

TEMPORARY TOTAL AFTER TERMINATION FOR CAUSE - TO PAY OR NOT TO PAY?

Illinois employers have long been confronted with the problem of what to do with the employee who has work restrictions resulting from an injury that is the subject of a workers' compensation claim. The general rule applied by the Illinois Workers' Compensation Commission is that, until the employee reaches maximum medical improvement, he is entitled to payment of temporary total disability benefits unless the employer can show that work within the worker's restrictions is available to him. The obvious way to reduce the lost time benefits paid is to provide the employee with light duty. However, what happens if the employee who is working light duty is terminated for cause? Does he continue to get disability payments because work within his restrictions is no longer available to him, or does the employee's misconduct disqualify him from further temporary total payments? Until recently employers and, for that matter, employees, arbitrators and commissioners, have been forced to grope for the answer by the application of common sense without any authoritative guidance. In 2008 we were given guidance by the Appellate Court in *Interstate Scaffolding v. The Workers' Compensation Commission* in which the Workers' Compensation Panel unanimously found that discharge for cause could terminate Petitioner's rights to TTD, although the justices differed on whether the employer had proven enough in that case to justify the termination of benefits.

The Illinois Appellate Court's decision was recently overturned by the Supreme Court in *Interstate Scaffolding v. The Workers' Compensation Commission*, (Docket No. 107852 January 22, 2010). The employee was working light duty as a consequence of work-related injuries when his employment was terminated for defacing company property with graffiti. The employee claimed, and the employer disputed, temporary total disability after the termination. The arbitrator denied compensation, but on review, the Workers' Compensation Commission awarded benefits. The Appellate Court held that the employee was not entitled to benefits. An appeal to the Supreme Court followed. The Supreme Court reinstated the Commission's award of benefits. In finding that termination for cause does not affect Petitioner's rights to TTD, 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 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.

The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force.

Flynn, 211 Ill. 2d at 556. Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury.

The Court made its holding clear as follows:

For the reasons stated above, we hold that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged—whether or not the discharge was for “cause.” When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits.

Under this case the only issue regarding TTD is whether the employee's condition has stabilized and, if it has not and he does not have work within his restrictions available to him, he is entitled to TTD, even if work would have been available to him but for his own misconduct which led to his termination.

We recommend that any claims handlers who have been denying TTD solely on the basis that, but for the employee's termination for cause light duty work would be available, the back disputed TTD be paid. Until the issuance of the Supreme Court's decision on January 22, 2010, the Appellate Court opinion provided employers some protection from a claim for penalties. With the law now clearly established that termination for cause is not a factor in the determination of the employee's rights to TTD, further denial of benefits on the basis that unavailability of work is due to Petitioner's misconduct can be cited as justification for the imposition of penalties.