

Liability for Temporary Disability Benefits to Employee Terminated for Cause

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Providing temporary disability benefits during the course of an injured worker's recovery is a rather straightforward process. Simply stated, if the injured worker is provided work restrictions by his physician and the employer is unable to accommodate those restrictions then temporary disability benefits are owed. If the employer can accommodate the restrictions then no temporary disability benefits are owed, provided he is earning the same as his pre-injury wages.

However, what happens when an employer accommodates an injured worker's restrictions and then terminates the injured worker's employment for some violation of company policy? The employer is no longer accommodating the restrictions and the injured worker is now out of work. Is he entitled to temporary total disability ("TTD") following his termination?

In the past, it was generally believed the injured worker was entitled to temporary total disability benefits following termination unless the action which led to the termination was criminal or quasi-criminal in nature. Other attempts have been made to terminate TTD based upon a constructive refusal of suitable employment argument, but for the most part, these arguments failed before the Commission and the Carrier was generally responsible for picking up TTD following a worker's termination if that worker was under work restrictions.

The South Carolina Supreme Court recently shed some light on this issue and provided the defense with a solid argument when faced with the scenario above. In *Pollack v. Southern Wine & Spirits of America*, 405 S.C. 9, 747 S.E. 2d 430 (2013), the Supreme Court affirmed the Commission's denial of TTD benefits to an injured worker who returned to work on modified duty with restrictions and was subsequently terminated for cause by his employer. Pollack injured his back lifting a case of alcohol in the course of his employment, but returned to work five days after the accident with a lifting restriction not to exceed 15 pounds. The employer was able to accommodate those restrictions and provided Pollack his full salary while working within these light duty restrictions.

Pollack was then involved in a motor vehicle accident involving a company vehicle. The company's policy stated that all accidents with a company vehicle must be reported and that failure to provide such notice would result in termination. Pollack did not report the accident, was subsequently terminated, and initiated a claim seeking TTD from the date of termination forward. The Full Commission affirmed the Single Commissioner's denial of compensation, finding the injured worker was not out of work due to his injury, but rather for violating company policy.

The Supreme Court affirmed and reasoned that pursuant to S.C. Code Ann. §42-9-260, TTD payments may begin when “an employee has been out of work *due to* a reported work-related injury...” Furthermore, per S.C. Code Reg. 67-502(B)(1) disability is defined as the “incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury in the same or any other employment.” Pollack argued on appeal that his employer was required to either offer suitable employment within his work restrictions or pay TTD. The Supreme Court agreed with this assertion, but held the employer clearly offered suitable employment as Pollack in fact returned to work at a modified duty. In affirming the Commission’s order, the Supreme Court clarified and stated “[a]n injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to or because of* the injury.” Pollack’s incapacity to earn wages was due to his violation of company policy and subsequent termination for cause. As such, Pollack was not entitled to TTD following his termination.

While this is certainly a favorable opinion for the defense, employers and carriers are still urged to use caution when terminating employees working under light duty restrictions. The Supreme Court specifically noted that an employer’s denial of TTD benefits must be scrutinized carefully and cited several cases where an employer’s attempt to deny TTD failed.^[1] In order to maintain a successful denial of TTD in these cases, it will be crucial to establish the company’s policy in question and testimony from the employer and injured worker regarding that policy. In *Pollack*, the injured worker testified he was aware of the policy and the employer testified that other employees have been terminated for failing to report accidents in the past. The employer further testified that but for Pollack’s violation of company policy he would still be employed. These are all significant factors and important to establish during the investigation phase of any claim involving a terminated employee.

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[1] The jurisprudence in this area reflects the Commission's commendable recognition of the natural motivations that may be at play when an employer seeks to deny or terminate TTD benefits. *See, e.g., Johnson*, 398 S.C. 595, 730 S.E.2d 857 (affirming the Commission's award of TTD benefits and rejection of the employer's argument that it attempted to accommodate the employee's injury and that its purported offer of light duty work was reasonable); *Last v. MSI Const. Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991) (affirming the Commission and holding substantial evidence supported the continuation of TTD benefits where the employer sought to terminate TTD benefits based on a claimant's refusal to accept medical care while the claimant was incarcerated); *Davis v. UniHealth Post Acute Care*, --- S.C. ---, 741 S.E.2d 770 (Ct. App. 2013) (affirming the Commission and holding substantial evidence supported the Commission's determination that the employer was required to pay TTD compensation to the claimant where the claimant did not refuse employment by falling asleep briefly on the job). *Pollack*, footnote 5.