TEMPORARY DISABILITY ISSUES: LIGHT DUTY, MULTIPLE EMPLOYERS AND TERMINATION OF EMPLOYMENT

Introduction

Especially during difficult economic times, when many people are working paycheck to paycheck, and are often working more than one job to make ends meet, protecting our clients' temporary disability benefits has become increasingly more complicated.

When analyzing temporary disability claims it's important to start your argument with first principles:

- That the predominant purpose of the WC is to provide a quick, efficient remedy for wage loss. Elec. Assocs., Inc. v. Heisinger, 111 N.J. Super 15, 19-20 (App. Div.), certify. Denied, 57 N.J. 139 (1970).

- NJSA 34:15-38 provides that temporary disability benefits are payable from the day petitioner is first unable to work until the day he is able to "resume work and continue permanently."

Light Duty

Carriers have been increasingly pressuring their insureds to provide their employees with light duty work in order to reduce the amount of temporary disability benefits payable. For the small business owner accommodating light duty work is often very difficult. So if the employer is not represented by counsel at the time of the light duty release I often send to the employer, either directly or through my client, explaining that they can reject light duty work. See, Appendix. If petitioner is released light duty and no light duty work is available, temporary disability benefits must continue. Harbatuk v. S&S Furniture, 211 N.J. Super. 614 (App. Div 1986).

A. BUSINESS OWNERS:

If petitioner is the owner of a business, and no light duty work is available, other than overseeing the business for which the petitioner does not draw a salary, then petitioner is entitled to receive temporary disability benefits. Tobin vs. All Shore All Star Gymnastics, 378 N.J. Super. 495 (App. Div. 2005).

B. MULTIPLE EMPLOYERS

1. *Seasonal Employees*:

Outland v. Monmouth-Ocean Ed. Serv. Comm 154 NJ 531 (1988)
Teacher on a 10 month contract is entitled to temporary benefits during the summer if she proves lost wages, in that she normally worked for a second employer during the summer months.

1. *Second Part-Time Job*:

   Temporary disability is not inconsistent with occasional activity. Harbatuk v. S&S Furniture (App.Div 1986). Accordingly, petitioner is still entitled to temporary benefits if unable to work for respondent due to injuries, despite being cleared to return to work at a second, lighter part-time job.

2. *Two Full Time Jobs*:

   Paucay v. Hickory Ridge Horse Farm, CP#2010-1429 (J. French 2011)
   Petitioner was injured during the course of a full time job with a farm, during the same time he worked at a second full time job in a book store. When he was released to return to work light duty the farm was unable to accommodate the restriction, but the book store did allow him to return to work light duty. Even though respondent was unable to accommodate the light duty work restriction, Judge French held that there was no statutory basis to order continued temporary benefits since petitioner was able to work full-time at his second job.

   In reaching this conclusion Judge French read Section 38 very narrowly to indicate that temporary benefits cease when petitioner resumes work or is permanently disabled. In doing so, she commented that our statute does not provide for "partial temporary" benefits. However, in 2012 Judge Cox ordered just that in Soto vs. Herr's Food, 2012 NJ Wrk. Comp. LEXUS 4 (Sept. 7, 2012).

   While carriers will always argue that a petitioner who returns to work at a lighter, full-time job is not entitled to receive temporary benefits for the heavier job he is unable to perform due to injuries, I believe that if this issue is taken up to the Appellate Division, Paucay will be overturned, since petitioners in this situation have incurred lost wages due to the work injury.

C. PARTIAL TEMPORARY BENEFITS:

   Although there is no provision for partial temporary benefits in the statute, as a matter of fairness, "partial" benefits are payable if a petitioner who was a full time employee is advised to return to work for a limited number of hours. Petitioner will then receive his partial salary for part-time work, with respondent owing the difference between part-time salary and the temporary disability rate. Soto vs. Herr's Food, CP# 2011-18325 (J. Cox 2012). See, Appendix

   Soto was not appealed and has been followed in practice by most carriers. The finding in Soto completely contradicts Judge French's reasoning in Paucay, and provides a roadmap for arguing that temporary benefits should be paid to a petitioner, despite returning to work at a second full time job, if he is unable to return to light duty work for the respondent. To hold otherwise would punish the hard-working petitioner who held down multiple jobs prior to the injury.

State Temporary Disability Benefits for Petitioners with Multiple Jobs

Clients who are unable to work at a second job due to a work injury with an unrelated employer should be instructed to apply for State temporary disability benefits to replace lost wages from the second job. State TDB has the authority to assert a lien on the proceeds of workers' compensation awards, and has been asserting liens more often for benefits paid for a second job completely unrelated to the work injury,

based upon the agency's interpretation of the Duplication of Benefits Laws, N.J.S.A. 34:15-57.1; N.J.S.A. 43:21-30; N.J.A.C. 12:18-1.5 and the Scott decisions.

1. In the Matter of Charles Scott, 321 N.J. Super. 60 (1999)
The first of two Supreme Court decisions in Scott held that a petitioner who was collecting workers' compensation benefits from a part-time job could also collect State TDB benefits from his unrelated full-time job. The Court did not reach the issue of duplication of benefits in the first Scott case, instead remanding the case back to the Division of TDB, to determine whether there was an offset.

In response to Scott 1, the Division of TDB implemented a policy to govern the offset procedure. Rather than analyzing the income from each job separately, which would have made our lives much easier, the Agency adopted the procedure of combining income from multiple jobs together to calculate the TDB rate, and then deduct any amount received through workers' compensation.

In the Matter of Charles Scott, 162 N.J. 571 (2000)
Following the remand, the Appellate Division discussed whether or not the state should receive an offset for the workers' compensation benefits paid to petitioner for his part-time job. Petitioner's counsel, Paul Schwartz, argued that the Court should look at each job separately to determine whether there was a duplication of benefits. Unfortunately, the Court declined to adopt Paul's common sense suggestion, which would have made the analysis much easier. The Court instead went along with the convoluted procedure developed by state agency to calculate the TDB rate by combining the income paid by all employers "covered" by the TDB law, and then reducing benefits by the workers' compensation rate.

2. Parascando vs. Dept. of Labor, 435 N.J. Super. 617 (App. Div. 2014). See, Appendix.
The petitioner had two part-time jobs. She was collecting workers' compensation benefits through her job with a school district, which was not a "covered" employer under the State TDB Law. She applied for TDB benefits for her second part-time job at Vinny's Pizza. State TDB paid her, based upon only the income she received at Vinny's Pizza and hen asserted a lien on her workers' compensation claim against the school district. The Appellate Division held that it was incorrect for TDB to assert a lien since the wages from the school were not included in the calculation of the TDB rate, so there was no reason to reduce the rate by the workers' compensation benefits. Although the opinion is limited to cases in which one of the employers is not covered by State TDB law, such as a municipality, the language in Parascandolo can be used to argue against a lien when State TDB benefits were paid for a second or third job. For instance, the Appellate Division urged the agency to view each job "separately," when making a determination of whether petitioner received duplicate benefits, as petitioner's counsel in Scott originally suggested. "In sum, we conclude that the Board's decision was based upon an erroneous interpretation of N.J.S.A. 43:21-30(b)(3) and N.J.A.C. 12:18-1.5 that undermined the policy underlying the TDBL by denying appellant the full recovery of benefits due her when there was neither a duplication of benefits nor a windfall to her. We discern no legislative mandate to penalize appellant's diligence in holding two jobs by reducing the TDB she was entitled to receive from Vinny's. The Board's decision was therefore arbitrary, capricious, and unreasonable, requiring reversal."

3. Completing the Application for State TDB

The application form is currently geared towards claimants who only have one employer. The form only provides for a "yes" or "no" answer on whether the injury is work related. If a petitioner checks off that the injury is work related State TDB will automatically assert a lien. If a petitioner indicates that the injury is not work related, he could potentially be charged with fraud. Until State TDB changes the form, and starts analyzing each job separately, petitioners should list all jobs, and specify that the injury was not related to the job for which benefits are sought. Claimants should also submit a separate "Part C" for each and every employer, including the employer which is paying workers' compensation benefits, so that TDB adds the wages of all covered employers before it takes the offset.

Temporary Disability Benefits Following a Separation from Employment

Unemployment Benefits:

Cherry v. Edmund's Direct Mail, C.P. No. 2009-21068 (J. Taglialatella 2010)
Held that a petitioner who was terminated after a work injury and was receiving unemployment benefits until she had surgery was entitled to receive temporary disability benefits, since she is able to prove a loss in unemployment benefits.

Social Security Disability

Ferguson v. Board of Education, No. A-3053-10T4 (App. Div. 2012)
Respondent terminated temporary disability benefits on the basis that petitioner effectively removed herself from the workplace when she applied for and received social security disability benefits. The Appellate Division found that an award of SSD was not a basis to deny temporary disability benefits, as evidenced by the setoff provisions in the Social Security Act.

Job Abandonment or Termination:

Electronic Associates, Inc. v. Heisinger, 111 N.J. Super. 15 (1970)
Held that a petitioner who resigned her position due to pregnancy was not thereafter entitled to be paid temporary disability benefits.

Cunningham vs. Atlantic States, 386 N.J. Super. 423 (App. Div. 2006)
After petitioner was terminated from his job with respondent for cause, he was advised that additional treatment was needed related to the injury. The Appellate Division held

that in order to qualify for temporary disability benefits, the petitioner must establish on remand that "but for" his work-related disability he would have been employed.

Although the Appellate Division repeatedly limited its ruling to petitioners who were initially returned to work full duty, insurance carriers continue to argue a much broader interpretation of Cunningham, which is contrary to our Statute. Ironically, the Cunningham Court was attempting to follow the social legislative intent of the Compensation Act by indicating that a worker who returns to work on full duty and is terminated for cause can still possibly obtain temporary disability by proving wage loss.

Accordingly, there is no basis for respondents to argue that Cunningham changes the holding in Harbatuk v. S&S Furniture, 211 N.J. Super. 614 (App. Div 1986), which makes it clear that a petitioner who is terminated while on light duty is entitled to continued temporary disability.

Dorsey v. First Atlantic Federal Credit Union, No. A-1008-06T3 (App. Div. 2008). Petitioner was terminated for cause shortly after a work accident, due to a banking error. Thereafter, she was unable to hold down jobs for long periods due to her injuries. Respondent denied temporary disability benefits on the basis of Cunningham and also argued that she removed herself from the workforce due to her subsequent pregnancy. The Judge of Compensation found that the sole basis for petitioner's disability was her work injury and not the pregnancy, based upon the treating physician's testimony. The Court further held that petitioner's disability claim was already asserted prior to her termination, unlike Cunningham's claim, and she was never restored to the point where she could resume work. See, Appendix.

Condi vs. Compucom, No. A-6453-08T3 (App. Div. 2010)
Upheld the decision of Judge French, denying a second round of temporary disability benefits after petitioner was declared MMI orthopedically, because she had been terminated earlier in the year for being out of work for over 12 months. After she was released by the authorized orthopedist she was examined by Dr. Tobe, who recommended psychiatric treatment related to the accident. Respondent's expert of course believed petitioner's depression was unrelated. A neutral doctor was chosen, Dr. Hewitt, who found that her pre-existing anxiety disorder was aggravated by the work accident and indicated that she was unable to work. However, Dr. Hewitt's opinion was not received until three months after she was declared MMI orthopedically. The trial court found that since petitioner was unemployed at the time she was finally declared temporarily disabled, she had no wages to replace, and was therefore not entitled to receive temporary benefits. The Appellate Division upheld for the reasons stated by Judge French. The case could have easily come down the other way if the Judge had believed that petitioner's psychiatric temporary disability related back to an earlier date when petitioner was first examined by her expert, Dr. Tobe.

PRACTICE NOTE: To restart temporary benefits you must receive an out of work note pre-dating the termination, or present evidence that petitioner was actively seeking employment.

Borden v. T&M Auto, Inc., CP#2010-30620 (J. Kovalcik 2011)
Held that respondent inappropriately terminated benefits under Cunningham. Petitioner was terminated shortly after returning to work due to a slow-down in business. After he returned to treatment and the doctor placed him on "light duty" work the respondent failed to pay temporary benefits. Instead, petitioner collected unemployment benefits. Judge Kovalcik held that the respondent misconstrued Cunningham since petitioner did not voluntarily abandon his job. But the Judge went further in clarifying that the Cunningham decision does not stand for the proposition that a petitioner who is terminated for cause is forever banned from receiving temporary benefits. Rather, a petitioner in such a predicament must first prove that he actually lost income because of his disability. There is no need for the Court to perform such an analysis in the absence of a volitional act by the employee leading to the termination of employment. Accordingly, if a petitioner is unemployed due to no fault of his own, he need not prove "loss of income" in order to qualify for temporary benefits. The Judge reviewed case law from other states and held that "[n]o case was found where a Court went so far as the Respondent argues we should go here, to place a burden of establishing actual loss on an admittedly disabled employee who was out of work as a consequence of employer initiated termination due to no voluntary action by the employee." The Court held that Mr. Borden need not establish "lost income" just because he was not working at the time of the disability – it was enough that petitioner was actively seeking employment prior to returning to authorized treatment. As such, the Court ordered respondent to pay temporary disability benefits and to reimburse the state in full for all unemployment benefits it paid petitioner during the period he was limited to working light duty. **This decision should be attached to every Motion for Temporary Benefits in which respondent seeks to deny benefits pursuant to Cunningham**.

Gioia v. Herr Foods, Inc., No. A-0667-10T4 (App. Div. 2011).
Five days after a work accident petitioner was released to return to work light duty. On the same day, respondent received the results of a drug test indicating that petitioner tested positive for cocaine on the date of the accident. His employment was terminated immediately. The trial Judge found that petitioner was entitled to receive temporary disability benefits on the basis that he was employed at the time he became disabled, and thus sustained a loss of income. The Appellate Division reversed and remanded for further findings, indicating that temporary disability benefits should only be awarded if petitioner was able to prove that he would have been employed elsewhere and actually lost income because of his disability, as opposed to his drug use.

Pitts vs. Leone Industries, Inc., C.P.# 2012-10853 (J. Voyles 2012)
Petitioner was severely burned at work and blood tests revealed the presence of marijuana in his system. He was immediately terminated on the basis of violating company drug policy and was denied temporary benefits on the basis that he voluntarily removed himself from the workplace pursuant to Cunningham. Judge Voyles found that temporary benefits were owed since petitioner was hospitalized for the injury on the day of his termination and was totally unable to work on that date. The Court distinguished the case from Gioia on the basis that petitioner was hospitalized on the date of his termination, and completely incapacitated as a result of the injuries, unlike Gioia, who was capable of performing light duty work. "To hold differently would contravene N.J.S.A. 34:15-38 and would set a dangerous precedent wherein employers could routinely terminate an at will employee the moment a workplace injury occurs in order to avoid the payment of temporary disability."

Liu vs. Bally's Casino, No. A-0737-13T3 (App. Div. 2014)
Psychiatric claim in which petitioner suffered an anxiety attack. Ms. Liu was terminated for violating the company leave policy when she took a leave of absence without first obtaining a doctor's note. The trial judge found that Cunningham did not apply since petitioner's termination was directly related to the work incident because "but for" the incident causing the anxiety attack she would have been working. The Appellate Division disagreed and chastised the Judge of Compensation for failing to apply the Cunningham analysis. In essence, the Court found that petitioner abandoned her job and was therefore not entitled to receive temporary benefits since there was no medical documentation proving a nexus between her alleged psychiatric injury and loss of income.

Hulitt v. Farm-Rite, Inc., CP#: 12-18007 (J. Voyles 2015).
Petitioner was injured in a work-related motor vehicle accident and his employment with respondent was terminated the next day. He received authorized medical treatment and temporary disability benefits until he was released as MMI. Approximately two years later, petitioner filed a Motion for Medical and Temporary Disability Benefits. He testified that he did not voluntarily remove himself from the work force, and was never able to return to work due to his injuries. However, unlike the Dorsey case, in which petitioner had never been declared capable of work, Mr. Hulitt was cleared to return to work two years prior to the filing of the motion. Since the Court found that petitioner was not actually absent from work, and had not even looked for employment, he was therefore unable to prove lost wages, so he was not entitled to receive temporary benefits. See, Appendix.

Katzenstein v. Dollar General, Docket No: A-1141-13T3 (App. Div. 2016)
After petitioner returned to work following an accident he was terminated for violating company policy. He was denied unemployment benefits on the grounds that he was terminated for misconduct, contrary to his testimony at trial. Petitioner subsequently underwent authorized surgery, but was denied temporary disability benefits on the basis of Cunningham. In support of a Motion for Temporary Benefits petitioner incorrectly certified that he was denied unemployment benefits because of his disability. The Appellate Division upheld the Court's decision, which largely hinged upon the petitioner's lack of credibility. However, the decision is instructive on reviewing the necessary analysis when under Cunningham: (1) did petitioner have a "promise or prospect of employment; and (2) did he have to forgo the employment due to his work-related disability. See, Appendix

PRACTICE TIP: When a client is released to return to work and her position with respondent is no longer available, direct client to document her job search and keep records of her efforts to obtain employment. In the event of a later period of temporary disability these records will lay the groundwork for a Cunningham analysis.