

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

March 2010

A WORD FROM THE PRACTICE GROUP CHAIR



With the cold winds of February came the chilling news that our Illinois Supreme Court reversed the employer-favorable TTD decision in *Interstate Scaffolding*. I am sure that many of you were inundated (as was I) with requests from the petitioners' bar to start paying TTD in situations that had no resemblance to the facts in *Interstate Scaffolding*. Hopefully you were able to resist their suggestion that TTD is now required in all circumstances.

This month our featured author is Stacie Linder of our Peoria office. Stacie is a member of our workers' compensation defense team and is well-suited to comment on *Interstate Scaffolding* and what it does – and does not – mean concerning TTD liability. Stacie assisted Brad Elward, head of our Appellate Court workers' compensation practice, in writing the *amicus curie* "friend of the court" brief submitted to and accepted by the Supreme Court in *Interstate Scaffolding*. They "fought the good fight" by supporting the employer's arguments.

In our March issue we first address the facts and holding of *Interstate Scaffolding*. We then discuss other TTD scenarios and offer advice on how to handle those situations. We also highlight the recent Workers' Compensation Commission decision of *Gonzales v. ITT Industries*, which held that an employer has no TTD liability when a claimant, who was on restricted duty, is laid off along with all other employees due to the economy. I am confident that those same plaintiff attorneys who called you about *Interstate Scaffolding* neglected to mention the employer-favorable *Gonzales* decision! While the TTD fight goes on, we are happy to report that not all is "doom-and-gloom" concerning this important issue.

Please mark your calendars for our annual Workers' Compensation Seminar, which is scheduled to take place in Bloomington, Illinois this year on Thursday, May 20, 2010, at 1:00 p.m. The seminar will focus on specific strategies and tactics which can be used to effectively resolve recurring workers' compensation issues when faced with difficult facts.

Kevin J. Luther
Chair, WC Practice Group
kluther@heyloyroyster.com

COMMISSIONER RETIRES

Commissioner Paul Rink retired February 26, 2010. He has been a member of the Commission since 1991 and most recently has served as the public representative on Panel C with Barbara Sherman (employee representative) and Kevin Lamborn (employer representative). The public Commissioner from either Panel A or B will cover Commissioner Rink's place during oral arguments and review calls until a new Commissioner is appointed.

THIS MONTH'S AUTHOR:

Stacie Linder is an associate in our Peoria office. In addition to her expertise in workers' compensation defense, Stacie has experience in a wide variety of litigation matters, as well as real estate and business transactions.



SUPREME COURT ADDRESSES PROPRIETY OF TTD TERMINATION WHERE EMPLOYEE IS FIRED FOR VIOLATING COMPANY RULES

On January 22, 2010, the Illinois Supreme Court issued its much-awaited decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, No. 107852, 2010 WL 199914 (Jan. 22, 2010). The issue before the Court was whether an employer's obligation to pay temporary total disability (TTD) workers' compensation benefits to an employee ceases when the employee is terminated for conduct unrelated to the injury. The Supreme Court broadly held that an employer's obligation to pay TTD benefits *continues* until the employee's medical condition has stabilized or until the claimant is capable of reentering the work force. This month's issue of *Below the Red Line* focuses on the *Interstate Scaffolding* decision and the effect it may have on how employers handle other TTD issues.

Factual Background

The claimant, Jeff Urban, an employee of Interstate Scaffolding, injured his head, neck and back in an accident while in the course and scope of his employment. His physician released him for light-duty, and he continued to work for Interstate Scaffolding in that capacity. After writing some religious "graffiti" on a wall in a storage room on the employer's premises, he was fired for defacement of property. Following his termination, the employer ceased paying his TTD benefits.

Procedural History

Arbitrator Hennessy heard the case and determined that the claimant's TTD benefits ended on the date of his termination for cause. According to the arbitrator's decision, "[n]otwithstanding the divisive, conflicting testimony regarding the arguments and confrontations of May 25, 2005, at the [employer's] place of business and the unusual basis for the termination of the [claimant], this Arbitrator finds the [claimant] is not entitled to temporary total disability benefits subsequent to his termination of May 25, 2005." *Interstate Scaffolding*, 2010 WL 199914 at *3. Arbitrator Hennessy did not provide any explanation for the termination of the TTD benefits after the claimant's termination.

On review, the Workers' Compensation Commission overturned Arbitrator Hennessy's ruling and held that the claimant was entitled to TTD benefits beyond the date of his termination "based on the fact that [the claimant's] condition

had not stabilize[d] as of the June 29, 2005 Arbitrator's hearing." *Id.* The Commission did not make any findings with regard to Urban's termination. The circuit court confirmed the Commission's decision, and the matter proceeded to the Appellate Court, Workers' Compensation Division, which in a 3-2 decision reversed the Commission's decision on the issue of TTD. The Court concluded that although the claimant's condition had not stabilized and even the employer's IME had opined a need for cervical surgery, he was not entitled to TTD benefits because he was terminated "for cause" on May 25, 2005.

In reaching this decision, The Appellate Court majority reviewed several factually similar Illinois decisions and concluded that "the critical inquiry in determining whether the employee is entitled to TTD benefits after leaving the workforce centers on whether the departure was voluntary." *Id.* at *5. The majority believed that the claimant, by violating work rules and defacing company property, had voluntarily withdrawn himself from the workforce, and therefore was not entitled to continued TTD benefits. According to the Appellate Court, "[t]he overriding purpose of the Illinois workers' compensation scheme is to compensate an employee for lost earnings *resulting from a work-related disability*." *Interstate Scaffolding, Inc. v. Workers' Compensation Comm'n*, 385 Ill. App. 3d 1040, 1047, 896 N.E.2d 1132 (3d Dist. 2008). Removing one's self from the workforce by violating company rules is not the same as losing earnings from a work-related disability.

Two of the five justices dissented. Although agreeing with the majority in principle – that TTD may be terminated when an employee is fired for violating company rules – the two dissenting justices advocated that if the employee can establish that the medical restrictions resulting from the work-related injury prevents him from securing employment at pre-injury work levels, TTD benefits should be payable for the loss of earning capacity.

Following the decision and on motion of the claimant, two of the justices made the appropriate finding under Supreme Court Rule 315(a) that the case involved significant issues warranting Supreme Court review.

Supreme Court Analysis

The Supreme Court accepted the employee's petition for leave to appeal and after extensive briefing (including an *amicus* brief on behalf of the Association of Illinois Defense Counsel authored by Heyl Royster), the Supreme Court held that as a matter of law an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee has been discharged, even if for cause. When an injured employee has been discharged by his employer, the determinative inquiry

for deciding entitlement to TTD benefits remains whether the claimant's condition has stabilized.

In reaching this conclusion, the Supreme Court cited section 8(b) of the Act, which states: "weekly compensation . . . shall be paid . . . as long as the total temporary incapacity lasts." 805 ILCS 305/8(b). The Court then noted that the Commission's determination of how long the claimant was temporarily totally incapacitated was a question of fact that could only be disturbed if it was against the manifest weight of the evidence. The Supreme Court took issue with the fact that while the Appellate Court admitted there was sufficient evidence that the claimant had yet to reach MMI, it nonetheless failed to uphold the Commission's decision.

Practice Pointer #1: *If you have a situation where the petitioner has been terminated for a voluntary act of misconduct while working with restrictions, consider whether an IME could be conducted to find the petitioner has reached MMI.*

Looking to the language of the Act, the Court noted that there was no statutory language providing that TTD benefits can be terminated, suspended or denied when an employee is discharged for "volitional conduct." Since the Act failed to specifically grant the Commission the power to evaluate whether the discharge was the result of an employment decision, the Commission lacked the power to make such a determination. Thus, the Court held that the Commission's only focus in such cases must be whether the claimant is at MMI or ready to re-enter the work force.

Practice Pointer #2: *If the petitioner is not at MMI but is capable of working, consider performing a formal or informal job search to identify other jobs available to the petitioner within the restrictions. If it can be shown that the petitioner was capable of re-entering the work force, even if he is not at MMI, he would not be entitled to TTD benefits.*

According to the Court, the Commission's exclusive focus in determining whether an employee is entitled to TTD is whether the claimant's condition has stabilized (reached MMI) or whether the employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury. Therefore, whenever a claimant has not yet reached MMI and he remains temporarily totally disabled as a result of his work related injury, *Interstate Scaffolding* says he will be entitled to TTD benefits, regardless of whether he has been terminated for violating company rules or not.

WHAT DOES *INTERSTATE SCAFFOLDING* MEAN IN OTHER TTD TERMINATION SETTINGS?

The Supreme Court's ruling makes it clear that the Act provides TTD benefits to an employee so long as he is not at MMI or is temporarily totally disabled as a result of his work injury. Although this has been the relevant standard for many years, the Court's strict interpretation of the Act likely means that judicial exceptions will not be allowed and that absent a guiding provision of the Act, the sole determinative issue is whether the employee has reached MMI. While it is very possible that the decision may cause the Commission to be reluctant to terminate a petitioner's TTD benefits prior to MMI, there are still valid arguments for terminating TTD in various situations that have not been specifically overruled by *Interstate Scaffolding*. *Interstate Scaffolding* does not say that a claimant is entitled to be paid TTD benefits *ad infinitum*. Terminating TTD remains one of the most effective ways of bringing a case to rapid conclusion, and thus grounds for terminating TTD should be carefully evaluated.

Terminating TTD When Providing Employment Within Restrictions

Employers frequently terminate TTD benefits pre-MMI by providing employees with temporary employment within the physician's restrictions while they continue to receive treatment and heal. Such practices should not be affected because the thrust of *Interstate Scaffolding* centers on how an employer can terminate TTD benefits when an employee has not reached MMI and has not received a full release to return to work.

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Terminating TTD When The Employee Refuses To Work Within The Restrictions

Illinois law is well-settled that TTD benefits can be cut off if the employee refuses work falling within the physical restrictions prescribed by his doctor. See 820 ILCS 305/8(d); *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 166, 601 N.E.2d 720 (1992). Under this section of the Act, employees who refuse to comply with an employer's offer of light duty work within the physician's restrictions should not be entitled to TTD. *Galentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 559 N.E.2d 526 (2d Dist. 1990). However, with the advent of temporary partial disability, which entitles the employee to a temporary wage differential, current law suggests that the employer may still be obligated to cover the partial TTD until the claimant reaches MMI.

Terminating TTD Upon The Receipt Of Social Security Benefits

In *Schmidgall v. Industrial Comm'n*, 268 Ill. App. 3d 845, 644 N.E.2d 1206 (4th Dist. 1994), discussed with approval in the *Interstate Scaffolding* decision, the claimant had not been released by his physicians to return to work and had elected to receive Social Security disability benefits. The Commission, however, denied his claim for TTD benefits finding that he had withdrawn himself from the workforce since he was receiving Social Security pension benefits. The Appellate Court reversed the Commission's decision, noting that the claimant was not receiving Social Security benefits because he had left the workforce, but rather because he had not been released by his doctor and was not *physically capable* of working at that time. Applying this analysis more generally, it appears that when an employee has not yet reached MMI and a physician has not released a claimant to return to work with temporary restrictions, the employee is entitled to TTD benefits. Thus, the result in *Schmidgall* appears consistent with *Interstate Scaffolding*.

Terminating TTD Upon Retirement Or Acceptance Of Pension Benefits

City of Granite City v. Industrial Comm'n, 279 Ill. App. 3d 1087, 666 N.E.2d 827 (5th Dist. 1996), was also discussed in the *Interstate Scaffolding* decision. In *City of Granite City*, the claimant, who had not reached MMI, had been released

to work light-duty and did so, working 40 hours per week. At some point before reaching MMI, however, the claimant left his job in order to collect his disability pension. The Commission denied the claimant TTD benefits because he was able to work. The Appellate Court upheld that finding, stating that the duration of TTD benefits is controlled by the claimant's ability to work and his continuation in the healing process. Here, work within the claimant's restrictions was available but refused. Under these facts, employers would be able to terminate TTD benefits when the claimant has not yet reached MMI because the employee's physician released him to return to work with temporary restrictions and the claimant refused work within those restrictions. Thus, the result in *City of Granite City* is consistent with *Interstate Scaffolding*.

Terminating TTD Based on Employee Lay Offs

Another scenario, although not specifically addressed by the Court in *Interstate*, is whether an employee is entitled to TTD benefits when the employee is laid off for reasons unrelated to the injury by the employer prior to reaching MMI. There are cases that have held that the employee is entitled to TTD benefits unless the employer could obtain employment for the employee within the restrictions elsewhere. See *Whitney Productions v. Industrial Comm'n*, 274 Ill. App. 3d 28, 653 N.E.2d 965 (2d Dist. 1995).

However, a recent decision by the Workers' Compensation Commission reached a contrary result. In *Gonzales v. ITT Industries*, 09 I.W.C.C. 1182, 2009 WL 5067488 (Nov. 9, 2009 Indus. Comm'n), the claimant was not entitled to TTD after he was released with a light duty restriction when all employees had been laid off due to the economy. The Commission concluded that the claimant was not temporarily totally disabled because the release to light duty work fundamentally meant that he was not totally disabled. Since the claimant was not placed at a disadvantage over the able-bodied employees, he was not entitled to TTD. In other words, because all of the employees were laid off, the claimant had not been treated any differently than his co-workers. Finally, the Commission questioned whether the claimant ever needed restrictions because he testified that there had been a change in his condition since the accident, even though his doctor eventually released him at MMI.

According to *Gonzales*, when a claimant is laid off, consideration must be given to whom is affected by the lay-off, the

extent of the claimant's restrictions, and whether it is possible to show that the claimant is at MMI. *Gonzales* is likely to be appealed, and we will keep you advised when the judiciary resolves the issue raised in that case.

Terminating TTD Where Employee Fails To Cooperate With Medical Care Or Rehabilitation Efforts

The Workers' Compensation Act provides specific scenarios where an employer may terminate TTD benefits. Under section 19(d), TTD benefits may be suspended or terminated if the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts. See 820 ILCS 305/19(d); *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 830 N.E.2d 584 (2005); *Hayden v. Industrial Comm'n*, 214 Ill. App. 3d 749, 574 N.E.2d 99 (1st Dist. 1991) (holding that TTD justifiably terminated by the employer when the injured employee was unwilling to cooperate with vocational placement efforts).

Terminating TTD Where The Employee Violates Rules Set Forth In A Collective Bargaining Agreement Or Policy Handbook

Interstate Scaffolding involved what might be termed a "tenuous" termination – one in which there was not a violation of a clearly-defined work rule. Had the employee violated a clearly defined work rule applying to all employees, such as a rule prohibiting employee drug use, or one imposed through a

union agreement, it is possible that the Illinois Supreme Court might have addressed the issue differently. We expect efforts to try to distinguish *Interstate Scaffolding* when violations of well-defined rules result in termination of employment, and employers then attempt to cut off TTD benefits.

CONCLUSION

Many will argue that the Supreme Court in *Interstate Scaffolding* has established a "bright line" rule that an employer's TTD benefit liability continues in situations where the employee has been discharged, even where the discharge was for "cause." Keep in mind that each situation does have its own set of specific facts and, as such, efforts should be made to differentiate your claim from the facts and evidence presented in the *Interstate Scaffolding* decision. Efforts should also be made to develop defenses to TTD liability separate and apart from the "discharge" issue. You should also be aware that case law in Illinois allows a party to argue for a "good faith" change in the law when the opportunity arises. We all need to be looking for those opportunities.

As this edition of *Below the Red Line* has discussed, *Interstate Scaffolding* does not mean that a claimant is entitled to be paid TTD benefits *ad infinitum*. Terminating TTD remains one of the most effective ways of bringing a claim to rapid conclusion, and *Interstate Scaffolding* highlights the need to carefully evaluate the grounds for terminating TTD. When you are considering terminating TTD and are in the need of assistance in determining the possible effects of *Interstate Scaffolding* on your case, please do not hesitate to give us a call or send us an email for assistance.

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WORKERS' COMPENSATION CONTACT ATTORNEYS

HEYL, ROYSTER, VOELKER & ALLEN

PEORIA

Supervising Attorney:

Bradford B. Ingram - bingram@heyloyroyster.com

Attorneys:

Craig S. Young - cyoung@heyloyroyster.com

James M. Voelker - jvoelker@heyloyroyster.com

James J. Manning - jmanning@heyloyroyster.com

Stacie K. Linder - slinder@heyloyroyster.com

Dockets Covered:

Bloomington • Galesburg • Peoria • Rock Island

SPRINGFIELD

Supervising Attorney:

Gary L. Borah - gborah@heyloyroyster.com

Attorneys:

Daniel R. Simmons - dsimmons@heyloyroyster.com

Sarah L. Pratt - spratt@heyloyroyster.com

John O. Langfelder - jlangfelder@heyloyroyster.com

Erin L. O'Boyle - eoboye@heyloyroyster.com

Dockets Covered:

Carlinville • Clinton • Decatur • Jacksonville/Winchester
Quincy • Springfield • Taylorville

URBANA

Supervising Attorney:

Bruce L. Bonds - bbonds@heyloyroyster.com

Attorneys:

John D. Flodstrom - jflodstrom@heyloyroyster.com

Bradford J. Peterson - bpeterson@heyloyroyster.com

Toney J. Tomaso - ttomaso@heyloyroyster.com

Jay E. Znaniecki - jznaniecki@heyloyroyster.com

Joseph K. Guyette - jguyette@heyloyroyster.com

Dockets Covered:

Danville • Joliet • Kankakee • Lawrenceville
Mattoon • Urbana • Whittington/Herrin

ROCKFORD

Supervising Attorney:

Kevin J. Luther - kluther@heyloyroyster.com

Attorneys:

Brad A. Antonacci - bantonacci@heyloyroyster.com

Thomas P. Crowley - tcrowley@heyloyroyster.com

Lynsey A. Welch - lwelch@heyloyroyster.com

Dana J. Hughes - dhughes@heyloyroyster.com

Bhavika D. Amin - bamin@heyloyroyster.com

Dockets Covered:

Chicago • De Kalb • Geneva • Ottawa • Rock Falls
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EDWARDSVILLE

Supervising Attorneys:

Bruce L. Bonds - bbonds@heyloyroyster.com

Lawrenceville and Mt. Vernon Calls

Craig S. Young - cyoung@heyloyroyster.com

Collinsville Call

Toney J. Tomaso - ttomaso@heyloyroyster.com

Belleville Call

Attorney:

James A. Telthorst - jtelthorst@heyloyroyster.com

Dockets Covered:

Belleville • Collinsville • Carlyle • Mt. Vernon

APPELLATE:

Brad A. Elward - belward@heyloyroyster.com

Dockets Covered:

Statewide

Peoria

Suite 600
124 SW Adams St.
Peoria, IL 61602
309.676.0400

Springfield

Suite 575
1 North Old State
Capitol Plaza
PO Box 1687
Springfield, IL 62705
217.522.8822

Urbana

102 E. Main Street
Suite 300
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford

Second Floor
120 West State Street
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville

Mark Twain Plaza III,
Suite 100
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646
