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

QUESTION: When the basis for termination is disputed, is it incumbent upon the Industrial Commission to make a determination whether a claimant has "voluntarily abandoned" her employment?

It is well-established in Ohio that a claimant who is terminated "for cause" has voluntarily abandoned her employment, and is therefore ineligible for future temporary total disability (TTD) compensation absent a reintroduction to "gainful employment" at a later date. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.,* 72 Ohio St.3d 401, 403 (1995); *State ex rel. McCoy v. Dedicated Transport, Inc.*, 97 Ohio St.3d 25, 2002-Ohio-5305. Recently, the Ohio Court of Appeals, Tenth Appellate District, considered a case involving an employee who was terminated "for cause" under disputed circumstances and whether the employer's basis for the termination was sufficient to bar future temporary total disability compensation.

State ex rel. Jones v. Indus. Comm., 2014-Ohio-1528, involved a claimant who worked at a residential care facility who injured her back in 1998. A workers' compensation claim was filed and recognized for "lumbar sprain and aggravation of pre-existing disc displacement." In June 2010, the claimant was terminated from employment for striking a resident, an allegation that was denied by the claimant. (The claimant subsequently sought and received unemployment compensation over the objection of the employer.) In March, 2011, the claimant sought and received an additional allowance for "major depression," and in June 2011, the claimant sought additional TTD compensation dating back to September 2010. The request went to hearing, and a DHO deemed her ineligible because her June, 2010 termination for cause constituted "voluntary abandonment" pursuant to the three-part test of *Louisiana-Pacific.* The claimant appealed, but an SHO affirmed the order, concluding that "the Commission has no role in determining if the employer acted with significant information or otherwise properly" in terminating the claimant, and that the claimant had not sought re-employment. This prompted a *mandamus* action, which led to an agreement to remand this matter to be heard by a new SHO. The new SHO, in a very lengthy order, noted with specificity several discrepancies in the record as to whether it was the claimant who had slapped the patient (the claimant testified that she did not, and at least one of the records submitted by the employer referred to another employee with the same first name) but concluded that the incident had occurred and that the termination satisfied *Louisiana-Pacific.* The SHO also concluded that the two-week "return to work" was not a "gainful return to employment." This prompted yet another *mandamus* action, during which a magistrate issued a report recommending that the decision of the SHO be affirmed, resulting in an objection from the claimant.

The Tenth District sided with the claimant, taking the unusual step of adopting the findings, but rejecting the conclusions of the magistrate. The Court held that in the "totality of the circumstances," no evidence supported the finding that the claimant voluntarily abandoned her position. The Court cited "strong reason" to believe that the claimant did not engage in the conduct which caused her termination, including that she had many years of exemplary care, the submission of paperwork which indicated that another "Loretta" had struck the patient, and that the claimant testified that she was not responsible. The family member who made the complaint

never testified under oath, and OBES granted unemployment benefits concluding that the claimant was not fired for just cause over the objection of the employer. "Being fired does not in and of itself constitute abandoning a job." *Id. at p. 10.* The Court further found that the claimant had in fact returned to work for several days in December 2012 before realizing she was not capable, and thus had returned to gainful employment. "There is no magic number of days that a person must work in pain before saying 'I can't do this job.'" The Court granted the writ, remanding the matter back to the IC for an order granting compensation.

It should be noted that the claimant's objection to the findings of the magistrate stated that the "central issue to this action is whether the two week return to work" constituted gainful employment, a point noted in a dissent in *Jones.* Arguably, the claimant did not dispute that the termination itself was sufficient, or perhaps felt that the "return to gainful employment" argument was its best chance for success. Nonetheless, *Jones* reaffirms the position that it is incumbent upon the Industrial Commission to look at whether a termination was just and thus a "voluntary abandonment" of employment. 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.

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