

**From:** Don Drinko  
**Sent:** Wed 10/17/2018 4:38 PM  
**Gallagher Sharp Shop Talk: Workers' Compensation**

Recently, the Supreme Court of Ohio issued a landmark decision in the matter of *State ex rel. Klein v Precision Excavating & Grating Co*, Slip Opinion No. 2018-Ohio-3890, in which it drastically changed the way courts will view situations where an employee voluntarily removes himself from employment and the impact upon his ability to receive temporary total disability (TTD) compensation. In doing so, the court explicitly overruled two (2) of its previous decisions, *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, and *State ex rel. OmniSource Corp., v. Indus. Comm.*, and severely limited the application of several other case addressing this issue.

*State ex rel. Klein v Precision Excavating* involved an employee who was injured on November 5, 2014. On October 31, 2014, he had provided his employer with two (2) weeks' notice, citing his intention to move to Florida. He also told several co-employees about this plan. After the injury, his doctor took him off work through January 5, 2015. When the employee sought temporary total disability compensation, he was granted a closed period from November 6, 2014 through November 19, 2014, the date before his resignation. This order was affirmed administratively, prompting an appeal to the Tenth District Court of Appeals. Citing *Reitter Stucco*, the Court of Appeals concluded that the claimant was medically unable to return to his former position on November 20, 2014, and therefore was unable to voluntarily abandon his employment on that date as a matter of law. The Industrial Commission took a direct appeal to the Supreme Court of Ohio.

The Supreme Court reversed, finding that the claimant had voluntarily abandoned his employment by providing notice, and therefore was not eligible to receive temporary total disability compensation. In choosing to overrule *Reitter Stucco* and *OmniSource*, the Court stated that those decisions contradict a "fundamental tenet" of disability compensation: that the industrial injury must cause the worker's loss of earnings. When a claimant removes himself from employment for reasons unrelated to the work-related injury, he is no longer eligible for temporary total disability compensation. The Court stated that *Reitter Stucco* (claimant fired for comments about company while on temporary total disability compensation did not abandon his employment) and *OmniSource* (claimant receiving TTD compensation did not voluntarily abandon his employment when he failed to maintain a CDL due to drunk driving convictions) were a "radical departure" from this precedent. The problem originated with a single sentence in a previous case, *State ex rel. Pretty Products, Inc. v. Indus. Comm.*: "A claimant can abandon a former position of employment only if the claimant was physically capable of doing that job at the time of the alleged abandonment." The application of *Pretty Products* resulted in inequality between persons who are discharged for misconduct (*Reitter Stucco, OmniSource*) and those who voluntarily quit or retire (*State ex rel. Hildebrand v Wingate Transport, Inc., Shop Talk 2/12/15*.) It is not fair when an employee who retires cannot get TTD, but one who was fired for losing his license due to a DUI is able. The Court indicated that its intention to do away with illogical and arbitrary distinction.

Going forward, when a workers' compensation claimant voluntarily removes himself from his former position of employment unrelated to a workplace injury, he is no longer eligible for TTD

compensation, even if the claimant remains disabled at the time of his separation from employment. Applied to the facts in *Klein*, the Court concluded that the claimant had clearly given notice and followed through with his stated intention to relocate to Florida. Therefore, despite the fact he was totally disabled at the time of the departure, he had “voluntarily abandoned” his employment and could not receive TTD.

In a blistering dissent Justice Kennedy concurred in judgment only. In his opinion, Justice Kennedy argued that the Court should have gone further, and overruled *Pretty Products* and *State ex rel. Gross v. Indus. Comm.*, 2007-Ohio-4916 (“*Gross II*”). *Gross II* involved an employee who was fired for misconduct that led directly to his injury, and overruling it would simplify the analysis. Similarly, other decisions relying upon the *Pretty Products* line of cases, such as *State ex rel. Cordell v. Pallet Cos.*, were based upon the same line of thinking contained in *Reitter Stucco* and *OmniSource*. “The majority seems woefully ignorant of the confusion pervading our cases.” The dissent supposes that the reluctance to overrule *Cordell*, which was decided in 2016, may stem from recent changes to the composition of the Court, but this is not an excuse for the “disjunction and contradiction that now exists in our case law” on the issue of abandonment. Justice Kennedy lobbies for a simplified rule that would apply *Pretty Products* only to those TTD cases with similar facts, and simply hold that when a worker abandons employment for reasons unrelated to the injury itself, such as by quitting, resigning with notice, retiring, being incarcerated, or committing misconduct that results in termination, the causal connection between the injury and the wage loss is severed.

Obviously, this decision will result in the elimination of several “loopholes” to the concept of voluntary abandonment, and indeed may ultimately result in a reversal of *Pretty Products*. However, I doubt that a reversal of *Gross II*, which would thereby authorize the denial of TTD benefits for terminations resulting directly from the conduct which led to an injury, to be adopted any time soon.

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.  
GALLAGHER SHARP  
1501 Euclid Avenue - 6th Floor  
Cleveland, OH 44115  
Direct Dial: 216.522.1326  
[ddrinko@gallaghersharp.com](mailto:ddrinko@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)