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Good Faith Terminations and Related Headaches

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Temporary Disability Overview

- An injured worker receives temporary disability from the time he is injured, until the time his injury is permanent and stationary.
- Temporary disability is calculated at two thirds an injured workers average weekly wage at the time of injury.
- Two types of temporary disability: temporary total disability (TTD) and temporary partial disability (TPD)
  - TTD means the industrial injury has completely removed the injured worker form the labor market
  - TPD means that the worker is able to work light duty with restrictions.
Labor Code 4657

- In case of temporary partial disability the weekly loss in wages shall consist of the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn during the disability, to be determined in view of the nature and extent of the injury. In computing such probable earnings, due regard shall be given to the ability of the injured employee to compete in an open labor market. If evidence of exact loss of earnings is lacking, such weekly loss in wages may be computed from the proportionate loss of physical ability or earning power caused by the injury.
The Origin of the Good Faith Termination Defense

- The purpose of TPD is to compensate for wage loss resulting from the industrial injury.
- The injured worker must be willing to work while on TPD:
  - “There can be no doubt that section 4657 makes it quite clear that in cases of temporary partial disability the employee is expected to be willing to earn such wages as he is able considering his injury, and that if some other ascertainable cause other than the injury substantially contributes to his inability to earn wages, such separate cause must be separately evaluated, and only the proportion chargeable to the industrial injury allowed as compensation.”
Origin of Defense (con’t)

- Huston v. WCAB (1979), 95 Cal.App.3d 856, 868
  - “If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments.” (Internal citations omitted, emphasis added).
Steps to Proving the Defense -
Step 1

• What is the type of temporary disability?

• TPD – continue to Step 2

• TTD – stop analysis and pay TD. The good faith termination for cause defense can only cut off liability for temporary partial disability, not temporary total disability
Step 2

- Was Applicant willing and available to perform modified duty?

- YES - continue to step 3

- NO – Applicant does not get TD

Step 3

• Has Defendant shown that the injured worker was terminated for good cause?

  • YES – continue to Step 4

  • NO – stop analysis and pay TD
What is “termination for good cause”? 

- Termination cannot be for just any old reason. It must be for “good cause”.
- Defined as: “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.” Cotran v. Rollins Hudig Hall Intern., Inc., (1998) 17 Cal.4th 93, 108.
Not Good Faith Termination For Cause

YOU ARE FIRED!
You Be the Judge

• Facts from the employer’s perspective:
  ▫ Injured worker is a mechanic
  ▫ Competitor’s vehicle drives up to the shop
    • Driver of vehicle was friend of injured worker
  ▫ Injured worker helps fix a hose leak
    • Estimates about 15-30 minutes of time used
  ▫ Does not ask supervisor whether he should fix leak
  ▫ Injured worker admits that he knew he probably should not have fixed the leak on company time
  ▫ Employer fires injured worker for theft of time
• Is this a good faith termination for cause?
TRIAL RESULT

• Not a good faith termination for cause.
• 104 weeks of TD due at $1,062.47 or, $110,496.88 total

• WHAT?!?

• What facts did the employer overlook?
You Be the Judge (con’t)

• Let’s add some more facts from discovery:
  ▫ Injured worked had worked for employer 22 years
  ▫ Company had a progressive discipline policy, which was not followed
  ▫ Mechanics would often work on supervisors private vehicles on company time
  ▫ Co-worker who assigns work out did not object to Applicant performing work
  ▫ Work performed was to prevent a fluid spill on company property
  ▫ Only past discipline history was for Applicant causing a fluid spill on company property
Moral of the Story

• Don’t rush to terminate an injured worker before fully investigating the termination and allowing the injured worker a chance to respond to the allegations

• Not only are you subjecting yourself to a TTD award, but potentially a LC 132(a), wrongful termination, FEHA, or ADA claim as well.
Step 4

Prior to termination, was the injured worker working on modified duty?

- **YES** – Defendant - You have met your burden that modified duty was available, genuine, and offered in good faith. There could be arguments as to whether modified duty would have continued following termination. To be safe, put the modified duty offer in writing and provide it to the injured worker. You may also run into two other road blocks: 1) should the injured worker’s restrictions change, and 2) where the employer has a policy of terminating modified duty after a set number of months. Be prepared to continually document the availability of modified duty.

- Applicant – Go to step 5.
Step 4 (con’t)

• **NO** – Defendant - **Stop everything!** You must put a modified duty offer in writing as soon as possible. Keep in mind that the courts are going to closely scrutinize the post-termination modified duty offer. So document the offer very well. Defendant has to show that modified duty was available, genuine, and offered in good faith.

• Applicant – you have a strong position to win your TD, but be prepared to go on to Step 5.
How do you prove a modified duty position exists?

• Pretty obvious if injured worker is working modified duty at time of termination
  ▫ However, Applicant’s attorney will need to check that modified duty would have continued indefinitely
    • Many companies have written policies regarding the length of modified duty (i.e. one year only)
    • Be careful in cases where the restrictions change over time. You need to continually document the availability of modified duty post-termination.
How do you prove a modified duty position exists? (con’t)

• What if the injured worker goes on temporary disability after termination?
  ▫ Higher scrutiny is given to post-termination offers of modified duty (see slide Quiett v. System Transport)
  ▫ Defendant will have a heavy burden of showing a modified duty position was available, within the IW’s work restrictions, genuine, and offered
    • Notice the “and offered” language in Huston
    • Put the detailed offer in writing and include language that you would have provided the modified work position, but for the employee’s acts that led to termination
  ▫ Even this may not be enough depending on the facts of your case
    • Consider a compromise settlement on TD
Sample Discovery from Applicant

1. Please provide all documents your client intends to rely on at trial to prove that modified work was and is available and would have been offered to Applicant from [date period].

2. Please provide all documents your client intends to rely on at trial to prove that Applicant’s termination was for cause.

3. Please provide all documentation / evidence including but not limited to company memoranda, manuals, papers, emails, posters, and the like, which document the policies and procedures regarding your client’s modified duty work program.
Sample Discovery (con’t)

4. Please provide a listing of all persons from 1/1/2010 through today who have worked within your client’s modified duty program. For each person listed, please provide their occupation, normal job duties, work restrictions, job title of accommodated position, job duties of accommodated position, notice of offer of modified duty, and accommodated work hours. (To protect privacy rights, you may refer to the individuals on this list by pseudonym or initials).

5. Please provide a list of all positions within a 20 mile radius of Applicant’s primary work site, which could accommodate the following restrictions: [List restrictions].
Sample Discovery (con’t)

• 6. Please provide all documentation, which your client may rely upon at trial to prove that those occupations, listed immediately above, were available within [time period].

• 7. Please provide a job duties listing for Applicant’s position.

• 8. Please provide all documentation including but not limited to papers, text messages, emails, memoranda, letters, and the like, which document your client’s specific intention to offer Applicant a modified work position, but for Applicant’s termination
Sample Discovery (con’t)

• Depositions to take:
  ▫ Person or person(s) most knowledgeable regarding Applicant’s termination.
  ▫ Person or person(s) most knowledgeable regarding your client’s modified duty program.
Step 5 - Odd Lot Doctrine

• Applicant will argue the “odd lot” doctrine applies. Under “odd lot”, Applicant argues that his restrictions effectively prevented Applicant from performing any job in the open labor market for which Applicant is skilled.

• Burden shifts to Defendant to show that work was available that applicant could perform.

• If applicant is an Odd Lot – TPD is presumed to be TTD
Does Odd Lot Apply?

- WCAB indicated in *Quiett* (infra) that the “odd lot” doctrine would not apply in cases where the injured worker is terminated for cause, while performing modified duty.
- This is an issue that would need a case on point. *Drews* did not apply the odd lot doctrine to its opinion. In *Esquival*, the parties stipulated that Applicant was an odd lot, but the opinion rested on Defendant’s failure to show good faith termination for cause.
Why Odd Lot Doctrine Should Apply

- Even if Applicant is terminated from a modified duty position, the odd lot doctrine should apply for the following reasons:
  - 1) L.C. 4657 commands that “due regard shall be given to the ability of the injured employee to compete in an open labor market[.]”
  - 2) Under normal circumstances, a terminated employee is free to compete in the open labor market, without restrictions; however, when injured with restrictions, the terminated employee is not free to compete. Where the injury prevents the injured worker from finding suitable work, TD is due.
  - 3) Not allowing the odd-lot doctrine to apply would provide a perverse incentive to fire injured workers while on modified duty
Why Odd Lot Should Apply (con’t)

• 4) Limited scope - Applicant’s attorneys need to remember the limited scope of “odd lot doctrine”
  ▫ “Odd lot” does not apply when the injured worker is released to light duty of a general nature.
• 5) Specific language of approval in Huston.
Case Review

- Facts:
  - The parties stipulated at trial that Applicant was terminated for violation of company policy.
  - Applicant was injured while trying to stop customers from stealing
  - The court also found uncontroverted evidence that the employer would have offered modified duty, but for the termination
- Holding: No TD paid – good faith termination and modified duty was available as store greeter
Case Review (con’t)

- *Butterball Turkey Co. v. WCAB* (Esquival) (1999) 65 C.C.C. 61 (writ den.)

- Facts:
  - Parties stipulated that in the absence of modified duty from Defendant, Applicant was an “odd lot”
  - Applicant was performing modified duty
  - Applicant took a 30 minute break without clocking out on his time card
  - Applicant terminated for falsification of time card

- Holding: TD Due. Defendant failed to show that Applicant’s alleged misconduct rose to the level of termination under company policies
Case review (con’t)


- **Facts:**
  - Applicant is on TPD
  - Fired for allegedly lying to coworker about his ability to make up time from a tardy clock-in

- **Holding:** TD Due – Defendant did not meet burden of showing good faith termination for cause

- **Points of law:**
  - If you are terminating an employee for a first offense, you need to show that the alleged conduct is something that would ordinarily lead to termination for a first offense
Case Review

- *Quiett v. System Transport*, (5/15/08) OAK 0336115 (unpublished panel)
- Injured worker was not entitled to TD due to good faith termination for cause
  - Parties stipulated at trial that termination was due to violation of company policy
  - Applicant tested positive for medical marijuana
- Holding: No TD due.
- Points of law from this case:
  - Higher scrutiny for modified duty offer if injured worker is placed on temporary disability after termination.
  - Where Applicant is actually performing modified duty at the time of termination, genuineness of modified duty offer is not questionable.
Summarizing the Law Into a Three Prong Analysis - Prong One

1) Defendant must first offer substantial evidence that Applicant’s termination was for cause. *Butterball Turkey Co. v. WCAB* (1999) 65 Cal.Comp.Cases 61 (writ denied). If Defendant cannot show termination for cause, temporary partial benefits are treated as temporary total benefits, which are due and payable. *Id.* If Defendant can show termination for cause, the analysis continues.
Summarizing the Law Into a Three Prong Analysis - Prong Two

2) Only after Defendant shows termination is for cause, the court then examines whether Defendant can show that modified work was available, genuine, within the work restrictions, and offered in good faith. *Huston v. WCAB* (1979) 95 Aal.App.3d 856, 868 [44 Cal.Comp.Cases 798, 806] If Defendant fails to show the above, wage loss is deemed total and Applicant is entitled to temporary total disability. *Id.*
Summarizing the Law Into a Three Prong Analysis - Prong Three

- 3) If the Defendant shows that modified work was available and offered, the burden shifts to Applicant to show that his restrictions effectively prevented Applicant from performing any job in the open labor market for which Applicant is skilled (the “odd lot” doctrine). *Titsworth*, 39 Cal.App.2d at 669.
  - A) If applicant falls within the “odd lot” doctrine, the burden shifts back to the Defendant to show there was work available that Applicant can perform in the open labor market. *Meyers v. I.A.C.* (1940) 5 Cal.Comp.Cases 149, 39 Cal.App.2d 665 (Published). If Applicant is prevented from performing work in the open labor market, temporary partial disability is deemed total. *Id.*
QUESTIONS?

• Questions, comments, concerns?
• Feel free to contact me at eledger@mastagni.com