

**Maximum Medical Improvement Is Key Factor In
Determining Liability For Temporary Total Benefits**

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In recent consolidated cases the Industrial Commission division of the Appellate Court held that temporary total disability benefits would be awarded until claimant's condition had medically stabilized, even though evidence demonstrated he was working part-time and attending school. *Mechanical Devices v. Industrial Commission*, ____ Ill.App.3d ____, 800 N.E.2d 819, 279 Ill.Dec. 531 (4th Dist. Oct. 2003). Both Respondent and Petitioner appealed from a decision of the Industrial Commission awarding 52-1/7 weeks of temporary total disability benefits, but denying prospective medical benefits and penalties. (This article will address the TTD issue only.)

Claimant, Michael Johnson, worked as a machinist for Respondent, Mechanical Devices. He injured his right shoulder on 2/2/99 and developed low back pain the following day. One week later claimant saw Dr. Nord who diagnosed right shoulder strain and lumbar strain. An MRI revealed a rotator cuff tear and on 3/17/99 claimant underwent shoulder surgery. On 4/28/99 claimant was terminated because he had exhausted medical leave time. At the time of the accident, claimant also worked as a shuttle bus driver for the YWCA. At that job he averaged between 20 and 25 hours per week, but stopped working after the accident.

On 6/3/99 Dr. Nord released claimant to work with restrictions including standing and sitting for limited periods, no climbing, occasional bending and no lifting over 10 pounds. TTD benefits were terminated by the employer as of that date. Claimant was last evaluated by Dr. Nord on 7/1/99. Dr. Nord testified that claimant was not at maximum medical improvement with respect to his right shoulder and was not able to work full duty as of that date. He further testified that claimant was not at maximum medical improvement regarding his low back and recommended weight loss, physical therapy and anti-inflammatory medication for treatment of the low back.

On 7/6/99 claimant returned to work as a shuttle bus driver for the YWCA. He testified that job was within his work restrictions. During the period from 7/6/99 to 9/30/99 he worked between 24 1/2 and 41 1/4 hours per week. However, for the period from 7/6/99 to the arbitration hearing in early January, 2000, claimant averaged only 15 hours per week. As of 7/26/99 he enrolled full time in cosmetology school attending classes four days per week for six hours per day. He testified that training involved classroom instruction and hands-on training that included standing and sitting while cutting hair.

Claimant turned down a job offer at Federal Express because it involved lifting beyond his restrictions and also turned down a job from Hertz because it involved moving cars, whereas he had applied for a customer service job. Various examining physicians agreed that claimant's condition could have been causally related to the work injury. An arbitrator of the Industrial Commission awarded temporary total disability benefits through 7/6/99 when claimant returned to work for the YWCA. On review, the Industrial Commission awarded TTD benefits through the date of trial, but allowed a credit for wages earned at the YWCA. Respondent appealed on the issue of liability for temporary total disability, arguing that claimant's work for the YWCA, attendance at cosmetology school and rejection of several job offers were all factors that should foreclose TTD benefits beyond the release to work date. Respondent also argued that the award

of TTD was improper because the Commission effectively legislated a partial temporary wage differential award.

The Appellate Court began its analysis by stating that the duration of TTD benefits was a question of fact which was not to be set aside unless contrary to the manifest weight of evidence. "To establish entitlement to TTD benefits, a claimant must demonstrate not only that he or she did not work, but also that the claimant was unable to work." [Citation deleted.] Further, the Appellate Court noted that the dispositive test was whether the claimant's condition had stabilized, that is, whether the claimant had reached maximum medical improvement. [Citation deleted.] The Appellate Court identified four factors to consider in determining whether a claimant has reached maximum medical improvement: (1) a release to return to work; (2) the medical testimony concerning the claimant's injury; (3) the extent of the injury; and (4) "most importantly" whether the injury has stabilized. Despite evidence that claimant had indeed worked for the YWCA approaching a full-time basis at times between 7/6/99 and 9/30/99, the court likened that work to "occasional wages", which did not necessarily preclude the finding of temporary total disability, citing E.R. Moore Co. v. Industrial Commission, 71 Ill.2d 353, 361 (1978) and J.M. Jones Co. v. Industrial Commission, 71 Ill.2d 368, 372-73 (1978) in which the Supreme Court affirmed an award for temporary total disability benefits for a claimant who was able to drive a bus for approximately three hours per day following the injury. The Court found most persuasive the medical testimony that claimant's condition had not stabilized, specifically finding that "no doctor stated that claimant had reached maximum medical improvement." Accordingly, they rejected the employer's argument that claimant's school attendance conflicted with inability to work.

On the issue of the so-called temporary partial disability benefit, the Appellate Court noted that there is no provision for such under the Illinois Workers' Compensation Act. The decision awarding benefits for 52-1/7 weeks was affirmed, but modified to eliminate any offset for claimant's earnings at the YWCA.

In a specially concurring opinion, Justice McCullough, stated in part as follows: "If we are to approve awards of TTD in cases similar to the factual scenario here, it would be worthwhile for the legislature to provide for credit." He further observed that: "Although I do not dissent, I urge the Commission and this Court be wary of complete eroding the word "total" in "temporary total disability."