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HEYL ROYSTER WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals *January 2009*

A WORD FROM THE PRACTICE GROUP CHAIR

On behalf of Heyl Royster and our workers' compensation practice group, I want to wish you a healthy and prosperous new year. We hope that each of us can put the doom and gloom of the 2008 economy behind us and surprise the Wall Street analysts with a great 2009.

One of the most frequently asked questions we receive is "Do I have to pay TTD?" We usually answer with a phrase like "it is not black and white" and then discuss the specific facts that initiated the TTD inquiry and phone call.

This issue of our Workers' Compensation Newsletter is devoted to that nagging TTD question. Our workers' compensation attorneys in our Rockford office discuss TTD issues that also involve a bit of employment law and business reality. Jim Telthorst of our Edwardsville office has the pleasure of highlighting a recent decision of the Workers' Compensation Commission Division of the Appellate Court which is very favorable from the defense perspective.

So, the message here is optimism. With efficient claims handling and good communication, favorable results can be obtained!

Be sure to mark your calendars for our 24th Annual Claims Handling Seminar, which will be held the afternoon of Thursday, May 21, 2009 at the Doubletree Hotel in Bloomington, Illinois. Please e-mail me with any suggestions for topics.

Thank you for allowing us to serve you.

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OUR PRACTICE GROUP OFFERS:

- EEOC, OSHA, and Department of Labor Representation
- Supervisor WC Training
- In-House Seminars
- Employment and Harrassment Training and Testing
- Risk Management of Workers' Compensation Liability
- Appellate Court Representation

In This Issue

PROFESSOR BONDS – PRACTICE POINTERS

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Q. What action must an employee take before the fraud and insurance non-compliance unit will investigate an allegation of fraud?

A. Section 25.5(e) requires that the employee either: (1) have filed with the Commission an Application for Adjustment of Claim and have either received or attempted to receive benefits under the Act, or; (2) the employee must have made a written demand for the payment of benefits that are related to the reported fraud.

- Practice Pointer. Employers and/or insurance carriers should consider adding a request for benefits to their standard accident report forms or to the medical releases, and both should be signed by the employee during the processing of a request for workers' compensation benefits. This would constitute a "written demand" for the payment of benefits on which an investigation of alleged fraud allegations could be based.
- Practice Pointer. Employers and/or insurance carriers might consider adding language to the endorsement section on the back of a TTD check indicating that "the employee is required to report any other income" or an indication that "if you earn any additional income while receiving TTD benefits call this phone number." This might lay the groundwork for a successful investigation of intentional fraud.

Q. Where can you find more information with respect to the Illinois fraud provisions and the reporting of fraud allegations?

A. Go to either the Illinois Workers' Compensation Commission website at www.iwcc.il.gov, call (877) 923-8648 or e-mail Francis "Buzz" Walsh, the current Fraud Unit Supervisor at francis.walsh@illinois.gov.

Q. Have there been any successful prosecutions of employees for fraud since the implementation of the 2005 amendments?

A. To date, there have been six successful prosecutions of employees for fraud, the majority of which were based on surveillance videos. These convictions have taken place in Cook County, Peoria County and Champaign County. Unfortunately, the Illinois General Assembly recently cut the budget for the Fraud Unit by nearly 50%.

Q. Can you access any prior claims or settlements from the Commission website by typing in a name just as you can access civil and criminal records via the websites of Circuit Clerks throughout Illinois?

A. At present the answer to this is "no." To obtain information with respect to prior filings and settlements, e.g. to determine whether a credit might be due for prior settlement with respect to a specific body part, it is necessary to have the actual WC file number in order to access Commission records. However, information based on Petitioner's name can be obtained by calling the Commission directly.

ARE TTD BENEFITS OWED AFTER AN EMPLOYEE IS TERMINATED FOR CAUSE?

By Brad A. Antonacci, Rockford
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Often the situation arises where a claimant returns to work in a light duty position for the employer following an injury. The employer then terminates the claimant for cause, such as excessive absenteeism. The Workers' Compensation Commission has been less than clear as to whether temporary total disability (TTD) benefits would then be due to the claimant. However, there is support for the position that the claimant is not entitled to TTD benefits.

There have been a number of cases where the Commission has decided that the claimant is entitled to TTD benefits after being terminated for cause. In *Sapp v. Wal-Mart*, 04 W.C. 46838, 06 I.W.C.C. 0459, 2006 WL 1702577 (I.W.C.C. May 30, 2006), the claimant returned to work performing light duty work after his injury. However, the employer terminated the claimant due to absenteeism. The Workers' Compensation Commission narrowly interpreted the definition of TTD. Because the claimant had not yet reached maximum medical improvement, as his condition had not yet stabilized, the claimant was entitled to TTD benefits, according to the Commission. In *Wleklinski v. Kelley Services*, 06 W.C. 54649, 08 I.W.C.C. 0254, 2008 WL 1787573 (I.W.C.C. Mar. 6, 2008), the claimant was terminated, but the Commission held that the claimant was entitled to TTD benefits following this termination, noting that the respondent's obligation to pay TTD benefits was not severed by terminating the claimant's employment. The Commission found that no light duty position was ever offered to the claimant. The Commission actually imposed penalties upon the employer for its failure to pay TTD benefits in this case.

On the other hand, the Commission has also held that the claimant was not entitled to TTD benefits after being terminated for cause. In *Cordero v. Binzel*, 94 W.C. 44770, 96 I.I.C. 893, (1996) the claimant was terminated for cause, and light duty work was available to the claimant. The Commission in this case denied the claimant's request for TTD. In *Kirk v. City Int'l Lease Dep't*, 03 W.C. 55382, 06 I.W.C.C. 0382, 2006 WL 1704190 (I.W.C.C. May 8, 2006), the claimant was terminated for failing to appear for work for three consecutive days. This was after the employer put the claimant on light duty. The Commission denied the claimant TTD benefits because the claimant failed to prove that he was unable to work. Finally, in *Trevino v. Vesuvius*, 03 W.C. 25021, 07 I.W.C.C. 1215, 2007 WL 3133740 (I.W.C.C. Sept. 24, 2007), the Commission denied TTD benefits to a claimant who was terminated for violating a "no call/no show" policy of the employer. The Commission denied TTD benefits even though the claimant had not yet reached maximum medical improvement at the time of his termination.

In other words, the Commission has not clearly ruled on whether a claimant is entitled to TTD benefits after being terminated for cause, and neither the Illinois Supreme Court nor the Workers' Compensation Commission Division of the Appellate Court have directly addressed this issue. The Appellate Court did have an opportunity to address this issue in the case of *Menard v. Workers' Compensation Comm'n,* Coles County Circuit Court, No. 06 MR 22, but unfortunately chose to decide the case on other grounds. Nevertheless, as outlined above there are sufficient case law and Commission decisions to support a defense position that a claimant is not entitled to TTD benefits if the employer is accommodating light duty restrictions and the claimant violates company policy, resulting in termination.

TEMPORARY TOTAL DISABILITY AND UNEMPLOYMENT COMPENSATION

By Thomas P. Crowley, Rockford

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To be eligible for unemployment benefits, an individual must show that he or she is able to work, is available for work, and is actively seeking work. 820 ILCS 405/500(c) (2008). This would appear inconsistent with the notion of temporary total disability. A claimant is temporarily totally disabled 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. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 732-33, 734 N.E.2d 482, 248 Ill. Dec. 554 (3d Dist. 2000). However, in Illinois a claimant can collect both temporary total disability benefits and unemployment compensation at the same time.

If an individual is incapacitated from work, one

would think that he or she would not be available for work, able to work or actively seeking work as is required to receive unemployment compensation benefits. Alternatively, if an individual is able to work, is available to work, and is actively seeking work, then it would be logical to think that the individual is not temporarily totally disabled and thus not entitled to TTD benefits. The dispositive inquiry is whether the claimant's condition has "stabilized," i.e. whether the claimant has reached maximum medical improvement which is not necessarily the ability or availability to work. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 289 Ill. Dec. 794 (5th Dist. 2004).

The Illinois Supreme Court addressed this issue in *Crow's Hybrid Corn Co. v. Industrial Comm'n*, 72 Ill. 2d 168, 380 N.E.2d 777, 20 Ill. Dec. 568 (1978). In *Crow's Hybrid Corn*, the Supreme Court held that the unemployment compensation statute and the workers' compensation statute were not mutually exclusive, and that the receipt of temporary total disability is not inconsistent with the receipt of unemployment benefits for the same period. The court also noted that the unemployment compensation statute states a claimant is not eligible for unemployment compensation, or should receive reduced benefits if the claimant is receiving remuneration under the workers' compensation statute, and stated that once disability benefits are received, either the unemployment compensation should be reduced or the unemployment compensation fund should be reimbursed. To give the employer credit for the unemployment compensation payments suggests the unemployment compensation fund should be liable for that period of disability for which the claimant receives unemployment benefits, but is the disability attributable to his employment?

Earlier this year, the Workers' Compensation Commission came to a different conclusion. In *Herrera v. Cabrini Retreat Center, Inc.,* 06 W.C. 5742, 08 I.W.C.C. 0317, 2008 WL 1794742 (I.W.C.C. March 17, 2008), the Commission held that the respondent was eligible for an offset of unemployment compensation earnings against temporary total disability benefits, pursuant to section 8(j) of the Workers' Compensation Act. Section 8(j) of the Act contains broader language concerning credits due the employer than that of the unemployment compensation statute, and does not specifically address when a claimant receives unemployment compensation. Why the Commission chose to give a credit to the employer for unemployment benefits rather than the unemployment compensation fund a credit for the TTD payments is not clear. Until the courts in Illinois consider both statutes and decide how they should interact with each other, employers should always seek a credit for the amounts of unemployment compensation received by the petitioner.

POSSIBLE ISSUES CONCERNING TEMPORARY PARTIAL DISABILITY BENEFITS

By Lynsey A. Welch, Rockford
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Temporary partial disability benefits was an amendment to the Illinois Workers' Compensation Act, effective February 1, 2006. This amendment was a substantive change, and only applies to cases with an accident date on or after February 1, 2006.

The creation of temporary partial disability benefits was necessary to end a monumental unfairness to the employer who previously was not able to receive a credit for an employee's earnings when the employee was working on a limited basis but had not yet reached maximum medical improvement. Since its creation, the Workers' Compensation Commission Division of the Appellate Court has yet to issue any decisions concerning disputes relating to temporary partial disability benefits. However, we do anticipate a couple of issues that may lead to opportunities for the Appellate Court to issue decisions concerning the interpretation and application of the temporary partial disability provision.

One possible issue would be whether temporary total disability benefits or temporary partial disability

benefits are appropriate. In such disputes, the employee will argue that he is entitled to temporary total disability benefits, while the employer will argue temporary partial disability benefits are appropriate. Two scenarios where such a dispute may arise are as follows. In the first scenario, an employee is offered light-duty work within his restrictions; however, the employee argues that he is not capable of performing the certain job duties that the employer has made available. In the second scenario, doctors render conflicting or contrasting opinions as to an employee's capabilities, and the employer is not able to accommodate both sets of restrictions. In both scenarios, the employee will contend that he is entitled to temporary total disability benefits, and the employer will argue temporary partial disability benefits are appropriate.

A second possible dispute that may arise would be regarding the proper way to calculate the temporary partial disability benefits to which a claimant is entitled. The rate of pay for temporary partial disability is equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of their job duties for which they were engaged at the time of the accident and the net amount which he is earning in the modified job. Disputes may arise as to what constitutes "net earnings." It is our suggestion that employers take the position that the net earnings of an employee be calculated in a manner similar to the credit an employer receives pursuant to Section 8(j) of the Workers' Compensation Act. Thus, the petitioner's net earnings would include any deductions made by the employer other than taxes and Social Security withholdings, including but not limited to health insurance premiums, disability policy premiums, union dues, or child support withholdings. This calculation increases the petitioner's net earnings, whereby decreasing the difference between the two pay rates and resulting in a diminutive temporary partial disability benefit.

Until these issues are resolved, defense strategy should continue to lean toward a conservative interpretation of the provision.

TTD LIABILITY FOR ILLEGAL ALIENS

By Dana J. Hughes, Rockford
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Neither the Illinois Supreme Court nor the Workers' Compensation Commission Division of the Appellate Court has addressed whether an illegal alien is entitled to benefits under the Illinois Workers' Compensation Act. However, the Appellate Court has held that an illegal alien is not entitled to temporary total disability benefits when his citizenship status affects his ability to return to work, but may still be entitled to medical and permanency benefits.

In *Miezio v. Z-Wawel Construction*, the claimant was released to work with restrictions following a work-related injury, but the employer could not accommodate the restrictions. 00 I.I.C. 0341, 98 W.C. 16088, 2000 WL 33418770 (I.I.C. April 28, 2000). The employer instituted vocational rehabilitation benefits and paid the claimant TTD until it discovered that the claimant was not a U.S. citizen. At arbitration, the arbitrator found that the claimant was not entitled to further TTD benefits because the claimant was unable to work solely due to his citizenship status. On review, the Commission upheld the decision to deny further TTD benefits. However, the arbitrator found, and the Commission agreed, that the claimant was entitled to a percentage of loss of the person-as-a-whole. The Commission found that the claimant was entitled to wage differential or permanent total disability benefits in part because he was not legally able to return to work in his pre-injury capacity. The Commission found it unnecessary to decide whether his citizenship status alone precluded a wage differential award.

A similar result was reached in *Gomez v. Illinois Sportservice*, 03 W.C. 19746, 07 I.W.C.C. 0798, 2007 WL 2152828 (I.W.C.C. June 18, 2007). After a work-related injury in July of 2003, the claimant was restricted to sedentary, then light duty. The employer could not accommodate the restriction and paid the claimant TTD benefits. When the employer found out

that the claimant had used an incorrect Social Security number at the time of hire, it suspended TTD benefits. At arbitration, the employer's human resource manager testified that the employer could accommodate the light duty restriction, but refused to offer the work because it learned that claimant was not a U.S. citizen. The arbitrator found that the claimant could not return to work "solely due to her illegal immigration status" and denied further TTD benefits. The arbitrator did order the employer to pay claimant's reasonable and necessary medical expenses. On review, the Commission affirmed the arbitrator's decision.

An issue yet to be resolved is whether the employer would be responsible for TTD benefits if the claimant could prove that the employer knew of the claimant's citizenship status at the time of hire. On the other hand, an employer who unknowingly hires an illegal immigrant may now be more willing to question whether the claimant is entitled to any benefits under the Illinois Workers' Compensation Act.

APPELLATE COURT RULES THAT LIGHT-DUTY EMPLOYEE NOT ENTITLED TO TTD BENEFITS AFTER BEING TERMINATED FOR CONDUCT UNRELATED TO HIS DISABILITY

By James A. Telthorst, Edwardsville
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A recent decision of the Workers' Compensation Commission Division of the Appellate Court could have a significant impact on the handling of employees that are working on a provisional or "light duty" work status. In *Interstate Scaffolding, Inc. v. The Workers' Compensation Commission*, 896 N.E.2d 1132, 324 Ill. Dec. 913 (3d Dist. 2008), the court held that such a "light duty" employee is not entitled to collect TTD benefits after he voluntarily removes himself from the work force for reasons unrelated to his injury. This is a question of first impression for the court on this issue, and is bound to receive considerable attention in the coming months.

The claimant was a union carpenter by trade, and sustained work-related injuries to his head and neck in July of 2003. The petitioner received medical care, and was eventually allowed to return to work by his treating physician subject to certain lifting restrictions. His employer was able to accommodate these restrictions, and the petitioner worked light duty on a regular basis from starting in February, 2005.

The employee testified that in April, 2005 he used a permanent marker to write religious inscriptions on the walls and shelves in a storage room on the employer's premises. The claimant admitted that he did not have permission to write these inscriptions, and that the writings did not pertain in anyway to his job duties. The petitioner testified that other employees were aware that he authored the inscriptions, and that there was other graffiti and writings which pre-existed his inscriptions. However, there was no other place on the employer's premises where non-work-related slogans or writings appeared on the walls, shelves, or fixtures other than this storage room.

In late May of 2005, the employee contacted the payroll department to give notice of the fact that he had been overpaid and no payroll taxes were being withheld from several of his recent paychecks. This precipitated a confrontation between the petitioner and the assistant to the employer's president. The exact discussions held between the claimant and the assistant during this heated meeting were in dispute. However, the claimant shortly thereafter contacted the local police department to file a complaint that he was being harassed and discriminated against on account of his religious beliefs. A police officer was dispatched to the employer's facility, who then interviewed various individuals and wrote a report. However, no arrests were made and no one was charged with a crime. The assistant contacted the employer's president, who was out-of-town at the time, to report the incident and the fact that the claimant had notified the police. The assistant then informed the employer's president for the

first time about religious inscriptions that had been made on the walls and shelves in the storage room by the claimant. The employer's president shortly thereafter terminated the claimant for defacing company property.

In its analysis, the Appellate Court conducted an extensive review of relevant case law on general standards for awarding TTD benefits. In so doing, the Court observed generally that the claimant could have been entitled to TTD benefits as of the date of his termination based on his medical condition and restrictions. The Court then focused on the issue of whether TTD benefits should be awarded to an employee who returns to light-duty work but is subsequently taken out of the work force for reasons unrelated to the work injury. The Court reasoned that the decisive question in this analysis is whether the employee had control over the reason or factor that took him out of the work force. In making this determination, the Court relied upon its prior decisions in the cases of *City of Granite City v. Industrial Commission*, 279 Ill. App. 3d 1087, 666 N.E.2d 827 217 Ill. Dec. 158 (5th Dist. 1996), and *Schmidgall v. Industrial Commission*, 268 Ill. App. 3d 845, 644 N.E.2d 1206, 206 Ill. Dec. 153 (4th Dist. 1994). The Court also conducted an extensive survey of the case law in other states that have confronted this question.

Since the overriding purpose of the Illinois Workers' Compensation Act is to compensate an employee for lost earnings resulting from a work-related disability, the Court concluded that an employee should not be allowed to collect TTD benefits after he was removed from the work force as result of volitional conduct that was unrelated to his injury. The Court reasoned that if an employee was allowed to collect TTD benefits in such circumstances, that would not advance the goal of compensating an employee for a work-related injury but rather provide a windfall to employees dismissed for unrelated causes. Lastly, the Court held that this same rationale should be applied as well to situations where an employee was dismissed while collecting maintenance benefits as part of a vocational rehabilitation or a trial return to work.

The two dissenting members of the Court agreed with the general proposition that TTD benefits could be discontinued to a light-duty employee that was terminated from the work force as a result of his volitional acts of conduct that are unrelated to the disabling condition. However, the dissent argued that the majority's decision was incomplete because it lacked standards for a practical application of this new principle. The dissent went on to argue that before TTD benefits can be terminated in these situations, that the employer should have the burden to establish: (a) that the employee violated a rule or policy; (b) that the employee was fired for a violation of that rule or policy; (c) that the violation would ordinarily result in the termination of a non-disabled employee; and (d) that the violation was a voluntary act within the control of the employee and not caused by the employee's disability.

On December 2, 2008, the Appellate Court denied a petition for rehearing but certified the case for appeal to the Illinois Supreme Court. In any event, this case is a bit of fresh air for an employer who is forced to terminate for cause a non-compliant or unruly employee that is working on light duty. Nevertheless, the prudent employer will attempt to meet the more rigorous test outlined by the dissent when faced with a similar factual scenario. This conservative approach should ensure that the denial of payment of TTD benefits following the termination date will be upheld. Also, adhering to this more rigorous standard should be beneficial in the defense of possible collateral litigation such as a wrongful termination suit which could later arise. Employers would still be wise to contact knowledgeable legal counsel before taking any disciplinary action or terminating an employee who is working on a light-duty basis.

Heyl Royster's 24th Annual Claims Handling Seminar

Thursday afternoon, May 21, 2009

Doubletree Hotel Bloomington, Illinois

E-mail kluther@heylroyster.com with any suggestions for topics

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The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.