



Voluntary Abandonment: Are Injured Workers Protected?

By Angela M. Hardway, Esq.

Angela Hardway attended The University of Akron School of Law as an evening student while working for Bevan & Associates, LPA, Inc. After graduating and passing the Ohio bar exam in 2004, Angela became an associate attorney with Bevan & Associates. Her primary practice area is claimant focused workers' compensation law. Angela also represents clients in victim's rights, family law and estate planning. Angela is a Super Lawyers Rising Star circa 2011, 2012 and 2013, and a member of OSBA, Akron Bar Association and OAJ. For more information, please contact her at (330) 650-0088 or visit www.bevanlaw.com.

One thing often overlooked in the daily grind of workers' compensation is the spirit upon which Ohio's workers' compensation program was developed. Because of negligence lawsuits between workers who were injured on the job and employers who blamed the worker's own negligence, Article II, Section 35 of the Ohio Constitution was enacted, creating Ohio's no fault system. This program was meant to compensate injured workers for injuries sustained in the scope and course of employment regardless of who was negligent. Further, it was made clear in ORC 4123.95 that the workers' compensation statutes are to be construed liberally in favor of employees. Yet, more and more, the rules and regulations enacted under workers' compensation law are moving away from protecting injured workers' rights and toward limiting avenues of recovery for injured workers. The most recent evidence of this is in the area of voluntary abandonment.

Voluntary abandonment is a premise in workers' compensation that was judicially created decades ago. Before the judicial creation of voluntary abandonment there were problems due to employers firing employees under the guise of violating a work rule as a way to avoid the payment of wage benefits if an employee was hurt on the job and had to miss work. The employer's fear was an increase in the workers' compensation costs due to lost time related to the injury. So, if the injured worker was no longer an employee, the employer could avoid the very expensive impact on his workers' compensation premium rates.

This set the stage for the Ohio Supreme Court to step in. In *Pretty Products v. Industrial Commission* the court decided that this problem needed to be addressed and placed limitations on claims of voluntary abandonment. *Pretty Products* established that an investigation as to why an injured worker separated from his employment is not needed if the injured worker was disabled due to the injury at the time of the separation from employment. The reasoning is simply that an injured worker cannot voluntarily abandon his employment if he is disabled.

Now, almost 20 years after *Pretty Products*, injured workers continue to defend themselves against claims of voluntary abandonment. The recent Ohio Supreme Court case, *State ex rel. Hildebrand v. Wingate Transport Inc.* is an example. In *Hildebrand*, the injured worker sustained a low back injury that resulted in work restrictions. The injured worker advised his employer that he was to be on restricted duty per his doctor for 10 days. The employer indicated that work restrictions would not be a problem and that the employee should return to work. The employer also requested the keys back to a vehicle the em-

ployer had been loaning the injured worker for the past six months. The injured worker, upon that request, became upset and directly asked the employer if he was being fired. The employer replied no. The injured worker then came to the worksite and began loading tools into another employee's work vehicle. The employer requested he stop so inventory could be taken of the items being removed from the premises.

Ultimately, although it is unclear as to why, the injured worker was escorted from his place of employment by police. The court held in *Hildebrand* that the injured worker voluntarily abandoned his employment even though the facts were unclear as to whether the injured worker was in fact fired or his actions were interpreted as he quit. What is clear is *Hildebrand* was disabled and on work restrictions. Was it coincidental that the employer suddenly decided that six months was too long to loan his truck to *Hildebrand*? The employer asked the injured worker to return keys to the vehicle in a fashion that made *Hildebrand* ask if he was being fired. It seems logical that this chain of events clearly show that actions were taken by the employer that caused the injured worker to feel he was fired due to his injury and that the acceptance of the light duty restrictions were pretense. In what can be argued as a direct contradiction to *Pretty Products*, the court found that the injured worker voluntarily abandoned his position.

The dissent in *Hildebrand* clearly found fault with the majority decision. The dissent argued that this case is clearly in line with *Pretty Products* and the decision was erroneous. The workers' compensation system was designed to be construed in favor of injured workers, but clearly was not in this case. Does *Hildebrand* leave an opening for employers to manipulate an already difficult system for injured workers using voluntary abandonment? Only the future will tell, but it certainly leaves the question open as to how effective *Pretty Products* will be in future cases containing similar allegations of voluntary abandonment.

