

# Is This the End of the Voluntary Abandonment Defense for Ohio Employers?

By Corey Kleinhenz

On March 2, 2023, the Tenth District Court of Appeals announced its decision in *State ex rel. Autozone Stores, Inc. v. Industrial Commission*, 2023-Ohio-633. Unfortunately, the decision is not favorable for Ohio employers.

In *Autozone*, the employer was contesting claimant's entitlement to temporary total disability ("TTD") compensation following an approved surgical procedure taking place two months after the date of claimant's termination by his employer.

Claimant was injured on June 15, 2020 and was working in a light duty capacity until his termination on September 16, 2020. Employer argued claimant was not entitled to TTD compensation because claimant had no "lost wages" to replace since he was not working at the time of his November 16, 2020 surgery.

Administratively, the Industrial Commission approved claimant's request for TTD compensation beginning on the date of claimant's surgery. Employer filed a mandamus appeal to the Tenth District Court of Appeals, requesting the order be vacated and claimant be found ineligible for TTD compensation pursuant to R.C. 4123.56(F).

The Tenth District Court of Appeals affirmed the Industrial Commission and rejected the employer's contention that claimant was ineligible for TTD compensation following the date of his termination.

*Autozone* is an extremely significant case since it's the first appellate review of R.C. 4123.56(F)'s application to a claimant's eligibility for TTD compensation following a departure from the workplace.

Prior to R.C. 4123.56(F), a claimant's eligibility for TTD compensation was based on whether their departure from the workplace was "voluntary." If the claimant's departure from the workplace was "involuntary," claimant remained eligible for TTD compensation following departure from the workplace. If claimant's departure was "voluntary," claimant was ineligible for TTD compensation. This was commonly referred to as the defense of "voluntary abandonment."

In 2020, the Ohio Legislature enacted 4123.56(F), which superseded any prior judicial decisions applying the doctrine of "voluntary abandonment" and provided as follows:

If an employee is unable to work or suffers a wage loss as the direct result of an impairment arising from an injury or occupational disease, the employee is entitled to receive compensation under this section, provided the employee is otherwise

qualified. If an employee is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the employee is not eligible to receive compensation under this section. It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section.

The Court in *Autozone* did not take into consideration whether claimant's departure (termination on September 16, 2020) from the workplace was "voluntary" in determining his eligibility for TTD compensation. Instead, the Court applied the following analysis:

R.C. 4123.56(F) requires a claimant's inability to work to stem immediately from an impairment arising from an injury or occupational disease. We decline to extrapolate an additional requirement in R.C. 4123.56(F) that a claimant prove he or she is unable to work *only* due to an impairment arising from an injury or occupational disease. Such a reading would in essence add words to the statute, which courts are not permitted to do. Furthermore, the second sentence of R.C. 4123.56(F) shows the legislature contemplated that multiple "reasons" may contribute to a claimant being unable to work, and only when those reasons are "unrelated" to the workplace injury would TTD be inappropriate. To instead adopt the employer's position would, in essence, turn the court's gaze back to those facts surrounding why the claimant left the workforce preceding the period of TTD compensation—effectively resurrecting the voluntary abandonment analysis expressly superseded by the legislature.

It was employer's contention that the second sentence of R.C. 4123.56(F) applied and, therefore, claimant's termination on September 16, 2020 made him ineligible for TTD compensation as of the date of his surgery on November 16, 2020. Employer argued claimant was not working or had suffered a wage loss as the *direct result of reasons unrelated to his injury*. Employer maintained claimant's lost wages were directly related to his termination and since he was not working at the time of his request for TTD compensation, he was ineligible for TTD compensation. Employer cited to several prior Ohio Supreme Court decisions in support of its argument. Unfortunately, the Court rejected the employer's argument and found claimant remained eligible for TTD compensation despite his prior termination and failure to be in the workforce at the time of his TTD request. In doing so, the Court stated the following:

Not working—alone—is not dispositive, but rather requires an inquiry into whether the claimant is unable to work as the direct result of an impairment arising from an injury or occupational disease. So long as that causal link is established, and he or she is otherwise qualified, the claimant is eligible for TTD compensation. Although the employer implies we should analyze the effect of the termination and whether evidence exists that claimant had abandoned the workforce prior to his approved surgery, this is exactly the analysis the legislature expressly superseded by enacting R.C. 4123.56(F). Contrary to the employer's position, R.C. 4123.56(F)

requires us to review only whether the claimant in this case was unable to work as the direct result of an impairment arising from an injury or occupational disease to support the grant of TTD for the period specified.

Overall, we find the text of R.C. 4123.56(F) to be unambiguous. If a claimant is unable to work, R.C. 4123.56(F) sets forth two operative questions to be eligible for TTD compensation: (1) whether he or she is unable to work as the direct result of an impairment arising from an injury or occupational disease; and (2) whether he or she is otherwise qualified to receive TTD compensation. R.C. 4123.56(F) does not impose an additional requirement on a claimant to prove he or she is unable to work *solely* due to an impairment arising from an injury or occupational disease. Only when an otherwise qualified claimant is not working as a direct result of reasons unrelated to the allowed injury or occupational disease is the claimant ineligible to receive TTD compensation.

**Given the above analysis of the Court, Ohio employers are left to wonder how requests for TTD compensation can be successfully defended pursuant to R.C. 4123.56(F).**

It is important to note that workers' compensation cases are generally extremely fact specific and determined on a case-by-case basis rather than under general principles of law. In addition, the Standard of Review for reversal of administrative orders via mandamus appeals is extremely stringent. Essentially, so long as there was "some evidence" to support the administrative order and, so long as there was no "abuse of discretion" by the Industrial Commission, the underlying order will not be reversed through mandamus appeal.

In this particular case, the following facts most likely also contributed to the Court's legal analysis in this case:

- (1) Claimant's termination on September 16, 2020 was found to be "without just cause" by the Ohio Department of Jobs and Family Services ("ODJFS").
- (2) Claimant's termination occurred only 3 months following his injury and while he was performing light duty work due to his physical restrictions directly related to his injury.
- (3) Claimant went forward with his surgical procedure only 2 months following his termination.

It is suspected that had the above facts been different, perhaps the legal analysis performed by the Court would have been different. For instance, if claimant had been terminated "for just cause," or had claimant been working "full duty" at the time of his termination, or had claimant waited *2 years* to have surgery rather than *2 months* (without searching for alternative employment following his termination), perhaps the Court would have found claimant's lost wages were the direct result of reasons unrelated to his injury and denied TTD compensation pursuant to R.C. 4123.56(F). However, only time will tell as

more and more cases applying R.C. 4123.56(F) with different fact patterns are litigated in Ohio appellate courts.

*Autozone* is a Tenth District Appellate decision which can still be appealed to the Ohio Supreme Court. If employer files an appeal and the Ohio Supreme Court issues a decision in this matter, we will update you accordingly.

Should you have any questions or concerns with respect to your workers' compensation claims or policies, please do not hesitate to reach out to any of the Roetzel attorneys identified below.

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