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### ***Temporary Benefits When an Employee Voluntarily Leaves to Pursue Other Employment***

Accommodating light duty work restrictions often allows employers to limit the award of temporary disability benefits. It is often argued that temporary benefits are not due when an injured employee fails to avail himself of light duty work offered by the employer. But what happens if an employee voluntarily leaves the employer of injury to pursue a job with a different employer? In the recent case of *Zwiener v. Becton Dickinson-East*, the Nebraska Supreme Court held that an employee who is injured through the course of his employment, and then leaves to pursue another job, does not waive temporary total disability benefits simply because the employer responsible for the injury could have accommodated light duty restrictions had the employee continued working there.

In *Zwiener*, the employee suffered a shoulder injury in the course of his employment with Becton. The injury was originally thought to be minor and was treated with conservative care and no work restrictions. Seven months after the accident, Zwiener resigned his employment with Becton to accept a new job that would allow him to work outside and receive higher wages. Shortly after starting his new job, Zwiener was told he had a rotator cuff tear and he required surgery. While recovering from the surgery, Zwiener would be precluded from using his right arm. Zwiener's new employer could not accommodate one handed work, so Zwiener was off work while convalescing from the surgery. Becton refused to pay temporary total disability benefits while Zwiener was off work, under the theory that Becton could have accommodated the one handed duty restriction if Zwiener had not left to pursue other employment.

Zwiener eventually had to undergo a second surgery on his shoulder. Both before and after the surgery, Zwiener's attorney corresponded with Becton's counsel to let the employer know that Zwiener was available to work at Becton under the light duty restriction post surgery. Zwiener's attorney asked that Becton notify Zwiener whether this would be allowed and when he should show up for work. Becton did not respond to the offer by Zwiener to work light duty. Becton also refused to pay temporary total disability benefit during the period of time Zwiener was off work following the second surgery. Becton argued that an employee waives temporary total disability benefits when the employee leaves a job that could have accommodated medical restrictions.

The Supreme Court disagreed with Becton and held instead “that an employee who leaves a job with an employer responsible for an injury in order to pursue more desirable employment does not waive temporary total disability benefits simply because the employer responsible for the injury would have accommodated light-duty restrictions during postsurgical recovery periods necessitated by the injury.” The Supreme Court held that adopting a rule to the contrary would be both contrary to the beneficent purpose of the Nebraska Workers’ Compensation Act and public policy. If a worker could only receive temporary benefits while working for the employer of accident, the worker would effectively be bound to the employer of accident and would lose the mobility and freedom to seek other work opportunities.

In support of its holding that temporary disability benefits are not forfeited simply because an employer would have accommodated light duty work, the Supreme Court cited its prior cases of *Guico v Excel Corp.* and *Manchester v Drivers Management*. In both cases, the Supreme Court ruled that the injured worker was entitled to temporary benefits after the termination. The firings for cause in both *Guico* and *Manchester* were based upon behavior of the employees that were linked and related to the work accident and injury. In *Guico*, the employee’s violation of a safety rule both caused the injury and resulted in his termination. In *Manchester*, the employee, an over-the-road truck driver, was terminated for speeding, which negligence was the cause of the accident.

Left unanswered by the Supreme Court in *Zwiener* is whether temporary total disability benefits are owed when an employer could have accommodated light duty restrictions, but the employee was fired for misconduct *unrelated* to the injury. The Supreme Court in *Zwiener* suggested that because such facts were presently not before the Court, the question remained unanswered. The issue of whether temporary total disability benefits must be paid when the employer could have accommodated light duty work, but the employee was fired and lost that accommodation because of misconduct unrelated to the injury, has been at issue before at least three different trial judges of the Nebraska Workers’ Compensation Court. Judges Coe, Fridrich and Fitzgerald have all been faced with facts that supported the injured employee could have continued working but for being terminated for reasons unrelated to the accident. In each of these three cases, temporary disability benefits were awarded. However, because this was an unanswered question not previously decided by an appellate court, none of these trial court decisions resulted in an award of penalties.

If these three trial court decisions are any indication, the current trend among the Nebraska Workers’ Compensation Court appears to be to award temporary total disability benefits to workers fired for misconduct unrelated to the injury, even though medical restrictions could have been accommodated by the employer of injury. Employers and carriers who opt to deny temporary disability benefits to workers fired for misconduct unrelated to the injury do so at a risk. However, since this specific set of facts has not yet been decided by an appellate court, the denial of temporary benefits likely will not include an award of a waiting time penalty.