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Temporary Transitional Employment – A New Trend on the Horizon

Imagine, for a moment, that an employee is injured at work and cannot immediately return to his former job due to medical restrictions resulting from the work injury. The restrictions are temporary and at some point, should be lifted as the employee's condition improves, thereby enabling the employee to return to his former job.

We all understand that an employer can offer temporary work to the employee within his restrictions as part of the company's overall return to work policy. This situation offers benefits to both the employer and the employee, ranging from reduced workers' compensation benefits (and thereby reduced premiums) for the employer, to the positive association the employee gets from being productive instead of sitting around home waiting to improve.

But can an Illinois employer offer light duty work through another entity, say, a volunteer entity such as a charity?

Other states have examined this scenario and several have adopted what is referred to as temporary transitional employment (TTE), whereby the employer is permitted to return the employee to light-duty work with another business while the employee's condition heals. At least eight states have already adopted specific TTE or similar programs via statute, while others permit TTE programs based on their workers' compensation statute's current wording. This article discusses the concept of TTE and how Illinois employers might implement such a program given the current language of the Illinois Workers' Compensation Act (Act).

The Importance of Returning an Employee to Work

The issue of returning an employee to work permeates most aspects of a workers' compensation claim. The employee's entitlement to temporary monetary disability benefits hinges on his ability to return to the work force while recovering from the work injury. The ultimate value of the case depends on whether or not that injured worker has returned to the workforce at all, and if so, in what capacity. The employer then, of course, has an interest in both of those issues, so as to mitigate costs both during the employee's active treatment and after treatment at the time of settlement. Naturally though, the employer has issues to consider other than just the economic aspects.

If the employee's job at the time of the injury is fairly physically demanding or somewhat dangerous, the employer may be hesitant to return the employee to that same position while the employee is still seeking treatment and not 100 percent recovered in an effort to avoid a new injury. Additionally, the employer likely has an interest in promoting a positive work environment and good employee morale by showing they are sensitive to work-related injuries and are willing to work with employees to get them back to work, in whatever capacity that may be.

In consideration of the fact that the Act suggests that its primary purpose is to return an injured employee to the workforce, and with concern for the issues above, defense attorneys have long searched for innovative ways to get an injured employee back to work in some capacity. Cue the development of Temporary Transitional Employment (TTE).

TTE, often called "modified duty off-site" (MDOS) and "early-return-to-work" (ERTW) programs, describes a working relationship wherein an injured employee, while still receiving medical treatment for a work injury, is released to return to work with certain restrictions that cannot be accommodated by an employer. In an attempt to return the employee to the workforce, the employer, or insurance company, in many instances, makes arrangements for the employee to work for a third party that can accommodate the individual's restrictions. The relationship usually continues until the employee's restrictions are lifted such that they can return or transition to their pre-injury employment.

These third parties are often not-for-profit organizations or charities such as Goodwill Industries or The Salvation Army, but can be any type of work at all. The arrangement appears ideal on the surface—the purpose of the Act is being satisfied because the employee is returning to the workforce, albeit on a temporary basis, the temporary employer is receiving the benefit of having an employee work without incurring the costs typically associated therewith, and the insurance company is able to reduce the cost of the claim, which would likely also reduce the risk of a potential increase in premiums for the employer—so everyone seemingly wins. In addition, the employee is probably more motivated to cooperate with his medical treatment, be released from care and return to his pre-injury employment when the alternative is working at a not-for-profit instead of sitting on the couch watching daytime TV.

A Case Study

Beginning in 2007, The Ohio State University undertook an interesting study of the impact of TTE. Saddled with $10 million per year in workers' compensation costs, OSU decided to change its approach to disability management and decided to move ill and injured workers to less demanding jobs instead of leaving them at home during recovery and convalescence. Encarnacion Pyle, *Injured OSU Workers Shift to Light Duty as They Heal*, The COLUMBUS DISPATCH (Feb. 26, 2008). In just over a year, OSU reassigned some 500 employees to such light-duty jobs, some of which included delivering magazines to patients in the medical center or enforcing the university's no-smoking policy. During this period, OSU was able to avoid workers' compensation payments by paying their employees their regular salaries.

At the end of the program's first year, OSU had saved roughly $4 million—about double what it anticipated—which did not even include the projected savings from reductions in workers' compensation policy premiums due to lower claim payouts. The program also produced a positive effect on the workers, who reported feeling more productive and happier.

Recent Trends on TTE in Illinois

As much as it seems like an ideal consideration, at least two arbitrators have rejected employer TTE programs. In *Adam Kilduff v. Tri-County Coal*, 12 WC 38843, 9 (Nov. 5, 2014), the respondent terminated the petitioner's TTD benefits when he failed to show up for a volunteer job located through a vocational rehabilitation counselor. The petitioner had been released with light duty restrictions that the employer could not accommodate. The employer used a vocational rehabilitation expert to place the petitioner in a job that could accommodate his restrictions. However, the vocational expert recommended only volunteer positions. *Kilduff*, at 9. Arbitrator Pulia rejected the employer's argument that it could suspend TTD benefits based on the petitioner's rejection of a light duty job offer since the offer was "not for light duty work with respondent, but rather for volunteer work to be performed for an entirely different employer, where no employer-employee relationship exists between the employer where petitioner will be working and the petitioner." *Id*. at 10.

Arbitrator Pulia further stated that "it is the obligation of the respondent during a period of temporary total disability to provide light duty work for petitioner within its own company, where the petitioner remains under the control and supervision of the employer and not under the direction and supervision of an individual at another employer." *Id*. Arbitrator Pulia acknowledged that although such an arrangement is neither specifically provided for nor specifically excluded statutorily, it is against public policy due to the possible litigation that could result if the employee is injured while working under the direction and control of a person other than their employer. *Id*.

In *Richard Lee v. Fluid Management*, 11 WC 48656 5 (Sept. 6, 2013), Arbitrator Kane relied on the lack of statutory support for TTE as the basis for denying respondent's request to terminate TTD benefits. In further explaining his denial, Arbitrator Kane adhered to a strict interpretation of the case law regarding an employee's entitlement to TTD benefits: the employee had not reached maximum medical improvement and the employer could not provide work within his restrictions, so he was entitled to continued TTD benefits. Although apparently irrelevant, Arbitrator Kane also pointed out the clear bias in the fact that the vocational expert testifying in support of placing the petitioner in TTE was an employee of the employer's insurance carrier, as well as the fact that the TTE offer left many unresolved issues such as liability for potential injuries while working at the TTE, reimbursement of mileage to travel to/from TTE, and other issues specific to the arrangement in that case. *Lee*, at 6.

As evidenced by the arbitrators' decisions in the two cases above, there are a number of arguments against TTE and arbitrators are not yet accepting TTE as valid light duty job offers, which means litigation and litigation costs will increase as attorneys continue to fight this battle. So what can we, as defense attorneys, do to best represent the interests of our clients who are looking to reduce the cost of defending these cases?

In arguing that an employee should be required to accept a TTE position if their employer offers it, there is not much Illinois case law to rely upon. Fortunately, we may look to other jurisdictions to support our position that TTE should be accepted in Illinois.

TTE in Other States

As mentioned previously, at least eight other states have statutory provisions permitting some form of TTE, albeit under differing names. These states include: Arizona (Ariz. Rev. Stat. Ann., § 23-1048 (1995 & Supp. 2011)); California (Cal. Lab. Code) 139.47 §West 2003 & Cum. Supp. 2010)); Colorado (Colo. Rev. Stat ;((2011) 105-42-8 § .Iowa (Iowa Code Ann ;((2009) 85.33 § .Maine (Me. Rev. Stat. tit. 39-A§ , 214)); Michigan (Mich. Comp. Laws § 418.30)); Montana (Mont. Code Ann. § 39-71-105 (2005)); and Washington (Wash. Rev. Code § 51.32.090 (2010)). Nebraska also encourages the return of the employee to gainful employment. *See* Neb. Rev. Stat. § 48-162.01(1).

In Ohio, temporary total disability benefits owed to an employee may be terminated in the event the employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment. *Sebring v. Industrial Comm'n*, 123 Ohio St. 3d 241, 244-45 (Ohio 2009). In *Sebring*, the employee lived and worked in Ohio when he sustained a work related injury. Before completing his treatment, he moved to Wyoming due to his wife's employment transfer. *Sebring*, 123 Ohio St. 3d at 241. Upon presenting a release to return to light duty work and requesting TTD benefits from the Ohio employer, the employee was offered two light duty positions. *Id.* at 241-42. The first position was at the employer's facility in Ohio, which the employee refused, citing his relocation to Wyoming. *Id*. at 242. The second was at a Goodwill Store in Wyoming as part of a TTE program, which the employee

also refused. The court found the TTE job in Wyoming to be a bona fide job offer and agreed with the employer's refusal to provide benefits based on the employee's refusal of both offers. *Id*. at 244-45.

In *Gay v. Teleflex Automotive*, No. 3:06-CV-7104, 2008 U.S. Dist LEXIS 24907, *1 (N.D. Ohio Mar. 28 2008), an African-American employee was injured while working and released to return to work with certain restrictions. To accommodate those restrictions, the employer assigned the employee to modified duty off-site work at a local YMCA and advised the employee that his workers' compensation benefits were contingent on his attendance at the TTE. *Gay*, 2008 U.S. Dist LEXIS 24907, at *3-4. The employee brought suit in federal court for racial discrimination, arguing that a Caucasian co-worker was accommodated on-site for more than three years while recovering from her work related injury. *Id*. at *4. In dismissing the employee's claim, the court noted the TTE program was authorized by company policy, that the employee maintained his employment status within the employer, and that he was covered under the employer's labor agreement. *Id*. at *19. The court also pointed out that the employee was paid the same as if he had been working at the employer's facility, he did not lose any material benefits or standing within the employer, and he was not demoted as a result of the assignment. *Id.* While this analysis was applied specifically in that case to show the employee did not have an adverse employment action sufficient to support a cause of action for discrimination, it does shed some light into some factors that a court may consider when determining whether to find a TTE job to be a *bona fide* job offer.

New Jersey appears to support TTE programs as well. In *Martin v. Goodwill Industries of S.N.J., Inc.*, No. A-6097-06T3, 2008 N.J. Super. Unpub. LEXIS 1617 (N.J. Super. Ct. App. Div. Apr. 10, 2008), the employee was injured while working for his employer. When the employer could not accommodate the light duty restrictions, arrangements were made for the employee to work light duty at a local Goodwill store. In support of that arrangement, the employer pointed out that TTE helped the employee "remain active while out of work and retain a 'work ethic.'" *Martin*, 2008 N.J. Super. Unpub. LEXIS 1617, at *2.

The Case for TTE in Illinois

Although TTE is not explicitly provided for in the Act, the statute still provides ammunition to rely on in support of our argument. For example, Section 8(d) discusses wage differentials, which only become relevant when the employee returns to employment earning less than he was at the time of his injury. 820 ILCS 305/8(d)(1). This most often occurs when the employee has secured a different job in a different field and his wages are less than what he was earning at the time of the injury. Typically, the case is then resolved by a settlement representing a portion of the difference between the earnings. That the Act explicitly provides direction on how to handle a situation when the injured worker returns to a job different than his pre-injury employment should be argued when presenting a case in favor of acceptance of a TTE program.

Before discussing permanency and settlement, the Act provides for temporary partial disability (TPD) benefits when an employee is earning less while working light duty than he would be earning if employed in the full capacity of the job. 820 ILCS 305/8(a). The Act specifically contemplates the light duty work that could trigger TTD to be a modified job provided to the employee by the employer "or in any other job that the employee is working." *Id*. An argument can be made that TTE is analogous to both TPD and a wage differential since the Act clearly contemplates an employee returning to the work force at a position other than what he or she was working at the time of injury, both during treatment and after being released from care, and provides direction on how to handle benefits in those situations.

With respect to TTE, an argument against forcing employees to participate is often a question of liability. For example, if the employee is injured while working at the TTE facility, the argument against TTE suggests there would be a dispute over which employer would be responsible for the injury, potentially leaving the injured employee with significant medical bills while the parties attempt to shift the blame. A comparison can be made to a borrowing/lending employee situation as discussed in 820 ILCS 305/1(a)(4). In a borrowing/lending employee situation, the injured employee is typically "employed" by the loaning employer. Their wages may be paid by that employer and they are typically covered under the loaning employer's workers' compensation insurance. The loaning employer sends the employee to work for the borrowing employer, typically at an off-site location. The borrowing employer directs the employee's work. Defense attorneys should point out the clear analogy of a TTE situation to a borrowing/lending employer scenario, which is specifically contemplated by the Act and attempts to resolve that potential problem.

In a more aggressive manner, consider drafting a contract between all parties—employer, employee, and third-party employer—that outlines the specifics of the employment relationships, *i.e.* who is responsible for compensation, who is providing workers' compensation insurance, and who has liability in the event of an accident. While it can be a slippery slope to create contract liability in the event of a potential, future accident, if all parties enter into the agreement fully aware of the potential risks therein, there is a strong basis to argue that the eventual TTE is legitimate and an acceptable job offer. If the employer uses a vendor to set up the TTE and the same TTE employer is routinely used, a contract outlining those issues could be on hand and available in each instance.

With respect to the specifics of the TTE opportunity, it is likely best if the job hours are the same as the hours the employee worked at his pre-injury job. Likewise, the TTE opportunity should be within the same distance from the employee's house. Asking the employee to drive an hour for TTE when he previously traveled five miles to work, or asking him to work third shift when he was hired for first shift work, will fuel an employee's argument as to why the TTE is unreasonable.

It currently seems unlikely that we will get to a point where TTE will be explicitly provided for in the Act. Because TTE is not contemplated by the Act and has not yet been accepted through case law, employees can, and often do, refuse to participate. The TTE is often a job that is nowhere close to what the injured employee was hired to do, and typically, not anything they have any experience or training in. Employers must continue to offer TTE in cases where the employer cannot (or will not, perhaps) accommodate the employee's return to work restrictions. If the TTE program is not going to be specifically accepted, employers must at least do what they can to have the TTE work be considered a *bona fide* job offer sufficient to suspend benefits if rejected. At this point, the defense bar is just working the case up for trial.

Getting Vocational Experts Involved

One component to consider is getting a vocational rehabilitation expert involved. The Act provides that the employer must provide medical and vocational services to rehabilitate the employee. 820 ILCS 305/8(a). If the employee is released to return to work with restrictions that the employer cannot accommodate, in order to attempt to mitigate ongoing costs, a course of vocational rehabilitation can be started (although admittedly costly itself). The employee's entitlement to ongoing financial benefits then hinges on his cooperation with the vocational rehabilitation process. Consequently, one avenue is to have a TTE program in place that can be used during the vocational rehabilitation process.

There are two ways to go about this. First, have a TTE opportunity be a job lead as part of the vocational rehabilitation. It would be treated just like any other job prospect that has work within the employee's restrictions,

meaning benefits can likely be suspended if the employee refuses the opportunity. In that instance, however, if the employee secures employment through vocational rehabilitation, the job would probably not be classified as TTE and would, instead, be a new job independent of the previous employment. The employee could work in that capacity while continuing to seek treatment and then, assuming a release with restrictions that the employer would accommodate, return to his or her pre-injury employment. In that instance, all of the benefits of a TTE situation are present, but because the opportunity was offered through vocational rehabilitation, it would likely not be viewed as TTE and should be more widely accepted.

Alternatively, consider having participation in a TTE job a condition of vocational rehabilitation. For example, the vocational rehabilitation process often involves more than just finding the injured worker a job. It involves preparing them for re-entering the work force through resume building, professional interview skills, educational instruction, and so forth. Part of that process can be participation in a TTE program while searching for a more permanent, appropriate job. In support of this alternative, you will likely need a vocational expert to testify about the advantages of continuing to be a contributing member of the work force and how it affects future employability.

The Benefits of Networking

Another component of vocational rehabilitation is networking and making connections for potential employment. Working through a TTE program provides an injured worker with the opportunity to make networking connections that the worker can use both during their recovery to remain a functioning member of society and, perhaps, after their release, in both their personal and professional lives. Including TTE with vocational rehabilitation under this method may not alleviate the arguments against the legitimacy of TTE, and we must still need to prepare for litigation if the employee does not participate and benefits are consequently suspended, but it certainly adds to the argument in favor of TTE.

Preparing for Trial, if TTE is Not Accepted

Once it is clear that the employee is not going to willingly participate in TTE, begin to develop your arguments in support of TTE for trial. Consider using a vocational rehabilitation specialist to opine on the benefits of the employee returning to the work force in any capacity. Include factual evidence regarding how extended periods of time away from the work force affect an employee's likelihood of returning to work. Be sure to address the psychological and emotional effects of being removed from the work force for an extended period of time, and how those factors ultimately play into the likelihood of the employee being a productive member of the work force.

Include factual evidence—namely actual sociological/psychological studies—to support your position and do not rely solely on the testimony of your vocational rehabilitation expert alone. In that regard, be sure to prepare your vocational rehabilitation expert for trial. Try to select a neutral expert. At the very least, do not use an employee of the employer or insurance company, or someone associated with them, as the bias is obvious and would reduce your expert's credibility at trial. While it cannot be denied that the vocational expert was solicited by the defense, there are plenty of credible and neutral rehabilitation specialists available for consideration.

Another possibility is to get a medical opinion from a physician who could comment on the need for the injured worker to remain physically active during ongoing medical treatment. It is sometimes implicit in medical records that remaining physically active will promote a quicker and more effective recovery. However, in cases where the worker is

unwilling to participate voluntarily in TTE, do not rely on what may be implicit in the medical records and certainly do not rely on what the employee's treating physician may state (unless it is favorable to your position, of course). Instead, consider soliciting an opinion on that issue directly. Employers often solicit an independent medical examination once the employee is released with certain restrictions in order to confirm the need for the restrictions. At the time of that examination, ask the IME physician to comment on the medical benefits of the employee remaining physically active by working. Of course, this suggestion is not applicable in all instances as the restrictions may vary, but a medical opinion addressing the physical benefits of continuing to contribute to the work force is a good tool to consider using in the right factual circumstances.

Similarly, if TTE work is available within the employee's restrictions, consider presenting the potential opportunity to the employee's treating physician. If the physician agrees that the work is within the patient's restrictions, it adds credibility to the job opportunity and support for why the employee should accept it. Of course, the physician could do the opposite and say the employee could not perform that work for whatever reason, so it is important to consider this option only after you have already developed your case in support of the TTE through vocational rehabilitation and/or an independent medical opinion agreeing with the appropriateness of the TTE position.

If all efforts fail and an employee simply refuses to cooperate in TTE, litigation is necessary to attempt to limit the ongoing exposure. For now, defense attorneys have to continue to be creative in soliciting and creating the evidence in support of temporary transitional employment opportunities to be prepared for when litigation does occur.

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