

## EMPLOYMENT SERVICES ALERT

10/4/18

### Ohio Supreme Court Expands Voluntary Abandonment Defense

By [Eric Bruestle](#), [Jonathan Miller](#)

In *State ex rel. Klein v. Precision Excavating & Grading Co.*,<sup>1</sup> decided September 27, 2018, the Ohio Supreme Court ruled a claimant who voluntarily removes himself from his former position of employment for reasons unrelated to the workplace injury is no longer eligible for temporary total disability compensation, even if the claimant remains disabled at the time of his separation from employment.

Shortly before his November 5, 2014, injury, John Klein gave two weeks' notice to his employer he was resigning and moving to Florida. Medical evidence established Klein was disabled from the date of injury through at least January 5, 2015. Klein informed the BWC that he was moving to Florida effective November 20, 2014. The Industrial Commission granted Klein temporary total disability (TT) benefits from the date of injury through November 19, 2014, ruling Klein voluntarily terminated his employment on November 20, 2014, for reasons unrelated to his workplace injury.

The Tenth District Court of Appeals reversed the decision of the Industrial Commission and ordered that TT should continue. Citing *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*,<sup>2</sup> the Tenth District Court of Appeals ruled the Commission cannot find an injured worker voluntarily abandoned his employment when he quit work and moved to a different state if medical evidence establishes he remained medically incapable of returning to his former employment at the time he quit his job. The Supreme Court reversed stating "it is time to overrule *Reitter Stucco* and *Omnisource*"<sup>3</sup>. The court noted that in *Reitter Stucco* and *Omnisource* they held that even if a separation from employment satisfies all the criteria of voluntary abandonment, the claimant remains eligible for temporary total disability compensation if he is still disabled at the time of the separation. The court found that "*Reitter Stucco* and *Omnisource* contradict a fundamental tenet of temporary total disability compensation: that the industrial injury must cause the worker's loss of earnings." The court also stated "this exception to the voluntary abandonment rule, however, has created at least two unintended consequences: it immunizes claimants from the consequences of their own voluntary conduct and it authorizes compensation in scenarios for which temporary total disability compensation was not intended."

The Supreme Court outlined its justification for overruling *Reitter Stucco* and *Omnisource* stating those decisions had created confusion and "defy practical workability." They further noted those decisions have created two lines of precedent for voluntary abandonment, with one set of rules for terminated employees and another for employees who voluntarily leave the workplace. The court found "there is no logical distinction between discharge and voluntary resignation for purposes of temporary total compensation. Both constitute a departure from employment unrelated to the workplace injury. And both sever the causal connection between the industrial injury and the loss of earnings. It's time to get rid of this arbitrary distinction."

Although it appeared the court was about to create a clear test based on causal connection between the industrial injury and the loss of earnings, the picture became much less clear when the court explicitly outlined the scope of its holding.<sup>4</sup>

<sup>1</sup> Slip Opinion No. 2018-Ohio-3890

<sup>2</sup> 117 Ohio St.3d 71, 2008-Ohio-499

<sup>3</sup> *State ex rel. Omnisource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 207-Ohio-1951

<sup>4</sup> But See *Pretty Prods.*, 77 Ohio St.3d at 7, 670 N.E.2d 466; *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162 ("Gross II"), and *State ex rel. Cordell v. Pallet Cos., Inc.*, 149 Ohio St.3d 483, 2016-Ohio-8446, 75 N.E.3d 1230; *State ex rel. Luther v. Ford Motor Co., Batavia Transm. Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250, 863 N.E.2d 151.

In their lengthy concurring opinion, three justices reviewed the cases the majority chose not to overrule, pointing out that those cases “focus on the timing of the termination, not the voluntariness of the injured worker’s conduct. It is curious that the majority chooses not to overrule them all.” They further state “the majority’s analysis only perpetuates the confusion”, and that further pronouncements from the court will be needed before the Industrial Commission and Ohio’s employees and employers will have clarity regarding application of the voluntary abandonment defense to payment of TT.

So what does this ruling mean for Ohio employers? Under this decision, where an employee abandons their employment for reasons unrelated to their industrial injury, their right to receive temporary total disability benefits will cease as of the date of that abandonment, even though on that date residuals of the industrial injury would prevent them from returning to their former position of employment. Less clear are those cases which turn on the timing or sequence of events leading to the voluntary termination.

Please direct questions related to the subject matter of this alert, or workers’ compensation in general, to any of the listed Roetzel attorneys.

**Doug Spiker**  
Practice Group Manager,  
Employment Services  
216.696.7125 | [dspiker@ralaw.com](mailto:dspiker@ralaw.com)

**Robert Blackham**  
216.615.4839 | [rblackham@ralaw.com](mailto:rblackham@ralaw.com)

**Eric Bruestle**  
513.361.8292 | [ebruestle@ralaw.com](mailto:ebruestle@ralaw.com)

**Monica Frantz**  
216.820.4241 | [mfrantz@ralaw.com](mailto:mfrantz@ralaw.com)

**Morris L. Hawk**  
216.615.4841 | [mhawk@ralaw.com](mailto:mhawk@ralaw.com)

**Phil Heebsh**  
419.254.5277 | [pheebsh@ralaw.com](mailto:pheebsh@ralaw.com)

**Doug Kennedy**  
614.723.2004 | [dkennedy@ralaw.com](mailto:dkennedy@ralaw.com)

**Jonathan Miller**  
419.254.5273 | [JDMiller@ralaw.com](mailto:JDMiller@ralaw.com)

**Nancy Noall**  
216.820.4207 | [nnoall@ralaw.com](mailto:nnoall@ralaw.com)

**Marcus Pringle**  
216.696.7077 | [mpringle@ralaw.com](mailto:mpringle@ralaw.com)

**Lauren Smith**  
419.254.5258 | [LaurenSmith@ralaw.com](mailto:LaurenSmith@ralaw.com)

**Brian Tarian**  
614.723.2028 | [btarian@ralaw.com](mailto:btarian@ralaw.com)

**Doug Unver**  
614.723.2081 | [dunver@ralaw.com](mailto:dunver@ralaw.com)

**Tim Webster**  
216.696.7795 | [twebster@ralaw.com](mailto:twebster@ralaw.com)