

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

QUESTION: When an employee is terminated for cause for violating a written work rule independent of the incident causing his injury, doesn't this mean that he has abandoned his employment and is not eligible for temporary total disability (TTD) compensation?

This question reminds me that it has been some time since we have discussed the *Louisiana Pacific* case and the standard that must be met for a termination to preclude TTD. *Louisiana Pacific Corp v. Indus. Comm.*, 72 Ohio St.3d 401 (1995) is the seminal Ohio case governing whether a termination constitutes abandonment, and includes a 3-part test to determine whether the violation of work rule is "voluntary": 1) the rule clearly defines the prohibited conduct; 2) the conduct was previously identified by the employer as a dischargeable offense; and 3) the claimant knew or should have known of the rule. Recently, the Tenth Appellate District was presented with a case involving a *Louisiana Pacific* termination, an allegation that the termination constituted abandonment, and whether the termination was sufficient to terminate TTD.

State ex rel. Demellweek v. Indus. Comm., 2018-Ohio-714, involved a claimant who injured his right shoulder on October 31, 2015. More than 5 months later, the claimant was fired for operating an order picker without wearing a harness or tether, a clear violation of the employer's work rules. The claimant protested that he was using the picker when it was only inches off the ground, nobody was in danger, and the other employees had done the same thing and had not been fired. One month after his termination, the claimant filed for TTD. The employer contested the TTD, alleging that he had abandoned employment, but a DHO disagreed, concluding that the consequence of the prohibited conduct was obscured by the sloppy classification of violations and the "practice, customs and usage of the [device]." On appeal, an SHO reversed, finding that the violation of safety rules was a clear violation of safety rules, that violations of such rules were explicitly subject to immediate termination, and it was within the prerogative of the employer to terminate the claimant based on the conduct. A *mandamus* action resulted with the Tenth District.

The Tenth District reversed, concluding that there was sufficient information in the employer's handbook that made it questionable as to whether the termination was abandonment. First, the SHO made no findings as to the height of the picker at the time (the claimant contended it was inches off the ground) and no claim that any other employee had been disciplined for this conduct. There were also no findings that the claimant had engaged in the behavior (or other unsafe behavior) before. The alleged violation was of a single provision of a handbook of more than 50 pages, in which acting in an "unsafe" manner could be construed to be both a "Class A" (immediate termination) or "Class B" (written warning) violation. *Louisiana Pacific* requires that an employee is on notice that his conduct can be expected to get him fired, but chooses to do it anyway, and this was not the case here. The court ordered the SHO order vacated and new order issued reflecting no abandonment.

Demellweek should be seen as a further attack on the issue of "abandonment by termination," which has never been popular with courts. The concern is that this case involved a violation of a clearly written work rule of which the employee was familiar and had signed an acknowledgement, and could be construed as an argument that the IC should evaluate not just the language of the rule, but whether the behavior in question should have been a fireable offense. The lesson is that if a termination will result in abandonment, the violated work rule must be written, spelled out clearly, must not leave any discretion as to whether an employee will be terminated, and that supportive evidence is contained in the record.

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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