

EMPLOYEE TERMINATED FOR CAUSE STILL ENTITLED TO

WORKER'S COMPENSATION BENEFITS

While I seldom write articles for this publication that deal with worker's compensation decisions, a recent one is worthy of note by electrical contractors because it awards temporary total disability benefits after an employee is terminated for violating plant safety rules. In *Emmpak Foods v. L.I.R.C.*, decided by the Court of Appeals in June of 2007, the employer, Emmpak, and its insurer, National Union Fire Insurance Company of Pittsburgh, sought judicial review of a Labor and Industry Review Commission's decision that a terminated employee of Emmpak was entitled to temporary total disability benefits after he was terminated by Emmpak for violating plant safety rules. Following the standard route of judicial review, the case was first heard by the Circuit Court for Waukesha County, which affirmed the L.I.R.C.'s decision. Emmpak and its insurer then appealed to the Court of Appeals.

The Court of Appeals discussed the degree of deference that it owed to the L.I.R.C. interpretations of worker's compensation statutes governing temporary total disability and held that it would grant the agency deference to its legal conclusions. The court noted that the courts are often required to interpret agency-administered statutes, and while the agencies are required to abide by the statutory constructions approved by the court, when a new case comes before an agency it properly looks to the court cases that have gone before it and analyzes and applies them. The Court of Appeals decided that it would defer to the agency's decision on the availability of temporary total disability benefits as being the most reasonable under previous court decisions. The Commission interpreted the law to provide no exception to liability for temporary total disability benefits where an injured employee is terminated for cause, even when the employee has continued to work post injury under restricted duty.

The court noted that the Wisconsin statutes provide that liability for worker's compensation benefits exist where: (1) the employee sustains an injury; (2) at the time of the

injury, both employee and employer are subject to the worker's compensation statute; (3) at the time of the injury the employee performing services growing out of or incidental to his or her employment; (4) the injury is not intentionally self-inflicted; and (5) the accident or disease causing injury arises out of employment. In the *Emmpak* case, the parties agreed that each of those conditions existed. The court also noted that as the employee continued employment on a restricted basis, he was receiving a wage and was not therefore entitled to disability payments. However, when he was terminated, the employee did suffer a wage loss which would ordinarily entitle him to temporary total disability payments. The issue in the case was therefore whether the employee's entitlement to temporary total disability benefits is affected by the fact that his wage loss came after he was terminated for cause.

In holding for the employee, the Court of Appeals cited a 1997 case, *Brakebush Brothers, Inc. v. L.I.R.C.*, involving an employee who had injured his back on the job and was temporarily unable to work, but while he was absent from work, his employer conducted an investigation and discovered that he had been bow hunting and playing pool. The employer then discharged the employee for misrepresentation of facts or giving false or misleading information regarding a work injury. The court approved the Commission's award of temporary total disability benefits to the employee, quoting the Commission:

“While the employer appears to have had sound reasons for terminating the applicant, this does not relieve the employer/insurance carrier from the obligation to pay temporary total disability benefits for the period in question.... To the employer and its insurance carrier, it may seem inequitable that the applicant is able to receive temporary disability benefits after having been discharged for good cause. However, worker's compensation is a statutory program and there is no provision in Chapter 102 which would allow the cutoff of temporary disability benefits as long as the work injury continues to cause disability.”

The Court of Appeals in *Emmpak* decided to apply the *Brakebush* rule, even though *Emmpak*'s employee had no wage loss following his injury as did the employee in *Brakebush*.

The court held that although Emmpak's employee continued at his old job, and therefore had no wage loss until he was terminated, it was his termination that triggered the availability of temporary total disability benefits rather than the injury on the job. The court rejected the question of whether the termination was meritorious, holding that public policy does not favor drawing a distinction between a "good" termination for a safety violation and a "bad" termination for some other reason, and that the statute does not make a distinction. The court noted that as recently as March, 2006 the state legislature enacted several changes in the statutory scheme for worker's compensation and did not alter the decision of the court in *Brakebush*.

It should be noted, however, that under new legislation, three exceptions to the right to receive temporary disability benefits were inserted: (1) the employer is not liable if it offers suitable work and the employee unreasonably refuses it, (2) the employer is not liable if the employee is charged with a crime and the termination is connection with the alleged crime, (3) the employer is not liable if the employee is terminated for violating an employer's drug policy that is written and regularly enforced.

The court in *Emmpak* observed that, "notably missing from the exceptions is a general 'for-cause termination' or 'safety-rule termination' policy, like the one claimed by Emmpak in the case.