

1 The State ex rel. Smith, Appellant, v. Superior's Brand Meats, Inc. et al.,  
2 Appellees.

3 [Cite as *State ex rel. Smith v. Superior's Brand Meats, Inc.* (1996), \_\_\_\_\_  
4 Ohio St.3d \_\_\_\_\_.]

5 *Workers' compensation -- Application for temporary total disability*  
6 *compensation -- Industrial Commission does not abuse its*  
7 *discretion when determining that claimant's departure from his*  
8 *former position of employment was "voluntary" and*  
9 *abandonment barred temporary total disability compensation.*

10 (No. 94-1758--Submitted May 7, 1996--Decided August 21, 1996.)

11 APPEAL from the Court of Appeals for Franklin County, No.  
12 93APD04-534.

13 Appellant-claimant, Cornelius W. Smith, was injured in the course of  
14 and arising from his employment with appellee Superior's Brand Meats, Inc.  
15 His workers' compensation claim was later allowed by appellee Industrial  
16 Commission of Ohio.

17 In 1983, Superior's suspected that claimant had been falsifying his  
18 time cards. In a meeting attended by claimant, his union representative, and  
19 a Superior's supervisor, claimant could not explain the irregularities.

1 Unsatisfied with claimant's response, Superior's told claimant that his  
2 employment would be terminated. Given the option of being fired or  
3 resigning, claimant, after consulting with his union representative, chose the  
4 latter.

5 Claimant secured other work. (*Id.* 19-20) In 1988, he applied for  
6 temporary total disability compensation from December 21, 1987 through  
7 April 3, 1988. A district hearing officer denied temporary total disability  
8 compensation, writing:

9 "This Hearing Officer finds that the claimant resigned [from] his  
10 former position of employment on June 7, 1983, for reasons totally  
11 unrelated to his industrial injury. Per the testimony at hearing, the claimant  
12 was not treating with his physician on or around June 7, 1983. There was  
13 no evidence presented by the claimant that supported any disability due to  
14 his injury affecting his ability to perform his former position of  
15 employment, other than the claimant's statement that he was on light duty  
16 on June 7, 1983. There was no evidence from the claimant that his  
17 physician recommended that he resign his former position of employment  
18 due to his injury.

1           “The claimant did allege, at hearing, that his resignation was not  
2   ‘voluntary’ regardless of the fact the [*sic*] he signed a statement indicating  
3   his resignation was ‘voluntary.’ Per the claimant, he had the choice to  
4   resign or be terminated. The claimant made no allegation that the  
5   threatened termination was in any way related to his industrial injury.  
6   While the claimant alleges duress and that his separation from his  
7   employment was wrongful, no proof that a formal grievance was filed or  
8   processed was proffered by the claimant.

9           “While the claimant’s resignation may not have been totally  
10   ‘voluntary’ from the claimant’s perspective in that, for reasons totally  
11   unrelated to his industrial injury, the employer gave the claimant the choice  
12   to either resign or to be fired. For purposes of Workers’ Compensation, this  
13   Hearing Officer finds that claimant’s resignation was ‘voluntary’ in that the  
14   alleged disciplinary factors precipitating claimant’s choice were totally  
15   unrelated to claimant’s industrial injury. When the claimant signed his  
16   ‘voluntary resignation’ statement, the claimant was aware that he was  
17   abandoning his former position of employment, thus preventing him from  
18   ever having his former position of employment to which he could return.

1           “Based on the above, this Hearing Officer finds the claimant  
2 voluntarily resigned, and abandoned his former position of employment.  
3 Therefore, it is ordered that payment of temporary total compensation from  
4 December 21, 1987 through April 3, 1988, inclusive, and from February 3,  
5 1989 through March 12, 1989, inclusive, is specifically disallowed.” The  
6 order was administratively affirmed.

7           Claimant filed a complaint in mandamus in the Court of Appeals for  
8 Franklin County, alleging that the commission abused its discretion in  
9 defining his departure as “voluntary.” The court of appeals denied the writ.  
10 This cause is now before this court upon an appeal as of right.

11           *Brian & Brian and Richard F. Brian*, for appellant.

12           *Buckingham, Doolittle & Burroughs, Brett L. Miller and Eleanor J.*

13           *Tschugunov*, for appellee Superior’s Brand Meats, Inc.

14           *Betty D. Montgomery*, Attorney General, and *Charles Zamora*,

15           Assistant Attorney General, for appellee Industrial Commission.

16           *Per Curiam*. This controversy presents another variation on a

17 recurrent theme--a claimant’s eligibility for temporary total disability

18 compensation when claimant no longer works at the job at which he or she

1 was hurt. The relevance of employment separation to temporary total  
2 disability compensation eligibility has its roots in *State ex rel. Ramirez v.*  
3 *Indus. Comm.* (1982), 69 Ohio St. 2d 630, 23 O.O.3d 518, 433 N.E.2d 586,  
4 syllabus, which defined ‘temporary total disability’ as “a disability which  
5 prevents a worker from returning to his former position of employment.”  
6 (Emphasis added.) This description prompted the later declaration that an  
7 industrial injury “must not only be such as to render the claimant unable to  
8 perform the functions of his former position of employment, but it also must  
9 prevent him from returning to that position.” *State ex rel. Jones & Laughlin*  
10 *Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App. 3d 145, 147, 29 OBR  
11 162, 163, 504 N.E.2d 451, 453. *Jones & Laughlin* accordingly held:  
12 “A worker is prevented by an industrial injury from returning to his  
13 former position of employment where, but for the industrial injury, he  
14 would return to such former position of employment. However, where the  
15 employee has taken action that would preclude his returning to his former  
16 position of employment, even if he were able to do so, he is not entitled to  
17 continued temporary total disability benefits since it is his own action,  
18 rather than the industrial injury, which prevents his returning to such former

1 position of employment. Such action would include such situations as the  
2 acceptance of another position, as well as voluntary retirement.” *Id.* at 147,  
3 29 OBR at 164, 504 N.E.2d at 454.

4 *Jones & Laughlin* was approved in *State ex rel. Ashcraft v. Indus.*  
5 *Comm.* (1987), 34 Ohio St.3d 42, 44, 517 NE 2d 533, 535, which stated:

6 “The crux of this decision [*Jones & Laughlin*] was the court’s  
7 recognition of the two-part test to determine whether an injury qualified for  
8 temporary total disability compensation. The first part of this test focuses  
9 upon the disabling aspects of the injury, whereas the latter part determines if  
10 there are any factors, other than the injury, which would prevent the  
11 claimant from returning to his former position. The secondary consideration  
12 is a reflection of the underlying purpose of temporary total compensation: to  
13 compensate an injured employee for the loss of earnings which he incurs  
14 while the injury heals.”

15 *State ex rel. Rockwell Internatl. v. Indus. Comm.* (1988), 40 Ohio  
16 St.3d 44, 531 N.E. 2d 678, clarified that only voluntary abandonment barred  
17 temporary total disability compensation. The nature of departure has  
18 remained the pivotal question since then.

1 Delineating between voluntary and involuntary can be confusing  
2 since the natural inclination to characterize departure by the party who  
3 initiated it does not always work. For example, an employee-initiated  
4 separation is considered involuntary if the decision to leave was injury-  
5 induced. *Rockwell*. Conversely, an employer may fire a claimant, yet  
6 successfully assert a voluntary departure under the theory that the  
7 termination resulted from misconduct that the claimant voluntarily  
8 undertook. *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio  
9 St.3d 118, 623 N.E. 2d 1202.

10 Claimant argues that his departure was employer-induced and hence  
11 involuntary. He asserts that the misconduct which the commission found  
12 transformed the separation into a voluntary one was never proven. As such,  
13 it could not have formed the basis for claimant's departure. We disagree.

14 At the outset, we recognize the great potential for abuse in allowing a  
15 simple allegation of misconduct to preclude temporary total disability  
16 compensation. We therefore find it imperative to carefully examine the  
17 totality of the circumstances when such a situation exists.

1           In this case, the commission suggests that the nature of the offense  
2           and claimant's actions corroborated the accusation of wrongdoing. The  
3           incident giving rise to claimant's resignation was not an isolated one.  
4           Instead, it was part of a documented pattern of irregularity in claimant's  
5           time cards. Claimant never denied that his cards had been falsified. He  
6           apparently denied to the employer that he did it, but could offer no credible  
7           alternative explanation for the repeated irregularities. Claimant also never  
8           seriously challenged the grounds for his termination which, as a union  
9           member, he could have done through the grievance process. While claimant  
10          alleges that he completed a grievance form, he did not produce any record  
11          of that document, had no knowledge if the grievance procedure was ever  
12          commenced, and admitted that he never pursued the matter further. Viewed  
13          cumulatively, this constitutes "some evidence" upon which the commission  
14          could conclude that the claimant committed the misconduct alleged, despite  
15          the lack of a formal adjudication thereof. We therefore find no abuse of  
16          discretion in the commission's determining that claimant's departure was  
17          "voluntary" and that this abandonment barred temporary total disability  
18          compensation.



1           RESNICK, J., concurs in the foregoing concurring opinion.

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