WCJO
WORKERS' COMPENSATION JOURNAL OF OHIO

JAN/FEB 2023 | VOLUME 37 | ISSUE 2

DOES THE BWC STILL BELIEVE THAT THE WORST INJURIES DESERVE THE BEST CARE?

By Jeffrey W. Harris, Esq.

Those of us who have practiced for many years in the field of workers compensation inevitably come across some extremely sad injuries. Death claims are obviously among those claims, but those claims generally involve legal work for only a limited number of years. Some claims, however, involve surviving claimants, and are both devastating and long lasting. Historically, the Bureau of Workers' Compensation (BWC) has handled such claims fairly well. These cases, most of which involve paralysis or severe brain damage, are usually assigned a trauma nurse, and that nurse, particularly with the help of an attorney, can usually help steer a claimant through the morass of workers compensation to get the care he/she really needs.

For the worst injuries, such care generally involves both physical adjustments to the injured worker's home and full-time nursing care. As one might imagine, both of these items can be recurrent and expensive. Physical adjustments to a home need to be periodically updated. Full time nursing care is just as it sounds. Moreover, it is pretty much never ending.

Despite the cost of these items, the bureau of workers' compensation has historically been very good about covering these expenditures. There are a lot of challenges in providing this coverage. Staffing is not always easy to find and sometimes, additional costs pop up for unexpected care needs. Nevertheless, for most of my career, workers compensation, to its credit, has tried to bend over backwards to accommodate the worst injured individuals.

Sadly, this attitude seemed to have changed in late 2021 when the BWC changed some of its policies to make it much, much harder for individuals to get full time nursing care. For those who do not interact with severely injured workers, it might be hard to understand how significant a change from full time care to most of the day care is. I cannot state this strongly enough. The change is massive. Individuals with almost no ability to care for themselves develop problems that those of us lucky enough to be without health cannot even dream of. And the timing of those problems is not predictable. Maybe those problems happen during the times that workers compensation wants to cover and maybe they do not. But for someone who cannot help themselves, a problem arising when no one is present can be

IN THIS ISSUE:

DOES THE BWC STILL BELIEVE THAT THE WORST INJURIES DESERVE THE BEST CARE? 1
CASE SUMMARIES 3
SUPREME COURT 3
COURT OF APPEALS 4

Mat #43002315

THOMSON REUTERS®

humiliating and uncomfortable at the least, and life threatening at the worst. I hear most commonly about concerns related to catheter care—catheters coming out leading to uncontrolled accidents and increased UTIs being two concerns—being literally stuck and unable to move when no one is present to help, and of course, fear of a major medical issue coming up when no one is present. Remember, it's not so easy for quadriplegics to call for and obtain help if no one else is there.

Fundamentally, it seems like workers' compensation is fine placing the burden of these risks on the injured workers. The word we keep hearing is that there is a desire for these burdens to become overwhelming so that the injured workers are forced to move away from home, and into full time care facilities. This is a cost issue. It seems like the cost of such facilities might be cheaper than full time at home care.

EDITOR-IN-CHIEF
Jeffrey W. Harris, Esq.

PUBLICATION EDITOR
Carol L. Fetter, J.D.

Workers' Compensation Journal of Ohio (ISSN 1088-2006) is a journal on workers' compensation law and practice in Ohio, edited by Jeffrey W. Harris, Esq., Tower of Blue Ash, Suite 301, 9545 Kenwood Road, Cincinnati, Ohio 45242. It is issued 6 times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. POSTMASTER: send address changes to Workers' Compensation Journal of Ohio, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

Workers' compensation knows of these problems. However, their efforts to minimize full time care have been ramping up. I recently came upon a very unsettling example for one of my quadriplegic clients, who I should note, is one of the nicest and most positive individuals one can ever come across. In his case, not only are they threatening his full-time care, but they are nitpicking at the care that is being provided. Currently there are some recommendations for the BWC to try and recoup compensation from the nursing provider for time spent on activities the BWC thinks are inappropriate, most notably an instance of helping feed the claimant's cat and helping the claimant move and turn on devices that he uses for entertainment. This raises so many questions. Is it really wrong for the nurse to spend a minute here or there doing something that helps this man live more comfortably? Is it really the best use of the time of the BWC employee to comb through payment records item by item looking for a minute here and a minute there to try and recoup compensation. Should the nurse in question really be castigated for doing something small and nice for a person in such dire straits.

I am going to be blunt in the solution to this problem. There was no problem that needed to be solved. Yes, it is expensive to take care of severely injured workers, but that is why the BWC exists. These are the last people that should be nickel and dimed. Full time care should be provided and everything possible should be covered to make them comfortable. The BWC should not be looking to save money on these people. They already have it bad enough. They do not need the BWC making it worse for them or trying to force them into nursing homes and they certainly not need the BWC poring over there nursing records to find a minute here and a minute there where the time was allegedly spent in a way the BWC does not like. I understand the BWC does not offer much sympathy these days, but to the extent it has some, it should certainly be used on its most disabled claimants. Twenty-four home care should not be difficult to get for someone who really needs it, and that care should have some flexibility in how it is provided. This is how the system has operated for years and it needs to return to that rather than hoping it can save money by pushing its worst of claimants into nursing homes.

CASE SUMMARIES

SUPREME COURT

Voluntary Abandonment: *Klein* clarified. Abandonment question remains intent to abandon the workforce entirely (rather than ability to perform former position). Evidence that injured worker intended to remain in the workforce but for the injury overcame resignation letter to employer

State ex rel. Ohio State University v. Pratt, 2022-Ohio-4111, 2022 WL 17071939 (Ohio 2022)

In July 2017, Lori Pratt gave Ohio State University two weeks notice of her intent to resign her employment (July 5). On June 24, before those two weeks passed, Pratt suffered an injury in the course of her employment. Her claim was allowed by the self-insured employer and Pratt had surgery on June 27. On June 28, she received a written offer of employment from a new employer with a job set to begin in the late summer/early fall based on mutual agreement on a date which would be later agreed on by the parties. Pratt accepted this job in writing. Pratt also requested temporary total disability compensation for the lost time due to her injuries. Ohio State rejected the request and a staff hearing officer initially disallowed the period of compensation based on the resignation letter. A Staff Hearing officer later reversed that decision findings no "voluntary abandonment" as Pratt had been in discussions with the new employer at the time of her resignation, showing that she did not intent to abandon the workforce. Ohio State filed an appeal in mandamus. The tenth district appellate court initially granted Ohio State's appeal based on *State ex rel. Klein v. Precision Excavating & Grading Company*, 155 Ohio St. 3d 78, 2018-Ohio-3890, 119 N.E.3d 386 (2018) finding that the resignation letter removed Pratt from the workforce. The Supreme Court disagreed with that interpretation, reversed the appellate court and upheld the Commission's order. The Court emphasized that *Klein* was intended to focus on departure from the workforce not the position of employment. The Court explained that *Klein* was not intended to change the focus from whether an individual intended to abandon the workforce; the Court said it was merely trying to say that an inability to return to the former position of employment was not determinative on its own. In this case, the Court determined that the Commission was within its discretion to find that Pratt's discussions for a new job was evidence that Pratt had not intended to abandon the workforce and would have remained in the workforce if not for her injury. As such, the Commission's granting of compensation was upheld.

Vested Rights: Exception did not apply because award of temporary-total-disability (TTD) compensation is not a vested right

State ex rel. Walmart, Inc. v. Hixson, 2022-Ohio-4187, 2022 WL 17331357 (Ohio 2022)

Diana Hixson was granted temporary total disability in 2018 before the decision that was issued in *State ex rel. Klein v. Precision Excavating & Grading Company*, 155 Ohio St. 3d 78, 2018-Ohio-3890, 119 N.E.3d 386 (2018). In *Klein* the court ruled that an injured worker who had informed his employer prior to his injury that he would be quitting to move to another state on a specific date was not entitled to compensation following the date he had planned to leave his job. Klein was originally granted compensation for a period that ended as of the date she informed Walmart of her retirement from their establishment. The Commission overruled that decision and granted a longer period of disability as Hixson was disabled from work at the time she left her employment. Following the *Klein* decision, Hixson's employer, Walmart, asked the tenth district court for a writ of mandamus overturning her period of disability. The court of appeals granted that writ of mandamus, finding that the Commission erred under *Klein* by granting compensation beyond the date of retirement Hixson appealed. The Supreme Court overruled the decision and found that the *Klein* decision was not retroactive.

In determining that *Klein* only applies prospectively, the court noted that *Klein* itself noted that it would be applied only to future cases. The Court then applied a three part test from in *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St. 3d 149, 2008-Ohio-5327, 897 N.E.2d 132, Prod. Liab. Rep. (CCH) P 18162 (2008), to determine whether the decision should in fact be applied prospectively. *DiCenzo* focuses first on whether the decision was foreseeable. The court in *Hixon* ruled that *Klein* was not foreseeable because it reversed previous cases of the Supreme Court. The Court said the second prong of the test, promoting the purpose behind the rule change, was a mixed result. Finally, the Court found that taking back all of the compensation that retroactively applying *Klein* would require would cause an inequitable result. Therefore, the Court found that it is appropriate not to apply *Klein* retroactively. As such, mandamus relief was denied and the application of *Klein* can only be used going forward from *Klein* up until the date that the law for voluntary abandonment was changed.

COURT OF APPEALS

Loss of Use of Vision: Brain stem injury not any different than cerebral cortex injury

State ex rel. Dobson v. Industrial Commission, 2022-Ohio-3796, 2022 WL 14424539 (Ohio Ct. App. 10th Dist. Franklin County 2022)

Gerald Dobson was injured on August 29, 2018 when he was trapped under a pile of lumber. He died on September 6, 2018 when his family removed him from a ventilator. Claimant ultimately filed for loss of use of vision in both eyes based on his anoxic brain injury. The Industrial Commission denied the motion based on *State ex rel. Smith v. Indus. Comm.*, 138 Ohio St. 3d 312, 2014-Ohio-513, 6 N.E.3d 1142, 303 Ed. Law Rep. 519 (2014), finding that case prohibited loss of use of the eyes based on brain function. Dobson appealed and mandamus where his appeal was denied by a Magistrate. Dobson appealed again and the court of appeals upheld the Magistrate's decision. The appellate court rejected Dobson's argument that this injury being to the cerebral cortex rather than to the brain stem did not change the results when the loss is due to brain function. As such, the writ of mandamus was denied.