

BELOW THE RED LINE

HEYL...
ROYSTER

WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

A Newsletter for Employers and Claims Professionals

July 2017

A WORD FROM THE PRACTICE CHAIR

Summer has finally settled in and we find ourselves dealing with hot, humid, and downright sticky weather. There is hope on the horizon for those who need a break from Summer because their kids have been home just a little too long. As the latest mass mailings show us, back to school sales are coming our way. So, I do hope each of you have found the time to unplug from the office and get out there and make some fun summer memories with family and friends. Everyone needs to re-charge those batteries and then get ready for the next workers' compensation battle.

Earlier this month Amber Cameron provided us with an E-Blast of information concerning the recent decision in *Holocker v. Illinois Workers' Compensation Commission*, and how it effects future file handling in light of our ability to limit the impact of the *Interstate Scaffolding* decision which we *have had to live with for years*. I believe the historical perspective Dana Hughes and Vince Boyle bring to this issue will be nothing but good news for limiting TTD exposure, as well as an outline for helping you with handling future cases with similar fact patterns. We stand ready to discuss and answer questions about these key issues, so do not hesitate to contact us. We always look forward to talking with our clients.



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APPELLATE COURT CLARIFIES *INTERSTATE SCAFFOLDING*'S APPLICATION TO TERMINATED EMPLOYEES – NO LONGER A BRIGHT LINE RULE?

By: Dana Hughes and Vince Boyle, Peoria

Our June news blast advised you about the recent appellate court decision in *Holocker v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160363WC, and this month we provide a more detailed assessment of the case, including how to handle post-termination TTD moving forward.

Last month the Illinois Appellate Court, Workers' Compensation Commission Division, issued a decision reevaluating an employer's obligation to pay temporary total disability (TTD) benefits after a worker has been terminated for cause unrelated to his workers' compensation claim. *Holocker* marks the court's first published decision to fully re-examine the Illinois Supreme Court's prior landmark decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010) and the appellate court's follow-on decision in *Matuszczak v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130532WC, where the courts held that when an employee who is entitled to benefits under the Workers' Compensation Act is terminated for conduct unrelated to his injury, the employer's TTD obligation continues "until the employee's medical condition has stabilized." *Interstate Scaffolding*, 236 Ill. 2d at 135-136; *Matuszczak*, 2014 IL App (2d) 130532WC, ¶ 21.

Holocker is significant because it is the first appellate court decision finding an exception to *Interstate Scaffolding*.

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General TTD Principles

TTD benefits are awarded for the period of time when an employee is injured until he or she has recovered as far as the character of the injury will permit. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). An employee is temporarily totally incapacitated 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 injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45.

To be entitled to TTD benefits, the claimant must prove not only that he did not work, but also that he was unable to work. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45; *McDanel v. Industrial Comm'n*, 307 Ill. App. 3d 1045, 1053 (5th Dist. 1999).

The dispositive test for determining TTD duration is whether the claimant's condition has stabilized, i.e., reached maximum medical improvement (MMI). *Mechanical Devices*, 344 Ill. App. 3d at 759. 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 petitioner's injury; and
3. The extent of the injury.

Land and Lakes Co. v. Industrial Comm'n, 359 Ill. App. 3d 582, 594 (2d Dist. 2005).

Thus, *Land and Lakes* establishes the outer boundary for TTD benefits and a demarcation between entitlement to TTD benefits and permanency. A claimant may not have reached MMI but is nevertheless no longer entitled to TTD benefits because he is back to work and performing his former job, even with restrictions.

The Impact of *Interstate Scaffolding*

Prior to the Illinois Supreme Court's 2010 ruling in *Interstate Scaffolding*, it was unclear whether TTD benefits would be owed to a claimant who returned to work in a

light duty capacity following a work-related injury, but was subsequently terminated for cause. While there were a few inconsistent Commission decisions on this issue, there was no direct ruling by the appellate court.

That changed when the Supreme Court in *Interstate Scaffolding* broadly 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." *Interstate Scaffolding*, 236 Ill. 2d at 149. To support this decision, the Supreme Court referenced section 8(b) of the Act, which states: "[w]eekly compensation ... shall be paid ... as long as the total temporary incapacity lasts." *Id.* at 142.

The Court did acknowledge three exceptions to the rule that TTD benefits are owed until the claimant's condition has stabilized: (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. *Id.* at 146. Yet as most readers know from claims' experience, these exceptions rarely present themselves.

Despite the holding of *Interstate Scaffolding*, uncertainty remained as to whether employees who have work restrictions and are terminated for cause are *always* entitled to TTD benefits. As one would expect, the petitioner's bar took this very position – in their view, an injured employee was as a matter of law entitled to TTD benefits unless the employee had reached MMI.

The first attempted inroad to *Interstate Scaffolding* came in the 2014 decision in *Matuszczak*. There, the claimant returned to work at light duty following a compensable injury, but was terminated from his employment for stealing. At the time he was terminated, the claimant admitted the theft and in a handwritten statement, stated he understood stealing was a crime that could result in his termination from work. Based on this evidence, the Commission found the claimant's decision to commit a work-place theft was a constructive refusal

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of light-duty work, and, therefore, denied entitlement to TTD benefits.

The appellate court reversed the Commission and held that under *Interstate Scaffolding*, the "critical inquiry for the Commission when determining claimant's entitlement to TTD was whether his medical condition had stabilized and he had reached MMI." *Matuszczak*, 2014 IL App (2d) 130532WC, ¶ 27. Finding that termination for cause was irrelevant, the appellate court held the Commission had erred in concluding that the voluntary act of theft, with knowledge that it might result in termination, was a refusal to perform light-duty work.

Following *Matuszczak*, many believed that the rules announced in *Interstate Scaffolding* were rigid and that MMI was the sole consideration for the receipt of TTD benefits.

Holocker – Inquiry Beyond MMI Status

In *Holocker*, the appellate court held that *Interstate Scaffolding* does not establish a *per se* rule that a worker is owed TTD benefits as a matter of law unless the claimant has reached MMI. Instead, the court concluded the determining factor is whether the claimant's condition has stabilized to the extent that they are able to re-enter the workforce. *Holocker* marks a departure from *Interstate Scaffolding* and injects a refreshing exception to what otherwise appeared to be a concrete rule.

The Facts

The claimant, Scott Holocker, worked as a transportation operator. Holocker was operating a crane, placing together heavy steel sections for an oversized mining truck, when a chainmail strap became stuck and broke, striking him in the face and chest, and causing damage to numerous teeth, multiple facial fractures, and chest contusions.

Holocker returned to work under light duty restrictions and was eventually released to work at full duty without restrictions. At this time, though, he was still treating for the work-related injuries to his face and mouth and had not yet reached MMI as to all of his injuries. Following his return to work, Holocker felt

uncomfortable operating cranes, experiencing anxiety and panic attacks. Nevertheless, he continued to work as a transportation operator.

Holocker's physicians restricted him from operating cranes for at least one year and recommended that if he did operate a crane thereafter, it should be done on a gradual basis to build his tolerance. Holocker's employer accommodated this restriction and he continued working as a transportation operator, primarily driving fork trucks.

Later in the year Holocker took a vacation and upon his return, he missed work for a number of days and failed to notify his employer for over three consecutive days. In accordance with the terms of the collective bargaining agreement, he was terminated. Holocker admitted he was aware of the terms contained in the collective bargaining agreement.

At trial, a clinical psychologist opined that Holocker continued to suffer from anxiety as a result of the work accident, but concluded he was able to perform all of the duties of his usual occupation except for operating a crane for a period of six months. Moreover, a certified rehabilitation counselor conducted a labor market survey and opined there were various employers near Holocker's home who were hiring for positions that matched his qualifications, salary, and restrictions.

Procedural History

Holocker sought TTD benefits post-termination arguing that his condition had not yet stabilized and that he was still restricted from operating cranes. The arbitrator awarded TTD benefits from the time of termination through the date of arbitration, finding Holocker had not reached MMI or been released to unrestricted full duty work as of the date his employment was terminated. The Commission reversed and distinguished *Interstate Scaffolding*, finding that "the determinative inquiry for deciding entitlement to [TTD] benefits remains, as always, whether the claimant's condition has stabilized" and "if [he] is able to show that he continues to be temporarily totally disabled as a result of his work-related injury." *Holocker*, 2017 IL App (3d) 160363WC, ¶ 27. The Commission concluded that Holocker's "work related injuries had stabilized and had

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no impact on his employment" (*Id.* ¶ 29) and that he "offered no evidence that he was significantly limited or precluded from reentering the labor market because he needed to temporarily avoid cranes." *Id.* ¶ 28.

The circuit court reversed the Commission and reinstated the arbitrator's award.

The Appellate Court Ruling

The appellate court reversed the circuit court and reinstated the Commission's decision to deny TTD benefits. The court acknowledged that Holocker had not yet reached MMI at the time of his termination, as he was still undergoing dental treatments and counseling for his anxiety. However, following his panic attack and until his termination, Holocker "had been released to work [full] duty with only one restriction, *i.e.*, that he not operate a crane." Per the court, Holocker "continued to work full duty as a 'transportation operator' within his original job classification without being required to operate a crane" and "it was not necessary for the employer to either modify an existing job or create a 'light duty' job to accommodate [Holocker's] work restrictions." *Id.* ¶ 36.

Additionally, the court found Holocker could have continued to work in his current position without having to operate a crane and, based on the labor market survey, was not precluded from reentering the work force. His "work-related injuries had stabilized to the extent that he was able to reenter the workforce and his injuries had no impact on his employment." *Id.* ¶ 38.

In addressing Holocker's argument that the only dispositive question regarding entitlement to TTD benefits is whether the claimant had reached MMI prior to his termination, the appellate court distinguished *Holocker* from *Interstate Scaffolding* and *Matuszczak*, stating:

In each of those cases, it was undisputed that, at the time of termination, the claimant's condition had not stabilized, that the claimant was unable to perform the job he had been performing for the employer prior to the work accident, and that when the claimant returned to work after the accident, it was in a light duty capacity.

Id. ¶ 39.

Thus, in *Interstate Scaffolding* and *Matuszczak*, the claimant's work injury diminished his ability to work. The same cannot be said of Holocker, as his work injuries had no effect on his employment.

In an important twist, the appellate court rejected Holocker's argument that an injured employee is entitled to TTD benefits as a matter of law unless he has reached MMI pursuant to *Interstate Scaffolding*. According to the appellate court, while *Interstate Scaffolding* did state that "when a claimant seeks TTD benefits, the 'dispositive inquiry is whether the claimant's condition has stabilized,' *i.e.*, whether the claimant has reached [MMI]," *Id.* ¶ 40, citing *Interstate Scaffolding*, 236 Ill. 2d at 142, the supreme court went on to say "[t]he fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force." *Id.* at 146. "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 and whether the employee is capable of returning to the work force." *Id.* Because Holocker's work injuries no longer impacted his ability to work or his employability, he was not entitled to receive TTD benefits following his termination.

What *Holocker* Means Going Forward

The appellate court in *Holocker* clarified the Supreme Court's decision in *Interstate Scaffolding* in that entitlement to TTD benefits is not solely based on a claimant's MMI status. Instead, benefits terminate when a claimant's condition has stabilized and he or she is capable of returning to work at full duty. Thus, if an employee has been released to return to work, even with restrictions, and those restrictions do not impair the individual's ability to perform his or her work at full duty, TTD benefits are not due. *Holocker* makes this clear, stating:

a claimant is not entitled to receive TTD benefits when his work injuries no longer impact his ability to work or his employability.

Holocker, 2017 IL App (3d) 160363WC, ¶ 40.

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In many cases the claimant will reach MMI and attain the ability to return to full-time work at the same time, but this is not always the case as we have seen in *Holocker*.

The appellate court's clarification here is certainly beneficial to employers as it limits an employer's potential exposure for TTD benefits when the employee returns to work at full-duty, but is still treating, and is subsequently terminated for unrelated causes. *Holocker* also applies to non-termination settings where the employee is able to return to full job duties and is not yet released. *Holocker* places an obligation on employers and their counsel to closely monitor a claimant's ongoing medical restrictions and medical treatment and to continually compare this information with the demands of the claimant's job. And when the medical status permits the claimant to return to full-duty employment, an offer should be made to return the employee to his or her former job. It is no longer necessary to await a full medical release so long as the restrictions do not impact the claimant's ability to work or his employability. *Id.* ¶ 40.

As an additional observation, it is important to note that in *Holocker*, the employer created a strong record to show that the employee could not only return to full-duty work for the employer, but also introduced evidence from a rehabilitation counselor that there were several jobs available in the claimant's geographic area that were within the claimant's restrictions. *Holocker* reinforces the need to be proactive in defending workers' compensation claims.

No further appeal was filed in *Holocker*, making the decision now final.



Dana Hughes - Peoria

Dana started in our Rockford office and moved to the Peoria office in 2015. She represents employers in workers' compensation claims. Dana frequently speaks and writes on Workers' Compensation law, including co-authoring *Southern Illinois University Law Journal's* "Survey of Illinois Law: Workers' Compensation." She is a graduate of Northern Illinois University College of Law and received her undergraduate degree at NIU. In 2016, Dana was named to the Leading Lawyers *Emerging Lawyers* list.



Vince Boyle - Peoria

As a member of the firm's Workers' Compensation Practice, Vince has experience in all aspects of workers' compensation cases, from arbitration hearings to reviews before the Workers' Compensation Commission to appeals in state and appellate courts. He also protects employers' interests in third party claims and lien recovery.

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TTD, DEATH, PERM. TOTAL & AMP. RATES

| ACCIDENT DATE | MAX. RATE TTD, DEATH, PERM. TOTAL, AMP. | MIN. RATE DEATH, PERM. TOTAL, AMP. |
|-------------------------|---|------------------------------------|
| 7/15/11 to 1/14/12..... | 1261.41..... | 473.03..... |
| 1/15/12 to 7/14/12..... | 1288.96..... | 483.36..... |
| 7/15/12 to 1/14/13..... | 1295.47..... | 485.80..... |
| 1/15/13 to 7/14/13..... | 1320.03..... | 495.01..... |
| 7/15/13 to 1/14/14..... | 1331.20..... | 499.20..... |
| 1/15/14 to 7/14/14..... | 1336.91..... | 501.34..... |
| 7/15/14 to 1/14/15..... | 1341.07..... | 502.90..... |
| 1/15/15 to 7/14/15..... | 1361.79..... | 510.67..... |
| 7/15/15 to 1/14/16..... | 1379.73..... | 517.40..... |
| 1/15/16 to 7/14/16..... | 1398.23..... | 524.34..... |
| 7/15/16 to 1/14/17..... | 1428.74..... | 535.79..... |
| 1/15/17 to 7/14/17..... | 1435.17..... | 538.19..... |

MINIMUM TTD & PPD RATES

| # of dependents, including spouse | 7/15/07- 7/14/08 | 7/15/08- 7/14/09 | 7/15/09- 7/14/10 | 7/15/10- 7/14/17 |
|--------------------------------------|---------------------|---------------------|---------------------|---------------------|
| 0..... | 200.00..... | 206.67..... | 213.33..... | 220.00..... |
| 1..... | 230.00..... | 237.67..... | 245.33..... | 253.00..... |
| 2..... | 260.00..... | 268.67..... | 277.33..... | 286.00..... |
| 3..... | 290.00..... | 299.67..... | 309.33..... | 319.00..... |
| 4+..... | 300.00..... | 310.00..... | 320.00..... | 330.00..... |

MAXIMUM PERMANENT PARTIAL DISABILITY RATES

| ACCIDENT DATE | MAXIMUM RATE |
|------------------------|--------------|
| 7/1/08 to 6/30/10..... | 664.72..... |
| 7/1/10 to 6/30/11..... | 669.64..... |
| 7/1/11 to 6/30/12..... | 695.78..... |
| 7/1/12 to 6/30/13..... | 712.55..... |
| 7/1/13 to 6/30/14..... | 721.66..... |
| 7/1/14 to 6/30/15..... | 735.37..... |
| 7/1/15 to 6/30/16..... | 755.22..... |
| 7/1/16 to 6/30/17..... | 775.18..... |

MAXIMUM 8(D)(1) WAGE DIFFERENTIAL RATE

| ACCIDENT DATE | MAXIMUM RATE |
|-------------------------|--------------|
| 7/15/13 to 1/14/14..... | 998.40..... |
| 1/15/14 to 7/14/14..... | 1002.68..... |
| 7/15/14 to 1/14/15..... | 1005.80..... |
| 1/15/15 to 7/14/15..... | 1021.34..... |
| 7/15/15 to 1/14/16..... | 1034.80..... |
| 1/15/16 to 7/14/16..... | 1048.67..... |
| 7/15/16 to 1/14/17..... | 1071.58..... |
| 1/15/17 to 7/14/17..... | 1076.38..... |

SCHEDULED LOSSES (100%)

| Effective 2/1/06 (and 7/20/05 to 11/15/05) | Effective 2/1/06 (and 7/20/05 to 11/15/05) |
|--|---|
| Person as a whole.....500 wks | Leg.....215 wks |
| Arm.....253 wks | Amp at hip joint.....296 wks |
| Amp at shoulder joint.....323 wks | Amp above knee.....242 wks |
| Amp above elbow.....270 wks | Foot.....167 wks |
| Hand.....205 wks | Great toe.....38 wks |
| Repetitive carpal tunnel claims.....190 wks | Other toes.....13 wks |
| Benefits are capped at 15% loss of use of each affected hand absent clear and convincing evidence of greater disability, in which case benefits cannot exceed 30% loss of use of each affected hand. | Hearing |
| Thumb.....76 wks | Both ears.....215 wks |
| Index.....43 wks | One ear.....54 wks |
| Middle.....38 wks | Eye |
| Ring.....27 wks | Enucleated.....173 wks |
| Little.....22 wks | One eye.....162 wks |
| | Disfigurement.....162 wks |

Death benefits are paid for 25 years or \$500,000 whichever is greater.

As of 2/1/06, burial expenses are \$8,000.

The current state mileage rate is \$0.535 per mile.

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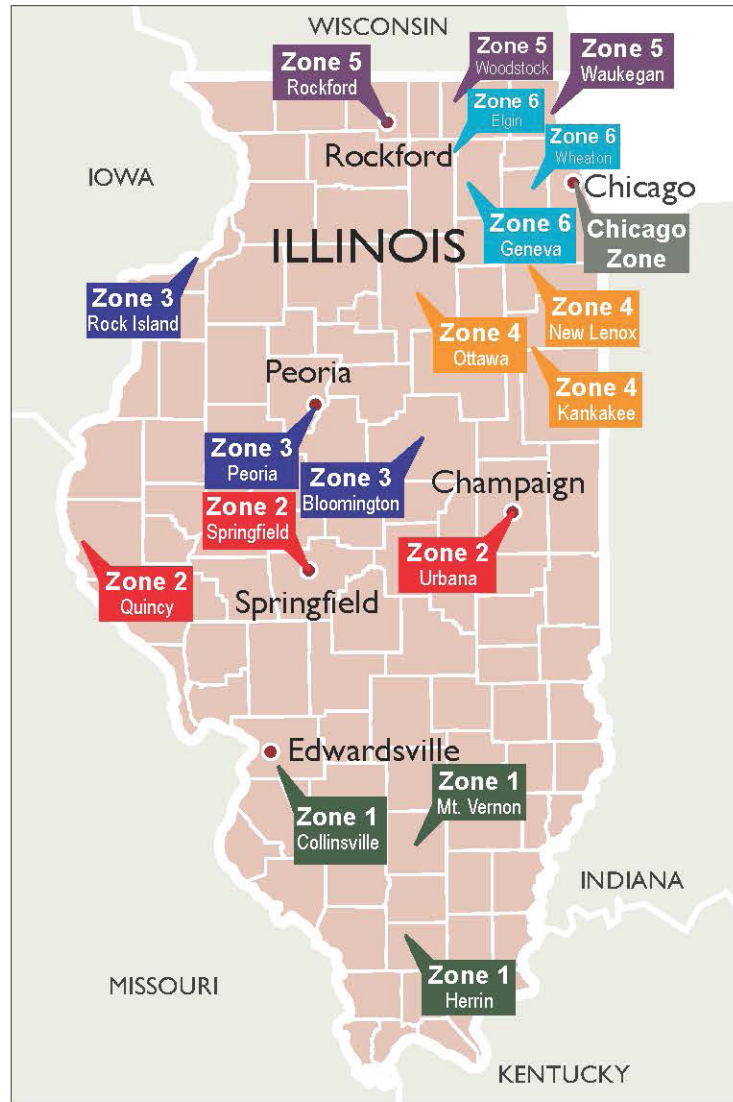
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