REVERSED and REMANDED by Court of Appeals en banc Record No. 1226-06-2 (January 29, 2008)
(5 Judges agreed with Judge Clements' Opinion and five Judges agreed with Judge Kelsey's Opinion.}
(This decision affirmed the panel decision at 49 Va. App. 668,644 S.E.2d 93 (2007) that reversed the Commission Opinion.)

VIRGINIA: 04/25/2006
IN THE WORKERS' COMPENSATION COMMISSION

WILLIAM C. DOWDEN, JR., Claimant

Opinion by DUDLEY
Commissioner

v. VWC File No. 204-26-18

HERCULES, INC., Employer
AQUALON COMPANY, Insurer

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REVIEW on the record by Commissioner Tarr, Commissioner Diamond, and Commissioner Dudley at Richmond, Virginia.

The claimant has requested Review of the Deputy Commissioner's June 6, 2005, Opinion denying temporary partial disability benefits and awarding the employer a credit for benefits paid from March 10 through July 13, 2003. He assigns error to the finding that he failed to cure his unjustifiable refusal of light duty and is not entitled to temporary partial disability benefits. We affirm.

The claimant sustained a compensable injury to his back on January 31, 2001, while earning an average weekly wage of $1,243.64. Since February 1, 2001, the employer has paid temporary partial disability benefits at the weekly rate of $161.10.

The claimant retired effective May 1, 2001, while earning $1,002 per week. On March 10, 2003, he returned to work earning $200 per week. The employer paid the claimant temporary partial disability benefits.

The employer filed an Application for Hearing on July 24, 2003, seeking a credit for benefits paid from March 10 through July 13, 2003. It alleged that the claimant refused selective employment by retiring on May 1, 2001, and that he returned to work on March 10, 2003. On September 5, 2003, the claimant filed a Claim for Benefits seeking temporary total disability benefits beginning May 1, 2001, and continuing.

By Opinion dated May 12, 2004, the Deputy Commissioner determined that the claimant unjustifiably refused selective employment upon retiring on May 1, 2001, and that he did not cure this refusal within six months. The claimant appealed.

By Opinion dated December 10, 2004, the Commission agreed that the claimant unjustifiably refused selective employment by retiring, but disagreed that the six-month deadline for a cure began running on May 1, 2001. The Commission remanded the case "for a determination of the date the claimant's cure requirement began, the extent to which the claimant may have violated [Virginia] Code § 65.2-712, and whether the claimant cured the unjustified refusal." (Op. at 7).

On remand, the parties submitted position statements. The claimant argued that his return to work on March 19, 2003, earning $200 per week cured the alleged refusal. He asserted that Code § 65.2-510(B) did not require that the light-duty employment be "comparable" in earnings to the

refused selective employment offered by the employer. The claimant maintained that: "To uphold somehow 'comparable' employment is [sic] a requirement, would change the statute as enacted by the legislature and would in fact nullify the effect of [§] 65.2-510 B." The employer argued that "under well-established case law," the claimant's wage loss as a result of earning only $200 per week was insufficient to cure his refusal.

The Deputy Commissioner found that the claimant did not cure his unjustified refusal of selective employment by finding light-duty employment "earning $200.00 per week, substantially less than his light duty position he held in early 2001, earning $1,002.00 per week." (Op. at 3). The Deputy Commissioner explained that:

> In construing [Virginia] Code § 65.2-510, the full Commission has held that, where disability benefits are suspended because an employee unjustifiably refused selective employment, the employee will be entitled to resumption of disability benefits once he procures comparable employment suitable to his disability or has made a good faith effort to obtain suitable employment. Newsome v. Food Lion, Inc., 77 OWC 173 (1998); Turnbull v. Northern Virginia Consultants, 75 OWC 240 (1996).

(Id.).[1]

On appeal, the claimant reasserts his argument that his new light-duty employment earning $200 per week cured his refusal. He argues that, "based on [Code §] 65.2-510 B he has cured any alleged unjustified refusal" and is entitled to temporary partial disability benefits. We disagree.

[1] The Deputy Commissioner also determined that since the claimant did not report his return to work on March 10, 2003, temporary partial disability benefits were not due beyond that date, and he needed to cure his refusal within six months of that date, which he did not. Lastly, the Deputy Commissioner awarded a credit to the employer for benefits paid from March 10 through July 13, 2003. The parties did not appeal any of these findings.

In 1995, § 65.2-510 was amended to include Sections B and C. Section B provides:

> If an injured employee cures his unjustified refusal by accepting employment suitable to his capacity at a wage less than that originally offered, the employer shall pay or cause to be paid to the injured employee during his partial incapacity pursuant to [Virginia Code] § 65.2-502, a weekly compensation equal to 66 2/3 percent of the difference between his average weekly wages before his injury and the average weekly wage the employee would have earned by accepting the original proffered light duty employment.

In Food Lion, Inc. v. Newsome, 30 Va. App. 21, 515 S.E.2d 317 (1999), the Virginia Court of Appeals examined the ability of an employee to cure a constructive unjustified refusal of light duty. In Newsome, after the employee was terminated, he obtained other selective employment at a wage equal to or greater than his light-duty job with the employer. Subsequently, he changed jobs several times, increased his wage, and thus, reduced his entitlement to partial disability benefits. Subsequently, the employee had to terminate his employment because his work restrictions changed. During this period, he was awarded temporary total disability benefits because he reasonably marketed his residual capacity. The employer argued that the original unjustified refusal of selective employment was continuing, and that the employee could only cure that refusal by obtaining employment at a wage equal to the wage in the job from which he was initially terminated. The Court of Appeals held that once an employee cures the unjustified refusal of selective employment by obtaining comparable employment, he is entitled to reinstatement of benefits if he reasonably markets his residual capacity. The Court noted that: "Code § 65.2-510 allows employees to cure an unjustified refusal of selective employment by obtaining equivalent selective employment." Id. at 25-26, 515 S.E.2d at 319. However, "[o]nce an employee has cured

the unjustified refusal, he or she is entitled to reinstatement of benefits when the employee is disabled and reasonably markets his or her residual capacity." Id. at 26, 515 S.E.2d at 320.

In Clements v. Riverside Walter Reed Hosp., 40 Va. App. 214, 578 S.E.2d 814 (2003), after the employee refused offered light duty, she worked with Mary Kay Cosmetics, and earned, at most, one-half the salary she was offered in the selective employment refused. While the Commission's decision in Clements was reversed on other grounds, the Virginia Court of Appeals accepted our determination that the job with Mary Kay Cosmetics was not comparable employment.

Recently, in Baker v. Sunrise of Alexandria, VWC File No. 211-09-09 (June 30, 2004), the Commission considered a similar issue of whether the injured employee cured her refusal by obtaining comparable employment or through reasonable marketing. We explained:

> A cure of a refusal of employment can be effectuated by the claimant's adequately marketing and by securing other employment. However, the other employment must be at a wage comparable to that of the previously refused position. MacWilliams v. Minton and Roberson, Inc., VWC File No. 192-19-71 (February 9, 2001). *It is not necessary that the wages in the new position be identical to those of the refused position. But they certainly must closely approximate them*. Turnball v. Northern Va. Consultants, 75 OWC 240 (1996). [emphasis added]

In Baker, the employee was earning a pre-injury wage of $580.38 in the selective employment that she refused. After her refusal, she began babysitting and earned $100 per week. We held that, "the $100 per week for babysitting is not comparable."

The present case is similar to Clements and Baker. The claimant was earning $1,002 per week in his selective employment, and after his refusal, he began earning $200 per week. The evidence does not indicate that the employment he procured was comparable and effectuated a cure

of his unjustified refusal of selective employment. We affirm the Deputy Commissioner's finding that the claimant failed to cure his unjustified refusal of light-duty employment.

For the reasons stated, the Opinion below is AFFIRMED.

This matter is hereby removed from the Review docket.

We refer the claimant's November 8, 2004, letter claim to our Claims Examination Department for processing.

DIAMOND, Commissioner, Dissenting:

I respectfully dissent from the finding that the claimant did not cure his unjustified refusal because he found a job that did not pay as much as his light duty job.

The Majority is incorrect as a matter of law in inferring that the 1995 amendment to § 65.2-510 precludes a claimant from curing his refusal by any means other than finding a job that pays an equivalent salary to the job he or she refused. The 1995 amendment to Code § 65.2-510 (adding a subsection "B") clearly contemplated that an injured worker may cure a prior unjustified refusal by accepting a lower paying, light duty job, by providing as follows:

> If an injured employee cures his unjustified refusal by accepting employment suitable to his capacity at a wage less than that originally offered, the employer shall pay or cause to be paid to the injured employee during his partial incapacity pursuant to § 65.2-502, a weekly compensation equal to 66 2/3 percent of the difference between his average weekly wages before his injury and the average weekly wage the employee would have earned by accepting the original proffered light duty employment.

See § 65.2-510(B)

To extend the clear meaning of this provision beyond what it says is inconsistent with the remedial nature of the Act, Humphries v. Boxley Bros. Co., 146 Va. 91, 106, 135 S.E. 890, 894 (1926), and it is not in accord with the clear mandate to interpret the Act liberally in favor of the injured employee. E.I. Du Pont De Nemours & Co. v. Eggleston, 264 Va. 13, 17, 563 S.E.2d 685, 687 (2002). See also Hillcrest Manor Nursing Home v. Underwood, 35 Va. App. 31, 39, 542 S.E.2d 785, 789 (2001) (recognizing the "highly remedial" purpose of the Act which was designed to "protect" employees).

Moreover, both the Court of Appeals and the Commission have previously recognized that a partially disabled employee can achieve at least a "partial cure" of an unjustified refusal by finding work earning lower wages than were provided in connection with the selective employment he or she refused. For example, in Hillcrest Manor Nursing Home v. Underwood, 35 Va. App. 31, 542 S.E.2d 785 (2001), the Court of Appeals affirmed the Commission's award of temporary partial disability benefits which was based on the wage differential between an employee's pre-injury average weekly wage and the weekly wage she would have earned in the selective employment that she refused. Recognizing the remedial purpose of the Act, the Court decided that the claimant's voluntary decision to work substantially fewer hours of work than were actually offered to her by the employer, thereby resulting in a substantially lower weekly wage than she would have earned had she accepted all of the available hours, did not preclude the claimant from recovering temporary partial compensation. Instead, the Court reasoned that the claimant's refusal of full-time, light duty work and her decision to work fewer light duty hours merely lowered her temporary partial compensation rate in accordance with Code § 65.2-510(B).

Similarly, in Robertson v. Sun States Maint. Corp., VWC File No. 210-95-35 (September 12, 2003), the Commission recognized that a partially disabled employee was not required to find work earning the same wage as he would have earned had he not refused selective employment to establish a "cure" of the refusal. In deciding that the employee had achieved a "partial" cure of his earlier unjustified refusal by reasonable marketing, the Commission engaged in a thorough discussion of the concept of "cure" and the 1995 amendment to Code § 65.2-510. The Commission also reviewed and summarized the results of numerous cases from the Court of Appeals pertaining to unjustified refusal and cure, and reached the following general conclusions:

> It appears that there are several potential levels of the cure for unjustified refusal of light duty. There can be a complete cure where comparable employment is obtained. There can be a partial cure where the partially disabled employee finds a job paying less than the unjustifiably refused job, wherein he or she is entitled to benefits based on wages in the job refused. It further appears that marketing residual work capacity can be a form of cure.

In the present case, however, the Majority has ignored our previous analysis in Robertson and has chosen to adopt a restrictive application of the Act which is inconsistent with the plain language of Code § 65.2-510(B) and the Act's remedial purpose.[2]

[2] The Majority also relies on the Commission's decision in Baker v. Sunrise of Alexandria, VWC File No. 211-09-09 (June 30, 2004), in concluding that, to achieve a "cure" of an unjustified refusal, a partially disabled worker is required to find work earning a wage comparable to the wage he would have earned had he not refused the selective work provided to him by the employer. In Baker, the Commission concluded that a worker did not cure a prior unjustified refusal of light duty by performing babysitting jobs and earning a substantially lower weekly wage than she would have earned had she not refused the selective employment offered to her by the employer. However, the Commission did not discuss the conclusions we had previously reached in Robertson or offer any explanation for a change in the Commission's analysis of cure in light of Code § 65.2-510(B).

The implications of the Majority's restrictive interpretation of the Act may be pointed out through this hypothetical: An individual with a severe and crippling disability may be working at a light duty job. He suffers a heart attack, and because of absenteeism, he is fired. This constitutes an "unjustified refusal," because his job loss is unrelated to the compensable injury. Within six months, the individual begins to look for work in good faith, but because of economic conditions, he can only find a lower paying job. Under established case law, this good faith marketing and the finding of a job each constitute a "cure" of the "refusal." See, e.g., Clements v. Riverside Walter Reed Hosp., 40 Va. App. 214, 226, 578 S.E.2d 814, 819-20 (2003) (ruling employee can establish cure by finding less-than-comparable work and continuing to market residual capacity).[3] However, the employer is given the benefit of not having to pay any more benefits than it would have had to pay under the earlier job. To extend this further and say that the employee can never cure his refusal despite good faith marketing and actually locating a job, is to imbalance the Act against a disabled employee. It penalizes an injured employee who through no fault of his own, such as for an unrelated medical reason, can no longer perform a particular light duty job – despite the fact that that person proves his or her good faith effort and intention to work.

For these reasons, I would reverse the decision of the Deputy Commissioner, find that the claimant achieved a partial cure of his refusal of light duty, and would award temporary partial compensation in accordance with Code § 65.2-510(B).

[3] In Clements, the Court of Appeals indicated that where the claimant found a lower paying job and did not also show good faith marketing, this was insufficient to find a cure of an unjustified refusal. To quote the opinion:

> A claimant can cure an unjustified refusal in several ways. She can continue working for the employer. . . . Reasonable efforts to market an employee's residual capacity can also cure an unjustified refusal of selective employment. . . . Finding other, comparable employment can cure a refusal as well. (footnote and citations omitted)

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

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