



WISCONSIN – TERMINATION & TTD MEMO – 2016

In Wisconsin, an employee terminated for cause remains eligible for temporary total disability benefits at least for injuries occurring **prior to March 2, 2016**. See DWD 80.47; Wis. Stat. § 102.43. **The general rule before March 2, 2016**, is TTD benefits are paid by the employer or insurance carrier through healing plateau—or the point at which the employee will get no better or worse because of the compensable injury. Benefits may be suspended by employers where the employee: reaches maximum medical improvement or healing plateau; unreasonably refuses to accept accommodating work; is convicted of a crime substantially related to work or is incarcerated and unavailable to return to work; unreasonably refuses to undergo recommended treatment (not including invasive forms of treatment); refuses to attend an IME after an order by the DWD to comply with that request; or violates a known and enforced drug policy after the employee has returned to light duty work. The last employer defense to TTD liability exemplifies one exception to the general rule.

The rule that an employee terminated for cause continues to receive TTD benefits was established in *Brakebush Bros., Inc. v. Labor & Indus. Rev. Comm’n*, 210 Wis. 2d 623, 563 N.W. 2d 512 (1997). In this case, an employee was fired for making false representations about his compensable injury during the healing period (playing in a pool league and bow hunting while out of work reportedly on bed rest). The Administrative Law Judge and LIRC ordered the employer to pay TTD for the period between the termination date and healing plateau. The Wisconsin Supreme Court upheld this ruling, and held that an injured employee who has been terminated is nonetheless entitled to disability benefits because the employee continues to be limited by the work-related injury. The Court explained “the injury, not the termination, [] is the cause of the employee’s economic loss.” The Court reviewed decisions from other jurisdictions in Maine, Minnesota, and Florida to apply the same public policy.

The law has changed effective March 2, 2016, allowing the employer to discontinue temporary benefits if the employee has been suspended or terminated due to “misconduct” or “substantial fault” as defined by unemployment statutes. See Wis. Stat. § 102.43(9)(e). “Misconduct” means one or more actions or conduct

evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer, together with other specific additional enumerated conduct deemed by the statute to be "misconduct". *See* Wis. Stat. § 108.04(5). "Substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following: 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction; 2. One or more inadvertent errors made by the employee; 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment. *See* Wis. Stat. § 108.04(5g).

At this time, we can recommend that for injuries occurring AFTER March 2, 2016, where the petitioner is terminated or suspended for post injury fault, TTD benefits may be terminated. However, for injuries occurring BEFORE March 2, 2016, we suggest to clients facing this issue to determine whether the employer can argue, by virtue of the conduct leading to the termination, the employee has unreasonably refused an offer of suitable employment within his or her temporary limitations. As a general matter, however, TTD liability continues during the healing period for a compensable injury after a for cause termination; therefore, it must be paid. As always, please feel free to contact us to discuss this issue or related matters.