

## **Workers' Compensation Report**

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# **Temporary Total Disability in a Post-Interstate Scaffolding World**

The Supreme Court's January 2010 decision in *Interstate Scaffolding v. Illinois Workers' Compensation Commission*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010) has had a significant impact on the employer's potential exposure for temporary total disability benefits. In *Interstate Scaffolding*, the claimant suffered a work-related injury in 2003. In 2005, while on light duty, the claimant was terminated after an incident involving the claimant defacing company property with graffiti. The employer refused to reinstate TTD upon the petitioner's termination. At arbitration, the arbitrator found that the claimant was not entitled to continued TTD benefits after his termination notwithstanding that he had not yet reached maximum medical improvement. The commission reversed and awarded TTD relying on the fact that the petitioner had yet to reach maximum medical improvement. The appellate court agreed with the arbitrator and reversed the commission. The case then proceeded before the Illinois Supreme Court. The Illinois Supreme Court held that the employer's obligation to pay TTD benefits to an injured employee did not cease because the employee had been discharged regardless of whether the discharge was for cause. The court stated:

Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied to an employee who remains injured, yet has been discharged by his employer for 'volitional conduct' unrelated to his injury. A thorough examination of the Act reveals that it contains no provision for the denial, suspension or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been "cause" for the employee's dismissal. Such an inquiry is foreign to the Illinois Workers' Compensation system.

*Interstate Scaffolding*, 236 Ill. 2d 132, 146.

From a practical, if not moral, point of view the outcome in the *Interstate Scaffolding* case is disconcerting. From a policy perspective, should an employee on light duty be allowed to commit a criminal act against his employer thereby leading to discharge and then be entitled to claim temporary total disability? In Illinois, the answer to that question is yes. Consequently, efforts were made subsequent to *Interstate Scaffolding* to amend the Workers' Compensation Act to effectively overturn the ruling of the Illinois Supreme Court. Those efforts failed during the 2011 legislative session.

Since *Interstate Scaffolding*, the commission has had occasion to further apply the principle announced in that case. Is maximum medical improvement the only relevant inquiry?

Where the petitioner is terminated with or without cause, *Interstate Scaffolding* provides that the petitioner should be paid TTD if they have yet to reach maximum medical improvement. Different factual scenarios, however, could result in different results.

In *Lopez v. AGI Media*, 11 I.W.C.C. 0576 (June 16, 2011), the petitioner Maria Lopez was working light duty when an audit of personnel files discovered discrepancies with regard to I-9 files and documentation as to the employee's legal ability to work in the United States. The petitioner resigned her employment when she was unable to provide proper documentation. At arbitration the petitioner admitted that she was not legally allowed to work in the United States and that she submitted her resignation for that reason. Without comment as to the issue of TTD, the commission affirmed the award of TTD benefits subsequent to her termination/resignation.

A similar result was reached in *Waddell v. Memorial Medical Center*, 10 I.W.C.C. 0742 (August 4, 2010), where a CNA sought TTD benefits subsequent to her termination from Memorial Medical Center. The petitioner had been terminated for excessive unscheduled absenteeism. The Commission found that the basis for the petitioner's termination was irrelevant in deciding whether the petitioner was entitled to temporary total disability benefits. As in *Interstate Scaffolding*, the Commission noted that the dispositive inquiry is whether the claimant had reached maximum medical improvement.

Where an employee voluntarily removes themselves from the workforce, while under restrictions, a different result may arise. Where an employee retires while working light duty, the employer will avoid further liability for TTD. In *Gill v. Meany, Inc.*, 10 I.W.C.C. 0935 (September 24, 2010), the petitioner voluntarily retired while being accommodated for work restrictions. TTD was not awarded as the petitioner voluntarily removed himself from the workforce. Similarly, in *Albert v. Egyptian Concrete*, 11 I.W.C.C. 0695 (July 18, 2011) an employee voluntarily retired while on light duty. Furthermore, the respondent argued that the petitioner failed to turn in off-work slips and, accordingly, should not be entitled to TTD. The Commission found that TTD was properly terminated for those reasons.

In *Wilson v. American Red Cross*, 10 I.W.C.C. 0969 (September 30, 2010) the commission addressed the issue of an employer's liability for TTD where the employee is terminated prior to maximum medical improvement and thereafter chooses to enroll in college. Following the petitioner's termination by the respondent, she enrolled in Southeast Community College where she obtained an associate's degree. At the time of arbitration she was attending Quincy University. The arbitrator found that the petitioner's undertaking of college course work did not preclude an award of temporary total disability. The arbitrator further noted that the obligation to pay TTD benefits does not cease because of the petitioner's discharge whether or not the discharge was for cause. The Commission affirmed without comment.

In September 2011, the Appellate Court published its first decision further interpreting *Interstate Scaffolding*. In *Otto Baum Co. Inc. v. Illinois Workers' Compensation Commission*, 2011 Ill. App. 4th 100959 WC (September 29, 2011), the claimant suffered a work related back injury in August 2008. He returned to work light duty, but claimed that his condition was exacerbated while on light duty and he was once again taken off work. On two subsequent occasions the employer offered the claimant light duty work within his restrictions; however, the employee refused to return to light duty work claiming that it hurt to drive his car to work. Two months later, the claimant requested light duty work from his employer. The employer refused to accommodate light duty at that time based upon the petitioner's two prior refusals to accept light duty assignments. Finding in favor of the employer, the arbitrator denied the petitioner's request for temporary total disability benefits subsequent to his rejection of the employer's light duty offer, *Otto Baum*, pg. 3. On review, the Commission increased the TTD award to cover the 13 6/7 weeks of benefit that the employee had sought for the period in which he was restricted subsequent to the employer's rejection of the petitioner's offer to return to work light duty.

The issue on appeal was whether the Commission erred in awarding the additional TTD benefits subsequent to the employer's rejection of the petitioner's offer to return light duty. The appellate court affirmed the Commission's award for TTD, concluding that the Commission's decision was not against the manifest weight of the evidence. *Otto Baum*, pg. 6. The court pointed out that the issue of TTD is a question of

fact and, as such, the applicable standard is the manifest weight standard. In awarding TTD, the court stated: “we must infer from the Commission’s decision that the Commission considered, and rejected, the possibility that the claimant’s refusal was so unjustified as to warrant termination of his TTD benefits, yet determine that the claimant’s refusal justified a suspension of his benefits for a time that he refused to work.” *Otto Baum*, pg. 6. The court reiterated that under *Interstate Scaffolding*, TTD benefits continue until an employee reaches maximum medical improvement. It should be noted that the arbitrator did not award TTD benefits during the time periods that the petitioner refused to work notwithstanding the light duty offer. That decision was affirmed by the Commission and left undisturbed by the appellate court. The court stated that an employer may be justified in termination of TTD benefits where an employee improperly refuses modified work.

The *Otto Baum* decision is concerning to the extent that an employee is able to reject light duty offers that are within his restriction and then cure the non-cooperation by requesting light duty employment at a later time. The *Otto Baum* decision, however, should not be read too broadly. Clearly, the appellate court’s opinion implies that reasonable minds can differ on the issue of suspension of TTD benefits versus termination of TTD benefits. Further the appellate decision can be cited for the employer’s benefit with regard to the court’s statement that “the commission has the discretion to terminate or suspend benefits in response to a claimant’s refusal to accept work within his restrictions.” *Otto Baum*, pg. 5. Accordingly, employers should continue to contest entitlement to TTD benefits where employees unjustifiably refuse to return to work pursuant to an offer of light duty employment. The *Otto Baum* decision does not create a bright line test as to when the rejection of light duty may lead to termination of benefits as opposed to suspension. The court, itself, has noted that this is a decision that will fall within the broad discretion of the Commission and will not be disturbed unless against the manifest weight of the evidence.

## About the Author

**Bradford J. Peterson** is a partner in the Urbana office of *Heyl Royster Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers’ compensation, construction litigation, auto liability, premises liability and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers’ compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers’ compensation claims “Medicare, Workers’ Compensation and Set Aside Trusts,” *Southern Illinois Law Journal* (2002).

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