



The Voluntary Abandonment Defense: Still Effective

by Mark A. Shaw and Holly L. Papalia

Suppose there is an employee who hurt his lower back lifting a large box. If he also is caught stealing from the employer and fired pursuant to a written policy prohibiting theft, would the employer still be responsible for paying temporary total disability (TTD) compensation? The answer to this question may depend upon a variety of factors and circumstances. Moreover, the Supreme Court of Ohio has issued several decisions in the past few years that have made application of the voluntary abandonment defense more difficult. Nonetheless, voluntary abandonment remains an effective defense that possibly can save an employer thousands of dollars in workers' compensation costs.

Louisiana-Pacific: The Beginning of the Judicially Created Voluntary Abandonment Doctrine

Temporary total disability compensation is payable when a work injury related disability prevents an employee from returning to his or her former position of employment. The purpose of TTD compensation is to replace lost wages while an industrial injury heals. Compensation ceases when the employee returns to work because there are no longer any lost wages to replace. If, however, an employee simply quits his or her employment or retires from the workforce, there would be no lost wages to replace and the employee generally would not be entitled to TTD compensation should he or she subsequently become disabled due to the industrial injury.

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In 1995, the Supreme Court of Ohio addressed the issue of whether an injured worker's voluntary actions that lead to his or her termination could be viewed similarly to disqualify him or her from receipt of TTD compensation. *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.*, claimant injured his back while in the course of and arising out of his employment. Thereafter, the employer began paying TTD compensation. Claimant's treating physician released him to return to work. However, claimant did not return to work, nor did he report to work for the next few days. As a result, pursuant to the employer's written attendance policy, claimant was discharged from his employment.

Claimant later requested TTD compensation. Ultimately, the Court denied TTD compensation holding that, although the employer may have formalized the separation from employment, it was the claimant who initiated it when he chose to engage in the misconduct that caused the firing. The Court specifically applied the principle that "one may be presumed to tacitly accept the consequences of his voluntary acts." The Court established a three-part test to define a termination as "voluntary" when it is "generated by the claimant's violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee."

Thus, in our example at the outset of this article, the employee who is caught stealing from his employer and fired after sustaining an industrial injury would not be entitled to TTD compensation as a result of the injury so long as the employer had a clearly defined written policy prohibiting stealing and informing employees that such conduct was a dischargeable offense.

Abandonment Does Not Mean Forever

After the Supreme Court decided *Louisiana-Pacific*, lower courts began to address a variety of factual scenarios and the voluntary abandonment doctrine evolved. One issue the courts addressed was whether a voluntary abandonment determination was forever. In other words, what happens where the injured worker, who was terminated for violation of a written policy, returns to work with a different employer and becomes disabled again due to the original injury? Is the injured worker still barred from receiving TTD compensation because he or she was determined to have voluntarily abandoned his or her former position of employment?

Before reaching this exact issue, the Court addressed the situation where an injured worker simply resigned his employment voluntarily, began work with another employer, and then became disabled due to the original industrial injury. In *State ex rel. Baker v. Indus. Comm.*, the Court held, "[w]hen a claimant who is medically released to return to work following an industrial injury leaves his or her former position of employment to accept another position of employment, the claimant is eligible to receive temporary total disability compensation ... should the claimant re aggravate the original industrial injury while working at his or her new job." Thus, the Court in *Baker* established that when an injured worker voluntarily leaves his or her original employment where he or she was injured, the employee will not be barred forever from TTD compensation should the employee re-enter the workforce and become disabled due to the original industrial injury.

After *Baker*, the Court was presented with the question of whether its holding would apply to the situation where an injured worker violated a written work rule or policy and was terminated resulting in a determination of voluntary abandonment under the *Louisiana-Pacific* doctrine. In *State ex rel. McCoy v. Dedicated Transport, Inc.*, the Court extended its holding in *Baker* and held, "a claimant who ... was fired under circumstances that amount to a voluntary abandonment of the former position [of employment] will be eligible to receive temporary total disability compensation ... if he or she reenters the workforce and, due to the original industrial injury, becomes temporarily and totally disabled while working at his or her new job." Thus, under *McCoy*, a claimant who was

found to have voluntarily abandoned his or her employment due to the violation of a written work rule pursuant to *Louisiana-Pacific* could again become eligible for TTD compensation if he or she reentered the workforce and became disabled again due to the original industrial injury.

Therefore, revisiting our example at the beginning of this article, assume the employee, after being terminated from his former position of employment for stealing and deemed barred from receiving TTD compensation, returns to the workforce at another job. After working for a couple of weeks, the employee's condition from the original injury flares up and causes him to go off work again. Pursuant to the Court's holdings in *Baker* and *McCoy*, the employee would be eligible to receive TTD compensation from his original employer even though he was deemed to have voluntarily abandoned that employment.

Termination from Employment: Timing may be Everything

After *Louisiana-Pacific*, the courts also began to scrutinize the timing of the discharge. In *State ex rel. Pretty Prods. v. Indus. Comm.*, claimant was injured. Her physician certified her off work for a period of time, during which she received TTD compensation. Claimant was then released to return to work, but she did not return to work that day or the following two work days. Consequently, her employment was terminated pursuant to a written policy regarding unexcused absences. Thereafter, claimant moved for TTD compensation and presented evidence that she was disabled during the three days the employer counted as unexcused absences.

The Court ultimately remanded the case back to the Industrial Commission for clarification of several issues. However, in its decision, the Court discussed previous holdings and noted that, “[a] claimant can abandon a former position or remove himself or herself from the work force only if he or she has the physical capacity for employment at the time of the abandonment or removal.”

The Court reinforced *Pretty Products* in the recently decided case of *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.* In *Reitter Stucco*, claimant sustained an industrial injury, eventually undergoing surgery. After surgery, claimant undertook physical therapy and a work-conditioning program and began receiving TTD compensation. While still off work, claimant was fired for comments made about the company's president. The employer stopped paying wages in lieu of TTD compensation. The Court reaffirmed its holding in *Pretty Products* and held that, even if all the elements of *Louisiana-Pacific* are satisfied and the claimant is deemed to have voluntarily abandoned his or her former position of employment, he or she will remain eligible for TTD if he or she was temporarily and totally disabled and unable to return to his or her former position of employment at the time of discharge. Thus, the Court's focus was on claimant's disability status at the time of termination from employment.

Current Status of Voluntary Abandonment: The Defense Still is Valid but Questions Remain

Even though the voluntary abandonment doctrine has evolved over the years, the doctrine remains a valid defense where the three prongs set forth in *Louisiana-Pacific* are satisfied. Where an employee violates a clearly defined written work rule or policy that was previously identified by the employer as a dischargeable offense and was known or should have been known to the employee, that employee will be deemed to have voluntarily abandoned his or her employment for purposes of eligibility for TTD compensation. Thus, employers should remain alert for situations where they can apply the voluntary abandonment doctrine to defend against claims for TTD compensation.

Employers also must be mindful, however, that the voluntary abandonment defense does not forever bar a claimant from receiving TTD compensation. A claimant who is deemed to have voluntarily abandoned his or her employment may regain eligibility for TTD compensation if he or she re-enters the workforce and again becomes disabled while working due to the original industrial injury. Moreover, if the termination from employment occurs while claimant is disabled, he or she may remain entitled to receive further TTD compensation from that employer.

Pretty Products and *Reitter Stucco* involved conduct by injured workers that led to their termination after the original industrial injury and while they were disabled. If faced with a situation involving pre-injury conduct that leads to termination after the industrial injury, will the Court similarly hold the injured worker still is entitled to TTD compensation? For example, assume an employee embezzles \$10,000 on a Friday, then sustains an injury on the following Monday and goes off work. On Tuesday, the employer discovers the embezzlement and immediately discharges the injured worker pursuant to its written policy prohibiting theft and embezzlement. Will the Court still hold that the injured worker is entitled to TTD compensation under this factual scenario? The answer should be “yes,” but arguably this case is yet to be decided.

The voluntary abandonment doctrine will no doubt continue to evolve. In the meantime, employers should consider consulting with legal counsel each time a case involves a potential voluntary abandonment of employment to explore whether this defense is applicable. If so, the employer may be able to save significant workers’ compensation costs.



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