

Entitlement to TTD After Termination for Cause of Light-Duty Employee

What happens when an injured employee who is working light duty on restrictions is terminated for cause? Is he entitled to temporary total disability benefits? The Appellate Court recently faced this issue and held that an employee who voluntarily removes himself from the work force for reasons unrelated to his injury is not entitled to collect temporary total disability (TTD).

The Recent Interstate Scaffolding Case

In *Interstate Scaffolding, Inc. v. I.W.C.C.*, (October 20, 2008), the Illinois Workers' Compensation Commission Division of the Illinois Appellate Court focused on whether the departure from work was voluntary and then stated that a termination for cause involved a voluntary act. The relevant facts in the case are an employee who sustained work-related head and neck injuries, was off work for an extended period of time and was eventually released to work with specific lifting restrictions. The employer accommodated the restrictions and the employee returned to light duty. A few months later, he was fired for defacing company property.

The Court first discussed the general rule entitling a claimant whose condition has not stabilized or, as often referred to, not yet at maximum medical improvement (MMI). A claimant in that situation would generally be entitled to TTD benefits. However, the Court noted that while there was evidence that this claimant's condition had not stabilized and he was technically considered temporarily totally disabled, he was not entitled to TTD benefits following his discharge.

The Court went on to review prior case law and how other jurisdictions had addressed the issue, noting that TTD had previously been denied based on other voluntary actions by a claimant including failure to cooperate with rehabilitation efforts or refusal to perform light-duty work. The Court also analogized the case to a light-duty employee voluntarily retiring from the work force to collect a pension, especially if the employee presented no evidence that the retirement decision was related to the work injury or disability. (*City of*

Granite City v. I.C., 279 Ill. App. 3d 1087 (1996). The Court thus joined other states that deny compensation to employees who are terminated for misconduct where the disability played no part in the discharge.

Lastly, the Court in *Interstate Scaffolding* stated that denying benefits to employees terminated for cause would not advance the stated goal of the Illinois Workers' Compensation Act to compensate an employee for a work-related injury. Rather, the Court sought to prevent a windfall to terminated employees.

The Dissent in Interstate Scaffolding

Of course, there is always another side in the law and there is a caveat to the *Interstate Scaffolding* decision. Can the denial or suspension of TTD benefits be lifted if an employee demonstrates that the work-related disability is the cause of an inability to find or hold new employment? Two of the five appellate judges who sit on the Commission Division of the Appellate Court dissented from the three-member majority opinion. The dissenting judges stated that the majority announced a new principle providing that TTD may be discontinued where an employee who, upon returning to light duty or to a rehabilitation assignment, is terminated from the work force as a result of voluntary conduct unrelated to his disabling condition, but did not provide standards for practical application of the new principle. The dissenting opinion expressed concern that if an employee subsequently establishes that the medical restrictions resulting from the work-related injury prevent him from securing employment at pre-injury work levels, then TTD benefits should be payable for any loss of earning capacity.

Therefore, the dissent indicated that simply showing voluntary conduct resulting in termination should be insufficient to discontinue benefits and suggested the employer should justify the reasons for discharging the employee before denying benefits. The dissent reasoned that doing so would prevent an employer from citing misconduct, which might not otherwise result in termination, as a pretext for terminating an injured employee and would protect against harassment leading to voluntary termination.

Employers would also benefit by being insulated against unacceptable behavior that ordinarily would result in the termination of an employee.

According to the dissent, there was no evidence in *Interstate Scaffolding* of whether the employee would be able to find and hold other employment due to any work-related disability or medical restrictions. Nor was there evidence of whether an able-bodied employee had ever been terminated for such conduct. It claimed however that there was evidence of his having trouble sleeping and increased irritability and temper which may have caused cognitive changes leading to his misconduct. The dissent opined that whether the employee's conduct was related to his post-concussion symptoms presented a fact question that neither party had addressed. A remand with an opportunity for both sides to present additional evidence was recommended. Such evidence might include the employee documenting an unsuccessful job search due to his ongoing restrictions.

The dissenting judges also raised concern that the Commission is not the proper forum for determining whether just cause existed for terminations, noting that employers might subsequently argue in retaliatory discharge actions that the Commission finding an employee's TTD benefits were properly denied following termination should bar relitigating that issue in a civil case.

Misconduct as a Motive to Expand Entitlement to TTD

Almost one year previous, the Appellate Court hinted at a position on the issue of entitlement to TTD after a "just cause" termination. In an unpublished order in the case of *Menard, Inc. v. I.W.C.C.*, (Docket No. 4-06-0771WC - filed November 9, 2007), the Court reversed the Commission who awarded TTD because the claimant's condition had not yet stabilized at the time of his termination. At least one of the claimant's doctors had recommended he participate in a pain management program and based on that recommendation, the Commission found the Petitioner was not at MMI. The Appellate Court disagreed, stating the claimant's condition had resolved as much as expected and pain management was solely to alleviate his subjective, fluctuating complaints of pain and to provide coping strategies. This reasoning differed from that of the lower court

which had also reversed the Commission, but cited its concern that the claimant should not be “free to terminate his employment of his own volition for non-medical reasons, or for deliberate misconduct in the workplace, and thereby compel the payment of TTD because his injuries had not stabilized.” In citing the lower court’s language, the Appellate Court noted that the claimant had not argued his termination was unjustified, but again based its denial of TTD on the evidence supporting a finding of MMI.

Prior Commission Decisions Have Awarded TTD After Just Cause Terminations

The *Interstate Scaffolding* holding represents a definite departure from positions often taken by the Commission. In past decisions, the Commission has awarded TTD after claimants were fired for store theft (*Kuzara v. Petrie Stores*, 00 IIC 0322), unspecified business reasons involving “improprieties” (*Burns v. Interparking*, I04 IIC 0227), safety rule violations (*Alicea v. Sysco*, 06 IWCC 0596), walking off a light duty job (*Saczek v. Rosewood Care Center*, 08 IWCC 0169) and termination for being “unsafe” (*Casper v. TCR System Co.*, 08 IWCC 215). However, it is not unprecedented for the Commission to deny benefits after a termination for cause. See, *Cookson v. Lowes*, 03 IIC 0495 (terminated after making threats and evidence that the employer would have continued accommodating work restrictions) and *Kirk v. City International*, 06 IWCC 0382 (termination under no call/no show policy).

Looking Forward After Interstate Scaffolding

There is a lot of controversy over the *Interstate Scaffolding* case. As one might expect, there is no general consensus among attorneys practicing in the workers’ compensation arena over the Court’s reasoning. The decision is from a narrow three-judge majority with a dissent that raised several concerns over application of the majority’s holding. The employee has filed a Petition for Rehearing to the Supreme Court of Illinois arguing that this is an important question of law and one of first impression in this state.

For the time being, the issue of whether an injured employee working light duty and/or with restrictions is entitled to TTD after termination remains a question of fact for the Commission to decide. The focus will be on why the employee was removed from the

work force. Any employee misconduct or other voluntary removal from the work force should be well-documented. Company policies and their enforcement should be well-established and communicated. It is in an employer's interest to show that the reason for an individual's termination was unrelated to the work injury or any resulting restrictions.

Finally, it must be remembered that the workers' compensation claim of an employee terminated under these circumstances is not extinguished by the termination. It becomes more difficult to oversee and manage the claim of a worker who is no longer working for you.