INTERSTATE SCAFFOLDING, INC., Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION et al. (Jeff Urban, Appellant).

Opinions filed January 22, 2010

In a unanimous decision the Illinois Supreme Court considered whether an employer's obligation to pay temporary total disability (TTD) to an employee who is working a light duty job, and who was injured in the course of his employment, ceases when the employer terminates the employee for conduct unrelated to the injury. The undisputed facts in this claim involve a claimant who was employed as a union carpenter, and sustained injuries on July 2, 2003 to his head, neck and back. Between the date of occurrence and May 25, 2005, the claimant underwent numerous diagnostic tests and treatments for his medical condition which required the claimant to remain off work, however there were times between July of 2003 and May of 2005 when the claimant's doctor allowed the claimant to return to work on a "light duty" restriction. TTD was paid when the claimant was not working, and the claimant received maintenance benefits making up the difference between his previous carpenters pay and his light duty pay during the times he worked at the light duty job. The claimant's employment was terminated on May 25, 2005 following an incident which occurred when the claimant went to the company office to discuss what he believed to be an error in his pay check regarding the amount deducted for Federal withholding

taxes. During that discussion the claimant admitted that in his prior paycheck he had been overpaid because he was paid union scale instead of light duty pay.

After this discussion, the claimant returned to his job. The president's assistant became irate, and knowing that a few weeks earlier the claimant had written some religious graffiti or slogans, using a permanent black marker on a metal cabinet in the storage room she confronted the claimant, and an agitated and brief argument occurred. The claimant was called a religious hypocrite for failing to report the payroll error two weeks earlier. Due to the result this heated exchange the local police were called. Both parties were interviewed by the police and no arrests or other action was taken.

After the police left, the president's assistant telephoned the president and told him what had occurred. The president of the company was also advised about the religious graffiti and the president asked to speak with the claimant's supervisor and instructed the supervisor to fire the claimant for defacement of company property. The employer refused to reinstate TTD benefits claiming that the claimant was terminated for cause. The record would suggest that graffiti had been tolerated in the storage room for some time prior to this incident.

The case came before the Commission on a 19(b) Petition, and essentially the medical evidence was not disputed. In fact the employer's IME doctor recommended a spinal fusion which earlier had been rejected by the claimant, but the claimant testified that due to the ongoing pain he was now ready to submit for that surgery. The claimant testified about the events surrounding his

dismissal, and he admitted he had written religious slogans in the storage room, but he did not believe those writings were the reason for his dismissal. He testified other employees had also written on, or made markings on the shelves and walls of the storage room and there had never been any repercussions of any kind. The only witness to testify on behalf of the employer was the assistant to the president who testified as to the events on the date of the dismissal, and the employer put into evidence copies of photographs of the religious graffiti which the claimant admitted writing on the shelves of the storage room.

The Arbitrator's decision was issued on July 22, 2005. After summarizing the facts of the case, the Arbitrator found in favor of the employer relative to the question of reinstating TTD payments, although the Arbitrator failed in his decision to offer any explanation as to why claimant was not entitled to TTD.

On review the Commission issued a decision modifying the Arbitrator's ruling and awarding TTD benefits in the sum of $1,004.41 per week for a five week period predicated on the fact that Petitioner's condition had not stabilized as of the hearing date before the Arbitrator. In addition, the Commission remanded the matter to the Arbitrator for further proceedings. The employer was also ordered to pay interest on the award pursuant to Section 19(n). The Commission did not discuss or make any findings with regards to the claimants termination.

The employer, Interstate, then appealed the matter to the Circuit Court of Will County which confirmed the Commission's decision awarding TTD benefits.

The employer next took an appeal to the Illinois Appellate Court, and in a three to two decision the Workers' Compensation Division of the Appellate Court reversed the Commission decision awarding benefits. The Appellate Court concluded that the claimant was not entitled to TTD benefits as he was terminated for cause on May 25, 2005. This Appellate Court reversal of the Circuit Court decision resulted in a Petition to the Illinois Supreme Court for Certiorari, which the Court granted.

The Supreme Court has now ruled that both the majority decision, and the dissent in the Appellate Court case, reached an incorrect conclusion. The Supreme Court found the Act has no provisions supporting 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. The Court states a thorough examination of the Act reveals it contains no provision for the denial, suspension or termination of TTD benefits as a result of an employees discharged by his employer. "Nor does the Act condition TTD benefits on whether there has been "cause" for the employees dismissal." Such an inquiry is "foreign to the Illinois Workers' Compensation system."

A close reading of the decision reveals that the Court interpreted the evidence and facts in this case as a situation wherein the employer had a history of people writing on the cabinets and walls of the store room for a period of time with no consequence, and that the employer chose to

use the incident of the claimant using a felt tip marker to write a psalm on a metal cabinet as the basis for terminating his employment. We believe that the Court viewed this as picking and choosing an incident that had never been the basis of any previous actions to terminate other employees, and that this is an example of an employer seeking some basis to "legitimately" terminate employment. This case, much like the *Cassens* case which we will discuss at length in our February newsletter, is a good example of the old adage that bad facts make bad law. It is interesting to note that there are a number of states that follow the legal concept set forth by the Illinois Supreme Court. Given that knowledge it would not seem to be the kind of case that one would want to bring to the Supreme Court of our State, risking a decision, such as the one we have now received, especially in a claim which could have been resolved for the payment of around $5,000.00 in TTD. Granted, a number of the states which do follow this concept of the law have modified it with legislative amendments, but the likelihood of that happening in Illinois, given the current makeup of the state legislature, is not very encouraging.

We now need to make some determinations as to what this decision will mean to Illinois employers, and also what it does not mean, what has changed and what has not. In this analysis. We believe we need to look at both when the right to collect TTD benefits commence after an employee is terminated while working a light duty job and those instances where TTD is not warranted.

The Court did not find that TTD benefits would be due and owing in the following situations:

- Where an employee refuses to cooperate with vocational rehabilitation efforts;

- Where an employee turns down a job offer within the restrictions set forth by the doctor.
- Where the employee refuses to submit to medical, surgical, or hospital treatment essential to his/her recovery, or fails to cooperate with good rehabilitation efforts as set forth in Section 19(n) of the Act.
- The employee is suspended or terminated, if the employee refuses work offered that is within the physical restrictions prescribed by the doctor.

- When an employee fails to call or report to work after a light duty position is offered in accordance with a medical opinion.
- Where an employee has self terminated his employment either by refusing to report, or has tendered a resignation while on light duty.
- Where an employee has refused to return to work after having been offered light duty work which conforms with medical restrictions, or has refused to return, but is not terminated.

It is very important that any job offer of restricted or light duty work be well documented. Do not rely on a telephone call or regular mail to document a legitimate job offer, but rather the offer needs to be made by way of certified mail, or by using one of the many express mail services that will provide the employer with a receipt showing delivery of the offer. If the employee has a facsimile machine a fax to the employee or his/her attorney would be another way to document delivery. TTD can be terminated, in accordance with the decision, when the claimant refuses to cooperate with vocational rehabilitation efforts, or if the employee refuses to submit to medical, surgical or hospital treatment essential to his/her recovery. Again, in each instance it is

extremely important that there be some documentation of this refusal.

Situations which will likely result in the resumption of TTD benefits:

- The termination of employment by the employer for reasons which the employer may deem to be "volitional conduct" or for reasons unrelated to the workers' compensation claim.

If the action of the employee is deemed to be criminal in nature, we are suggesting that in order to present an argument at the Commission against the resumption of TTD benefits that the criminal action be pursued with vigor. If this is done and results in either a guilty plea or a finding by the criminal court of a criminal offense, then we believe that there may be some basis for arguing that TTD rights should not be resumed after employment is terminated for the commission of a criminal act. Since this decision provides for the payment of TTD benefits if there is a termination of what the Court calls a volitional act, we are suggesting that immediately upon resumption of TTD benefits in accordance with this decision that the claimant, or his/her attorney, be notified in writing that the resumption of TTD benefits is being made under protest, and that there exists an intent to raise the question of a credit for any such TTD paid to be applied against any permanency either negotiated or awarded in the claim. Taking this position will allow the employer to escape the potential of penalties and attorneys fees, and might serve as the basis of mitigating the eventual total value of the case.

We think it is important to look at each case on a case by case basis. Although it is somewhat discouraging to see a decision such as this, we really need to examine how often situations such as this are going to arise in our cases. It is not likely, in this economic environment, that an employee will intentionally seek a termination of employment in order to re-establish his/her right to collect TTD payments for a limited period of time and later reach maximum medical improvement (MMI) and then be out of both TTD and a job. It is also unlikely that the Illinois Supreme Court intended to create a situation wherein an employee on a light duty work restriction related to a workers' compensation claim could come into his place of employment, pull out a gun, get terminated, and expect to have TTD benefits reinstated. We believe that the Court looked at the facts in the instant case and felt that this was a situation where the employer was "gunning" for this particular employee and saw an opportunity to terminate employment in the hopes that it would not have any repercussion. Unfortunately the parties worked this claim all the way up to the Illinois Supreme Court and now every employer has to take into consideration this decision when they are dealing with a light duty return to work. Certainly the addition of the temporary partial disability (TPD) section in the Act would seem to indicate that the legislature understood that one of the prime purposes of the Workers' Compensation Act is to encourage a return to the work place. Legitimate offers for return to light duty work in conjunction with a light duty medical release is encouraged, and we would recommend that an offer of light duty return to work be made available whenever possible. It is essential that return to work offers be well documented, and it is also essential that any termination for cause also be well documented as well as any refusal on the part of the employee to accept light duty employment. Failure to document, or failure to prosecute any criminal actions can result in the

obligation to resume TTD payments until such time as an injured employee reaches MMI.

We believe we also need to look to other jurisdictions that have a similar approach to this TTD question to determine what types of legislative changes were instituted to reach common sense resolutions of these types of questions. Unfortunately, the Illinois Supreme Court has created yet another grey area such as in the parking lot cases and the unexplained fall cases, but as in those instances, a review of the facts on a case by case basis can result in common sense resolutions as they arise.