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TERMINATION OF TTD: LIGHT HOUSEWORK

If a injured worker's earning power is not wholly destroyed and he retains the capacity to perform remunerative work during the healing period, he is disqualified from receiving temporary total disability (TTD). A worker who performs substantial gainful employment during the healing period does not qualify for temporary total disability compensation although he may qualify for temporary partial disability. *American Airlines v. Hervey*, 2001 OK 74, 33 P.3d 47. If the worker is in the healing period, temporary total disability is not automatically terminated merely because the injured worker performs some occasional or sporadic work for a small amount of pay. *Gray v. Natkin Contracting*, 2001 OK 73, 44 P.3d 547. These legal principles were used by Justice John F. Reif to craft the Oklahoma Supreme Court decision in *AmeriResource Group v. Gibson*, 2008 OK 33, __ P.3d __.

In March, 2005 Christopher Gibson claimed injury to his neck and left shoulder resulting from heavy lifting while installing audio-visual equipment for his employer. In April, he sought medical treatment due to persistent pain and was terminated by his employer. At trial, he testified that he was unable to perform his former work due to pain and muscle spasms in his neck and shoulder. After trying unsuccessfully to get another job, he filled his time helping his wife in her home-based child day care business, including doing light housework. The court appointed IME,

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Principal Employer May Be Liable for Injuries to Employees of Subcontractor

A general contractor is secondarily liable for injuries occurring to the employees of its subcontractor **if** the subcontractor has failed to provide coverage **and** the general contractor has failed to exercise *good faith* to determine the existence of coverage under a valid insurance policy. 85 O.S. §11(B)(2).

Normally a policy's term of coverage is for one year. The "good faith" requirements of 85 O.S. §11(B)(2) are met when the principal employer receives a certificate of coverage that includes the period of the subcontractor's work. However, the good faith responsibility includes the continuing

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DID YOU KNOW?

If you have performed work duties before or after clocking out of work for the same employer, you may be entitled to up to two or more years of back pay. The Fair Labor Standards Act requires that employers pay for all work performed such as putting on employer required equipment and/or clothing, sharpening knives, attending safety meetings, etc. If you have been underpaid for work performed, please call our office.

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Principal Employer, cont'd from page 1

obligation to obtain proof of coverage on the expiration date of the policy. "Good faith is not demonstrated when a principal employer accepts proof of his subcontractor's workers' compensation coverage but remains indifferent to the stated expiration date of that coverage." *Smalygo v. Green*, 2008 OK 34, __ P.3d __.

David Green (Claimant) suffered a work-related injury on October 10, 2002, while working as a construction laborer for Mark Murphy d/b/a Mark Murphy Construction, an independent contractor and subcontractor of the principal employer Millard Smalygo d/b/a Smalygo Homes. When Smalygo hired Murphy, he received a certificate of coverage for a workers' compensation policy covering Murphy's employees, including Green. The policy would have expired as late as August 13, 2002, but Murphy allowed it to lapse on April 1, 2002, without informing Smalygo.

When Green learned that his immediate employer had no workers' compensation coverage, he amended his claim to add Smalygo as principal employer.

If Smalygo had inquired about coverage on the anniversary date of the policy, he would have learned on August 13, 2002, nearly two months before Claimant's injury, that Murphy was uninsured. The Supreme Court found that there was competent evidence to uphold the panel's decision finding Smalygo's failure to inquire made him secondarily liable for Green's injuries (overturning the trial court order to the contrary).

It is interesting to note that Oklahoma is one of the forty-three states that allow an injured employee of an uninsured independent contractor to pursue a workers' compensation claim against the general contractor. Of those states, Oklahoma is the only one to allow a general or intermediate contractor to escape liability by a good faith reliance on proof of coverage.

Feel free to call our office for help with any type of insurance dispute or injury matter.

Don't forget that we can help obtain Social Security for you or anyone you know who is unable to work due to a disability.

Please note our additional office locations for future reference:

122 N. Broadway, Walters, Oklahoma 73572
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1861 E. 15th Street, Tulsa, Oklahoma 74104-4610
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Dr. Michael Wright, recommended neck surgery after an MRI showed a significant C5-6 disc herniation. Employer denied that Gibson was TTD alleging he retained the capacity to work. Trial court awarded TTD, COCA reversed, and Supreme Court reinstated the trial court decision.

Among other things, the Supreme Court in an 8-1 opinion held the following:

1. The ability to perform light housework must be sufficient in quality, quantity, or dependability to be marketable and this in turn, must be shown by competent evidence;
2. The daycare work was akin to light housework;
3. In this case, there is no evidence that wife paid claimant for his help or that claimant was generally employable as a daycare worker, nanny or housekeeper;
4. There is no evidence that his wife would or could have hired someone to help her if she had not had claimant's help;
5. Without such evidence, it is simply speculation that claimant's help "inured to his benefit because it enabled his wife to avoid

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Brown Recluse – Spider bites incurred in the workplace are covered by Workers' Compensation.

RECENT DECISION MAY HURT INJURED WORKERS

The Oklahoma Supreme Court recently ruled that workers who sustain soft tissue injuries may be limited to eight (8) weeks of off work benefits. The state legislature enacted a sweeping workers' compensation reform in July of 2005 which dramatically changed the benefits allowed to injured workers. In cases where there is no surgery and no anatomical abnormality, an injured worker may be limited to eight (8) weeks of temporary total disability (TTD). TTD is payable while a person is off work under the direction of a doctor as a result of an on the job injury.

One of the ways we may be able to argue around this limitation is by proving an anatomical abnormality. The most common scenario we see is where a worker has injured the spine or more specifically a disc in the spine but it is not a surgical condition. If we can show by objective evidence (i.e. an MRI or CT scan) that there is an abnormality of a disc or discs, then we may be able to prove that the injury caused the abnormality. If we are able to prove an abnormality, the court will award more than eight (8) weeks of TTD if indeed the injured worker remains off work in excess of eight (8) weeks. It is also possible that loss of range of motion (ROM) can be an anatomical abnormality such as in the case of an injured shoulder that is not surgical. Loss of ROM can be determined by either your treating doctor or the examining doctor that our office has you evaluated by.

The important thing to remember is that time off work may be limited now in some cases but we can always attempt to argue that the limitation does not apply to your particular injury. Never accept an insurance company's decision to stop your benefits at eight weeks without consulting our office.

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paying someone else to perform the functions [claimant performed]" (employer's argument);

6. This case presents a question of disputed fact and the order is supported by competent evidence which will not be disturbed on appeal;

7. In deciding whether or not claimant has the ability to follow continuously some substantially gainful or remunerative occupation, "the court could properly consider whether claimant was capable on a regular and continual basis of even light work in the real labor market without experiencing serious pain and discomfort on a daily basis."

The key question is whether or not the work performed (volunteered services) represents the ability to follow continuously some substantially gainful employment. Gibson's "help in his wife's home-based day care business does not conclusively show such ability. . . [T]his issue was a question of fact and the resolution of that question of fact in favor of the claimant does not offend any policy of the Workers' Compensation Act."

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