

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

January 2011



A WORD FROM THE PRACTICE GROUP CHAIR

Welcome to 2011! We are all hoping for a safe and prosperous new year.

This month's author is Brad Antonacci, who is one of our workers' compensation attorneys practicing out of our Rockford and Chicago offices. He has spent his entire professional career with our firm representing employers. We hope you find his article on the interplay between TTD benefits and economic lay-offs to be useful in your claims' handling.

As you know, the outgoing Illinois General Assembly seemed to be close to enacting some changes to our workers' compensation statute earlier in the month. In the end, no changes were enacted. A new General Assembly has been seated and we will keep you informed of any legislative developments.

Have a great month.

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THIS MONTH'S AUTHOR:



A native of Hampshire, Illinois, **Brad Antonacci** served as an editor of the Bar Review at Northern Illinois University College of Law. After graduating from law school in 2002, Brad joined Heyl Royster as an associate in the Rockford office.

Brad concentrates his practice in the area of workers' compensation and civil litigation. He has arbitrated numerous workers' compensation claims.

TTD LIABILITY AND MASS LAYOFFS

by Brad Antonacci

As the economy continues to struggle, many employers are facing workforce lay-offs to stay competitive. One issue that seems to be getting increasing attention in these times concerns how economic lay-offs affect an employer's obligation to pay workers' compensation benefits, particularly total temporary disability. The following discussion highlights some of the more significant Illinois cases touching upon these issues and offers a look at the potential scenarios where TTD questions might arise. Additionally, we offer some suggestions on how best to manage your cases to mitigate TTD obligations when lay-offs are unavoidable.

GENERAL ENTITLEMENT TO AND DURATION OF TTD BENEFITS IN ILLINOIS

Temporary total disability benefits are awarded for the period of time from when an employee is injured until he has recovered as far as the character of the injury will permit. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 800 N.E.2d 819 (4th Dist. 2003). A person is considered totally disabled when he or she cannot perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117,675 N.E.2d 175 (1st Dist. 1996).

The test for determining TTD duration is whether the claimant's condition has stabilized, *i.e.*, reached maximum medical improvement (MMI). *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 800 N.E.2d 819 (4th Dist. 2003). The factors to consider in deciding whether a claimant's condition has stabilized include: (1) a release to return to work; (2) the medical testimony about the claimant's injury; and (3) the extent of the injury. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2d Dist. 2005). This test establishes the outer boundary for TTD benefits and a clear demarcation

between entitlement to TTD benefits and permanency. A person may not have reached MMI but is nevertheless no longer receiving TTD benefits because he is back to work and performing his former job, even with restrictions.

A claimant seeking TTD benefits must prove not only that he did not work but also that he was unable to work. *Anders v. Industrial Comm'n*, 332 Ill. App. 3d 501, 773 N.E.2d 746 (4th Dist. 2002).

"Unable to work" does not mean that the claimant is obligated to look for other work. However, evidence of a diligent but unsuccessful search for employment can be sufficient to show that claimant was not employable. *Residential Carpentry v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 975, 982, 910 N.E.2d 109 (3d Dist. 2009).

In *Lukasik v. Industrial Comm'n*, 124 Ill. App. 3d 609, 465 N.E.2d 528 (1st Dist. 1984), the Appellate Court did note that the period of temporary total disability may terminate before the claimant has recovered to the full extent. While the record reflected that the claimant may not have fully recovered as of the date TTD was terminated, the Appellate Court nevertheless found that the Commission could properly have determined that he was no longer totally disabled or unable to work. The Court found no basis from the evidence to justify claimant's failure to seek any employment following his release for light work, and therefore denied TTD benefits at that point.

ECONOMIC LAYOFFS AND TTD BENEFITS

The Case Law Paints a Bleak Picture for Employers

Three Illinois court decisions address a claimant's entitlement to TTD benefits where the claimant is on restrictions and is laid off due to economic reasons. In each case, the employee was released to return to work with restrictions but then was laid off for economic conditions. In affirming the Commission's decision to award TTD benefits while the employee was off work due to economic layoff, the courts focused on whether the employee was off work due to the restrictions or purely economic reasons. Where the employee's medical restrictions and inability to perform his usual employment impaired his ability to work, the fact that the employee had been laid off did not alter the TTD analysis. This conclusion is deemed consistent with the overriding purpose of the Illinois Workers'

Compensation Act to compensate an employee for all lost earnings resulting from a work-related disability.

In *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 739, 467 N.E.2d 1018 (1st Dist. 1984), the issue concerned the claimant's entitlement to TTD following a release to return to work with restrictions and a subsequent layoff due to economic reasons. The Appellate Court affirmed the Commission's finding that the claimant was entitled to continuing TTD benefits despite his economic layoff. In affirming the Commission's decision, the Court observed:

The Industrial Commission could properly find from the evidence that, even if there had been no layoff, the claimant was able to do only light work during the layoff period. At the time he left the plant on layoff he was under instruction by the company doctor to "stay off" his ankle. When the period ended, he was unable to perform his regular job because of pain in his ankle; and was, in fact, taken off that work and placed on light duty [italics added].

Ford Motor Co., 126 Ill. App. 3d at 743.

Thus, the employee's restrictions and inability to perform his usual employment, and not his economic related layoff, caused him to miss work. The claimant was, therefore, entitled to TTD benefits during the economic layoff.

The same result was reached in *National Lock Co. v. Industrial Comm'n*, 166 Ill. App. 3d 160, 519 N.E.2d 1172 (2d Dist. 1988), where the Appellate Court affirmed the Commission's award of TTD benefits during an economic layoff. Using the same reasoning as in *Ford Motor*, the Commission had noted that the employee could have continued working for the respondent had the restrictions arising from her work injury not prevented her from transferring into another job. The claimant's lost time, therefore, was due to her injury-related restrictions and not the economic conditions that prevailed at that time.

In *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278, 437 N.E.2d 628 (1982), the Illinois Supreme Court upheld an award of TTD benefits to an employee who was placed on light duty and was subsequently laid off. The claimant had sustained back injuries at work and was released to return to work with restrictions of light duty only. The claimant requested light-duty work, but the employer advised him that light-duty work was unavailable. The employer then laid off the claimant.

The Court rejected the employer's argument that the claimant was laid off because no work was available, and found that the restrictions limited the employee's ability to return for work. The Court further dismissed the employer's contention that claimant was working, since the work was not a consistent job, but rather occasional.

What Can We Draw From These Cases?

In each of the cases discussed above, the Court ruled that it is the nature of the restrictions and the claimant's ability or inability to return to the former line of work, and not the per se economic layoff that guides the Commission's decision to award TTD benefits. Even with an economic layoff, the issue focuses on whether the employee's injury and restrictions prevented a return to his or her "usual and customary line of employment." Thus, we can conclude that an employer's obligation to pay TTD benefits does not automatically end when there has been an economic lay-off. In the end, the analysis will depend on the facts of each case.

Commission Decisions Shed Little Additional Light

In *McLaughlin v. Fischer Paper Products, Inc.*, 09 IWCC 0029, 2009 WL 405326 (January 13, 2009), the parties stipulated that the claimant was temporarily totally disabled from October 12, 2004, through March 29, 2006, and that she was laid off on March 29, 2006, for economic reasons. The parties also stipulated that several other employees were laid off as well. The claimant stipulated that the layoff of the employees was due to economic reasons. The medical testimony was that during the period in question, the claimant was limited to light-duty work, that she would benefit from additional treatment, and that she was not yet at maximum medical improvement.

According to the Commission, the claimant "remained temporarily totally disabled and was not accommodated by [her employer]."

The Commission awarded TTD benefits for the period of March 30, 2006, the date of the layoff, through the date of hearing in February 2008. The Commission noted:

Petitioner stipulated that her light duty work with Respondent ended due to lack of work. Respondent contends that because the lay-off was due to lack of work, they have no liability for temporary total disability during this period. Where an employer

stops providing work to a claimant who remains under work restrictions and has not reached maximum medical improvement, the employer remains obligated to pay compensation for temporary total disability even though the employer stops providing work because of a lack of work.

McLaughlin, 2009 WL 405326 at Attachment 3.

The Commission rejected the employer's argument that an economic layoff should preclude TTD benefits and focused on the fact that the claimant had restrictions relating to the employment injury and the fact that she had not yet reached MMI.

However, *Gonzalez v. ITT Industries*, 09 IWCC 1182, 2009 WL 5067488 (November 9, 2009), reached a contrary result. There, the claimant was released to light-duty restriction when he was subject to a layoff along with his co-workers. The plant at which the claimant worked was closed due to an economic downturn. The Commission noted that the claimant and his co-workers were equally impacted by the fact that the plant was closed and were subject to a recall to work. Because the claimant and his co-workers were all awaiting a return to employment with the respondent until the end of the layoff period, the Commission concluded that the claimant was not placed at a disadvantage due to his physical disability. As the Commission noted, "Neither the [claimant] nor his co-workers had envisioned a pursuit of work activities with new employers, and all parties were merely awaiting the recall to the ITT location."

Support for the *Gonzalez* decision can be found in mid-1990s Commission decision, *Lorek v. Gross Common Carrier, Inc.*, 94 IIC 0375, 92 WC 2289 (March 15, 1994), where the claimant initially worked for the respondent as a hand trucker. He then worked as a painter for the respondent when he was laid off. Following the layoff,

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the claimant was recalled as a replacement parts hanger. Following this, the claimant then went to a doctor and was placed on light duty. The claimant continued to work light duty. He eventually underwent a right carpal tunnel release surgery and again returned to light-duty work. However, the claimant was then laid off in line of seniority with a number of other workers. The claimant was to go back to his orthopedic physician to determine his work restrictions, but he failed to do so. The claimant also claimed that he looked for a job after being laid off but was unable to find employment.

In denying TTD benefits, the Commission found it significant that the claimant provided no evidence that he was refused employment because of his work restrictions when he continued to look for work. The Commission also found it significant that there was no evidence that the claimant could not perform the jobs he sought. Presumably, if the claimant went to a business seeking employment, he at least felt he could perform the job. It is not clear from the decision that the claimant had reached MMI, but it appears that the Commission denied TTD benefits at least partially due to the fact that the claimant was to go back to his physician to determine his work restrictions but failed to do so.

POSSIBLE SCENARIOS EMPLOYERS MAY ENCOUNTER

Claimant Was Off Work and Had Not Yet Returned to Work Prior to the Economic Layoff

In this situation, the claimant will be owed TTD benefits regardless of the economic layoff because the claimant's inability to work is due solely to the injury. From a defense standpoint, our strategy should be to get an opinion that the claimant is at MMI, either from the treating doctor or through a Section 12 Independent Medical Examination (IME). We also want to show that the claimant had no restrictions or can return to his usual and customary line of employment. If we can establish this point, then no TTD benefits will be due and owing. However, we may be required to offer vocational rehabilitation and maintenance benefits during the claimant's vocational rehabilitation. If we are required to offer vocational rehabilitation, the goal is to get the claimant back to work in his usual and customary line of employment or get him back to work earning

at or near the prior earnings in their usual and customary line of employment.

Claimant Returned to Work With Restrictions (Perhaps Light Duty) and the Employer Accommodated the Restrictions at a Lower Wage Rate, and the Claimant Is Laid Off

A strong case can be made that the claimant is entitled to temporary partial disability benefits only. The claimant returned to work and was paid for that work, albeit at a lower wage. The Section 8(a) TPD benefit paid represents the inability to work at the former level. If that individual is let go because of an economic layoff, the employer should only have to continue to pay the TPD benefit and not the full wage. The claimant, to the extent he was able to work, was in the same position as the other non-injured workers.

The Claimant Returns to Work With Restrictions to His Former Job, Was Not at MMI, the Employer Accommodated the Restrictions With No Wage Loss, and the Claimant Is Laid Off

A strong argument can be made for terminating all TTD benefits. Our defense should be to show that the claimant's restrictions did not interfere with his job duties. This will require testimony from the employer that the employee did return to his usual and customary line of employment. We should argue that the claimant was able to perform his usual and customary line of employment. We should again attempt to obtain an opinion that the claimant is at MMI.

We should also introduce evidence through the employer that all employees, even those performing the claimant's old job, were laid off. We want to be able to show that the economy was the sole reason for the claimant's layoff and not the claimant's injury.

Claimant Returned to Work With Restrictions, Was Not at MMI, and Was Able to Perform His Former Job Because the Restrictions Do Not Interfere With Job Performance

The defense in this situation should argue that the claimant is in no different position than the other non-injured employees who were also let go and is therefore not owed TTD. We again should obtain testimony from the

employer that the claimant was able to perform his usual and customary line of employment despite having the restrictions. We should also attempt to obtain an opinion that the claimant is at MMI.

Claimant Is at MMI Without Restrictions, Returns to Former Employment, Then Laid Off

Under these facts, no TTD benefits are due and owing because it is clear that the sole reason for the claimant's layoff was the economy. The claimant's attorney will more than likely send the claimant back to the doctor to get a note indicating the claimant could not return to his former job or is not at MMI. If this does happen, we would need to dispute this with an opinion that the claimant is at MMI and can return to work without restrictions.

Claimant Is at MMI With Restrictions, Returns to Former Employment But No Accommodation Is Necessary, and Is Then Laid Off

Here, no TTD benefits are due and owing because claimant is at MMI. We must again prove that the claimant is able to perform his usual and customary line of employment even with the restrictions. We should also argue that the claimant is not entitled to maintenance or vocational rehabilitation because he was able to return to his former employment with no accommodation.

Claimant Is at MMI With Restrictions, Restrictions Interfere With Regular Job Duties, Employer Accommodated the Restrictions, and Then Claimant Is Laid Off

Since the claimant is at MMI, no TTD benefits are due and owing. However, since the restrictions interfere with the claimant's regular job duties, it is possible that we would be responsible for vocational rehabilitation and maintenance benefits. If this is the case, the key will be to get the claimant back to work at or near his prior earnings in order to avoid a Section 8(d)1 wage differential. The

employer will also want to show that the claimant was able to perform his usual and customary line of employment.

Claimant Is at MMI With Restrictions, Is Laid Off, Then Obtains Same Employment Elsewhere at a Lower Wage

In this situation, the claimant will likely push for a Section 8(d)1 wage differential. Our defense should be that the claimant has returned to work in his usual and customary line of employment even with his restrictions, so even if the claimant is earning less, he is unable to prove that he is entitled to a Section 8(d)1 wage differential. We will want to develop as broad of a definition of the claimant's usual and customary line of employment as possible to include his current employment.

Claimant Is Not at MMI, Obtains Employment Elsewhere After Being Laid Off, Subsequent Employer Accommodates Restrictions at a Lower Wage

Claimant will argue that he is entitled to temporary partial disability benefits since he is still on light duty. We will want to show that the claimant is at MMI and his condition has stabilized to avoid temporary partial disability benefits. We will also want to show that the claimant's current job falls within his usual and customary line of employment to avoid a Section 8(d)1 wage differential. We may also want to wait it out and see if the claimant's wages increase in order to reduce a potential wage differential.

Claimant Is Not at MMI Because She Delays in Arranging Future Surgery/Treatment, Is Working Light Duty at the Same Or Reduced Rate, and Is Then Laid Off

A strong argument can be made under these facts to deny TTD or temporary partial disability benefits. According to Section 19(d) of the Act, if a claimant refuses to submit to medical, surgical, or hospital treatment as is reasonably essential to promote recovery, the Com-

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mission may reduce or suspend the compensation of any such injured employee. We should therefore argue that the claimant's failure to continue with treatment is the reason she is not at MMI and is not able to return to her former line of employment.

Claimant Not at MMI, Offered Light-Duty Work And Refuses, and Is Then Laid Off

In this situation, we should argue that no TTD benefits are due and owing since the claimant refused to accept a bona fide job offer. The Appellate Court has made clear that if a claimant does not take a bona fide job offer, benefits will be denied. *City of Springfield v. Industrial Comm'n*, 216 Ill. App. 3d 1027, 576 N.E.2d 568 (4th Dist. 1991). If the claimant does not accept a bona fide job offer, TTD benefits should be terminated if the employer is going to accommodate the claimant's light-duty restrictions.

WHAT CAN BE DONE TO LIMIT TTD EXPOSURE DURING LAYOFFS

An employee should not be entitled to receive TTD benefits (or even wage differential benefits) where the cause of his inability to work is due solely to the economic conditions and not due in any way to his restrictions or inability to find work. The defense should be raised that the claimant's medical restrictions are not the reason why the claimant is not currently working. Additionally, it should be argued that the claimant is not currently temporarily and totally restricted from work. If the injured worker would not be hired regardless of his physical condition, but rather due to economic conditions, the worker should not be able to receive TTD benefits.

It is important to note that if the claimant's disability does not impair their ability to find other work, then claimant is in no worse position than claimant's coworkers who were also laid off for economic reasons. By focusing on whether the claimant is in the same position as his coworkers who were laid off, this might let us skirt the idea that a claimant's ability to look for work is not a factor in the TTD analysis. According to *Gonzalez*, when a claimant is laid off, consideration must be given to whom is affected by the layoff, the extent of the claimant's restrictions, and whether it is possible to show that the claimant is at MMI. In the end, if a claimant cannot find work because economic conditions are tight, then the ultimate burden will default to the employer, and the employer will be required

to find work or show that work is available in the same manner as one does in a permanent total disability situation. This might fit into the argument that there must be a showing, regardless of whose burden, that the inability to work results from the disability.

The approach to these claims should also be to aggressively pursue a Section 12 IME (and perhaps a Functional Capacity Assessment) with the goal of minimizing the claimant's restrictions and to actively seek to find them alternative employment. The defense of these claims will be fact oriented and will require that (a) the restrictions are not as severe as claimed, and (b) the restrictions did not interfere with performance of claimant's former job.

Please feel free to contact us should you have any questions concerning the potential impact of an economic lay-off on an employer's obligation to continue paying TTD benefits or any other issues relating to workers' compensation.

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Look for an agenda in
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Invitations will be mailed at a later date

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