GETAWAY CLE SEMINAR

August 5, 2021

The Heart of the Matter

Voluntary Abandonment

Jon Goodman, Esq.
Jon Goodman Law, LLC
6797 North High Street, Suite 314
Worthington, Ohio 43085
jon@jongoodmanlawoffice.com
(614) 985-3552 Fax (614) 985-4133

David B. Barnhart, Esq.
PHILIP J. FULTON LAW OFFICE
89 E. Nationwide Blvd., Suite 300
Columbus, Ohio 43215
David@Fultonlaw.com
(614) 224-3838 Fax (614) 224-3933

PART 1

Introduction: Don Henley – The Heart of the Matter

"The more I know, the less I understand, all the things I thought I knew I'm learning again."

PART 2

CLARITY DE-*KLEIN*ED: VOLUNTARY ABANDONMENT AFTER *State ex rel. Klein v. Precision Excavating & Grading Co.*, ___ Ohio St.3d ___, 2018-Ohio-3890

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 industrial injury which renders him unable to perform the duties of such former position. This raises an issue of causal relationship.
>
> 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.
>
> * * * * * * *
>
> 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 the 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 form 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.*, ___ Ohio St.3d ___, 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 spared 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 positon for reasons unrelated to the injury.

Commentary and Conclusion

The Court claims to have clarified the law in *Klein*. But in reality, this case will only further convolute 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 clearly gives employers an incentive to fire injured workers.

Also, it is unclear why there must be a different test for voluntary abandonment (the former positon itself) than for the medical test for temporary total (i.e, the job duties of the former positon, but not the former positon 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 while eligible for or actually receiving temporary total. Unless the client demonstrates that his intent to leave the former position is motivated by the work injury, then *Klein* will likely operate to terminate temporary total.

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 brazen violation of each of these tenants. What the conservative justices of the Ohio Supreme Court say regarding these matters differs quite radically from what they do. Clarity of and respect for precedent have been abandoned when it comes to voluntary abandonment.

PART 3

Voluntary Abandonment as it applies to Permanent Total Disability

CASE LAW

State ex rel. Baker Material Handling Corp. v. Indus. Comm., 69 Ohio St.3d 202 (Ohio 1994) Syllabus by the Court

An employee who retires prior to becoming PTD is precluded from eligibility for PTD compensation only if the retirement is voluntary and constitutes an abandonment of the entire job market. (State ex rel. CPC Group, General Motors Corp. v. Indus. Comm. [1990] 53 Ohio St.3d 209, 559 N.E. 2d 1330 followed and applied. State ex rel. Chrysler Corp. v. Indus. Comm. [1991] 62 Ohio St.3d 193, 580 N.E. 2d 1082. State ex rel. Consolidation Coal Co. v. Yantz [1992], 63 Ohio St.3d 460, 588 N.E. 2d 845, modified.)

An employee who retires subsequent to becoming PTD is not precluded from eligibility for PTD compensation regardless of the nature or extent of the retirement. (State ex rel. Brown [1993] 68 Ohio St.3d 45, 623 N.E. 2d 55 followed...citations omitted)

The facts of Baker involve a gentlemen who sustained an industrial injury for his low back in 1987. He was paid TT compensation and he was found MMI. A month after that finding, he filed for PTD. He took an early retirement on February 8, 1990. Approximately 3 years later he filed his application for PTD. Claimant was granted PTD benefits. The employer filed a request for rehearing on the basis that the claimant had voluntarily removed himself from the labor market. Reconsideration was denied by the IC. The Court of Appeals found the claimant had not voluntarily abandoned the employment, but granted a writ returning the matter to the IC to determine the issue whether or not the retirement was voluntary. Cross appeals were filed from the Court of Appeals decision.

The holding in this case is important because of the certification issue by a self-insured employer. It is a case that should be well known to practitioners for that proposition. But it is also important for the question of PTD and the interplay of retirement.

The court examined the Chrysler Corp. case and the Consolidation Coal case where it determined the claimant's voluntary retirement would operate to preclude eligibility for PTD in the same way that it had previously determined retirement to preclude eligibility for TTD compensation. The court analyzed this as a proximate cause question. The court outlined the trilogy of cases dealing with TT compensation namely: State ex rel. Jones and Laughlin Steel Corp. v. Indus. Comm. (1985) 29 Ohio St.3d 145, State ex rel. Ashcraft v. Indus. Comm., 34 Ohio St.3d 42 (1987), and State ex rel. CPC Group, General Motors Corp. v. Indus. Comm. (1990) 53 Ohio St.3d 209; and explained the interplay between TT compensation and retirement.

> The court said, "TTD compensation is meant to compensate for the loss of earnings while the injury heals, the allowance for partial disability under 4123.57 under former R.C. 4123.57(A) is based on impairment of earning capacity." The court said, "Rather a claimant

is precluded from receiving this type of compensation only if by retiring he is abandoning the entire job market."

The court analyzed these decisions and because they involved different types of compensation; the purpose of the compensation is crucial.

> The court said at page 212, "PTD compensation has an entirely different purpose than TTD compensation. PTD compensation presupposes that there is no prospect that the claimant will ever return to his former position or any other employment." Citations omitted. PTD compensation, therefore is not meant to replace wages lost during the period of recovery but presumes the claimant will not recover. Accordingly, this type of compensation is based on the concept of estimated probable future loss due to injury (impairment of earning capacity) and requires a preliminary consideration of non-medical factors such as age, education and work experience, which have no place in determination of TTD. The court also distinguished PTD compensation from impairment of earning capacity even though they are both designed to compensate for impairment of earning capacity. PTD compensation does not require a comparison of the claimant's earning capacity before and after an injury. A claimant who is PTD has no earning capacity and is entitled to "receive an award to continue until his death". R.C. 4123.58(A)

The court said, "On the other hand, the permanently and totally disabled claimant is forever unfit for sustained remunerative employment. It would be useless and a vain requirement to force such a claimant to remain technically active for employment in which he is not fit to engage. Under such a requirement, a claimant would be 'penalized for failing to seek employment which he cannot reasonably be expected to perform'...citations omitted.

The court found that the claimant's retirement in this case occurring two to three years following his application for PTD, and two years earlier that the IC's determination of his entitlement to PTD, allowed the court to craft the rule that if a claimant retires prior to his application for PTD the employee is precluded from eligibility for PTD only when the retirement is voluntary and constitutes an abandonment of the entire job market. When an employee retires subsequent to becoming PTD, such employee is not precluded from eligibility for PTD compensation regardless of the nature or extent of retirement." Page 215.

State ex rel. Diversitech General Plastic-Film Div. v. Indus. Comm.

In this case, the court set forth the abandonment language and introduced the concept of intent. The court relied upon Ashcraft and Jones and Laughlin, stating "the question of abandonment is primarily one of intent that may be inferred from words spoken, acts done, or other objective facts, relevant circumstances existing at the time of the alleged abandonment should be considered." Diversitech at 383. In this case, the claimant voluntarily accepted light-duty work and remained at that position evidencing the requisite intent that he had retired from his former position of employment. The court did not accept that proposition of abandonment primarily because the light-duty placement was pursuant to a rehab contract and secondly he remained medically incapable of returning to his former position of employment. The court said that the Relator should not be penalized in the TTD determination by his own good faith efforts to mitigate damages

occasioned by his injury by returning to some less strenuous type of employment for a limited period of time. Id at 383.

The court further said, "Instead of remaining at home and drawing TT compensation for which he was eligible, the claimant attempted to hasten and return to his former job through rehabilitation and acceptance of a light-duty work. This commendable effort now serves to jeopardize future TT compensation eligibility – a result we find unacceptable." Id at 384.

Thus the claimant remained eligible for TT compensation. This case is important because it sets forth the criteria of returning to work in some capacity, not preventing a determination for TT compensation because of an "alleged abandonment of employment".

State ex rel. Kelsey Hayes Co. v. Grashel, 138 Ohio St.3d 297 (2013).

In this case, Kelsey Hayes appealed the judgment of a Court of Appeals which denied its request for a writ of mandamus in which the IC granted PTD to Arthur Grashel after he had retired. The argument was raised that Grashel had voluntarily abandoned his employment due to his hypersensitivity pneumonitis and hypersensitivity induced reactive upper airway disease. This occupational disease was allowed and Mr. Grashel was awarded TT compensation. He attempted to RTW in 2003 on the assembly line side of the plant away from the fumes that had aggravated his conditions. His symptoms returned. He stopped working in September of 2004 on the advice of his doctor. He asked for TT compensation and that was denied. The denial occurred on February 22, 2005. Unfortunately, because he was without money he elected to take Social Security Retirement benefits because he could not RTW. That was at the end of 2004. He then filed his first application for PTD in May of 2005. It was denied by a SHO wherein the hearing officer acknowledged that the claimant testified he was forced to take an early SS retirement due to having no income since September of 2004.

In 2007, he filed a second application for PTD. The SHO granted PTD. The Tenth District Court of Appeal issued a limited writ and returned the matter to the Commission to consider whether Grashel had voluntarily abandoned the workforce.

A second hearing was held in September of 2009 and again, Grashel was awarded PTD benefits concluding that he had left the workforce due to the allowed conditions in his claim. Thus, he remained eligible for PTD benefits.

Another complaint in mandamus was filed. The Court of Appeals denied the writ and the employer appealed to the Supreme Court. Kelsey-Hayes argued Inter alia that he voluntarily retired in 2004 and he also failed to seek other employment or vocational training, thereby abandoning the entire job market and making himself ineligible for compensation citing to Baker Material Handling.

The Supreme Court agreed that Grashel had abandoned the entire job market. After he stopped working in September of 2004, there is no evidence that he sought other employment or vocational rehabilitation. Consequently, the court found that Grashel was not disabled by his allowed conditions. Consequently he was not eligible for PTD and reversed the entitlement to PTD benefits. The court was narrowly divided on this, it was a 4 to 3 decision. The dissent pointed out once the Commission determined that Grashel's job departure was involuntary, the employer's

argument of voluntary abandonment failed and there was no need for the Commission's analysis to continue. Thus, the Commission did not abuse its discretion when it did not address whether Grashel had abandoned the entire job market. The court relied upon the Commission as it has the exclusive responsibility to assess the weight and credibility of the evidence. "Our role is limited to determining whether there is evidence in the record to support the Commission's stated basis for its decision." Id at 25, 26.

Industrial Commission Memorandums

IC Memo D5 – Voluntary Abandonment, sets forth three types of voluntary abandonment.

Voluntary Retirement; Termination; or Abandonment of the Workforce.

Voluntary Retirement simply is a restatement of the Baker case. But obviously the retirement would have to be causally related to the allowed conditions in the claim.

Abandonment of the Workforce is significant in that bullet point four, "An injured worker can voluntarily abandon his or her former position of employment even if an injured worker is physically unable to perform his or her former position of employment at the time of the abandonment. All relevant circumstances surrounding or existing at the time of the alleged abandonment of the former position of employment should be considered. If there is evidence that the IW intends to remain in the workforce inferred from words spoken, acts done, or other objective facts, this is not a voluntary abandonment of the entire workforce. Thus, the claimant's efforts at attempting to return to the workforce did not prohibit his eligibility for TT compensation."

IC Memo G3 – Guidelines to PTD Grant Orders

Filing an application for PTD can result in a tentative order. The authority for this can be found in Ohio Adm. Code 4121-3-34(C) (6) and (D). Now after a tentative order is issued granting PTD on the medical basis the parties have a right to object to the tentative order. The rule itself does not require any reason for the tentative order. It can be done out of spite or it can be done with a legal basis in mind. The IC recently added a new Memo G3 to deal with the issues arising from objections to PTD tentative grant orders. The reasons for this were that nothing was being submitted other than the mere incantation of voluntary abandonment, as an example. Consequently, Memo G3 says, "Tentative grant orders shall be issued when: (a) Commission specialists state the allowed conditions render the IW unable to perform any sustained remunerative employment. The IW's evidence agrees. If the employer's medical evidence agrees that the claimant is PTD and the Bureau's medical evidence states the IW is unable to perform any sustained remunerative employment." A hearing is then scheduled before a SHO on the appropriateness of the tentative order. "If the SHO finds that the granting of PTD was inappropriate due to a **colorable legal issue** that would preclude the granting of PTD, the tentative order shall be vacated and the IC-2 application returned for continued processing."

Frankly, it would seem to be more appropriate that if an objection is filed a reason should be stated and the evidence provided upon which the objector is relying to support the objection. The matter should then proceed to a hearing on the issue of the validity of the objection. The application should not be dismissed or denied and the order not vacated. If anything, the tentative order should be allowed to stand if the colorable legal issue is found wanting. In my personal experience, I have had two tentative orders issued under the current policy and they have both been vacated because of a colorable argument of voluntary abandonment.

Claim No. 08-347996.

This is the outcome on one of the objections to tentative order. The IC found it wanting and denied the Administrator's request for reconsideration on the appeal the request for reconsideration taken from the order granting PTD benefits. PTD benefits were upheld in that case by SHO, whose order is part of your materials, but he outlines the reasons why voluntary abandonment was not appropriate in this case. Namely: her significant additional allowances, her increase of PPD, the fact that Social Security benefits were granted to her based primarily upon the allowed conditions in a BWC claim, and because of that that she was unable to be employed in the workforce.

The authority for that comes from a decision of State ex rel. Digiacinto v. Indus. Comm, 2018 Ohio 1999. In this case, Mr. Digiacinto had filed one application for PTD, which had been denied by the IC. He had his industrial injury in August of 2001. He applied for SSD in May of 2002, based upon the lumbar conditions in the claim and SSD benefits were granted. He applied for PTD in 2006 and again in 2013, both of these were denied, based upon medical and vocational reports opining that the IW was capable of performing sustained remunerative employment. In 2014, his claim was amended for psychological disabilities. He applied for and received TT compensation until the Commission determined his psychological conditions had reached MMI. His third application was then filed in July of 2015.

The IC doctors found the claimant unable to engage in sustained remunerative employment and his attending physicians supported PTD as well.

The BWC opposed the application arguing the claimant had voluntarily abandoned the workforce.

The SHO granted PTD and did not find a voluntary abandonment of the workforce primarily because the BWC had waived that argument. The SHO in that order found that the IW had demonstrated his absence from the workforce was due to the allowed physical conditions in the claim and not due to a voluntary decision on his part to retire or otherwise not to work. Thus, his absence from the workforce could not be considered a retirement nor could it be considered voluntary. The hearing officer relied upon the numerous Medco-14 forms from the IW treating physicians for the physical and psychological conditions, and found that the facts of this case are not similar to the Grashel case. The IC vacated the order of PTD on reconsideration because of the voluntary abandonment. The Magistrate upheld the Commission's decision. The argument was raised under Ohio Adm. Code 4121-3-34(D)(1)(d) that the Adjudicator shall consider the evidence that is submitted of the IW's medical condition at or near the time of removal/retirement. Digiacinto was argued that the ALJ decision on SSD is persuasive to the finding of total disability that is dated closest to the date of supposed abandonment.

The Court of Appeals upheld the objection of the IW. The court said based on the evidence of the record, the ALJ decision should seem to "carry considerable weight" in the Commission's determination of the capacity to work and whether or not he left the workforce of his own volition. "We find the Magistrate cannot presume that the Commission had considered all the evidence before it and as a result, disagreed with the Magistrate's conclusion that the Commission's failure to mention the ALJ's decision was not an abuse of discretion."

The second objection raised by Digiacinto was the failure of the Administrator to consider the ALJ's decision. The Magistrate concluded the ALJ's decision could not be relied upon because the medical impairments underlying the ALJ's decision included a non-allowed condition, namely foraminal stenosis. Based upon State ex rel. Waddle v. Indus. Comm., 67 Ohio St.3d 452 (1993), the Magistrate concludes that a non-allowed medical condition cannot be used to advance or defeat a request for PTD compensation, even though the mere presence of non-allowed conditions does not automatically bar PTD compensation. Because of the mention of the non-allowed conditions it cannot be used to advance or defeat the third PTD application. Digiacinto said the reason he was submitting the ALJ decision was not to advance that the claimant was PTD but rather to show the IW did not intentionally or on his own volition abandon the workforce. Consequently, the Court of Appeals upheld both objections filed by Digiacinto and granted a writ of mandamus and returned the case to the IC for a new hearing on whether he was PTD.

State ex rel. Digiacinto v. Indus. Comm.,2020-Ohio-707. Reliance upon Digiacinto was short lived. On March 3, 2020, the Supreme Court vacated the Court of Appeals decision and reversed the 10th District's judgment and returned the matter to the Commission. The court felt that in an evidentiary ruling that the Industrial Commission did not abuse its discretion in relying upon its previous orders from 2007 and 2013 to deny PTD compensation finding the claimant was capable of other work activity in 2007 and 2013. It also felt that the Commission did not have to list the evidence that it considered under State ex rel. Fultz v. Indus. Comm., 69 Ohio St. 3d 327. There the court said that if the Commission does list the evidence it considered but omits a particular piece of evidence from that list, this court will presume the Commission overlooked it.

In this case, the court's failure to discuss the Social Security Administration's (SSA) decision was not fatal to the Commission's decision. The court said that the Commission did not run afoul of Fultz. Thus the presumption of regularity controlled and the Commission's consideration and rejection of the ALJ's decision must be presumed.

The court went further then saying that even if the ALJ decision was not considered by the Commission, the 10th District should not have returned the matter to the Commission because the ALJ's decision is incapable of supporting a result contrary to that already reached by the Commission. Paragraph 22. The court found that the ALJ's decision was incapable of supporting a conclusion that Digiacinto left the workforce because of his industrial injury because contrary to Diagiacinto's assertion, the ALJ did not tell Diagiacinto that he could not work due to his allowed conditions or any others. Rather the ALJ's decision expressly stated that Diagiacinto is capable of sedentary work."

Consequently, it would appear as if the way around this, even if the decision by a Social Security Judge was that the claimant was capable of work and found him eligible for SSD benefits, is that the parties should argue that the decision had the effect of removing the claimant from the workforce. It would also be important to have the SS decision in the record at the time of the application.

State ex rel. Black v. Indus. Comm., 137 Ohio St.3d 75 (2013)

In this case, claimant was a press operator when he injured his low back. He was released to RTW in December of 2000, and on December 11, 2000, claimant notified his employer that he intended to retire on February 28, 2001. While he returned to modified duty, he returned to his doctor for back pain and a possible hernia. Claimant worked until February 9, 2001 and retired at the age of 55 on February 28, 2001 with 38 years of service. He sought no other vocational training or other employment. He began receiving Social Security Disability benefits in September of 2001. PTD was denied on July 1, 2010 on the basis that the claimant had not worked or looked for work since retirement of February 28, 2001. Thus, the retirement was voluntary and an abandonment of the entire workforce and the IW was ineligible for PTD.

The court upheld the finding. There was no medical evidence that any physician advised the IW to retire as a result of the allowed injuries. Paragraph 15.

State ex rel. Pierron v. Indus. Comm., 120 Ohio St.3d 40, 2008-Ohio-5245, figured significantly in the Black decision. The court said whether claimant has voluntary retired or has abandoned the workforce is a question of fact for the IC to determine. The court upheld the IC order finding that Black's retirement was voluntary in nature and the timing of his release to RTW on February 9th and his official retirement on February 28th of the same year and that there had been no further work or looking for work since his retirement, the claimant was not voluntary but it was an abandonment of the entire workforce.

State ex rel. Denzil Cook v. Indus. Comm., 15 AP 1025, 2016-Ohio-8497.

In this case, the claimant had filed three successive applications for PTD. The Magistrate recommended the court deny the requested writ of mandamus finding the Commission did not abuse its discretion when it exercised continuing jurisdiction over the SHO's order. The Relator's initial workers' compensation injury was in 1967 when he was 20 years old. The claim was allowed for acute lumbar myositis and depressive neurosis. For the next 40 years he worked for several employers. He ceased working in November of 2008 when he was laid off from seasonal construction work. He filed three applications, the first two which were denied in 2010 and 2013 were denied based upon orders finding Relator capable of performing sustained remunerative employment.

In his 2013 application, he testified that he stopped working in 2008 because he could no longer keep up or do the work which included heavy lifting and cleaning dump truck beds. His third application was filed in 2015, the Bureau argued that the claimant had voluntarily abandoned the workforce following the Commission's 2010 and 2013 denials of PTD. PTD was granted. The

SHO found the Bureau's argument regarding voluntary abandonment was incorrect because of the testimony in the 2013 hearing. The BWC requested reconsideration which the IC granted. The Magistrate's opinion at paragraph 32 states, "A failure to seek other work or pursue vocational rehabilitation after a Commission adjudication that a claimant is capable of sustained remunerative employment can support a finding that by his own inaction, the claimant has voluntarily abandoned the workforce." State ex rel. Roxbury v. Indus. Comm., 138 Ohio St.3d 91, 2014-Ohio-84; State ex rel. Crogdon v. B&B Ents. Napco Flooring, LLC, Tenth District 14 AP 477, 2015-Ohio-1512. The court denied the requested writ.

State ex rel. Ernest Williams, 2000-Ohio-1161, Tenth District.

In this case, his industrial injury occurred on May 5, 1978 and five applications for PTD were filed from 1991 through 2015. All five were denied. He was also denied TT compensation in 2013. In this case, the claimant had attempted to RTW in 2015 when his friend gave him a job driving a gravel truck, which he was unable to do after two weeks. The Court of Appeals denied the writ of mandamus finding the claimant's two week attempt at returning to work did not negate the failure to RTW or attempt to RTW in 30 years and it was his only attempt at employment since 1978. Consequently, it was within the province of the Commission to assess the credibility of the evidence including the testimony of Relator in making that determination. Paragraph 43 of the Magistrate's decision discusses State ex rel. McCoy v. Dedicated Transport, 97 Ohio St.3d 25, 2002-Ohio-5305 and State ex rel. Hassan v. Marsh Bldg. Products, 100 Ohio St.3d 300. The court said, "TT eligibility is reestablished if the claimant reenters the workforce and due to the original industrial injury becomes disabled while working at his or her new job. Thus, under McCoy the claimant has the burden to show that he became disabled while working at his new job. Meeting that burden here requires submission of credible medical evidence proving that the alleged disability actually arose during the new job rather than before the new job. That is, Relator must show by medical evidence that it was his industrial injury that compelled him to quit his new job. The court noted the Hassan case explained, "The final objection to TTC payment involves the extent of claimant's subsequent employment with Airborne Express. In this case, we are persuaded by claimant's assertion that because any employment – no matter how insubstantial – bars TTC, see State ex rel. Blabac v. Indus. Comm., (1999) 87 Ohio St.3d 113, 1999-Ohio-249, then any employment should be sufficient to invoke McCoy." Hassan at paragraph 8.

The syllabus in McCoy v. Dedicated Transport, 97 Ohio St. 3d 25, 2002-Ohio-5305 states, "A claimant who voluntarily abandons his or her former position of employment, or who was fired under circumstances that amount to a voluntary abandonment of a former position, will be eligible to receive TT compensation pursuant to R.C. 4123.56 if he or she enters a workforce and due to the original industrial injury, becomes TTD while working at his new job."

State ex rel. Jenkins v. Indus. Comm., 2017-Ohio-7896.

The court indicated that voluntary abandonment of a workforce defense which must be revised by the employer. The burden of proof falls on the employer or the administrator relying upon State ex rel. Black v. Indus. Comm.

In the Jenkins case, the court found that neither party raised or argued the issue of voluntary abandonment, nor did the SHO raise the issue during the hearing. The SHO raised the issue the first time in the decision denying the application for PTD. The court found that this was a violation of the IW's due process rights by denying his PTD application on the basis of voluntary abandonment without giving Relator sufficient notice and an opportunity to present evidence on that issue. See also State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St. 3d 78 (1997).

State ex rel. Navistar, Inc. v. Indus. Comm., ___Ohio St.3d ___, 2020-Ohio-712. Claimant sustained two significant injuries working for employer before retiring in 2003. He eventually then worked part-time for another company from 2004- 2010. While he was working part-time, he had surgery for an allowed condition and was awarded temporary total. The part-time employer closed in 2010 and claimant did not return to work in any capacity thereafter.

In 2015, claimant filed for PTD which was granted by the IC based on reports from Drs. Rutherford and Grunstein. Dr. Grunstein opined that claimant could perform some activities for a few hours each day but not enough for sustained work of any kind. The IC found that the allowed physical conditions precluded sustained remunerative employment and therefore did not discuss the non-medical disability factors. No mention was made of a voluntary abandonment defense for the first time. The employer claimed that there were facts in the record that supported this defense even though it was not argued at the PTD hearing. The IC refused reconsideration and the employer sought a writ of mandamus in the Tenth District Court of Appeals.

The appellate court held that the employer waived the voluntary abandonment defense by not arguing it at the PTD hearing and that there was some evidence to support the IC's award of PTD. The employer appealed to the Supreme Court as of right.

While the case was pending before the court, claimant passed away. The court ordered the employer to show cause why the mandamus action should not be abated by claimant's death. The employer responded and the court proceeded to address the abatement issue and the merits in its opinion.

The court held that even though a claimant's death typically abates a workers' compensation claim pursuant to Ohio Adm. Code 4123.5-21, there is an exception when an employer appeals from a decision that ordered compensation paid. See Youghiogheny & Ohio Coal Co. v. Mayfield, 11 Ohio St. 3d 70 (1984). The court reasoned that if the employer prevailed, it would either be reimbursed what it had paid from the surplus fund pursuant to R.C. 4123.512(H) and/or save on the amount it paid for the safety and hygiene fund assessment. See R.C. 4123.35(J); Ohio Adm. Code 4123.-17-32(B). Thus, there remained a justiciable issue.

On the merits, the court found that the employer waived the voluntary abandonment defense by failing to raise it at the PTD hearing. The fact that there were issues mentioned at the hearing that could allow the IC to infer that voluntary abandonment occurred was not enough. The court cited Adm. Code 4121-3-34(D), which states:

"If, after hearing, the adjudicator finds that the IW voluntarily removed himself or herself from the work force, the IW shall be found not to be permanently and totally disabled. If evidence of voluntary abandonment is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement."

The court noted that the IC abuses its discretion by failing to address voluntary abandonment if it is raised and argued, or by addressing it for the first time in an order when it is not argued at the hearing. See State ex rel. Stevens v. Indus. Comm., 142 Ohio St.3d 313, 2015-Ohio-1352 (employer raised and argued the issue but the IC failed to address it); State ex rel. Jenkins v. Indus. Comm., 2017-Ohio-7896 (10th Dist.) (issue not argued at hearing but IC denied compensation based on voluntary abandonment anyway thereby violating claimant's right to due process). Moreover, if the issue is not raised and argued when a party has the opportunity to do so, the defense is waived. See State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St.3d 78 (1997). In Quarto Mining, the employer "sat idly by" during the PTD hearing and failed to raise a voluntary abandonment defense, even though there was evidence on file that may have supported the argument. The employer sought a writ of mandamus after PTD was granted and argued that the IC should have to address voluntary abandonment even if it is not raised and argued by a party if there is evidence on file that could support the defense. The court rejected that argument and reiterated that voluntary abandonment is an affirmative defense that must be raised and proved. It is not the IC's job to address a defense that the employer and/or BWC fails to assert.

In this case, the employer conceded in its reconsideration motion that it did not argue voluntary abandonment at the hearing, but asserted that it should have been addressed by the IC because there was evidence on file that could have supported the defense. The court rejected this argument based on Quarto Mining and further noted that it does not matter if the defense is raised for the first time in mandamus or in a reconsideration motion that is denied – if voluntary abandonment is not "brought into issue" (i.e., raised and argued) at the hearing, it is waived.

The court also rejected the employer's attack on the evidence cited by the IC in support of its award of PTD. The employer argued that because Dr. Grunstein allegedly found claimant capable of four hours of work per day (the report did not actually say that), the report did not support PTD. The employer asserted that the ability to work four hours a day is an automatic basis for denial of PTD pursuant to State ex rel. Bonnlander v. Hamon, 150 Ohio St.3d 567, 2017-Ohio-4003. However, in Bonnlander the IC denied PTD based on a report that said claimant could work four hours per day, whereas in this case, Dr. Grunstein's report was relied on to award PTD. Moreover, Bonnlander explicitly held that there is no hourly standard for determining one's capacity to perform sustained remunerative employment. "Sustained" means "an ongoing pattern of activity" that can be intermittent, occasional, or part-time and the IC must decide PTD applications on a case-by case basis.

The employer also argued that Dr. Rutherford's report was equivocal and therefore not "some evidence" supporting the award of PTD. The court did not reach that argument because Dr. Grunstein's report was found to be some evidence and as long as some evidence supports the IC's decision, the fact that other reports it relies on are flawed is irrelevant. See State ex rel. Ehlinger v. Indus. Comm., 76 Ohio St.3d 400 (1996).

Note – this is an important case that reinforces several principles:

a) If the IC relies on medical evidence to support PTD based on the allowed conditions, there is no need for it to discuss the non-medical Stephenson factors. See State ex rel. Galion Mfg. Div., Dresser Industries v. Haygood, 60 Ohio St.3d 38 (1991);
b) There are no bright-line rules when it comes to PTD and the number of hours that can be worked in a given day. These are case-by-case determinations and the IC cannot simply rely on a physician's "bottom line" identification of an exertional category (medium/light/sedentary) but must base its decision on the specific restrictions imposed by the physician in the body of the report. See State ex rel. Howard v. Millennium Inorganic Chemicals, 10th Dist. No. 03AP-637, 2004-Ohio-6603, quoting State ex rel. Owens-Corning Fiberglass v. Indus. Comm., 10th Dist. No. 03AP-684, 2004-Ohio-3841. Therefore, if the physician imposes specific restrictions, "the commission must review the doctor's report and actually make certain that any physical restrictions the doctor listed correspond with an ability to actually perform at the exertional level indicated by the doctor";
c) The BWC and employers waive affirmative defenses if they fail to raise and argue them when they can. This principle is crucial and should be carefully considered any time that voluntary abandonment could become an issue. Review the history of the claim and determine if there was a situation in which the defense could have been raised but was not. If such an omission occurred, voluntary abandonment can be defeated. For examples of this argument, see the IC's order in claim numbers 97-550552 (October 4, 2018) and 12-826974 (October 11, 2018). These orders are available at https://www.ic.ohio.gov/orders/browse.jsp;
d) Be aggressive in fighting voluntary abandonment. Remember it is the employer/BWC that bears the burden of proof – ambiguities or half-baked defenses should be resolved in the claimant's favor. See State ex rel. Abbott Foods, Inc. v. Indus. Comm., 10th Dist. Franklin No. 03AP-503, 2004-Ohio-2496. Moreover, the claimant's testimony is "some evidence" on the issue of voluntary abandonment and the IC has an affirmative duty to determine whether a rule violation actually occurred and not just accept the employers' version of events. See State ex rel. Brown v. Indus. Comm., 10th Dist. Franklin No. 10AP-1021, 2010-Ohio-6174, affirmed by State ex rel. Brown v. Indus. Comm., 132 Ohio St.3d 520, 2012-Ohio-3895. See also, State ex rel. Welsh Ents., Inc. v. Indus. Comm., 10th Dist. Franklin No. 19AP-127, 2020-Ohio-2801 (IC does not have to accept a criminal no contest plea with respect to the facts of whether a claimant was fired for assaulting the employer. The IC is within its discretion to find the claimant's testimony more credible than the employer's testimony. A plea in a criminal case does not get res judicata effect in a related civil case – it is admissible but not dispositive).

PART 4

Am. Sub. H.B. No. 81

On June 16, 2020, Governor DeWine signed Am. Sub. H.B. No. 81. It becomes effective September 14, 2020. This Bill makes some significant changes in Ohio Workers' Compensation Law, and made significant changes to the doctrine of voluntary abandonment.

Ohio Rev. Code 4123.56 (F), now provides the following,

"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."

The entire section changes the voluntary abandonment landscape especially as it relates to temporary total disability. The test now goes back to a proximate causation question, which is where it started.

What is the reason the injured worker is unable to work? Is it for reasons unrelated to the allowed conditions?

The standard is now whether or not the direct result of reasons unrelated to the allowed injury or occupational disease prohibits him from receiving compensation.

So the question becomes, if an IW is no longer working for his former employer and now has a necessity for surgery, should the claimant be entitled to TT compensation? The question then becomes, why is the claimant not working? Is it because of his loss of income for whatever reason? Or is it because of the surgery that the claimant is having and the necessary recuperation period from that surgery?

Obviously, Louisiana Pacific is probably still good law. Certainly the employer can terminate an IW. The ramifications of that decision have been altered by 4123.56 (F). Also, note the last sentence of the section, "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". If one thinks back to the decision of Armstrong, which dealt with the psychological disability being occasioned by a physical injury, the following language was found: State ex rel. Armstrong v. John R. Jergenson Co., 136 Ohio St.3d 58, at paragraph 26. "In addition to the arguments asserted by Armstrong, OAJ argues that requiring a claimant to prove a causal connection between a mental condition and a compensable physical injury would make recovery from any claimant's 'nearly impossible.' While we appreciate and respect OAJ's concerns regarding the difficulty of proving causation, that argument is more properly addressed to the general assembly, the branch of state government charged by the Ohio Constitution with making policy choices for the workers' compensation fund. The general assembly may determine that mental conditions had developed

contemporaneously with compensation physical injuries, or that arise out of the same accident or occurrences of physical injuries, should be compensable, and amend the statutory language accordingly. Absent a mandate from the general assembly that such conditions are compensable, however, we will not expand workers' compensation coverage to them."

Consequently, we will see if the court's pronouncement on policy decisions remains as strong as it was in denying benefits for psychological conditions. As it stands now, the general assembly has spoken on the issues of voluntary abandonment. At least for TT compensation, voluntary abandonment has been removed by law.

Ohio Rev. Code 4123.58 also changes the definition of Permanent Total Disability. (D)(3) now provides, "The employee retired or otherwise is not working for reasons unrelated to the allowed injury or occupational disease." The General Assembly struck out the language of "voluntary abandoned the workforce". Because of that, PTD has also undergone a significant alteration by the General Assembly.

Admittedly, Ohio Adm. Code 4121-3-34(D)(1)(d) still says, "If, after hearing, the adjudicator finds that the IW voluntarily removed himself or herself from the workforce, the IW shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the IW's medical condition at or near the time of removal/retirement." This administrative code rule will have to be altered by the Industrial Commission since it is no longer based upon the law. Voluntary abandonment language was directly removed from Rev. Code 4123.58.

Obviously, this would be a source of ongoing litigation as we sort out the meaning of Am. Sub. H.B. No. 81.

There are cases pending in the Court of Appeals, Tenth District. *State ex rel. Huntington Bancshares Inc. v. Taku,* 21AP54. The case is awaiting a Court of Appeals decision. The following is the SHO analysis awarding TTD.

Pages 12-13 of *Taku* of the Reply Brief:

> R.C. 4123.56(F) provides in pertinent parts that an injured worker is entitled to temporary total disability compensation if an Injured Worker is unable to work as a direct result of impairment arising from an injury. However, an Injured Worker is not entitled to temporary total disability compensation if the Injured Worker is not working as the direct result of reasons unrelated to the allowed injury.
>
> The Staff Hearing Officer finds the preponderance of the evidence established that as of 06/19/2020 when the Injured Worker underwent left knee surgery and was disabled from all work by Dr. LaDu, the Injured Worker "was unable to work as a direct result" of the allowed conditions. Despite the Injured Worker's lay off and the fact he was not working for another employer immediately

> preceding his surgery, the Staff Hearing Officer finds the Injured Worker would have been working prior to the surgery but for the allowed conditions and the necessity for surgery associated with the allowed conditions. The Injured Worker engaged in an extensive job search effort following his lay off and even received a job offer which was retracted due to the need for surgery per the Injured Worker's credible testimony. The Staff Hearing Officer specifically finds the proximate cause of the Injured Worker's unemployment prior to his surgery was the allowed conditions and not the layoff. But for the need for surgery, the Staff Hearing Officer determines the Injured Worker would have been employed prior to his surgery date. Accordingly, the Staff Hearing Officer is not persuaded the Injured Worker "was not working as the direct result of reasons unrelated to the allowed injury" and determines the Injured Worker is eligible to receive temporary total compensation.
>
> The foregoing order is based on the MEDCO-14 reports from Dr. LaDue dated 06/19/2020 and 09/29/2020; the 12/09/2020 report from Dr. Whitehead; the job search information filed by the Injured Worker's testimony at hearing regarding his job search efforts.

The flipside of this coin can be found in the Magistrate's opinion in *State ex rel. The Ohio State Univ. v. Pratt,* 19AP603.

The facts of this case involve a Food & Beverage Manager at OSU. She was hired for another job and gave her two-week notice to OSU. Before the end of her employment, she fell and shattered her elbow. TT initially paid without objection. Five weeks later, OSU filed for overpayment and termination of TTD based on abandonment. DHO agreed with OSU and vacated TTD on an abandonment basis. SHO reversed and reinstated TTD. Reconsideration sought and granted. IC, 2-1, upheld SHO.

Mandamus ensued 9/11/2019. Magistrate's opinion issued 1/28/21. Magistrate found the revised statute did not apply in this case even though 4123.56(F) clearly says it should. Magistrate relied on *Klein* which overruled *Reitter Stucco* and *Omnisource*. Magistrate finds OAC 4123.56(F) not to be retroactive and even if it was, it would be unconstitutional. *Klein* controls and the IC abused its discretion in awarding TTD. Case is pending a decision from the Court of Appeals.