

E\*Alert

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## **RECENT CHANGE TO THE WISCONSIN WORKER'S COMPENSATION ACT**

By: Dan Pedriana, Esq.

A recent amendment to the Wisconsin Worker's Compensation Act has relieved some of the effects of earlier Department of Workforce Development policy regarding return to work issues and provides some statutory exceptions where an employee who is off work is not entitled to temporary total disability benefits despite remaining in the healing period.

As a general rule, an employee need not be available for work in any sense while totally disabled from performing his or her job and while in the healing period. The employee remains entitled to temporary total disability benefits even if the employee is enrolled in school, hospitalized for reasons unrelated to the injury causing disability, or incarcerated. While this may seem unfair or contrary to public policy, there is no statutory basis for denying benefits in such cases. This policy was reaffirmed in *Brakebush Brothers, Inc. v. LIRC*, 210 Wis. 2d 623, 563 N.W.2d 512 (1997), in which the Wisconsin Supreme Court held that an employee who was terminated for making misrepresentations related to his own level of physical activity, did not lose eligibility for temporary disability benefits. The Court reasoned that the injury, not the termination, was the cause of the wage loss.

The Labor and Industry Review Commission ("LIRC"), which is empowered to review worker's compensation Administrative Law Judge decisions, has declined to make any exceptions to the *Brakebush* ruling in a variety of circumstances. In *Arista Rea v. Kenosha Beef International*, WC Claim No. 1990070904 (LIRC May 5, 1999), an employee was awarded continuing temporary disability after he had been terminated when the Immigration and Naturalization Service determined he was an undocumented illegal alien. In *Wellsandt v. Chippewa County*, WC Claim No. 93050745 (LIRC November 28, 1997), LIRC held

that a discharge for failing to perform work was not the “equivalent of refusing an offer of work.” Temporary total disability benefits were therefore awarded.

In January, 2006, Section 102.43(9) Wis. Stats., was adopted to relieve some of the effects of earlier Departmental policy. Under the new statute, an employee who (1) refuses an offer of suitable employment without reasonable cause, (2) is suspended or terminated by the employer after returning to work within his physical limitations because of the commission of a crime substantially related to the employment, or (3) is suspended after returning to work within his physical limitations by the employer because of a violation of the employer’s drug policy in effect and enforced at the time of injury, is not entitled to worker’s compensation benefits under Sec. 102.43(9), Wis. Stats. While there exists a presumption that an employee who is not working and remains in the healing period is entitled to temporary total disability benefits, the amendment to § 102.43(9), Stats. provides some relief from the effects of the *Brakebush* decision and the Department’s earlier policy.

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If you have any questions about the issues raised by this e-alert, please feel free to contact Dan Pedriana at (414) 273-3910 or by e-mail at [dpedriana@lindner-marsack.com](mailto:dpedriana@lindner-marsack.com)

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