

MEMORANDUM

VIA EMAIL (LSCHAFF@OHIOMFG.COM AND RBRUNDRETT@OHIOMFG.COM)

TO: Lisa Schaaf and Robert Brundrett

FROM: Sue A. Wetzel

DATE: January 31, 2017

RE: Recent Supreme Court Decision:

State ex rel. Cordell v. Pallet Cos., Inc., 2016-Ohio-8446

In a 5-2 opinion, the Supreme Court found that the Ohio Industrial Commission (“Commission”) abused its discretion by denying James F. Cordell’s application for temporary-total disability (“TTD”) compensation after he was terminated following a workplace injury for violation of a work rule that occurred before the injury and was discovered as a result of the injury.

Cordell sustained a work-related injury on February 16, 2012 and filed a workers’ compensation claim the next day. A post-accident drug screen was ordered, the results of which were available on February 22, 2012. The results showed that Cordell tested positive for marijuana and opiates, in violation of his employer’s drug-free workplace policy, and he was promptly terminated for such violation. Cordell’s employer did not allege that Cordell’s marijuana use had anything to do with his injury.

The Bureau allowed Cordell’s claim for medical benefits for a fractured right tibia and fibula, as well as, TTD compensation starting on February 17, 2012. Cordell’s employer, Pallet Companies, Inc. (“Pallet”) appealed the decision, with the matter ultimately reaching a third-level hearing. Relying on the decision in *State ex rel. Paysource USA, Inc. v. Indus. Comm.*, 10th Dist. No. 08AP-677 (Mar. 26, 2009), the Industrial Commission (the “Commission”) held that Cordell had voluntarily abandoned his employment when he used drugs prior to his injury and, therefore, was barred from TTD compensation. A lone dissenting panel member noted that *Paysource* had since been heavily discounted and that the Commission should have reached the opposite conclusion, in accordance with the decision in *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162 (“*Gross II*”)

Cordell challenged the ruling in the Tenth District Court of Appeals and asked the court to vacate the Commission's order denying TTD compensation. The court referred the matter to a magistrate, who compared the holding in *PaySource* with the decision in *Gross II*. The magistrate ultimately adopted and applied the rationale in *Gross II*, finding that a pre-injury infraction that remains undetected until after the workplace injury occurs is not grounds for concluding that a claimant has voluntarily abandoned employment. The court adopted the magistrate's recommendation and ordered the Commission to vacate its order denying Cordell's TTD compensation. Pallet appealed this decision to the Supreme Court.

The Supreme Court held that an employee who is terminated after a workplace injury for conduct prior to and unrelated to the workplace injury, is not barred from receiving TTD compensation under a theory of voluntary abandonment, provided the discovery of the dischargeable offense occurred because of the injury and at the time of the termination the employee was medically incapable of returning to work as a result of the workplace injury. The Court applied *Gross II* in support of its holding.

Because Cordell's workplace injury resulted in the discovery of his work-rule violation and because he was medically incapable of returning to work when he was terminated, his termination did not constitute voluntary abandonment. As a result, the Court affirmed the 10th District's writ of mandamus compelling the Commission to grant Cordell's TTD compensation. Importantly, while the Court acknowledged that Pallet had the right to terminate Cordell because of his violation of its work rules, it also made clear that such right did not change the fact that "Cordell was injured in the course and scope of his employment and that at the time of his termination, he was temporarily and totally disabled." The Court also noted that if it were to deny Cordell's TTD benefits, such denial would encourage employers to investigate injured employees' preinjury conduct for any dischargeable offenses, which would undermine the core principles of Ohio's workers' compensation law.

It is also important to note that Justices O'Donnell and Kennedy dissented from the majority opinion. Justice O'Donnell stated that in his view, Cordell did indeed voluntarily abandon his employment at the time he used marijuana in violation of company policy. Justice O'Donnell distinguished the cases relied upon in the majority opinion, noting that such cases involved employee misconduct and discharge that occurred *after* a workplace injury. Because Cordell used marijuana prior to his injury, he had physical capacity for employment at the time of the offense, and, therefore, voluntarily abandoned his employment at that time.

Justice Kennedy noted in her dissent that Supreme Court precedent "establishes that when an employee uses illegal drugs in violation of a written drug-free workplace policy, that misconduct severs the casual connection between the injury and the wage loss, precluding [TTD] compensation."

Specifically, Justice Kennedy stated that *Gross II* and its accompanying line of cases should be applied only in cases with similar facts—cases in which the employee is fired for violating a workplace-safety rule when the misconduct causes the workplace injury.