

From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

Question: When offering an injured worker "light duty," what is an employer's obligation if the injured worker has moved?

In Ohio, one of the best ways to terminate temporary total disability ("TTD") is to make an offer of "light duty" employment. Pursuant to OAC 4121-3-32(A)(6), if an employer plans to use the offer as a basis for terminating TTD, it must be in writing, set forth a detailed description of the position, and offer work in a "reasonable proximity" to the claimant's residence. (It need not be at the employer's primary facility - employers can offer work at other locations or companies, such as charitable ventures.) The Supreme Court of Ohio was recently presented with an opportunity to clarify the "reasonable proximity" requirement when an employee has relocated to another state. Must the light duty job be in "reasonable proximity" to his current residence?

State ex rel. Sebring v. Industrial Comm., 123 Ohio St.3d 241, 2009-Ohio-5258, involved a claimant who sprained his back in July, 2005, missing about a month of work. In September, 2005, he was laid off, and subsequently relocated with his family to Wyoming. In January, 2006, the employee rejected a recall to his original position in Ohio, but did not attribute it to his injury. In March, 2006, the claim was additionally allowed for two disc conditions, and TTD was awarded retroactive to November, 2005. When the claimant was released to "light duty" in August, 2006, the employer immediately made an offer of a "light duty" position in Wyoming (at Goodwill Industries) which the claimant refused, citing a plan to return to Ohio. When picking up his check in Ohio, he refused an oral offer of light duty citing his residence in Wyoming. The employer then moved to terminate TTD. The Industrial Commission terminated TTD based on a refusal of a valid "light duty" job offer (erroneously citing *Louisiana Pacific*), and on *mandamus* the Tenth District Court of Appeals affirmed, holding that the "reasonable proximity" requirement of OAC 4121-3-32(A)(6) does not require an employer to make an offer that is in the "reasonable proximity" of the claimant's present residence. This prompted an appeal as of right to the Supreme Court.

The Supreme Court affirmed, but did not address whether "reasonable proximity" follows the injured worker. The Court found that considering this issue was "unnecessary" because the record clearly reflected offers of "light duty" work within a "reasonable proximity" to both of injured worker's residences in Wyoming and Ohio. Would this case have been decided the same way if the employer had not offered a "light duty" position in Wyoming? Judging from the Tenth District's strongly worded opinion, it seems likely. The magistrate's opinion adopted by the Tenth District considered at length an employee's right to move and an employer's right to offer "light duty" to its employees. In the end, it found that the employee "cannot shift to the employer the responsibility of accommodating the difficulty of his reporting to work in Ohio" while residing in Wyoming.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com