Injured Workers Held Accountable When Terminated for Cause

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It is an age old question from employers and carriers alike. If an employee returns to light duty and then either fails to call or show up for work or violates some other company policy, will he be allowed to collect temporary total disability benefits if he is terminated? The employer is frustrated because he is forced to keep an employee on his payroll who appears to be taking advantage of the situation and simply won't follow the rules while other non-injured employees watch and grow angry that they are not permitted to act in the same way. They see that the employee who doesn't follow the rules is rewarded by being allowed to stay home while receiving a weekly compensation check. The employer is stuck between a rock and a hard place. If the injured worker is terminated while on light duty, he is automatically entitled to temporary compensation. If the injured worker is allowed to continue working while not obeying company policy, other workers feel they can do the same.

Injured workers have a duty to return to work if suitable employment is offered. Failure to do so bars any entitlement to temporary benefits. This is well established law pursuant to S.C. Code Ann. § 42-9-190 which provides that "if an injured worker refuses employment procured for him suitable to his capacity and approved by the Commission he shall not be entitled to any compensation at any time during the continuance of such refusal." The case in which an injured worker refuses suitable employment outright is a fairly simple one when determining entitlement to temporary compensation. However, the "blurred lines" or gray area is the case in which an injured worker is terminated for cause and therefore, constructively refuses suitable employment. Employers and carriers have long argued that constructive refusal of employment should result in the same bar of those benefits. Until now, the Courts have often disagreed or at least not yet been given a set of facts on which they would allow such an argument.

Earlier this year, the Court of Appeals declined to rule on the overall argument of constructive refusal of employment in *Davis v. UniHealth Post Acute Care*, 402 S.C. 541, 741 S.E.2d 770 (Ct. App. 2013) and instead found specifically on that set of facts that the employee did not refuse, constructively or otherwise, her employment when she fell asleep during work hours. They relied upon the lower court's finding that Claimant's inability to stay awake was due at least in part by her lower back injury and resultant pain which apparently kept her from sleeping the previous night. The Court did not agree with the Defendants' argument that "sleeping for one minute or less" rises to the level of constructive refusal of employment and therefore, they never reached the ultimate question of whether such an argument is even valid in South Carolina.

It now appears that there is a silver lining for employers and carriers. In the recently decided case of *Pollack v. Southern Wine & Spirits of America*, Opinion No. 27285, 2013 S.C. LEXIS 168 (2013), the court once again considered the predicament of an employer who tries in good faith to provide employment within an injured worker's restrictions but is then forced to decide whether to terminate the employment when the employer commits an act which would usually result in termination. In *Pollack*, the employee returned to work with restrictions following an admittedly compensable injury to his low back. While working light duty, the injured worker's company vehicle collided with another company vehicle and upon inspecting the vehicle and believing that there was no damage, he failed to report it. The employer's company policy clearly stated that all incident and accidents involving company vehicles had to be reported immediately regardless of damage, or lack thereof. Because the injured worker failed to report the incident, his employment was terminated due to a violation of company policy. The injured worker then requested temporary total disability benefits since he was terminated while on light duty. The employer and carrier denied those benefits on the basis that he caused his own termination thereby barring him from temporary benefits. They argued that entitlement to temporary benefits is triggered when there exists a nexus between the work-related injury and the inability to earn wages. The Court agreed.

As evidence of its argument, the employer presented testimony at the hearing that every employee has a duty to report an incident or accident involving company vehicle, regardless of damage or severity, is, in fact, company policy and that other employees had been let go due to the same violation. Additionally, the employer presented testimony that the decision to terminate the claimant's employment was a decision made by the corporate office and that the claimant would still be working light duty but for his violation of company policy and resultant termination.

In its ruling, the court never addressed "constructive refusal of employment" as it does not appear that that specific legal theory was even argued. Instead, the court focused on the nexus between the work-related injury and the inability to earn wages. The definition of "disability" under the Act is "when the incapacity for work *resulting from an injury* is total, the employer shall pay, or cause to be paid,…a weekly compensation…" See S.C. Code Ann. § 42-9-10(A). (Emphasis added.) Additionally, Section 42-9-260 provides that temporary payments are due "when an employee has been out of work *due to a work-related injury*" (Emphasis added.) The Court reasoned that when an employee's inability to earn wages is brought about by himself by causing his termination, he is not entitled to temporary total disability benefits. The Court also warned, however, that each case should be looked upon carefully by the Commissioners who should make every effort to eliminate those circumstances in which an employer is simply looking for ways to terminate an employee's employment. They cautioned that each set of facts should be "scrutinized carefully".

Prior to the *Pollack* case, the Workers' Compensation Commission held a general view that absent egregious behavior on the part of the injured worker causing his termination, termination while on light duty, even for cause, would not bar the claimant from entitlement to temporary compensation. Certainly, this case changes that stance and while each set of facts will have to be addressed individually and carefully by the Commission to ensure that the employer is not "looking for" a reason to terminate the claimant, there is certainly more hope now than ever before that the employee will no longer be allowed to "run amuck" on light duty with no thought toward consequences.

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