VOLUNTARY ABANDONMENT and R.C. 4123.56(F): MEET THE NEW BOSS, SAME AS THE OLD BOSS?

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Introduction

Voluntary abandonment is a judicially-created, affirmative defense to an injured worker's request for temporary total disability compensation (temporary total) or permanent total disability compensation (PTD). See *State ex rel. Jenkins v. Indus. Comm.*, 10th Dist. Franklin No. 16AP-534, 2017-Ohio-7896, ¶4. As an affirmative defense, voluntary abandonment must be raised and proved by the employer or the BWC. See id. A claimant's only burden is to prove that his disability is caused by the allowed conditions in his workers' compensation claim. See *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 83-84 (1997). A claimant has no duty to eliminate other causes of his disability. See id.

Voluntary abandonment can occur in one of two ways. The first is when a claimant quits his former position of employment and/or the entire workforce for reasons unrelated to her injury. The second type of voluntary abandonment occurs when a claimant is terminated or fired by the employer when she violates a written work rule that 1) clearly defined the prohibited conduct; 2) was identified by the employer as a dischargeable offense before the offense occurred; and 3) was known or should have been known to the claimant. See *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995).

Voluntary abandonment has its origins not in any statute, but in *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982). The syllabus of *Ramirez* states: "Under R.C. 4123.56, temporary total disability is defined as a disability which prevents a worker from returning to his former position of employment." The Court also stated that

> R.C. 4123.56 … specifically refers to the capability of an employee "to return to his former position of employment." "Position" is defined by Webster's Third New International Dictionary as "the group of tasks and responsibilities making

> up the duties of an employee." The Industrial Commission, in determining whether relator was entitled to temporary total disability, did not consider whether he was capable of returning to his former position of employment as a construction laborer.

See *Ramirez*, 69 Ohio St.2d at 632.

In 1985, the 10th District Court of Appeals created voluntary abandonment in *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.*, 29 Ohio App.3d 145 (10th Dist. 1985). The court framed the issue before it and held as follows:

> the issue before us is whether a person who has voluntarily taken himself out of the work force and abandoned any future employment by voluntarily retiring is prevented from returning to his former position of employment by an industrialinjury which renders him unable to perform the duties of such former position. This raises an issue of causal relationship.
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> Relator's argument is to the effect that even if claimant were able to perform the duties of his former employment, he would not return to that position since he has retired or, in other words, has abandoned that position. The court in *Ramirez* recognized the possibility that an employee might abandon his former position of employment by indicating that temporary total disability compensation may be terminated when an employee has returned to work, without limitation as to whether the return to work was to the former position of employment. We find that the same result must ensue from a voluntary retirement.
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> 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 by an industrial injury which renders him unable to perform the duties of such former position of employment. 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. However, where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment. Such action would include such situations as the acceptance of another position, as well as voluntary retirement.

In 1987, the Supreme Court adopted voluntary abandonment based upon *Jones & Laughlin*. See *State ex rel. Ashcraft*, 34 Ohio St.3d 42 (1987). In *Ashcraft*, the claimant requested TTD while incarcerated. The Court found that incarceration is a voluntary

abandonment independent of the disabling nature of the allowed conditions. The Court held that there is a two-part test for voluntary abandonment issues:

> The first part of this test focuses upon the disabling aspects of the injury, whereas the latter part determines if there are any factors, other than the injury, which would prevent the claimant from returning to his former position. The secondary consideration is a reflection of the underlying purpose of temporary total compensation: to compensate an injured employee for the loss of earnings which he incurs while the injury heals [citations omitted]. When a claimant has voluntarily removed himself from the work force, he no longer incurs a loss of earnings because he is no longer in a position to return to work. This logic would apply whether the claimant's abandonment of his position is temporary or permanent.

Ashcraft, 34 Ohio St.3d at 44. This language sets forth the two-part test that is at the core of every abandonment issue. Part one: do the allowed conditions prevent the injured worker from performing the job duties of the former position? Part two: are there any non-injury reasons for claimant's departure from the former position and/or workforce?

When the abandonment is due to the allowed conditions, it is "involuntary" and does not preclude payment of temporary total. See *State ex rel. Rockwell Interntnl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988), syllabus. The Court stated that in determining whether an abandonment is voluntary or involuntary, the

> Proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire. We hold that where a claimant's retirement is causally related to his injury, the retirement is not "voluntary" so as to preclude eligibility for temporary total disability compensation.

Rockwell, 40 Ohio St.3d at 46. Voluntary abandonment issues are "primarily [ones] of intent that may be inferred from words spoken, acts done, and other objective facts [and] … all relevant circumstances existing at the time of the alleged abandonment should be considered." See *State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm.*, 45 Ohio St.3d 381 (1989).

Confusion comes from the different standards for establishing temporary total eligibility from a medical perspective vis-à-vis voluntary abandonment. Medically, the issue is whether the allowed conditions prevent the injured worker from performing the job duties of the former position of employment – the specific job itself is immaterial. See *Ramirez*, 69 Ohio St.2d at 632. However, when it comes to voluntary abandonment, the former position itself is the focus. See *State ex rel. Thomas v. Indus. Comm.*, 42 Ohio St.3d 31 (1989); *State ex rel. McGraw v. Indus. Comm.*, 56 Ohio St.3d 137 (1990); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. In *McCoy*, the Court explicitly stated that the "former position of employment test" (i.e., the job duties of the former position) is not the standard for voluntary abandonment. Rather, voluntary abandonment is based on the need for a causal connection between the allowed condition and the loss of wages. If something other than the allowed

conditions precludes the claimant from continuing to work at the former position itself, then voluntary abandonment applies. In other words, but for the industrial injury, the claimant would be gainfully employed at the former position. See *McCoy*, at ¶ 29-35.

Over the years, courts have struggled to apply this confusing quagmire of their own creation. Yet, despite the chaos, a few clear principles emerged:

1) voluntary abandonment does not apply if the dischargeable offense occurred *before* the work injury. Several courts have held that voluntary abandonment cannot be premised on pre-injury conduct. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 19. See also, *State ex rel. Ohio Welded Blank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, ¶ 14; *State ex rel. L-3 Fuzing v. Indus. Comm.*, 10th Dist. No. 10AP-184, 2011-Ohio-4248;

2) voluntary abandonment does not apply when a long latency disease such as mesothelioma, asbestosis or pneumoconiosis causes disability after a voluntary retirement. See *State ex rel. Liposchak v. Indus. Comm.* (1995), 73 Ohio St.3d 194 (mesothelioma); *State ex rel. Vansuch v. Indus. Comm.* (1998), 83 Ohio St.3d 558 (asbestosis); *State ex rel. Reliance Electric Co. v. Wright* (2001), 92 Ohio St.3d 109 (pneumoconiosis); *State ex rel. E.I. DuPont DeNemours & Co. v. Indus. Comm.*, 10th Dist. No. 05AP-944, 2006-Ohio-3913 (asbestosis);

3) voluntary abandonment does not apply if the conduct for which the claimant is terminated was "causally connected" to the injury itself. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 19 (claimant was fired for the conduct that caused his injury - pouring water into a deep fryer); *State ex rel. Feick v. Wesley Community Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986 (termination for negligent driving that resulted in injury); *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758 (termination for causing the accident in which claimant was injured); *State ex rel. Cordell v. Pallet Cos., Inc.*, 149 Ohio St.3d 483, 2016-Ohio-8446 (claimant terminated for failing a post-injury drug test – the rule violation was discovered because of the work injury); and

4) voluntary abandonment does not apply if the claimant was not already disabled due to the injury at the time of the abandonment. In other words, a claimant cannot abandon a job that s/he is already unable to perform due to the industrial injury. See *State ex rel. Pretty Prods., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996); *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951; *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916; *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499; *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758. This line of cases unambiguously held that if the injury is the already disables the claimant from the job duties of the former position, subsequent events are irrelevant, even if they would otherwise establish a voluntary abandonment defense.

Unfortunately, this fourth exception to voluntary abandonment was eliminated by the Supreme Court's recent decision in *State ex rel. Klein v. Precision Excavating & Grading Co.*, 155 Ohio St.3d 78, 2018-Ohio-3890. And so begins a new era of chaos.

The Holding in *Klein*

In *Klein*, the claimant sustained a chest injury on November 5, 2014 and his physician wrote him off work through an estimated January 5, 2015. Prior to the injury, claimant had contemplated moving to Florida for better weather and better job opportunities. Two weeks after his injury, he informed the BWC of his new address in Florida. The Industrial Commission awarded temporary total, but only through November 20, 2014, the date that claimant apparently left Ohio and the former position of employment for Florida. Temporary total was denied after November 20, 2014 because claimant voluntarily quit for reasons unrelated to the allowed conditions, even though he was already disabled by them before moving to Florida for better job opportunities.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court followed the law and granted the writ, citing *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996), *State ex rel. Omnisource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499. Those cases clearly established a rule of causal connection that if the allowed conditions have already disabled the claimant from the job duties of the former position, subsequent events are irrelevant, even if they would otherwise establish a voluntary abandonment defense.

The employer appealed as of right to the Supreme Court. Alleging "due respect for the principles of stare decisis," the Court reversed, denied the writ, and overruled *Omnisource* and *Reitter Stucco*. Citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, the Court explained that it was refusing to follow its own decisions in *Omnisource* and *Reitter Stucco* because they were wrongly decided, because they defy practical workability, and because no undue hardship will result from them being overruled. The Court purported to base its reasoning on the need for a causal connection between the lost wages and the allowed conditions. According to the Court, even if that connection exists, subsequent voluntary abandonment of the former position for reasons unrelated to the injury breaks the connection and temporary total is not payable thereafter. And that principle is true regardless of whether the abandonment is due to a claimant quitting or being terminated.

Although it overruled *Omnisource* and *Reitter Stucco*, the Court explicitly stated that it was not overruling other voluntary abandonment cases, such as *State ex rel. Cordell v. Pallet Cos., Inc.*, 149 Ohio St.3d 483, 2016-Ohio-8446, *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, and *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250. Those cases involve situations where the injury and the termination are connected. The Court found those situations distinguishable from Mr. Klein's situation, as well as those in *Omnisource* and *Reitter Stucco*, where the claimants quit the former position for reasons unrelated to the injury.

Commentary and Conclusion

The Court claims to have clarified the law in *Klein*. But in reality, this case only further convolutes the voluntary abandonment quagmire. The Court focused on causal relationship, but if the injury creates disability before a voluntary abandonment, there is already a causal relationship between the injury and the lost wages. That was precisely the point of *Pretty Prods.*, *Omnisource*, and *Reitter Stucco*: you cannot abandon a job from which you are already disabled by the work injury. Thus, the Court relied on causal relationship to overrule cases that properly applied that very principle.

The claimant in *Klein* was unable to work because of a chest injury. The fact that he moved to Florida did not cure his chest injury. Moreover, the claimant moved to Florida, at least in part, due to better job opportunities there. Thus, there was no abandonment of the entire workforce. Apparently, anything that a claimant does to remove herself from the former position, even if she is already disabled by an industrial injury, can result in voluntary abandonment if the claimant's action is unrelated to her injury. From a policy perspective, this decision is dangerous because it gives employers an incentive to fire injured workers.

Also, it is unclear why there must be a different test for voluntary abandonment (the former position itself) than for the medical test for temporary total (i.e, the job duties of the former position, but not the former position itself). This artificial distinction only further complicates an already confusing area of the law. These standards should be consistent. Without a basis in statute, the courts should not extend voluntary abandonment to further deny compensation that otherwise would be payable. Such action ignores R.C. 4123.95 which requires liberal construction of workers' compensation laws. Somehow, the Court has missed its obligation to follow the law and not create it.

In the wake of *Klein*, it is hard to know how to advise clients on the applicability of voluntary abandonment. However, several points can be made:

1) pre-injury conduct still cannot give rise to voluntary abandonment – *Klein* did not abrogate this exception. Indeed, the facts in *Klein*, as well as in the cases it overruled (*Omnisource* and *Reitter Stucco*), involved situations where the actions that gave rise to the abandonment occurred after the injury;

2) disability caused by long latency occupational diseases such as asbestosis, mesothelioma, and pneumoconiosis remains beyond the reach of voluntary abandonment;

3) a causal connection between the injury and separation from the former position will preclude voluntary abandonment (as in *Gross II* where the behavior that causes the injury also constitutes a work rule violation that results in termination; or as in *Cordell* where the injury results in the discovery of the rule violation). But great care must be taken when advising clients who want to leave the former position if they are eligible for or are already receiving temporary total. Unless the client demonstrates that his intent to leave the former position is motivated by the work

injury, *Klein* will likely operate to terminate temporary total. For example, see *State ex rel. Ohio State Univ. v. Pratt*, 10th Dist. Franklin No. 19AP-603, 2021-Ohio-3420, in which the claimant had informed her employer she would be leaving for another job prior to her work injury. She was then injured and began receiving temporary total. The Industrial Commission awarded continued temporary total over the employer's argument that voluntary abandonment precluded compensation after the date she left her former position, even though she was already disabled as a result of the injury. The Tenth District Court of Appeals reversed, finding that the Industrial Commission should have followed *Klein* because the facts of that case were very similar to those in Ms. Pratt's claim. The appellate court held that if a claimant leaves the former position for reasons unrelated to the injury, temporary total is barred, even if the claimant is off work due to the injury before the separation from the former position occurs.

Ohio workers' compensation is a statutory creation. R.C. 4123.95 sets forth clear-cut legislative intent that the laws be applied liberally in favor of injured workers and their dependents. Conservative jurists constantly crow about respect for the separation of powers. Never legislate from the bench, they say. Always show respect for *stare decisis*, they say. But in voluntary abandonment, we see the abandonment of those principles.

R.C. 4123.56(F): Statutory Text and Applicability

Effective September 15, 2020, entitlement to temporary total disability compensation is governed by R.C. 4123.56(F). The statue says:

> If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise qualified. If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

It seems clear that the Legislature wanted to eliminate the judicially-created voluntary abandonment doctrine from Ohio law. However, exactly how the new law is supposed to be applied is not clear at all. This fact is frustrating as we have traded a confusing quagmire of voluntary abandonment case law for an opaque statute. To use a football analogy, one feels that the ball has not been moved farther down the field, but simply moved to another hash mark. Or, from a musical perspective, is this like The Who's famous line in *Won't Be Fooled Again*: "meet the new boss, same as the old boss"?

To date, the only issue that is clear with respect to R.C. 4123.56(F) is that it applies prospectively only. The general rule is that statutes apply prospectively only, unless expressly

made retroactive by the plain language of the statute. See R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 105 (1988). The reason for this maxim is that ex post facto laws, or laws that retroactively change or eliminate previously vested rights, are disfavored and repugnant to basic fairness. See Art II, Section 28 of the Ohio Constitution; *Van Fossen*, 36 Ohio St.3d at 105. However, retroactive laws that affect only remedial or procedural rights, as opposed to substantive rights, are permissible. See S*tate ex rel. Slaughter v. Indus. Comm.*, 132 Ohio St. 537, 542 (1937). Accordingly, the proper test is to first determine whether the statute expressly states that it is to be applied retroactively; if it does not, then it can be applied prospectively only. See. R.C. 1.48; *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163. Only if the statute expressly states it should be applied retroactively should a court proceed to determine whether it affects substantive or merely procedural/remedial rights. See id. If the former, such application is unconstitutional under Art. II, Section 28 of the Ohio Constitution. If the latter, it can be applied retroactively. See *Van Fossen*, 36 Ohio St.3d at paragraphs one and two of the syllabus.

Uncodified section 3 of HB 8, the legislation that enacted R.C. 4123.56(F), says that the changes to R.C. 4123.56 "apply to claims pending or arising after the effective date of this section." Because the new statute contains no language stating that it applies retroactively, it can be applied prospectively only. See R.C. 1.48. Also, this conclusion has been reached twice by the Tenth District: *State ex rel. Hamilton v. Indus. Comm.*, 10th Dist. Franklin No. 19AP-510, 2021-Ohio-1824, ¶ 27-29 (R.C. 4123.56(F) applies prospectively only); *State ex rel. Ohio State Univ. v. Pratt*, 10th Dist. Franklin No. 19AP-603, 2021-Ohio-3420, ¶ 20-21 (same). Therefore, it can be stated with clarity that R.C. 4123.56(F) applies only to applications for temporary total filed in any claim on or after September 15, 2020. It does not say that voluntary abandonment never was the law - only that it is not the law from September 15, 2020 forward.

It is worth noting that, in dicta, *Hamilton* speculates that if R.C. 4123.56(F) were applied retroactively, it would be unconstitutional because it would eliminate substantive rights. The appellate court observed that "there is no reason to doubt that an award or denial of [temporary total] affects a substantive right … [t]o apply the new statutory law midstream would work more than a remedial change in the law." Id., at ¶ 29.

While it is clear that R.C. 4123.56(F) applies prospectively only, applying the statutory text itself is very difficult. If there is any clarity, it is that the General Assembly "superseded" all voluntary abandonment case law. The statute expressly says so. And because voluntary abandonment is a judicially-created doctrine, the abrogation of all such judicial decisions must mean that the defense is no longer available when adjudicating applications for temporary total filed on or after September 15, 2020. But then we have the sentence "[i]f an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section." This language is a model of ambiguity. Is the employee not working or suffering a wage loss relevant for the period prior to the period being requested, or only from the date it is requested? If the claimant is not working before the period requested, does that automatically bar temporary total? The answers to these questions appear to depend on who is making the argument, which

hearing officer is addressing the argument, what mood s/he is in, and the relative alignment of Venus and Pluto. That is to say, there is no clear answer because the statutory text is hopelessly ambiguous.

When faced with an ambiguous statute, we turn to the rules of statutory construction to discern the intent of the Legislature. If the plain language of the law is clear, then the words must be applied as they are written. Words cannot not be inserted into the text, nor read out if present. Only if a statute is ambiguous (i.e., capable of more than one reasonable interpretation), should the rules of statutory construction be applied. See, e.g., *Armstrong v. John R. Jurgenson Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237. The following are the general tenants of statutory construction:

> 1) that in enacting the law, it is presumed that the General Assembly intended to comply with the Constitutions of Ohio and the United States;
> 2) that the entire statute was intended to be effective;
> 3) that a just and reasonable result was intended when the circumstances surrounding the passage of the law are considered;
> 4) that a result feasible of execution was intended; and
> 5) that legislative history and laws upon the same or similar subjects be considered, along with administrative construction of the law.

See R.C. 1.47 and R.C. 1.49.

We are also guided by the legislative mandate that R.C. 4123.56(F) be liberally construed in favor of injured workers and their dependents. See R.C. 4123.95. This mandate is not a suggestion or a tie-breaker. It is a requirement. If the Legislature required the law to be strictly enforced in favor of employers, would there be any hesitation in following that fiat?

The ostensible reason that R.C. 4123.56(F) was enacted is that voluntary abandonment was an abomination. It was a judicial creation - something that conservatives regard as the great satan of American jurisprudence. Courts are not supposed to legislate from the bench, but that is clearly what occurred with voluntary abandonment. So the point was to eradicate from the law a doctrine which, due to its complexity and unpredictability, employers and injured workers alike regarded as pernicious and confusing. If that is true, any argument that R.C. 4123.56 represents a codification of voluntary abandonment must be wrong. Why would the Legislature intend to codify a doctrine that everyone despised? That is an absurd result and R.C. 1.47(C) says that such unjust, unreasonable results cannot be the Legislature's intent. See *State ex rel. Clay v. Cuyahoga Cty Med. Examiner's Office*, 152 Ohio St.3d 163, 2017-Ohio-8714.

Further, it is extremely important to note that upon the passage of R.C. 4123.56(F), the Industrial Commission rescinded its voluntary abandonment Policy Memo D5. If R.C. 4123.56(F) were a codification of voluntary abandonment, the Industrial Commission would not have eliminated its policy on the subject. To suggest otherwise is patently absurd.

If voluntary abandonment is dead from September 15, 2021 forward, as it must be based on the foregoing analysis and legal authority, how do we apply the ambiguous language of R.C. 4123.56(F)? First, automatically barring temporary total if the injured worker is not working prior to the period requested is misguided. Such application is the opposite of liberal construction, a rejection of the mandate of R.C. 4123.95. Also, since the goal of temporary total is to compensate for lost wages while an injury heals, temporary total eligibility should remain as long as the injured worker intends to remain in the workforce. That is precisely what the Supreme Court contemplated in *Ramirez*, the seminal temporary total decision. Focusing on the former position itself contradicts the spirit of *Ramirez* and starts us down the same path that led to voluntary abandonment. It is absurd to repeat past failures and eliminate voluntary abandonment statutorily, only to revive it, like some frankensteinian freak, under the guise of R.C. 4123.56(F).

Moreover, it must be observed that it was never the law that a claimant be working up to the time temporary total was sought for compensation to be awarded. For example, in *State ex rel. Honda of Am. Mfg., Inc. v. Indus. Comm.,* 139 Ohio St.3d 290, 2014-Ohio-1894, the claimant retired from his former position due to his injury, but did not abandon the entire workforce. The Supreme Court held that intent is the key issue when it comes to temporary issues when a claimant is not working up to the time that temporary total is sought. The issue is two-fold: 1) the reason that the claimant left the employer must be due to the injury (i.e., involuntary as opposed to voluntary abandonment); and 2) there must be evidence, which can consist of the claimant's testimony, that claimant intended to remain in the workforce. If those two criteria are in the claimant's favor, temporary total remains payable, regardless of whether the claimant is working at the time the new period of TTD is sought. See also, *State ex rel. Rockwell Interntnl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988), syllabus.

Of course, *Honda* is a voluntary abandonment case and R.C. 4123.56(F) states that it is abrogated. But the same is true of *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St.3d 428, 2005-Ohio-2587, and *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008–Ohio–5245, the cases cited for the proposition that temporary total cannot be awarded if the claimant is not working up to the time that compensation is sought.

In order to harmonize R.C. 4123.56(F) with the ostensible legislative intent to eliminate voluntary abandonment and the liberal construction mandate of R.C. 4123.95, the author suggests that the following be the law:

1) that as long as the claimant remains in the workforce, s/he is eligible for temporary total. If s/he is not working at the time temporary total is sought, it is a fact issue for the hearing officer whether his/her inability to perform the job duties of the former position is due to the injury, or to unrelated factors. If the former, temporary total must be paid. If the latter, it must be denied;

2) that issues such as voluntary quits or firings for cause are relevant only if the claimant has no intent to remain in the workforce after such occurrences. Otherwise, we head down the same path that led to voluntary abandonment. Employers have the right to fire

injured workers, but doing so does not automatically preclude payment of temporary total. Unless the injured worker has left the entire workforce, temporary total must be awarded if the injury is what precludes her/him from performing the job duties of the former position as of the date temporary total is sought.