

Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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Offices Throughout Southern California

Trovillion Inveiss & Demakis has offices located throughout Southern California and represents clients at all Southern California WCAB venues. Our offices are located in San Diego, Los Angeles, Orange County and Riverside. Please visit us at www.TIDLAW.com for full information on each office and our attorneys.

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PRACTICE POINTER: WHEN CAN DEFENDANTS DENY TEMPORARY DISABILITY BENEFITS TO A TERMINATED EMPLOYEE?

The recent decision from the Appeals Board in *Romero v Sunbelt USA Inc.* (2014) Ca. Work Comp P.D. Lexis 728, is of particular importance to defense practitioners. Defendants have often argued, with little success, that an applicant terminated for cause while on modified work is not entitled to temporary disability. The WCAB in a split decision held that an applicant was not entitled to temporary disability benefits during a period of temporary partial disability if the defense establishes that applicant was terminated for cause.

Defendant's argument was simple. But for the termination, the employer would have offered modified work to the applicant. Defendant further argued that the termination for cause was tantamount to a refusal of modified work and that it no longer had an obligation to provide temporary disability benefits.

To no surprise, the defense argument made no impression on the WCJ. The trial judge found the applicant entitled to temporary disability indemnity. At trial, the employer testified that but for the termination, the employer would have accommodated the work restrictions provided by the treating physician. However, they were unwilling to do so due to the applicant's poor work ethics and performance.

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On appeal, the WCAB reaffirmed the principle in *Vittone v WCAB* (2001) 66 Cal. Comp Cases 435 that an applicant may be estopped from claiming temporary disability indemnity corresponding to periods that she refused suitable modified work without good cause. Applying similar reasoning, the WCAB held that an applicant terminated for cause during a period in which he or she was offered modified work is not entitled to temporary disability indemnity.

Practitioners should note the following if asserting this as a defense against demands for payment of temporary partial disability benefits:

- Need for employer to establish by credible evidence at trial that applicant was terminated for good cause. This signifies misconduct by an employee that justifies termination.
- In a case where the applicant was working regular duties and was later placed on modified duties by the treating physician after a termination for cause, credible evidence by the employer should include the following:
 - The nature of modified work that would have been provided for the injured worker had he continued to work for the employer.
 - A showing of modified work positions offered to other injured workers in the past or present.
 - A showing that a practice of modified work positions for injured workers is widely embraced by the employer.

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