Gallagher Sharp LLP

May 29, 2019

WORKERS' COMPENSATION SHOP TALK

QUESTION: Can a Verbal Light Duty Offer Serve as Evidence to Preclude an Award of Temporary Total Disability Compensation?

It is well-established under Ohio law that in order to terminate temporary total disability (TTD) compensation that is already being paid, an employer must give the claimant a written light duty job offer at least forty-eight (48) hours prior to initiating those proceedings. The written offer must identify the position offered, and include a detailed description of the duties required and the physical demands of the job. *OAC 4121-3-32(A)(6).* However, it is also well-established that in certain circumstances, a verbal offer of light duty can be effective. Recently, the Tenth District Court of Appeals considered a case involving a verbal light duty job offer that was first accepted, then rejected, and whether that offer could serve as a basis to bar an award of TTD.

State ex rel. Mercy Health Indus. Comm., 2019-Ohio-1859 concerned a claimant who was injured on May 4, 2017. On May 18, 2017, a physician assistant completed a MEDCO-14, a document that provides restrictions upon which the claimant could return work. The employer spoke with the claimant on May 22, 2017, and made an offer of light duty within those restrictions. The claimant initially accepted the offer, agreeing to return to work after a doctor's appointment on May 25, 2017, but then refused to return to work, indicating she had taken medication and could not drive. She also noted that her restrictions had changed as a result of the May 25th visit. On June 2, 2017, the employer sent the claimant a written light duty offer which was identical to the verbal one, and the claimant eventually returned to work in that position on June 6, 2017. The claimant later sought TTD for the period from May 25 through June 5, 2017. The employer objected, arguing that TTD should be denied because it had made the claimant a verbal light duty offer within her restrictions, and her failure to accept that offer should preclude TTD for the closed period. A DHO disagreed, finding that a written light duty offer was required and that the Industrial Commission could not properly evaluate a verbal offer. An SHO affirmed the ruling, prompting the employer to file an application for *mandamus* to the Tenth District Court of Appeals.

The Tenth District reversed in part, sending the matter back to the Industrial Commission for consideration of the employer's verbal light duty job offer. In the eyes of the Court, the key to the case was an affidavit submitted by the employer contending that the verbal light duty offer of May 22 was identical to the written offer, and fully complied with all restrictions and limitations. The blanket dismissal of this evidence, which was not contradicted, required remand. If believed, that affidavit supported a finding that the verbal light duty job offer fully complied with the restrictions contained in both the May 18th and May 25th MEDCO-14s. The Court also distinguished two cases cited administratively, each of which concerned a different set of facts. *State ex rel. NIFCO v. Woods*, 2003-Ohio-6468, concerned not an original award of TTD but an effort to terminate TTD. *OAC 40121-3-32(A)(6)*, which requires a written offer, applies only

where an employer seeks to terminate TTD benefits. *State ex rel. Coxson v. Dairy Mart Stores of Ohio, Inc.*, 90 Ohio St. 3d 428 (2000), involved a situation where a written light duty job offer was not specific enough. The Court held that it was not satisfactory despite a statement that the employer would "work with the physician" to satisfy all restrictions. In the present case, there was clear evidence that the verbal job offer did fully comply with the May 18th and May 25th restrictions. Therefore, the claim should be remanded to consider the issue of whether the oral offer of light duty (which was originally accepted by the claimant) should preclude TTD.

One of the central issues in *Mercy Health* concerned whether it was possible for the Industrial Commission to retroactively consider an "oral" offer of light duty. Because of an affidavit submitted by the employer, a potentially meritorious argument should be considered. Certainly, the injured worker could have rebutted this evidence with evidence of her own that the offer did not satisfy both sets of restrictions, but it is solely within the purview of the Industrial Commission to resolve these factual issues.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq
Gallagher Sharp LLP
Sixth Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310
ddrinko@gallaghersharp.com
www.gallaghersharp.com

