Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *October 2014*

A Word From The Practice Group Chair

Another month has passed, and we welcome you to the October edition of ***Below the Red Line***, our firm's monthly Workers' Compensation newsletter. It seems impossible this is our last edition for 2014 before the holiday season is fully in swing. We hope your Fall is going well and you are looking forward to a joyous November and December.

Unfortunately we must report this month on yet another disappointing decision from the Illinois Appellate Court, Workers' Compensation Division. Please take special note of the analysis contained in the article on the recent *Matuszczak* case by Brad Elward and Dana Hughes. While the Court's decision reversing the Commission's denial of TTD is troubling, the degree to which the Court went to construct an argument as to why the manifest weight of the evidence standard should not be applied to the Commission's decision is perhaps more disturbing. As we know, the manifest weight of the evidence standard of review is used very aggressively by the Appellate Court to uphold Commission decisions when the award is favorable to the employee. The strained legal analysis used by the Court to not apply the manifest weight of the evidence standard to the Commission's decision in this case is revealing to say the least.

Decisions like this, and many others we have seen from the Appellate Court over the past couple of years can be deflating. We do however need to continue our effort to effectively manage claims within the environment created by the Court. One lesson from this decision, which we have spoken about on many occasions, is the importance of an MMI opinion. It is also important to note that even the Appellate Court admits the *Interstate Scaffolding* decision does not preclude a TTD denial when the petitioner has refused a restricted duty work offer. While this *Matuszczak* decision attempts to limit an employer's right to construe the employee's actions as a refusal of the job offer, it is our suggestion that we continue to deny TTD when there is good evidence to support an argument that the petitioner is (in reality) refusing to work.

Decisions like this present difficult and complicated issues. As always please feel free to contact me or any of our Workers' Compensation attorneys to discuss this case or other matters you are addressing in your claims.

Best regards,

Craig S. Young
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In this issue . . .

APPELLATE COURT SOLIDIFIES *INTERSTATE SCAFFOLDING*'S APPLICATION TO DISCHARGED EMPLOYEES, EVEN WHERE THE EMPLOYEE ADMITTED HE KNEW THE ACTION IN QUESTION WOULD RESULT IN TERMINATION OF HIS LIGHT-DUTY EMPLOYMENT

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On September 30, 2014, the Appellate Court, Workers' Compensation Commission Division, handed down its first published decision specifically interpreting the Supreme Court's holding in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 142 (2010), which held that an employer's obligation to pay TTD benefits did not cease when the employee was discharged for misconduct unrelated to the injury. In the appellate court majority decision in *Interstate Scaffolding*, three of the justices concluded that allowing an employee to collect TTD benefits from his employer after he was removed from work as a result of conduct unrelated to his injury would not advance the underlying goal of compensating an employee for a work-related injury. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 385 Ill. App. 3d 1040, 1047 (3d Dist. 2008). The Supreme Court rejected this approach, instead opting for what some have called an "automatic" conclusion that TTD benefits are payable so long as the claimant is not at MMI, regardless of whether the employee was terminated for workplace misconduct.

In *Matuszczak v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130532WC, the claimant, a full-time night stocker for Wal-Mart, sustained injuries in March 2010 to his neck, back, and right arm, which were not disputed by the employer. The claimant received medical care and returned to light-duty work for Wal-Mart. On June 12, 2011, he was terminated from employment for an incident unrelated to his work injury. On cross-examination at arbitration, the claimant agreed that, at the time of his termination, he prepared a written statement acknowledging that he had stolen cigarettes from Wal-Mart on June 3, 2011, and on a "couple of days" in May 2011. He also agreed that, at the time he took the cigarettes, he understood that stealing was a crime and that stealing from his employer could result in his termination. Moreover, he acknowledged that, had he not stolen the cigarettes, he might still have been working for Wal-Mart in a light-duty capacity at the time of arbitration. The claimant had been unsuccessful in looking for work within his restrictions since his termination.

The Arbitrator's Ruling – TTD Owed

The arbitrator found the claim compensable and awarded TTD benefits commencing the date after the claimant was terminated for stealing, through the date of the section 19(b) hearing. The arbitrator found that the claimant was subject to light duty restrictions which were being accommodated by his employer, and that the claimant's condition had not stabilized, and had not reached maximum medical improvement. Relying on *Interstate Scaffolding*, the arbitrator concluded that TTD benefits should continue even after the claimant was terminated, and despite the claimant's statement, both at the time of his termination, and at arbitration.

The Commission's Ruling – TTD Denied

The Commission affirmed the arbitrator's overall conclusions as to accident and causation, but vacated the award of TTD benefits. Specifically, the Commission found that a claimant's benefits may be terminated or suspended if he refuses work within his physical restrictions, and concluded, based on the evidence, that the claimant's theft of cigarettes from the employer, coupled with his knowledge that his theft could lead to termination, constituted a refusal of work within his physical restrictions.

As a reminder, *Interstate Scaffolding* acknowledged only three exceptions to the rule that TTD benefits are owed until the claimant reaches MMI: (1) the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) the employee refuses to cooperate in good faith with rehabilitation efforts; and (3) the employee refuses work falling within the physical restrictions prescribed by his physician. *Interstate Scaffolding*, 236 Ill. 2d at 146.

Turning back to *Matuszczak*, the Commission further stated as follows:

> We do not believe the *Interstate Scaffolding* court was proscribing all use of discretion in cases involving employment termination; rather, as stated previously, we believe the court was rejecting an analysis of the propriety of the discharge and rejecting an automatic suspension or termination of [TTD] benefits in cases involving employment termination. *Matuszczak*, 2014 IL App (2d) 130532WC, ¶ 8.

Judicial Review and Appeal – TTD Reinstated

On judicial review, the circuit court of DuPage County reversed the portion of the Commission's decision that vacated the arbitrator's TTD award.

On the employer's appeal, the Appellate Court, Workers' Compensation Commission, affirmed the circuit court and reinstated the arbitrator's decision concerning the entitlement to TTD benefits. According to Wal-Mart's arguments, "although *Interstate Scaffolding* prohibits the automatic suspension or termination of TTD benefits when a claimant is fired for reasons unrelated to his injury, the case does 'not proscribe all use of discretion [by the Commission] when deciding whether an employer remains liable for TTD' following an employee's discharge." *Id*. at ¶ 13. Accordingly, the Commission was free to exercise its discretion on a case-by-case basis to determine that the claimant's decision to steal from the employer when he admittedly knew such action could result in his termination was the equivalent of refusing work within his physical restrictions and a valid basis for suspending or terminating TTD.

The appellate court rejected the employer's argument, finding that the sole issue was whether the employee's condition had reached MMI.

> [T]he appropriate inquiry for the Commission was whether claimant's medical condition had stabilized at the time of his termination. As to that issue, the undisputed facts show claimant was placed on light-duty work restrictions following his accident and he remained under light-duty restrictions after his June 2011 termination. *Id*. at ¶ 22.

According to the appellate court, the Supreme Court in *Interstate Scaffolding* held "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' and [w]hen 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." *Id*. at ¶ 20.

The appellate court then took the Commission to task, commenting, "despite finding claimant's condition was not stabilized, the Commission determined it had discretion to find the conduct that resulted in claimant's termination amounted to a refusal of light-duty work and was, therefore, a sufficient basis for denying TTD benefits." *Id*. at ¶ 23. The appellate court pointed to *Interstate Scaffolding*, noting that the Supreme Court acknowledged that TTD benefits may be suspended or terminated when a claimant refuses work within his physical restrictions; "however it also determined such a situation did not exist in the case before it—a case where the claimant was entitled to benefits under the Act and had returned to light-duty work for the employer but was later terminated for conduct unrelated to his injury." *Id*. The appellate court specifically found these circumstances were the same as those presented in the *Matuszczak* case.

Additionally, the appellate court said it found "nothing in the supreme court's decision that would show the result in *Interstate Scaffolding* was dependent upon the claimant's knowledge, or lack thereof, as to whether his conduct could result in termination." *Id.* at ¶ 25. The appellate court then reiterated a portion of *Interstate Scaffolding*, observing, "in Illinois, an at-will employee may be discharged for any reason or no reason and whether an employee is justifiably discharged is a matter "foreign to workers' compensation cases and completely separate from issues related to an injured employee's entitlement to TTD." *Id*. at ¶ 25 (citing *Interstate Scaffolding*, 236 Ill. 2d at 149). The appellate court then concluded, "[w]hether [the] claimant was appropriately discharged, or knew he could be as a result of his conduct, was not an appropriate consideration for the Commission under the circumstances presented." *Matuszczak*, 2014 IL App 2d 130532 WC, ¶ 25.

The appellate court in *Matuszczak* rejected the employer's argument that the case was one subject to the manifest weight of the evidence standard, which would have given deference to the Commission's finding that the claimant had voluntarily refused work within his restrictions by stealing from his employer when he knew he could, as a result, be terminated. While that exception clearly exists under *Interstate Scaffolding*, the appellate court instead chose to apply a *de novo* standard, commenting that "if the Commission relies on a legally erroneous premise to find a fact, the resulting decision is contrary to law and must be reversed." *Id*. at ¶ 15. Using this approach, the court's inquiry was limited to whether the Commission had any discretion to look at the termination when evaluating whether the claimant was entitled to TTD following his termination. The appellate court gave the Commission absolutely no leeway to consider whether the claimant's actions were, indeed, the equivalent of a voluntary refusal to accept work within his restrictions.

It is interesting to compare the two factual scenarios presented by *Matuszczak* and *Interstate Scaffolding*. In the former, the claimant was aware that stealing could lead to his termination and the end of his light-duty work; thus,

he nevertheless stole the cigarettes with full knowledge that he could and would be terminated. In the latter, the stated reason for the claimant's dismissal was defacement of the employer's property due to the claimant writing religious graffiti in the employer's storage room. Although the claimant in *Interstate Scaffolding* admitted to writing religious slogans in the storage room, he did not believe those writings were the reason for his dismissal, stating other employees had written on the shelves or walls of the storage room without repercussion.

Interestingly, the appellate court in *Matuszczak* stated, "[j]ust as the facts of *Interstate Scaffolding* did not amount to a refusal of light-duty work, the facts here also fail to present such a situation." *Id.* at ¶ 24. Yet, the appellate court did not let the Commission – the so-called determiner of facts – make that call. Instead, if foreclosed consideration of the issue. A strong argument can be made that the claimant's actions in *Matuszczak* were a constructive refusal of light-duty work. *Interstate Scaffolding* itself made it clear that a claimant's entitlement to benefits may be terminated or suspended if he "refuses work falling within the physical restrictions prescribed by his doctor." *Interstate Scaffolding*, 236 Ill. 2d at 146. Here, the Commission concluded that very thing, albeit in a constructive manner.

Viewing this case as one subject to a manifest weight of the evidence (deference) or *de novo* (anew) standard of review was crucial in how the court decided the case. Under the manifest weight standard, the appellate court would have been obligated to give deference the Commission's ultimate conclusion that the claimant's actions were the equivalent of voluntarily refusing work within his restrictions. Under the *de novo* standard as applied, the question was whether the Commission had the discretion to make the determination in the first instance. Concluding that the Commission did not, the appellate court has limited the Commission's consideration of the issue in future cases to a very limited set of facts; *i.e.*, facts where the employee simply says, *no, I reject that employment opportunity*. Under an Act where the concepts of constructive notice as well as constructive termination are well-settled principles, this seems contrary to the law.

As with many recent cases, the results of the *Matuszczak* decision, as well as the Supreme Court's decision in *Interstate Scaffolding*, will need to be addressed legislatively. Recent legislative efforts have not yet been successful at bringing a bill to the floor. Senate Bill 2625, introduced on November 7, 2013 by Senator Kyle McCarter, was re-referred to Assignments (comprised of 3 Democrats and 2 Republicans) on March 28, 2014. The proposed language reads as follows:

> No employer shall be required to pay temporary partial disability or maintenance benefits to an employee who has been discharged for cause. Prior to suspension of temporary partial disability or maintenance benefits, the employer shall provide notice to the employee who has been discharged for cause. Following a hearing, the Commission may reinstate the temporary partial benefits and retroactively restore any benefits the employer should have paid if it finds the employer's discharge of the employee was not for cause. "Discharge for cause" means a discharge resulting from the employee's voluntary violation of a rule or policy of the employer not caused by the employee's disability.

This proposal seems consistent with the appellate court majority's decision in *Interstate Scaffolding*.

Hopefully the *Matuszczak* decision will rekindle interest in this legislation.

The *Matuszczak* decision was released on September 30. It is our understanding that Walmart will be filing a petition for rehearing and will also request a statement that the case involves a substantial question warranting consideration by the Supreme Court, which, if granted, will permit it to file a petition for leave to appeal to the Illinois Supreme Court.

Practice Tip . . .

- **Keep in mind when you are corresponding with counsel that copying a nurse case manager or voc rehab specialist on an e-mail may destroy the attorney/client communication privilege.**

Brad Elward - Peoria Office

Brad concentrates his work in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 275 briefs and argued more than 200 appellate court cases, resulting in more than 86 published decisions.

Brad is the Immediate Past President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law.

Brad was recently published in Volume 101, No. 12, of the Illinois State Bar Journal, where he wrote on the subject of the Supreme Court's recent mailbox rule decision and its application to workers' compensation judicial reviews.

Dana Hughes - Rockford Office

A native of Rockford, Dana has been an associate in our Rockford office since 2006. She represents employers before arbitrators and commissioners of the Illinois Workers' Compensation Commission and before the circuit court in third party liability claims. Dana has also represented businesses in subrogation matters, and has defended businesses and individuals in automobile negligence and premises liability actions. Her writing has been published in the Northern Illinois University Law Review and Kane County Bar Association newsletter. Dana has presented before the Illinois State Bar Association's Insurance Law Section and contributes to Heyl Royster's annual claims handling publication. Dana serves on the Winnebago County Bar Association's Board of Directors and volunteers as an arbitrator in the 17th Circuit's court-annexed arbitration system.

Workers' Compensation Group

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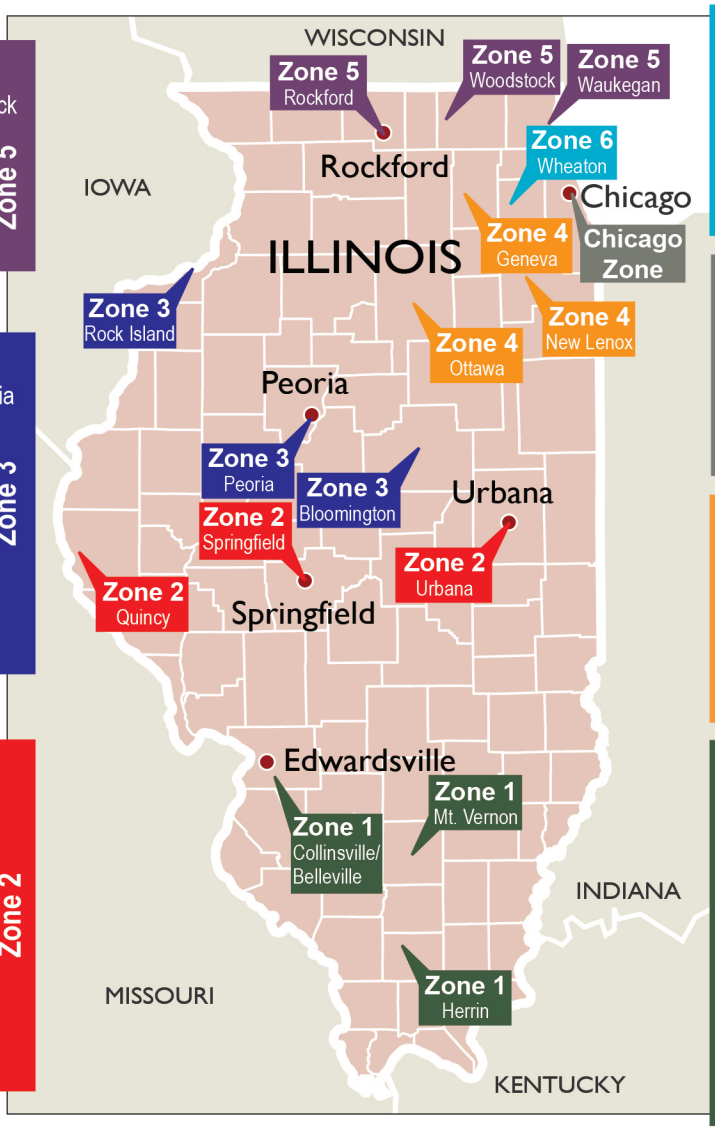
ILLINOIS ZONE MAP



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