Gross II*. Both the district hearing officer and staff hearing officer denied the requested compensation, noting relator voluntarily abandoned his employment. The commission refused relator's appeal from the staff hearing officer's order.

{¶5} Respondent Forest City Technologies, Inc. filed a request on January 2008 that the commission invoke its continuing jurisdiction under R.C. 4123.52 and reconsider the staff hearing officer's order mailed December 12, 2007. Forest City asked that the order granting relator temporary total disability compensation be examined for an alleged mistake of law, asserting the issue of voluntary abandonment was res judicata and precluded the award of compensation in the staff hearing officer's order. The commission determined it would exercise its continuing jurisdiction, decided a mistake of law occurred, and concluded the issue of voluntary abandonment not only was res judicata but precluded the order granting temporary total disability compensation.

{¶6} On those facts, the magistrate determined that when the commission's jurisdiction was invoked through the employer's request that the commission exercise its continuing jurisdiction, the commission properly should have applied *Gross II* and determined the doctrine of voluntary abandonment does not apply to pre-injury conduct or conduct occurring simultaneously with the injury. Accordingly, the magistrate determined a limited writ should be granted.

II. Objection

{¶7} The Industrial Commission filed an objection to the magistrate's decision:

The magistrate erred in finding that the Commission could reconsider the basis for Relator George Haddox's original application for temporary total disability, when Haddox never moved the Commission to exercise continuing jurisdiction, and the Commission would not have abused its discretion to deny such a motion on the merits.

{¶8} The commission's objection argues that relator's original application for temporary total disability compensation, although denied prior to *Gross II*, was denied on the grounds that relator voluntarily abandoned his employment, a conclusion that became res judicata for all future applications and precludes relator's mandamus action attacking the temporary total disability determinations denying his applications for such benefits. Because the magistrate did not so conclude, the commission objects contending the magistrate erred when he "bootstrapped the merits into a R.C. 4123.52 motion made, not by Haddox, but by Forest City." (Objection, 2.)

{¶9} Had the employer not invoked the commission's continuing jurisdiction on the one application that granted relator temporary total disability compensation, the commission's arguments would be more persuasive. Instead, as the magistrate properly concluded, when the employer invoked the commission's continuing jurisdiction, and the commission determined it would exercise that continuing jurisdiction, the commission should have applied the law then extant and appropriate to the issue.

{¶10} Here, the issue was voluntary abandonment, and at the time the commission exercised its continuing jurisdiction, the Supreme Court of Ohio had decided *Gross II*. Under the terms of *Gross II*, relator's actions prior to and concurrent with his industrial injury did not form a basis for concluding he voluntarily abandoned his employment, meaning the commission abused its discretion in concluding otherwise.

Indeed, the commission's determination through its staff hearing officer on relator's second application for temporary total disability compensation acknowledges that *Gross II* applied to relator's situation.

{¶11} In response to the magistrate's determination, the commission argues that, because relator never invoked the commission's continuing jurisdiction, the commission properly applied res judicata, including the doctrine of voluntary abandonment, when it exercised its continuing jurisdiction.

{¶12} As the magistrate correctly notes, who invoked the commission's continuing jurisdiction does not resolve the issue. Rather, once the commission's continuing jurisdiction properly was invoked, the commission's previous determinations were subject to revision outside the doctrine of res judicata. *State ex rel. Thompson v. Indus. Comm.*, 10th Dist. No. 08AP-374, 2009-Ohio-1543, ¶46 (stating "[t]he doctrine of res judicata, as applied to administrative proceedings before the commission, is limited by the commission's continuing jurisdiction"). Once res judicata no longer applied, the commission should have applied the law in effect, *Gross II*. See *State ex rel. Hassan v. Marsh Bldg. Products*, 100 Ohio St.3d 300, 2003-Ohio-6022 (applying the law in effect at the time the Supreme Court issued its limited writ). Applying *Gross II* to the facts of relator's case compels the conclusion that relator did not voluntarily abandon his employment so as to preclude temporary total disability benefits.

{¶13} In the final analysis, when the commission exercised its continuing jurisdiction pursuant to the employer's request, the prior determination of the commission concluding relator voluntarily abandoned his employment no longer had a preclusive effect, and the commission should have applied the Supreme Court's decision in *Gross II*

to conclude relator did not voluntarily abandon his position of employment on the basis of violations that occurred prior to and concurrent with his industrial injury.

{¶14} Accordingly, we overrule the commission's single objection.

III. Disposition

{¶15} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it.

{¶16} In accordance with the magistrate's decision, we issue a writ (1) ordering the commission to vacate its order of May 29, 2008 that vacates the staff hearing officer's order of December 6, 2007 (mailed December 12, 2007) on grounds that the staff hearing officer's order contains a clear mistake of law, and to enter an order that reinstates the staff hearing officer's order of December 6, 2007 that had awarded temporary total disability compensation beginning September 4, 2007, (2) ordering the commission to vacate the staff hearing officer's order of February 14, 2008 that denied relator's December 18, 2007 motion for temporary total disability compensation beginning December 21, 2005 on res judicata grounds, and to enter an order that determines relator's December 18, 2007 motion based upon the medical evidence submitted to support the motion, and (3) ordering the commission to vacate the staff hearing officer's order of August 31, 2006 (mailed September 8, 2006) that denied temporary total disability compensation beginning December 21, 2005 on grounds that the discharge constituted a voluntary abandonment of employment and to enter an order finding that the discharge does not constitute a voluntary abandonment. The commission shall further

determine the merits of the request for temporary total disability compensation beginning December 21, 2005 in a manner consistent with its determination of relator's December 18, 2007 motion for temporary total disability compensation.

*Objection overruled;
writ granted.*

BROWN and DORRIAN, JJ., concur.

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. George H. Haddox,	:	
	:	
Relator,	:	
	:	
v.	:	No. 10AP-152
	:	
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Forest City Technologies, Inc.,	:	
	:	
Respondents.	:	
	:	

MAGISTRATE'S DECISION

Rendered on March 30, 2011

David W. Goldense and Libert Pinto, for relator.

Michael DeWine, Attorney General, and *Elise Porter*, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶17} In this original action, relator, George H. Haddox, requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate orders denying him temporary total disability ("TTD") compensation on eligibility grounds, and to enter new orders awarding TTD compensation beginning December 20, 2005.

Findings of Fact:

{¶18} 1. On December 20, 2005, relator sustained an industrial injury in the course of his employment with respondent Forest City Technologies, Inc. ("Forest City"), as a truck driver. Initially, the industrial claim (No. 05-422111) was allowed for "sprain lumbar region."

{¶19} 2. In January 2006, Forest City terminated relator's employment because he was no longer insurable under the company's corporate policy as a result of three automobile accidents in 2005, two of which he was cited for failure to maintain an assured clear distance.

{¶20} 3. On January 11, 2006, relator filed a request for TTD compensation for the time period December 20, 2005 to January 11, 2006.

{¶21} 4. Following a February 21, 2006 hearing, a district hearing officer ("DHO") awarded TTD compensation beginning December 21, 2005, and to continue upon submission of supporting medical evidence to an estimated return-to-work date of June 1, 2006.

{¶22} 5. After an August 31, 2006 hearing, a staff hearing officer ("SHO") mailed a corrected order on September 8, 2006 that vacates the DHO's order of February 21, 2006. The SHO's order states in part:

Staff Hearing Officer finds that, the request for temporary total disability compensation from 12/21/2005 – 03/01/2006, and to continue, is denied as the claimant was discharged for cause which constituted a voluntary abandonment of employment. The employer had a clear written employment policy re-garding traffic or moving violations and their drivers involvement in same. The claimant was apprised of this policy, signed documentation at various times, throughout his employment regarding same and knew that a third

violation would result in his immediate termination from employment. Documentation in the file establishes that, the claimant had been fully apprised of the potential for termination of his employment should he be involved in another moving violation and the prohibitions regarding involvement in these violations when employed as a driver.

(Emphasis sic.)

{¶23} 6. Relator's administrative appeal from the SHO's order of August 31, 2006 (mailed September 8, 2006) was refused by the commission.

{¶24} 7. In an order dated September 13, 2006, the Ohio Bureau of Workers' Compensation ("bureau") calculated an overpayment of \$24,795.43. After an October 23, 2006 hearing, a DHO issued an order affirming the administrator's order.

{¶25} 8. After a December 4, 2006 hearing, an SHO issued an order affirming the DHO's order of October 23, 2006.

{¶26} 9. An appeal from the SHO's order of December 4, 2006 was refused by the commission.

{¶27} 10. On November 5, 2006, relator moved for additional allowances in the claim.

{¶28} 11. After a May 9, 2007 hearing, a DHO issued an order disallowing the requested additional conditions.

{¶29} 12. After an August 28, 2007 hearing, an SHO issued an order vacating the DHO's order. The SHO's order additionally allows the claim for: "Lumbar spondylolisthesis L5-S1, lumbar spondylosis L1-S1."

{¶30} 13. Forest City's administrative appeal of the August 28, 2007 order was refused by the commission.

{¶31} 14. After a hearing on November 2, 2007, a DHO issued an order that clarifies the additional allowances. The DHO's order states that the claim is allowed for: "aggravation of pre-existing lumbar spondylolisthesis L5-S1 and aggravation of lumbar spondylosis L1-S1."

{¶32} 15. Relator filed another C-84 request for TTD compensation based upon the additionally allowed conditions for the time period of September 4, 2007 through the present. After a hearing on October 1, 2007, a DHO issued an order denying the request, finding *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916 ("*Gross II*") distinguishable and relator's discharge not causally related to his December 20, 2005 injury.

{¶33} 16. After a hearing on December 6, 2007, an SHO mailed an order on December 12, 2007 that vacates the DHO's order of November 2, 2007 and grants compensation for the period requested, beginning September 4, 2007 through December 6, 2007 and to continue upon submission of proof. The SHO's order mailed December 12, 2007 states in part:

The Staff Hearing Officer finds that the rationale contained in *State ex rel. Gross v. Industrial Commission of Ohio (9/27/2007)*, 115 Ohio St. 3rd 249, * * * sets forth the guiding principals for evaluation of claimant's current request for temporary total disability compensation. As stated by the Court in this recent case, the voluntary abandonment doctrine "has never been applied to pre-injury conduct or conduct contemporaneous with the injury." Furthermore, the Court stated that if an employees' departure from the work place is causally related to his injury, it is not voluntary and should not preclude the employee's eligibility for temporary total disability compensation.

In the present case, while the employer was justified in terminating claimant for accumulation of points which would

prevent him from being a licensed driver and insurable, the termination involves actions that preceded the date of injury as well as actions that were contemporaneous with the injury sustained on 12/20/05 (traffic violation). For this reason, the Staff Hearing Officer determines that claimant's subsequent termination from employment did not relate to post-injury actions or inactions on his part and for that reason, and under the rationale of the Gross case, does not operate as a bar to the current request for payment of temporary total disability compensation beginning 9/4/07 forward.

{¶34} 17. On December 18, 2007, relator filed a C-86 motion requesting TTD compensation from the date of injury (December 20, 2005) to "the present and to continue." In the motion, relator cited to the SHO's order of December 6, 2007 (mailed December 12, 2007) that had granted TTD compensation beginning September 4, 2007. Relator's motion also cited to the Supreme Court of Ohio's decision in *Gross II*.

{¶35} 18. After a hearing on January 15, 2008, a DHO issued an order denying the compensation on res judicata grounds. The DHO's order states in part:

The District Hearing Officer finds that claimant's request for temporary total disability compensation, from 12/20/2005 to present, has been previously adjudicated by Staff Hearing Officer order dated 08/31/2006 and 12/06/2007, and that the District Hearing Officer is accordingly without jurisdiction to revisit the same.

District Hearing Officer rejects contention by claimant's counsel that District Hearing Officer can revisit temporary total disability compensation from 12/20/2005 and vacate 08/31/2006 Staff Hearing Officer order pursuant to Gross.

{¶36} 19. After a hearing on February 14, 2008, an SHO issued an order affirming the DHO's order of January 15, 2008. The SHO's order states in part:

The request for payment of temporary total compensation for the period of 12/21/2005 through 1/15/2008 is denied. The Staff Hearing Officer finds that payment of temporary total compensation for the period of 12/21/2005 through

8/31/2006 has previously been denied in this claim by the order of the Staff Hearing Officer from the hearing dated 8/31/2006. This period of compensation was denied on the theory that the injured worker had voluntarily abandoned his former position of employment. This Staff Hearing Officer now denies temporary total compensation for the period of 9/3/2006 through 9/3/2007 for the reason that the injured worker voluntarily abandoned his former position of employment. This Staff Hearing Officer finds that the Staff Hearing Officer order from the hearing dated 8/31/2006 is correct. The injured worker was terminated as a result of a violation of a written work rule. The injured worker was on notice that violation of this written work rule could result in his termination. The Staff Hearing Officer finds that the findings of the Staff Hearing Officer from the hearing dated 8/31/2006 were correct in view of the state of the law at the time of the injury in this claim. The injured worker's representative had requested that the case of State ex rel. Gross vs. Industrial Commission 115 Ohio State 3rd 249 (2007), be applied retroactively. The Staff Hearing Officer knows of no legal authority which would allow her to do so. The Staff Hearing Officer finds that there has been a ruling on the payment of temporary total compensation in this claim for the period beginning 9/4/2007. These are the findings of the Staff Hearing Officer from the hearing dated 12/6/2007. There is a request for reconsideration of these findings pending for the Industrial Commission at this time.

{¶37} 20. On February 25, 2008, relator filed an appeal from the SHO's order of February 14, 2008, and the commission refused it in an order mailed March 6, 2008.

{¶38} 21. Earlier, on January 25, 2008, Forest City filed a request for reconsideration from the SHO's order mailed December 12, 2007. Forest City asked the commission to invoke its continuing jurisdiction pursuant to R.C. 4123.52 and to re-examine the issue of TTD compensation based on an alleged mistake of law, contending that the issue of voluntary abandonment is res judicata.

{¶39} 22. After a May 29, 2008 hearing, the three-member commission determined that the SHO order mailed December 12, 2007 contains a clear mistake of

law of such character that remedial action would clearly follow. The commission's order of May 29, 2008 states:

* * * Specifically, the Staff Hearing Officer did not consider the doctrine of res judicata when there had been a previous ruling on voluntary abandonment by Staff Hearing Officer order issued 09/08/2006. Also, the Staff Hearing Officer misapplied the holdings in State ex rel. Gross v. Indus. Comm. (2007), 115 Ohio St.3d 249; and State ex rel. McCoy v. Dedicated Transportation, Inc. (2002), 97 Ohio St.3d 25. Therefore, the Commission exercises continuing jurisdiction pursuant to R.C. 4123.52 and State ex rel. Nicholls v. Indus. Comm. (1998), 81 Ohio St.3d 454, State ex rel. Foster v. Indus. Comm. (1999), 85 Ohio St.3d 320, and State ex rel. Gobich v. Indus. Comm. (2004), 103 Ohio St.3d 585, in order to correct this error. The Employer's request for reconsideration, filed 01/25/2008, is granted and the Staff Hearing Officer order, issued 12/12/2007, is vacated.

* * *

Even if the doctrine of res judicata does not apply to the matter, the Commission denies the current request for payment of temporary total disability compensation, from 09/04/2007 through 06/02/2008, as requested in the C-84s submitted by Kathleen Fagan, M.D., and dated 09/05/2007, 11/04/2007, 11/11/2007, 12/03/2007, 12/17/2007, 02/25/2008 and 03/20/2008, on the basis that the Injured Worker voluntarily abandoned his employment.

According to the testimony at the 05/29/2008 Commission hearing from Gary Thomas, Vice President of Human Resources for the Employer, the Injured Worker was terminated because the Injured Worker could no longer be insured as a truck driver on the Employer's group insurance policy. Mr. Thomas stated that the insurance company would no longer insure the Injured Worker because he had accrued three moving violations, which caused either property damage or personal injury, while working for the Employer. Mr. Thomas noted that the Injured Worker had actually accrued more than three moving violations while working for the Employer, but the other violations did not involve property damage or personal injury. Coincidentally, the allowed injury in this claim occurred simultaneously with

the third moving violation. The Injured Worker was not terminated because of the injury but because the Employer could not employ a driver who was not insurable. In State ex rel. McCoy v. Dedicated Transport, Inc. (2002), 97 Ohio St.3d 25, it was held that, to be eligible for temporary total disability compensation, the Injured Worker must show "that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings." The loss of earnings in this claim is due to the loss of insurability, not the injury. Accordingly, it is found that State ex rel. Gross v. Indus. Comm. (2007), 115 Ohio St.3d 249, is not applicable to this claim.

(Emphases sic.)

{¶40} 23. On February 19, 2010, relator, George H. Haddox, filed this mandamus action.

Conclusions of Law:

{¶41} The main issue is whether the commission has continuing jurisdiction to vacate the eligibility holding of its SHO's order of August 3, 2006 (mailed September 8, 2006). Finding that the commission has continuing jurisdiction to vacate the eligibility holding of the SHO's order of August 3, 2006 based upon the *Gross II* decision, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶42} Relator argues that the termination of an injured employee for a work rule violation that occurs prior to or contemporaneously with his work-related injury, is not, as a matter of law, voluntary, and thus, the commission abused its discretion when it determined that relator's termination constituted a voluntary abandonment of employment. After a ruling on voluntary abandonment by the SHO's order mailed September 8, 2006, the commission determined that subsequent rulings were barred by res judicata.

{¶43} The doctrine of res judicata operates "to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9, 10. The doctrine applies to administrative proceedings. *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260. However, res judicata has a limited application to workers' compensation cases because of the commission's continuing jurisdiction to reopen a matter pursuant to R.C. 4123.52. *State ex rel. Washington v. Indus. Comm.*, 112 Ohio St.3d 86, 2006-Ohio-6505.

{¶44} The commission's continuing jurisdiction under R.C. 4123.52 is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal. *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St.3d 454.

{¶45} The magistrate agrees with relator that the judicial expansion of TTD eligibility announced by the *Gross II* court can be a prerequisite for the commission's exercise of its continuing jurisdiction over final orders because the judicial expansion of TTD eligibility is a new and changed circumstance. See *State ex rel. Hassan v. Marsh Bldg. Products*, 100 Ohio St.3d 300, 2003-Ohio-6022 (while the claimant's mandamus action was pending in this court, *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305 was decided. Applying *McCoy*, this court issued a limited writ to the commission. This court's judgment was affirmed by the Supreme Court of Ohio.).

{¶46} In the SHO's order mailed September 8, 2006, relator was found to have voluntarily abandoned his employment. Subsequently, in *Gross II*, the court clearly set

forth that the doctrine of voluntary abandonment does not apply to pre-injury conduct or conduct occurring contemporaneously with the injury. Thus, another SHO conducted a hearing on December 6, 2007, and issued an order granting compensation for the period requested, beginning September 4, 2007 through December 6, 2007 and to continue upon submission of proof. The SHO found that while the employer was justified in terminating relator for the accumulation of points which prevented him from being a licensed driver and insurable, the termination involved accidents which preceded the date of injury and actions that were contemporaneous with the injury. Thus, the SHO determined that the termination did not relate to post-injury action and relator was entitled to TTD compensation.

{¶47} In its May 29, 2008 order, the commission determined that the issue of voluntary abandonment was res judicata and vacated the SHO's order mailed December 12, 2007. Further, the commission found that even if res judicata did not apply to these facts, the request for TTD compensation should be denied because relator voluntarily abandoned his employment. The commission found pursuant to *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305, that there was no cause-and-effect relationship between the injury and the loss of earnings because relator was terminated as a truck driver because he was no longer insurable due to moving violations he accrued. The commission found that *Gross II* was inapplicable to this claim.

{¶48} The commission found that the SHO order mailed September 8, 2006 denied TTD compensation based on a finding that relator had voluntarily abandoned the workplace. The commission stated that the SHO's order was not further appealed and

thus, was res judicata. The order was appealed; however, the appeal was refused by the commission. And, once the commission granted the request for reconsideration pursuant to R.C. 4123.52, the commission has the authority to address any issues pertaining to the order in question. *State ex rel. Hayes v. Indus. Comm.*, 10th Dist. No. 01AP-1087, 2002-Ohio-3675. See also *State ex rel. Sears, Roebuck & Co. v. Indus. Comm.* (1981), 1 Ohio App.3d 132. The parties are not arguing that the commission wrongly granted the request for reconsideration. Rather, the commission is arguing that relator should have filed a motion for reconsideration of the original voluntary abandonment decision under R.C. 4123.52. That argument is irrelevant, however, because the commission granted Forest City's request, thus, the issue was properly before the commission.

{¶49} Thus, the pertinent issue is whether relator voluntarily abandoned his employment and is thus ineligible to receive TTD compensation. This court has already followed and applied the *Gross II* case and determined that the voluntary abandonment doctrine has not been applied to pre-injury behavior. See *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646. In *Ohio Welded Blank*, the claimant sustained significant work-related injuries on September 28, 2007. As part of its substance-free work policy of which the claimant was aware, he was tested after the injury and tested positive for marijuana. The claimant was terminated as a result of the positive test results. The claimant sought TTD compensation but the DHO concluded that the voluntary abandonment doctrine did not preclude compensation because the activities that caused the employer to argue voluntary abandonment occurred before the injury. The SHO affirmed. This court refused to grant the employer a writ of mandamus to vacate the order granting TTD compensation.

{¶50} This court applied *Gross II* and determined that "a preinjury infraction undetected until after the injury is not grounds for concluding claimant voluntarily abandoned his employment. Although the infraction may be grounds for terminating relator's employment, *Gross II* clarifies that it is not grounds for concluding claimant abandoned his employment so as to preclude temporary total benefits." *Ohio Welded Blank* at ¶20. This court has also applied the same concept to find that the employer could not use the claimant's pre-injury rule violations to invoke the voluntary abandonment doctrine and preclude payment of TTD compensation benefits. See *State ex rel. Ohio State University Cancer Research Hosp. v. Indus. Comm.*, 10th Dist. No. 09AP-1027, 2010-Ohio-3839.

{¶51} In this case, relator was denied TTD compensation based upon a finding of voluntary abandonment of employment. Relator was a truck driver and had three moving violations and accumulation of points for his drivers license and was no longer insurable. However, the moving violations occurred prior to and contemporaneously with the injury. *Gross II* and the cases from this court, clearly set forth that the employer could not use relator's pre-injury and contemporaneous rule violations to invoke the voluntary abandonment doctrine and preclude payment of TTD compensation benefits.

{¶52} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its order of May 29, 2008 that vacates the SHO's order of December 6, 2007 (mailed December 12, 2007) on grounds that the SHO's order contains a clear mistake of law, and to enter an order that reinstates the SHO's order of December 6, 2007 that had awarded TTD compensation beginning September 4, 2007.

{¶53} It is further the magistrate's decision that the writ order the commission to vacate the SHO's order of February 14, 2008 that denied relator's December 18, 2007 motion for TTD compensation beginning December 21, 2005 on res judicata grounds, and to enter an order that determines relator's December 18, 2007 motion based upon the medical evidence submitted in support of the motion.

{¶54} It is further the magistrate's decision that the writ order the commission to vacate the SHO's order of August 31, 2006 (mailed September 8, 2006) that denied TTD compensation beginning December 21, 2005 on grounds that the discharge constituted a voluntary abandonment of employment and to enter an order finding that the discharge does not constitute a voluntary abandonment. The commission shall further determine the merits of the request for TTD compensation beginning December 21, 2005 in a manner consistent with its determination of relator's December 18, 2007 motion for TTD compensation.

/s/ Kenneth W. Macke
KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).