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COVID-19 BUSINESS CLOSURES & THE OBLIGATION TO PROVIDE INDEMNITY

What are California Employers and their Workers' Compensation Carriers or TPA's Rights, Duties and Obligations to Continue to Provide Ongoing Temporary Total Disability or Temporary Partial Disability Benefits to Employees As a Result of Federal, State and Local Governmental Mandated Temporary Business Closures or Interruptions when those closures result in Employees/Injured Workers no longer being able to continue to work Modified, Alternative or Regular Work?

INTRODUCTION

The purpose of this paper is to focus exclusively on California workers' compensation issues and related case law. Employment issues such as ADA and FEHA may overlap to some degree in certain situations especially employment involving permanent work restrictions after an applicant has reached MMI status. These issues should be addressed separately and in-depth by our employment law specialists.

Due to the worldwide COVID-19 pandemic, Governor Newsom declared a state of emergency in California on March 4, 2020. President Trump declared a national emergency beginning on March 13, 2020. On March 16, 2020, California counties began issuing shelter-in-place or stay-at-home orders. On March 19, 2020, Governor Newsom issued an executive order requiring all Californians to stay at home, subject to certain limited exceptions related to defined essential businesses and occupations.

Many nonessential businesses employed workers who suffered prior workers' compensation injuries not directly related to the coronavirus. These employees at the time of the shelter-in-place or stay-at-home orders may have been receiving temporary total disability benefits (TTD) or working in temporary modified, alternative or regular work positions with work restrictions and receiving temporary partial disability benefits (TPD) or working a temporary modified or alternate positions earning full salary.

What happens in situations where temporary modified or alternative work positions have been either temporarily or permanently eliminated (due to COVID-19)? What happens to the

employees who were working and were receiving TPD benefits; or who were not working but receiving ongoing TTD benefits? Under what particular facts and circumstances are there continuing legal obligations of California employers and their workers' compensation carriers/ TPAs to pay indemnity benefits?

California Workers' Compensation: A Statutory Benefit Delivery System: In assessing both the legal and public policy implications related to these issues, it is important to remember that while the California workers' compensation system is an adversarial system, it is at its heart a benefit delivery system. Based on the California Constitution, benefits are to be provided expeditiously and in an unencumbered manner. More importantly, with a few exceptions, it is essentially a no-fault system. Also, the right to workers' compensation benefits is wholly statutory. (*Weiner v. Ralphs Co*. (2009) 74 Cal.Comp.Cases 736, 2009 Cal.Wrk.Comp. LEXIS 143.)

In this context, if the reason an injured worker is no longer able to perform temporary modified or alternative work due to business closures solely under federal, state or local mandatory stay in place orders, with exceptions related to the operation of only essential businesses and occupations orders, should they lose the statutory right to receive wage replacement benefits?

The Importance of Using Correct Legal Definitions and Characterizations of Various Return to Work (RTW) Categories:

Issues can become murky and confusing by the widespread use of various return to work descriptives or variants such as "light work", "modified work", "alternative work", "equivalent work", and "regular work".

Many practitioners, claims professionals, and employers use the term "light work" as synonymous with modified work. Labor Code § 4650 relates to disability payments in general. It becomes even more confusing when one or more of these classifications or categories are either temporary or permanent in nature. Labor Code §4658.1 is applicable for all injuries on or after April 19, 2004, and lists only three RTW definitions of "regular work" (Lab. Code § 4658.1(a)), "modified work" (L.C. §4658.1(b) and "alternative work" (L.C. §4658.1(c)).

Article 6 of the California Code of Regulations (CCR) applicable to "Retraining and Return to Work-Definitions and General Provisions" (CCR §§10116-10133.60) also some offers guidance with respect to properly defining terms. CCR §10116.9 contains the definitions for Articles 6.5 and 7.5. Article 7.5 relates to supplemental job displacement vouchers for injuries occurring on or after January 1, 2013. Similar to Lab. Code 4658.1, CCR §10116.9 also lists only three RTW work definitions of "alternative work" (CCR §10116.9(a), modified work" (CCR §10116.9(h) and "regular work" (CCR §10116.9(p)). CCR §10116.9 also has definitions related to "permanent and stationary" and "work restrictions". See also, CCR § 10133.34 related to "Offer of Work for Injuries Occurring on or after January 1, 2013.

For purposes of our discussion, we are only focusing on those injured workers/applicants who are (or were) at the time of the shelter-in-place order either Temporary Totally Disabled (TTD) or Temporarily Partially Disabled (TPD) under "**temporary**" work restrictions given during the acute phase of treatment and **before** an injured worker is Permanent & Stationary (P&S) or have reached Maximum Medical Improvement (MMI).

The definitions of these two benefits under the Labor Code and Case Law are as follows:

Temporary total disability is a benefit paid during the period of time an injured worker is unable to work and is primarily intended to substitute for lost wages and not for a loss of future earnings or earning capacity. (*Gonzales v. Workers' Comp. Appeals Bd*. (1998) 68 Cal.App.4th 843, 63 Cal.Comp.Cases 1477); *J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 49 Cal.Comp.Cases 224. Temporary total disability and temporary partial disability indemnity benefits are intended primarily as a substitute for the worker's lost wages and to provide a steady source and stream of income during the time the injured worker is off work or has suffered a wage loss but is still employed. (*Chavira v. Workers' Comp. Appeals Bd. (Johns-Manville Sales Corp.)* (1991) 235 Cal.App.3d 463, 473, *Gonzales v. Workers' Comp. Appeals Board, supra*, 63 Cal.Comp.Cases at p. 1478).

Temporary total disability occurs when an employee is unable to earn any income during the period of recovery. In contrast, temporary partial disability occurs when an employee is able to earn some income during the recovery period but not full wages. (*Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257, 34 Cal.Comp.Cases 382.). "If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. (Lab. Code § 4657.) If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability." (*Huston v. Workers' Comp. Appeals Bd. (Coast Rock)* (1979) 95 Cal.App. 3d 856,868, 44 Cal.Comp.Cases 798, 806].) Temporary partial disability and the related calculation methodology is outlined in Labor Code §§ 4654 & 4657.

However, "….[i]f the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the workers is skilled **or** there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Ibid*. citations omitted).

Generally, a defendant's liability for temporary disability payments ends when the employee returns to work, is deemed medically able to return to work, or reaches maximum medical improvement/permanent and stationary status. (Lab. Code, §§ 4650-4657; *Huston v. Workers' Comp. Appeals Bd*., supra, 95 Cal.App.3d at 868).

Burden of Proof: The burden of proof rests upon the party holding the affirmative of or on the issue. Therefore, concerning temporary total disability benefits, the applicant holds the burden of proof by a preponderance of the evidence. (Lab. Code, §§ 3202.5 & 5705).

In Order for us to Apply the Holdings and Legal Principles in The Applicable Cases to Various Scenarios and Situations Where An Applicant's Temporary Modified/Alternate or Regular Work with Restrictions Has Ended Solely Due to COVID-19 Governmental Orders and Regulations Forcing Business Closures we must outline the factual scenarios that every employer/carrier/examiner deals with daily:

1. The employee is working limited or partial hours and receiving Temporary Partial Disability during the Acute Phase of Treatment before becoming P&S / MMI.

Based on applicable case law, this would appear to be best classified as temporary modified work or a light-duty position (if the inability to work regular hours or a reduction in hours is based on medical reporting) that is no longer available and is not attributable to the applicant's misconduct or inability to work these hours nor attributable to a decision by the employer other than to comply with the applicable state or local COVID-19 orders.

If (before the stay at home Order) there is a recent medical report (within the last 45 days) upon which the reduced or partial hours are based on, then TTD should be paid pending and subject to updated medical certification of the applicant's work status and also subject to the cap of 104 weeks on TTD.

2. The employee is working a temporary modified duty job that is not his or her normal job/ regular work.

Since the modified position is no longer available and is not attributable to applicant's misconduct such as a violation of company policy resulting in termination, or medical inability to continue to work in this modified position, TTD should be paid subject to updated medical certification of applicant's work status and subject to the 104-week cap on TTD.

3. The employee is working their usual and customary job/ regular work with work restrictions that are within their normal (pre-injury) job duties.

This may fall into <u>three</u> scenarios.

In the first scenario, the injured worker has work restriction but those restrictions do not impact their ability to do their regular work/ usual & customary job. This injured worker was receiving regular pay for regular work (that happened to be within their restrictions) at the time of the safe-at-home order. Based on a review of the labor code and case law below **NO** TTD would be due should this work becoming unavailable (due to COVID-19) because although the injured worker would still not be P&S/MMI their work restrictions were within their regular work and the lack of that regular work does not in and of itself mean the current work restrictions cause the injured worker to once again become TTD.

Secondly, in many instances of this situation a medical release to return to a usual and customary position with permanent work restrictions is based on an MMI/P&S status report, therefore, the applicant is not TTD and permanent disability advances should commence.

Thirdly, if there is no current MMI/P&S report, then based on current or updated medical reporting and certification or updated medical certification of the applicant's disability status, then either TTD should be paid or perhaps permanent disability advances a the TTD rate pending updated current medical reporting.

Credit Issues**:** *An important caveat is that if it appears there will be a need for a credit to be asserted or claimed for any alleged overpayment either against the same species of benefits or especially against another species of benefits ie., overpayment of TTD against PD or vice versa, then the benefit notice letter must expressly advise both applicant and his or her counsel of that fact, otherwise the potential credit may be jeopardized.*

4. Applicant was receiving TTD benefits at the time the safe at home Order issued based on a current medical certification with work restrictions that cannot be accommodated by the employer.

TTD should continue pending updated current medical reporting and certification subject to the 104-week cap.

Medical Examination Issues: COVID-19 Governmental Orders Create Significant Problems for Carriers, Employers and Applicants to Obtain Timely Updated Medical Reporting Related to Applicant's Current Disability Status.

Whether TPD or TTD should be paid relies upon primary treating physician examinations. As we know many if not most treating physicians, QME's and AME's have temporarily stopped conducting in-person face to face medical examinations. So how does the applicant, carrier or employer obtain an updated medical report on the applicant's current disability status?

If the defendant has medical control under an MPN then it would be incumbent on the carrier and TPA to facilitate an updated medical exam and to provide whatever information to the applicant that would enable them to schedule and attend the exam to obtain necessary medical certification/reporting related to the applicant's current disability status before benefits are either extended or terminated. In situations where the applicant is treating in an employer's MPN and the applicant is unable to easily and readily schedule a medical examination to determine the applicant's current disability status then it will be difficult to justify immediate termination of indemnity benefits.

It may take a lot of extra time and work for applicant and defense counsel as well as claims professionals to deal with the logistics of scheduling medical exams until the current state and local COVID-19 orders affecting movement and accessibility are either modified or end.

Some of the scenarios that have given rise to this memo outlined above will require more in-depth analysis depending on the medical treatment availability. What about these scenarios:

1. The PTP is available/open as an "essential business" because they are providing healthcare and all the doctor office staff has appropriate PPE and are willing to see the injured worker but the injured worker is not able/ too fearful / or wholly taking into consideration the shelter in place Order and will not leave their home to attend a doctor appointment to either continue their TTD or TPD status.

2. The PTP is unavailable, not open, not seeing patients in the office or via Telehealth but the applicant is willing to be seen either "in-person" with proper PPE or via Telehealth.

Do these two scenarios give rise to different analyses? Would benefits flow from one factual scenario rather than the other?

Telehealth Medical Evaluations: Subsequent to Governor Newsom's stay-at-home order of March 19, 2020, the DWC has encouraged primary treating physicians to continue to manage injured workers' care through Telehealth options whenever medically appropriate during the stay-at-home order up to May 1, 2020. Under all circumstances, the DWC requires video connections with options including remote visits via video-conferencing, video-calling or similar technology that allows each participant and party to actually see each other. Audio-only is not considered a Telehealth service. For detailed guidelines and procedures related to Telehealth, examinations see the DWC Newsline Release dated March 28, 2020, at https://www.dir.ca.gov/DRNews/2020/2020-26.html. You can also sign up for the DWC Newsline at http://www.dir.ca.gov/email/listsub.asp?choice=1

However, there is some question as to whether an MMI/P&S evaluation could be validly conducted via video in some cases that are dependent on physical measurements being done or certain diagnostic tests to be done or confirmed. Perhaps MMI or P&S status can be confirmed but with a caveat of a determination of actual WPI to be deferred to a later time when a physical exam is possible.

The Spectre of Penalties: In situations where an applicant's benefits are delayed or terminated there is the potential for self-imposed penalties under 4650(d) and 5814 for unreasonable delay. There are also potential audit unit penalties that must be considered. If the defendant has acted in a timely and reasonable manner and has not arbitrarily terminated benefits perhaps they can avoid 5814 penalties. However, 4650(d) penalties are automatic and self-imposed. Perhaps the DWC can provide some guidance on this issue and consider adopting emergency regulations addressing delays in benefit payments that are solely attributable to the COVID-19 situation and the parties being unable to secure timely medical evaluations despite acting diligently and with all the resources at their disposal.

Finally, the analysis that must be done on each case related to continued TTD or TPD rely upon case law based on other factual scenarios that may or may not give us direction during the current COVID-19 safe-in-place world.

CASE LAW

I. Cases Where the Employer Has No Obligation to Pay Ongoing TTD or TPD Related to Employee Not Being Able to Perform Modified or Alternative Work.

Labor Unrest and Related Strike: *Seale v Workers' Comp. Appeals Bd. (Shell Oil)* (1974) 39 Cal.Comp.Cases 676 (writ denied). The applicant worked at a Shell refinery. During the period he was performing light work offered by the defendant. A labor dispute arose and the applicant refused to cross the union picket line to reach the light work that had been made available to him. While he was on strike and absent from work he was deemed physically able to return to full duty but instead chose to remain off work until the strike settled. The WCJ awarded applicant TTD from January 23, 1973, to March 13, 1973, based on the odd-lot doctrine. Shell filed for reconsideration which was granted. The WCAB reversed the WCJ and held that the applicant's decision to not cross the picket line **was voluntary** and for reasons other than for physical inability to work and therefore he was not entitled to TTD.

Employee Quits Work for Reasons not Related to the Industrial Injury: In a situation where an employee quits their work for reasons unrelated to the injury, the employer is not liable for temporary partial disability (TPD) benefits if the employer can show they have modified work available and would have offered or done offer modified work within the restrictions contained in the medical report finding the applicant TPD. In *Nulwala v. WCAB (Cottage Hospital)* 2010 Cal.Wrk.Comp. LEXIS 223 the WCAB reversed a trial judge's findings and award of TTD benefits where the applicant stipulated that she quit her job to move out of state to join her husband who had been transferred to another state by his employer. The employer had offered her modified work immediately after the injury and remained ready, willing and able to offer modified work based on the restrictions of the reporting physician.

Applicant Terminated for Failure to Comply with Company Policy: *Flores v. Wal-Mart Associates Inc.*, 2012 Cal.Wrk.Comp. P.D. LEXIS 24. The WCJ in this case awarded applicant TTD benefits even though the parties stipulated the applicant was terminated for failure to comply with company policy. On reconsideration, the WCAB reversed the WCJ and framed the issue as "…whether applicant is entitled to temporary disability where he was terminated for cause for violating company policy, where he was later released to modified duty by his doctor, and where the employer would offer him modified work within his restrictions but for the prior termination for cause. The WCAB found merit in the defense argument that the applicant's termination was in good faith since he was terminated for cause. In addition, the defendant also introduced uncontroverted evidence that it would have provided the applicant work within his

work restrictions but for the termination. The WCAB held that under these facts applicant was not entitled to receive TTD benefits.

Applicant Working in a Modified Position Terminated for Theft: *Toloza v. Dolan Foster Enterprises, Dba Taco Bell* 2011 Cal.Wrk.Comp. P.D. LEXIS 51 (WCAB panel decision). Applicant a sales clerk while working in a modified position, made a sale which she did not enter into the cash register and instead kept the money to pay for a cab ride home. She testified that when she was closing the store at 2 a.m., she did not have enough money for a taxi and felt it was too dangerous to walk home. After an investigation was completed applicant was terminated. Following a trial, the WCJ awarded the applicant ongoing TTD benefits.

The WCAB granted defendant's petition for reconsideration and reversed the WCJ finding the applicant was not entitled to TTD benefits since the record reflected applicant was terminated for cause based on the employers uniform policy related to theft in which they terminated employment 100% of the time for the first offense and the amount of the money or items that were stolen was irrelevant. The Board also noted the defense witness testified the defendant would have continued providing modified work to the applicant if she had not been terminated. "Here the record reflects that applicant's lost wages after her termination was not related or due to her medical condition but rather to her being terminated for theft." It was the applicant's own misconduct created the lack of ability to return to modified work, and the defendant clearly established good cause for terminating the applicant's modified work position.

Immigration Status: In *Del Taco v. Workers' Comp. Appeals Board* (2000) 79 Cal.App.4th 1437, 65 Cal.Comp.Cases 342, the Court of Appeal "….[h]eld that, although an injured worker's immigration status is not relevant to the issue of entitlement to temporary disability, the injured worker is not entitled to vocational rehabilitation benefits where the employee is unable to return to work solely because of immigration status." However, the court also noted that with respect to return to work issues and entitlement to vocational rehabilitation services that "….[w]here it is an injured workers' immigration status that precludes him or her from returning to work the injured worker is not entitled to vocational rehabilitation services as awarding such benefits would deprive the employer from equal protection under the 14th Amendment to the United States Constitution." (*Del Taco*, supra, 65 Cal.Comp.Cases at p. 345.)

With respect to an applicant's immigration status and an employer's bona fide offer of modified or alternative work, if there is evidence an applicant is medically able to work in a modified capacity but is not legally able to return to or accept work in a modified position solely due to a confirmed undocumented residency status, there is no right of reinstatement to employment that would be prohibited under federal law and no liability for temporary total disability benefits. (see, *Cubedo v. Leemar Enterprises Inc*., 2011 Cal.Wrk.Comp. P.D. LEXIS 356, the WCAB relying on the Court of Appeal's decision in *Del Taco*, reversed and rescinded a WCJ's award of ongoing TTD when applicant could not return to a modified work position solely due to her immigration status.

Incarceration: The controlling statute in this area is Lab. Code § 3370. As a general rule, inmates of state penal or correctional institutions are not entitled to receive temporary disability benefits for injuries suffered prior to incarceration or during incarceration related to assigned prison employment. However, during incarceration in state penal or correctional institutions, benefits may be payable to the inmates dependents or if there are no dependents, to the UEF. The same rule **does not** apply to inmates of city and county jails and TD benefits are not statutorily barred for injuries suffered by inmates during their incarceration related to assigned jail employment or industrial injuries they suffered prior to their incarceration in county or city jails. (*The Brickman Group v. Workers' Comp. Appeals Bd. (Martinez)* (2007) 72 Cal.Comp.Cases 357).

There is recent case where a former state prison inmate who had been employed as an inmate laborer and settled his case by way of a Stipulation and Award for 31% PD and upon his release from state prison may still be eligible for Supplemental Job Displacement Benefits (SJDB) in the form of a voucher. The WCAB reasoned that although defendant made a timely offer of modified work it was not a bona fide offer since the applicant was released from prison and could not return to prison employment and therefore found the employer was not absolved of their liability to provide a SJDB voucher. (*Dennis v. State of California-Dept. of Corrections Inmate Claims, SCIF* 2018 Cal.Wrk.Comp. P.D. LEXIS 349.

II. Cases Where the Employer Has Been Found to Have a Continuing Obligation to Pay TTD or TPD.

Layoff Due to Plant Closure: *Bedoya v. Ashley Furniture Industries, Inc.*, 2018 Cal.Wrk.Comp. P.D. LEXIS 396 (WCAB panel decision). In this case, applicant was given two months notice his plant was being closed and that he would be laid off effective October 25, 2016. Subsequent to his layoff on December 13, 2016, applicant filed an Application for Adjudication alleging a cumulative trauma. He was examined by a QME in October of 2017, finding industrial causation for several body parts and conditions. The QME also initially opined the applicant should be restricted to light work with detailed work restrictions. In late 2017 the applicant's PTP also indicated applicant was limited to light work. In March of 2018 the PTP indicated applicant was TTD.

Following trial the WCJ awarded TTD benefits commencing on January 1, 2018 and continuing. Defendant filed for reconsideration alleging applicant was not entitled to TTD benefits since his employment was terminated for good cause based on the plant closure and the odd lot doctrine was not applicable. The WCAB denied reconsideration and affirmed the WCJ's award of TTD benefits. The Board noted that "an employer remains liable for TTD after terminating an employee if it fails to establish good cause by showing there was employee misconduct" and "moreover this is not a situation where the injured employee is not entitled to TTD because he or she ***voluntarily*** left work and/or chose to retire." (citations omitted).

The WCAB stated the situation in this case was:

> "…[M]ore akin to a situation where an injured employee's inability to work for full wages is a function of his or her industrial injury, which results in the employee being entitled to temporary disability benefits." (citations omitted). We conclude that this same principle applies if the employee's inability to work for full wages is a function of the employer's decision to close a plant **or otherwise layoff an employee (**emphasis added).

Since the applicant had not reached MMI status and since both the QME and PTP assigned work restrictions which would be necessary if applicant was to return to work and there was no evidence applicant was working or that defendant offered applicant modified work within the restrictions provided by the doctors he was entitled to TTD benefits.

Alleged Unsubstantiated and Unproven Termination for Cause: In *Reynoso v. Lusamerica Foods* 2018 Cal.Wrk.Comp. P.D. LEXIS 134 (WCAB panel decision), the employer contended applicant was not entitled to TTD based on the fact he was allegedly terminated for cause while he was still a probationary employee. Applicant was suspended from work seven days after suffering an admitted specific injury on August 14, 2016. The day after the suspension he was notified he was being terminated and received an actual termination notice along with a performance notice dated August 22, 2016 on August 24, 2016. The performance write up of August 22, 2016, stated that he had to improve but he was not given the actual opportunity to improve before he was terminated. Based on medical reporting and the testimony at trial the WCJ found that applicant was entitled to TTD based on the fact defendant failed to show modified work was available and had been offered and that applicant was terminated for cause. The WCAB affirmed the award of TTD until applicant was either returned to work, declared P&S, or until the two-year TTD cap expired. The Board found the timing of applicant's termination suspicious and the alleged reasons supporting the basis for termination for cause by defendant were unsupported and not persuasive and therefore his termination did not bar his entitlement to TTD.

Basically, the same result but with different facts in *Rivera v Pinnacle Application, Inc.,* 2019 Cal.Wrk.Comp. P.D. LEXIS 579 (WCAB panel decision). In this case the defendant argued the applicant who was employed as a driver was not entitled to TTD because he was terminated for cause. Applicant suffered an admitted orthopedic injury and a PTP indicated he could perform modified work but he was precluded from commercial driving and had other restrictions including a lifting restriction. Shortly thereafter, defendant notified applicant that it received information from the DMV that applicant had received a major citation that disqualified him from operating company vehicles and on this basis his employment was terminated since he was unable to perform the essential duties of his job.

Applicant made multiple contacts with the employer related to the availability of modified work and he was advised they did not have any light duty work for him. He was also told there was no position for him since he was hired as a driver. Applicant also provided a doctor's note every time he missed work. He testified his license was suspended for less than a month due to a DUI related "wet reckless driving."

The WCAB noted the employer holds the burden of proof by a preponderance of the evidence to show that the employee was terminated for cause and that it had modified duty that the injured worker could have performed. (Lab. Code §§5705 & 3202.5). However, the defense witness admitted that after applicant was terminated they did not contact applicant regarding modified work and there was no evidence that after applicant was determined to need modified work on or after May 16, 2018, the employer "could have provided applicant with modified work that complied with his medical restrictions or that it would have offered the work to applicant but for his termination." As a consequence applicant was entitled to temporary total disability for the period awarded by the WCJ.

Other cases finding applicants were still entitled to receive TTD benefits even though the defendant alleged misconduct are *Butterball Turkey Co. v. Workers' Comp. Appeals Bd*. (1999) 65 Cal.Comp.Cases 61 (writ denied) (applicant terminated for alleged falsification of time card) and *Manpower Temp. Services v. Workers' Comp. Appeals Bd. (Rodriguez)* (2006) 71 Cal.Comp.Cases 1614 (writ denied). (applicant on TPD until he was discharged for allegedly lying to a co-worker about having authority to make up work time when he arrived late). In both cases TTD benefits were awarded since defendants failed to prove applicant's alleged misconduct warranted either termination or disqualification from receiving TTD benefits.

Failure of an Employer to Continue to Offer a Modified/Light Duty Position: In *Perry v. Direct TV, Zurich American* 2018 Cal.Wrk.Comp. P.D. LEXIS 191 (WCAB panel decision), applicant suffered an admitted injury and based on work restrictions from the PTP, defendant provided light duty work. The applicant never owned his own personal vehicle and had always been provided with a company van not only for work but for his daily commute to and from work. Prior to suffering the admitted injury and at the employers urging, he moved to a city closer to the workplace. After the injury and in conjunction with his light duty assignment, applicant was transferred to another office location farther from his residence. Applicant was paid TPD for a period of time.

While the applicant was on light duty the company van was taken away from him and as a consequence he was unable to continue to work modified duty/light duty since he had no other way to commute to the office where defendant has assigned him to perform light duty. The WCJ awarded the applicant TTD on the basis that defendant's offer of modified duty was not a valid offer because based on these particular facts and circumstances he was not allowed to continue to use a company vehicle for his commute to his assigned light work assignment. On

reconsideration the WCAB affirmed the WCJ's award of TTD agreeing that defendant's offer of modified duty was not valid.

CAVEATS, CONCLUSIONS and FINAL NOTES

It is important to note that none of the various COVID-19 governmental orders issued to date terminate, suspend, or nullify in any way an employers or worker's compensation carrier's continuing legal obligation based on applicable statutes, regulations and case law to continue to provide statutory worker's compensation indemnity payments to injured workers. There have also been no directives from the California Department of Insurance, Department of Industrial Relations, or the Division of Workers' compensation in that regard.

Based on current applicable statutes, regulations and interpretive case law, an employer's inability to continue to provide or offer alternative, modified or regular work (within restrictions), based upon or due **solely** to governmental COVID-19 orders does not appear to be a legal bona fide basis for the unilateral termination of ongoing liability benefits before taking further necessary and reasonable steps including securing updated medical examinations related to certifying applicant's current disability status.

Given the current fluid and rapidly evolving nature of the Coronavirus-COVID-19 pandemic in the United States, this memo constitutes our preliminary analysis and is provided solely as a reference tool to be used for informational purposes and is subject to change based on evolving information. Therefore it should not be construed or interpreted as providing legal advice related to any particular case or cases. Each insurance company, claims administrator and employer should seek their own independent legal advice and opinion before they determine a course of action on a specific case or cases related to the compensability of injuries in the workplace and any liability for benefits allegedly related to coronavirus exposure.