

From: Don Drinko
Sent: Wed 7/24/2013 4:21 PM
Gallagher Sharp Shop Talk: Workers' Compensation

Question: What is the current status of *State ex rel. Gross v. Indus. Comm.*, -- termination as "abandonment"?

Many of you will recall the Supreme Court of Ohio's 2006 decision in *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St.3d 615, 2006-Ohio-6500 ("*Gross I*"), which held that an employee terminated because of his own misconduct that also caused his injury, had "abandoned" his employment and was ineligible for temporary total disability benefits ("TTD"). Almost immediately, the Supreme Court agreed to reconsider its decision in "*Gross II*," 115 Ohio St.3d 249, 2007-Ohio-4916, overruled itself by holding that an employee discharged for the same misconduct that caused his injury could not be said to have "abandoned" his position. Very few cases have since expounded upon this decision, but the Court recently addressed the status of "*Gross II*" in a case involving the aftermath of misconduct.

The procedural history of *State ex rel. Haddox v. Indus. Comm.*, 155 Ohio St.3d 307, 2013-Ohio-794, is complicated, but in essence it involved a truck driver who was injured in an accident. A workers' compensation claim was filed, and the claimant sought TTD. The employer contested the request because it had terminated the employee for cause. (The driver was cited, his third violation in one year, and as a result could not secure insurance.) The Industrial Commission initially denied TTD finding the driver had voluntarily abandoned his position, but later asserted continuing jurisdiction and reversed this position citing *Gross II*. The full Industrial Commission heard an appeal and reversed, distinguishing *Gross II* because the claimant was discharged for an inability to secure insurance, not for the citation. The Tenth District Court of Appeals granted a *writ of mandamus*, prompting an appeal as of right to the Supreme Court. The issue presented was whether termination as a result of the consequences of employee misconduct, rather than the misconduct itself, differentiated *Haddox* from *Gross II*.

The Court affirmed the Tenth District, finding that there was no distinction. It was the claimant's misconduct that resulted in his inability to secure insurance, and it was also this misconduct that resulted in his injury. Therefore, any attempt to allege that the employee had voluntarily "abandoned" his job was precluded by *Gross II*. Because the record reflected that the claimant was discharged as a result of the accident that resulted in his injury, his discharge was not tantamount to a "voluntary abandonment" so as to preclude TTD. *See also State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758. The Court also rejected a *res judicata* argument, stating that the assertion of continuing jurisdiction was viable to correct a clear mistake of law. Also notable is a strongly-worded concurrence by Chief Justice O'Connor, who said that the result was mandated by *Gross II*, but that the Generally Assembly should address this issue.

Based upon *Haddox* and *Upton*, a clear line has been drawn – if the same conduct which leads to an injury is the basis for a discharge for cause, employer's are precluded from asserting "voluntary abandonment." If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com