

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: When an employee leaves his employment due to termination, is it necessary for the Industrial Commission to determine whether that termination was voluntary or involuntary? Can he regain his right to temporary total disability compensation without actually returning to the workforce?**

In Ohio, temporary total disability compensation (“TTD”) is awarded pursuant to T.C. 4123.56 and is intended to compensate claimants “for wages lost where a claimant’s injury prevents a return to the former position of employment.” However, an employee who has voluntarily abandoned his position, such as when he is terminated for violation of a written work rule unrelated to a work-related injury, may be determined to be ineligible for temporary total disability compensation. *State ex rel. Louisiana–Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401 (1995). A claimant who has voluntarily abandoned his employment may thereafter reinstate his eligibility for TTD if he re-enters the work force and, due to the original industrial injury, becomes temporarily and totally disabled from his new job. *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2012-Ohio-5305. Recently, the Ohio Court of Appeals, Tenth Appellate District, was presented with a unique case involving an interpretation of *Louisiana-Pacific* and *McCoy*, and specifically whether a claimant can receive TTD for injuries arising from an old claim after being fired from a subsequent job and never returning to work.

*State ex rel. Collins v. Plageman et al.*, 2015-Ohio-736, involved a claimant who suffered a severe back injury in 1993 which ultimately required several surgeries. He returned to work full duty at his old job, but the employer subsequently went out of business. The claimant started his own company for a while then began working for Home Depot in 1999. In 2005, the claim was additionally allowed for “brief depressive reaction” but no additional TTD was granted. The claimant then left Home Depot and began working for Preferred Properties. In October, 2011, the claimant was terminated from Preferred Properties for theft and never returned to the workforce. Later in 2011, the claimant resumed treatment for his depression and subsequently sought additional TTD based upon that condition, but this request was denied by the Industrial Commission because the claimant testified at hearing that he was not working at the start of the requested period for reasons unrelated to the claim. In 2013, the claimant sought an additional allowance for “major depressive disorder” and again sought additional TTD. The request for additional allowance was granted by the Industrial Commission, but further TTD was again denied because the claimant never attempted to return to the workforce. (During the SHO hearing, the claimant testified that his termination was due to a “disagreement” with the employer.) The claimant then filed an action seeking mandamus in the Tenth Appellate District, alleging that the Industrial Commission abused its discretion when it failed to apply the “voluntary v. involuntary” analysis contained in *Louisiana-Pacific Corp., supra*, to determine if the termination from Preferred Properties was for violation of a written work rule. The claimant also argued that *State ex rel. Honda of Am Mfg. v. Indus Comm.*, 139 Ohio St.3d 290, 2014-Ohio-1894, stood for the proposition that that the Industrial Commission abused its discretion when it denied TTD based upon the fact that the claimant was not working at the time of the

request. A magistrate made findings of fact and conclusions of law and concluded that the writ should not issue, prompting an objection by the claimant.

The Tenth District affirmed, holding that the Industrial Commission did not abuse its discretion when it concluded that the claimant was not entitled to TTD. First, it concluded that there was no need to apply the strict 3-part test set forth in *Louisiana-Pacific* to determine if the termination was voluntary or involuntary, because the claimant himself had admitted during the hearing that his termination was for theft and not related to his work-related injury. The Court noted that the entire purpose of the 3-part analysis in *Louisiana-Pacific* was to ensure that a termination was not pretext, and in fact was unrelated to the injury. In the case at bar, the claimant did not dispute that, and therefore that analysis was not needed. Further, the decision in *Honda of Am. Mfg.* does not apply because while the claimant in *Honda* was not working at the time of his request for TTD, he had retired due to his work-related injury. *Honda* stands for the proposition that being out of work due to a work-related injury does not preclude a future award of TTD. In the case at bar, there was no doubt that the claimant had returned to work at his old job (and at several subsequent jobs) before he developed the new and debilitating condition, but that does not change the fact that there was no loss of wages due to the allowed conditions in the claim. Therefore, the Industrial Commission was correct to deny additional TTD.

*Collins* is a unique case in several respects, not the least of which is because the claimant admitted that his termination was for cause and not a pretext. It is also unusual for the Industrial Commission to deny TTD when a condition clearly related to the original injury is the cause of the disability. Unfortunately, in this case the claimant's own honesty (and previous lack thereof) worked against him.

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](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)