

TTD DENIED AFTER TERMINATION FOR CAUSE

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Many employers choose to limit liability for temporary total disability benefits, temporary partial disability benefits or maintenance benefits by providing light-duty employment for injured employees. During that period of light-duty employment, the employer may be faced with a difficult decision whether to terminate an employee for misconduct, and if so, whether it will then face liability for TTD, TPD or maintenance benefits for having done so. The Workers' Compensation Commission Division of the Appellate Court has recently decided that "an employee is not entitled to collect TTD benefits after he voluntarily removes himself from the workforce for reasons unrelated to this injury." Obviously, this is a favorable decision for employers in general, but the full extent of this new principal is difficult to predict.

In Interstate Scaffolding, Inc. v. The Workers' Compensation Commission, No. 3-07-0801WC (filed October 20, 2008), the three member majority of the Workers' Compensation Commission Division reversed the Commission award of temporary total disability benefits in favor of claimant Jeff Urban after his termination for defacing company property. Claimant worked as a union carpenter for respondent and was stricken with heat exhaustion on July 2, 2003 while working. Emergency responders placed claimant on a backboard and in attempting to move him, dropped him, causing claimant to strike his head and neck resulting in a mild concussion with post-concussion headaches and blurred vision. Claimant also incurred a cervical strain with MRI evidence of a broad-based disc bulge at C5-6. Respondent offered and claimant began working light-duty in February 2005. His wages were significantly less than had he been working full-duty, but supplemented by "maintenance" benefits from the respondent's workers' compensation carrier. While on light-duty, claimant defaced company property by writing religious inscriptions on walls and shelves in the storage area on respondent's premises. At the hearing on claimant's entitlement to temporary total disability benefits post termination, claimant acknowledged his conduct and lack of permission from respondent to engage in that conduct. Evidence indicated that his conduct first came to the attention of the respondent's president after an issue arose regarding overpayments on his paycheck. He was shortly thereafter terminated from employment at the instruction of the respondent's president.

At the hearing on claimant's entitlement to TTD benefits subsequent to his discharge, the arbitrator refused to award those benefits. The Commission reversed finding that claimant's condition had not stabilized, therefore he was entitled to continuing benefits. (In fact, claimant was paid "maintenance" benefits, not TTD during the period of light-duty.)

In the court's analysis, they reviewed well settled principals regarding entitlement to temporary total disability benefits, citing various cases for the proposition that a claimant is entitled to TTD benefits from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. The dispositive inquiry is whether the claimant's condition has stabilized, whether the claimant has reached maximum medical improvement (MMI). That period during which claimant is temporarily and

totally disabled is generally a question of fact for the Commission, this decision will not be disturbed on review unless contrary to the manifest weight of evidence. Citing those general principals, the Appellate Court first concluded that the Commission had sufficient evidence for its finding that claimant's condition had not stabilized. However, that did not end the inquiry and the court noted "the more interesting aspect of this appeal" was whether claimant was entitled to TTD benefits following discharge.

Respondent argued that the situation was analogous to cases in which maintenance benefits had been suspended or denied for failure to cooperate in good faith with rehabilitation efforts. The Appellate Court acknowledged that line of cases provided that an employee is not entitled to TTD benefits, but that those cases were not directly on point. The court found more relevant the holdings in City of Granite City v. Industrial Commission, 279 Ill.App.3d 1087 (1996) and Schmidgall v. Industrial Commission, 268 Ill.App.3d 845 (1994). In the Granite City case, the Commission had denied TTD benefits after an injured police officer returned to light-duty and thereafter took a disability retirement, removing himself from the workforce in order to collect his pension. The Commission's decision had been affirmed by the Appellate Court since claimant had not presented evidence demonstrating his injury had not stabilized, that he had not been released for light-duty work, or that he could not perform light-duty work. In contrast, the Commission held in Schmidgall that the injured worker was precluded from receiving TTD benefits once he began receiving social security benefits because he had removed himself from the workforce. The Appellate Court disagreed and found that even though claimant had initially returned to a light-duty capacity, he was thereafter taken off work by his physician and had not voluntarily removed himself from the workforce. The Appellate Court concluded that those cases suggested the critical inquiry in determining whether an employee is entitled to TTD benefits after leaving the workforce centers on whether the departure was voluntary.

The court also found instructive to its analysis cases from other jurisdictions addressing an employee's entitlement to TTD benefits following a discharge for misconduct. Two somewhat diverse lines of cases noted in Professor Arthur Larson's treatise on workers' compensation were reviewed by the Appellate Court. One line of cases denies compensation to employees who, after resuming employment following a work-related injury, are terminated for misconduct where the disability played no part in the discharge. Those cases reason that an employee should not be rewarded with disability benefits where the unemployment was not related to the disability but rather to a volitional act over which the employee exercised some control. The other line of cases go a step further and find that misconduct unrelated to the disability does not automatically barr the employee from receiving disability benefits if the employee can establish that the work-related disability hampers the employee's ability to obtain or hold new employment. So, even though the discharge may be justifiable, the employee can still obtain benefits upon a showing that the work-related disability is the cause for the employee's inability to find or hold new employment.

The Appellate Court majority implicitly rejected the second line of cases, finding as follows:

The overriding purpose of the Illinois Workers' Compensation scheme is to compensate an employee for lost earnings resulting from a work-related disability. [citations deleted.] Considering this purpose in conjunction with the law discussed above, we find that allowing an employee to collect TTD benefits from his employer after he was terminated from the workforce as a result of volitional conduct unrelated to his injury would not advance the goal of compensating an employee for a work-related injury. Instead, it would provide a windfall by continuing to compensate the employee despite the fact that the cause of the lost earnings following the employee's departure is unrelated to the injury. We note that this approach comports with the one taken in Granite City, Schmidgall, and those jurisdictions that deny compensation to employees who are terminated for misconduct where the disability played no part in the discharge and that it focuses on the reason the employee was removed from the workforce. Interstate Scaffolding, Inc., supra, page 10-11.

The Appellate Court reversed the decision of the Commission finding that "but for his conduct in defacing respondent's property, claimant would have continued receiving TTD benefits until his condition had stabilized." At oral arguments, the court was advised that claimant had been receiving both a salary from respondent as well as separate benefits from the respondent's insurance carrier designated as "maintenance." The court found no reason to believe that claimant was entitled to "maintenance" if he was not otherwise entitled to TTD benefits following the rationale noted above.

Two members of the division dissented, indicating that although they accepted the general principal benefits could be denied, they could not joint the remainder of the decision because the majority provided no standards for practical application of the newly announced principal. The dissent argued that the appropriate line of cases to follow would be the second referenced above wherein benefits may be suspended, but the employee may still show that despite just cause for discharge, medical restrictions resulting from the work-related injury prevent the employee from securing employment at pre-injury work levels, allowing temporary disability benefits to continue during the period of lost earning capacity. The dissent argued that type of approach serves to prevent an employer from using an infraction of company policy as a pretext for terminating benefits. Finally, the dissent argued that there was little evidence to show claimant's termination was "just" or that other able-bodied employees would have been terminated for such conduct.

Obviously, the full practical implications of this decision will not be known for some time, until tested further at the Commission and Appellate Court levels. However, certain generalities may guide an employer in determining its liability for continuing TTD benefits after an employee is terminated for cause. First, the court is very clear that the reasons for termination must be unrelated to the injury or disability. In many instances, a violation of a safety policy or rule directly results in injury to the claimant. In those circumstances, while termination may be

justified, it is practically impossible to argue that the conduct (violation of the rule or policy) is “unrelated” to the injury. Further, that conduct occurred contemporaneous with the injury, as opposed to after the injury and return to light-duty employment as in the Interstate Scaffolding case.

The Appellate Court seemed to generally accept the conclusory testimony that claimant in that case had violated company policy. In my opinion, an employer would be in a much better position taking advantage of this new case law where it can point to established and well documented company policies or rules. Of course, there are always situations arising in the workplace wherein the employee’s specific conduct cannot be reasonably foreseen and this decision seems to give sufficient leeway for the employer to make ad hoc decisions based on the employee’s conduct.

What about a situation involving a post-accident drug screen with a positive finding violating the company’s established policy? Although the reason for termination is a bit more closely linked to the actual injury, the employee’s conduct (ingesting drugs) is independent of the injury or resulting disability. I would argue the fact that the employer only discovers the violation of the rule or policy after the injury should not preclude the employer from taking advantage of the holding in Interstate Scaffolding. That position would be strongest where the employee had actually returned to light-duty employment before the termination. Arguments that an employer would have provided light-duty employment but for the termination are difficult to support if the employee had not in fact already returned to light-duty prior to the discharge.

Violation of a “no show, no call” policy during a period of light-duty employment should be sufficient to defeat liability for ongoing TTD benefits post discharge under the rationale of Interstate Scaffolding. Clearly, the employee’s conduct is volitional in not showing up for work or not advising the employer why he or she cannot show for work. Of course, there may be situations in which the employee’s physical condition as a result of the injury deteriorates to the point he or she cannot work in any capacity, and those cases will require a case by case analysis.

Finally, it should be noted that this case means the Commission will be determining factual disputes over the reasons for an employee’s discharge from employment. An employer is well advised to document and produce evidence of the reasons for discharge in as much detail as possible at the hearing before the arbitrator. The more egregious the conduct of the employee, the more likely the Commission will follow the holding in Interstate Scaffolding. A discharge for what the Commission may characterize as a minor infraction of employment policies or rules could lead to the Commission concluding the reasons for discharge were “pretextual” in nature and not sufficient to defeat the ongoing claim for temporary total disability benefits. How much leeway the Commission will have in “second guessing” the employer is only going to be determined by analysis of future cases specifically dealing with this issue.