

WORKERS' COMPENSATION SHOP TALK

QUESTION: CAN YOU CITE A CASE IN WHICH THE APPLICATION OF A “PROGRESSIVE DISCIPLINE POLICY” RESULTED IN A FINDING THAT A CLAIMANT “VOLUNTARILY ABANDONED” HIS JOB?

It is black letter Ohio law that a claimant, who leaves his job voluntarily, be it due to retirement, resignation, incarceration or termination for cause, can be said to have “abandoned” his position and therefore cannot receive temporary total disability (TTD) compensation. The “termination for cause” situation was unsettled until the Supreme Court’s decision in *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St. 3d 401 (1995), which held that an employee’s termination for cause would bar his receipt of TTD compensation, but only if the termination was due to violation of a written work rule that (1) clearly defined the prohibited conduct; (2) had been previously identified by the employer as a dischargeable defense; and (3) that this fact was known or should have been known to the employee. *Id.* at 403. Recently, the Tenth Appellate District considered a case involving a claimant who was terminated for failure to wear appropriate safety glasses, and whether that termination was a “voluntary abandonment” of his employment precluding TTD compensation.

State ex rel. Reisinger v. Indus. Comm., 2019-Ohio-3344 concerned a claimant who was injured at work. A workers’ compensation claim was filed, which was allowed for various soft tissue injuries, and the claimant returned to restricted duty the following day. On January 15, 2018, the claimant was terminated for failure to wear required Personal Protective Equipment (PPE). (The claimant failed to wear side shields on his prescription safety glasses.) Shortly after the termination, the claimant applied for TTD and the employer objected, arguing that the claimant was terminated in compliance with company policy, and therefore voluntarily abandoned his position. The matter proceeded to a series of hearings at which hearing officers awarded the claimant TTD compensation over the objection of the employer. The employer appealed, and on June 12, 2018, the Industrial Commission vacated the prior SHO order and denied the request for TTD compensation, finding that the employer had met the requirements of *Louisiana-Pacific Corp.*, *supra*. This led to a *mandamus* action in the Tenth District Court of Appeals, and after a Magistrate recommended that the decision be upheld, the claimant objected.

The Tenth District affirmed, concluding that claimant was properly discharged for cause, and had therefore “abandoned” his job. The employer demonstrated a “progressive discipline policy,” the claimant had multiple violations after his injury, including for failure to wear PPE, and had received coaching, a written warning, and a suspension before he was terminated. There was no doubt that the claimant was aware that failure to use PPE could result in termination, as the claimant signed acknowledgment to this effect. Claimant argued that there was no specific mention of “side shields” in his handbook, and that the guidelines did not state he would be

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discharged for failing to wear PPE. However, reference to specific acts is not required under *Louisiana-Pacific* as long as the claimant can be said to be aware that the offending conduct could be the basis for termination. Finally, the Court distinguished *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St3d 559 (2001), a case which found that a progressive policy could be undermined by non-enforcement, citing the fact that there was no such evidence adduced here.

Reisinger is an excellent example of how employers can protect themselves through the implementation and careful administration of a progressive discipline policy. While termination for failure to wear properly shielded safety glasses seems harsh, the company followed its policy to the letter, and properly documented these steps so that the termination was beyond reproach.

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.

Stay tuned for the new Shop Talk format coming in the next few weeks!

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