VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

KELLEY ABSHER, Claimant

Opinion by WILLIAMS
Commissioner

v. Jurisdiction Claim No. VA00000183504

NOV 29, 2011

MARY WASHINGTON HOSPITAL, Employer
SAFETY FIRST INSURANCE COMPANY, Insurer

Wesley G. Marshall, Esquire
For the Claimant.

Andrew M. Alexander, Esquire
For the Defendants.

REVIEW on the record before Commissioner Diamond, Commissioner Dudley and Commissioner Williams at Richmond, Virginia.

Both parties have requested Review of the Deputy Commissioner's April 14, 2011 Opinion suspending temporary total disability benefits effective April 23, 2010, awarding periods of wage loss benefits beginning May 19, 2010 and continuing, returning the claimant to Dr. Dale Pcsolyar, neurologist, for further medical treatment and continuing medical benefits for a post-concussion headache.[1] The claimant assigned multiple errors (12) to argue against the determinations that the employer offered *bona fide* selective employment within her capacity, that she unjustifiably refused any offer, and that wage loss benefits should be suspended.[2] The employer argues that the claimant

[1] The employer did not appeal the determination that the claimant was not released to return to her pre-injury employment. We omit discussion of this issue.

[2] Considering the issues involved and the complete record developed at the hearing, we find that oral argument as requested by the claimant is unnecessary and would not be beneficial in this case. Williams v. Va. Elec. & Power Co., 18 Va. App. 569, 445 S.E.2d 693 (1994).

was released to full-duty employment, was not disabled as a result of her occupational injury and that wage loss benefits should not be awarded after May 19, 2010. We AFFIRM in part and REVERSE in part.

We begin by noting that, within the claimant's "Amended Written Statement" filed on July 22, 2011, the claimant argues against the finding that she must return to treatment with Dr. Pcsolyar. The claimant did not timely appeal this determination when she requested Review. Regardless, the Commission may address any error on Review. There was no claim before the Deputy Commissioner regarding the responsibility for the claimant's future medical treatment and, at the hearing, no party sought resolution as to where the claimant should return for medical treatment. Accordingly, we VACATE this determination.

The claimant, a nurse, sustained a compensable injury by accident on November 8, 2009. The parties' Memorandum of Agreement indicated that she suffered a post-concussion headache. The employer has paid medical benefits and wage loss benefits.

Pertinent to our inquiry, the employer filed an Application for Hearing on April 23, 2010, seeking termination of the outstanding award. The employer alleged that, on March 29, 2010, the claimant refused proffered selective employment within her capacity. The employer relied upon the March 23, 2010 report of Dr. Anne Truong, rehabilitation specialist, advising that, "[c]onsidering that this is her Worker's Comp related injury, I would release her back to work at sedentary duty for 20 hours a week at this point. A prescription is written. She is to return to work on March 29, 2010." The employer enclosed a letter written by Betsy Hamlin on April 22, 2010. Ms. Hamlin advised that:

> [The employer] has sedentary work available for [the claimant] beginning 3/29/2010 but she has refused to return to work. The sedentary work would pay the Claimant's pre-injury wages.
>
> I received a voicemail message from [the claimant] 3/26/10 stating that she would not return to work because she was appealing Dr. Truong's decision to allow her to return to work.

At the hearing, Holly Payne testified that she worked as a nurse manager for the employer and supervised the claimant. Ms. Payne stated that the claimant did not return to work after the accident. Ms. Payne stated that, on March 25, 2011 around 11:00 a.m., she telephoned the claimant and offered her a position as a secretary. Ms. Payne described that the job required the claimant to "be responsible for order entry and answering phones." (Tr. at 10). Ms. Payne left the claimant a voicemail message regarding this offer and did not directly speak to her. Ms. Payne stated that she explained on the voicemail message that "we had a nurse leaving the secretarial position and that I needed her in that position and it would be night shift. . . . I said I was going to [be] flexible because it's a 12 hour shift and the work release was only for 20 hours so I was going to split it up." (Tr. at 11).

Ms. Payne denied that the position was physically demanding and stated that it required sitting in a chair, answering telephones, entering information into a computer, walking ten feet to the fax machine and looking at monitors. Ms. Payne testified that she asked the claimant to return her telephone call so she could place her on the schedule. She could not place an individual on the schedule without a confirmed commitment to work the shift. Ms. Payne did not give the claimant a time and date to report to work.

Ms. Payne understood from Betsy Hamlin that the claimant should work sedentary work, and she asserted that the offered position was consistent with those requirements. Ms. Payne said

that the job pay equaled a nurse's pay rate. Ms. Payne denied that the claimant returned her voicemail message. Ms. Payne did not send a letter to the claimant about the job nor did she present the claimant with a detailed description of the physical requirements of the job. Ms. Payne was unaware of any physical problems or limitations that the claimant had prior to the injury. Ms. Payne did not submit the job description to a physician for approval. Ms. Payne agreed that the claimant never told her that she was refusing the position because the claimant never responded.

Betsy Hamlin testified that she worked as a registered nurse for the employer concerning its workers' compensation employees. Ms. Hamlin stated that she began working with the claimant the day after her accident.

Ms. Hamlin said that she offered a position to the claimant to return to work for the employer. Ms. Hamlin explained that, on March 24, 2010, she received a fax from Dr. Truong releasing the claimant to sedentary work for 20 hours per week for four weeks. Ms. Hamlin stated that she spoke with Ms. Payne to verify the availability of sedentary work and then telephoned the claimant. Ms. Hamlin left the claimant a voicemail message to please telephone her "because she was to return back to work on March 29th 2010." (Tr. at 29). Ms. Hamlin said that she informed the claimant in the message that sedentary work was available, and that she was scheduled to work on March 29, 2010. Ms. Hamlin testified that, on March 26, 2010, the claimant left her a voicemail message advising that "she refused to go back to work because she was going to appeal Dr. Truong's decision." (Tr. at 30). Ms. Hamlin interpreted this statement to mean that the claimant would not return to work and was going to discuss her inability to return with Dr. Truong.

Ms. Hamlin telephoned the claimant several times thereafter to speak with her. Ms. Hamlin spoke with the claimant on April 12, 2010, and the claimant conveyed that she had a pre-existing

lumbar injury and could not sit for prolonged periods. Ms. Hamlin replied that the employer would accommodate any modified duty. Ms. Hamlin agreed that Dr. Truong did not review the physical requirements of the offered position; however, she asserted that, "I received notes from Dr. Truong saying sedentary work . . . We have a book that meets, that we determine the physical demands of the job." (Tr. at 37). Ms. Hamlin asserted that, in her profession as a health and wellness nurse, she could determine whether a job met sedentary requirements.

Angelique Quick testified to working for Genex as a nurse case manager and being assigned to the claimant's case. Ms. Quick stated that she attended the claimant's March 23, 2010 appointment with Dr. Truong. Ms. Quick said that, on May 10, 2010, the claimant informed her that she was terminated and could not speak with Dr. Truong. Ms. Quick said that, after the claimant saw the doctor, she stated that she had not improved and could not return to work as a result of a prior issue with giving birth to her son.

During cross-examination, Ms. Quick confirmed that she spoke on the telephone with Dr. Truong without the claimant present. Ms. Quick stated that Dr. Truong asked her to approve her plan of care and recommendations. Ms. Quick obtained approval.

The claimant testified that on November 8, 2009, her chair broke, and she fell forwards into her work station and then backwards to the ground. She described suffering injuries to the left occipital region, back of the head, neck, ribs, right arm and right SI joint.

The claimant stated that after her first evaluation Dr. Truong released her to sedentary work. The claimant responded that she could not perform sedentary work as a result of lumbar injuries sustained in 2002 while giving birth.

The claimant agreed that she attempted to remove Ms. Quick from her case. She said that she informed Dr. Truong that she did not want Ms. Quick's involvement, and Dr. Truong responded that Ms. Quick paid the bills and had to be involved. The claimant again informed Dr. Truong of her inability to perform sedentary employment owing to her lumbar condition. The claimant asserted that Dr. Truong and Ms. Quick made decisions about her health care, such as deciding that a functional capacity evaluation was unnecessary.

The claimant denied receiving Ms. Hamlin's message of March 29, 2010. She stated that Ms. Hamlin spoke with her about a light-duty job after April 16, 2010. Then, on April 28, 2010, the claimant received a letter indicating that she was no longer employed by the employer. The claimant denied knowingly quitting her employment. She denied that the employer gave her a date and time to report for work. She disputed that a physician approved a position for her, or that she discussed a job with the employer with her doctors. The claimant denied receiving a letter from the employer about a specific job. The claimant disputed that any representative of the employer asked her about performing the secretary position. The claimant denied having the capability of performing the secretary position because of her headaches and the lifting requirements.

The claimant wrote a letter to the Commission on April 28, 2010. She described that she could not perform a sedentary job as a result of her pre-existing lumbar problems and residuals from her work-related accident. She wrote that she was "pulling my documentation from prior physicians 2002 to give evidence of the reason of refusal of a sedentary position." The claimant noted that Dr. Truong wrote a note and "[i]t was not any specific position for [the employer]." (Tr. at 129). The claimant acknowledged talking with the claims adjuster, Mellissa Beasley, and Dr. Truong that

she could not work sedentary. She asserted that "I told [Ms. Hamlin] also that I was not going to take a sedentary offer."

The pertinent medical record reflects that Dr. Truong evaluated the claimant on March 23, 2010 for post-traumatic headache and occipital neuralgia. Dr. Truong's diagnoses included "musculoskeletal dysfunction of the head and shoulder complex with related tension headache" resulting from the work-related injury. Dr. Truong concluded that, "[c]onsidering that this is her Worker's Comp related injury, I would release her back to work at sedentary duty for 20 hours a week at this point. . . . She is to return to work on March 29, 2010." Dr. Truong issued a similar disability slip.

Dr. Truong administered trigger point injections on April 12, 2010, April 19, 2010 and May 3, 2010.

On May 10, 2010, Dr. Truong administered the claimant's fourth trigger point injection. The claimant reported persistent headache and neck pain. Dr. Truong concluded that the claimant had reached maximum medical improvement. Dr. Truong informed the claimant that she could return to working as a nurse, 30 to 40 hours per week, effective May 17, 2010. The claimant denied that she could return to work. Dr. Truong issued a disability slip advising that the claimant could "[r]eturn to full duty as a nurse" fulfilling 36 to 40 hours per week effective May 17, 2010.

The claimant sought evaluation from Fredericksburg Orthopaedic Associates on June 2, 2010. Certified Physician's Assistant, Heather Brown, evaluated the claimant's complaints of chronic headaches, ringing in her ear, chronic paracervical pain, vertigo and insomnia resulting from the occupational accident. PA-C Brown concluded that the claimant suffered cervical pain status-post whiplash trauma. A cervical MRI scan was prescribed for the chronic pain and it was

interpreted to be normal. Dr. Robert Squillante, orthopedist, completed a functional capacities evaluation on June 3, 2010 and restricted the claimant to sedentary duty. The claimant returned to PA-C Brown on June 18, 2010 with ongoing symptoms. PA-C Brown concluded that the claimant suffered a head injury, whiplash and potential complex regional pain syndrome. Work restrictions were continued on this date and on August 31, 2010. It appears that the diagnosis on the work slips was a cervical spine whiplash with chronic pain. PA-C Brown extended the work restrictions in September 2010.

Dr. Holly Hensley, neurologist, consulted with the claimant regarding her ongoing head pain.[3] Dr. Hensley noted that the claimant had suffered symptoms for approximately 10 months since the accident of November 2009. Dr. Hensley restricted the claimant from activities that caused worsening of her pain, such as lifting over 20 pounds. Dr. Hensley predicted that, after injections, the claimant could return to full capacity.

Dr. Truong issued a letter to defense counsel on October 27, 2010. She described her opinion that the claimant could return to sedentary work effective March 29, 2010 and then full duty on May 17, 2010. Dr. Truong denied having a relationship with Ms. Quick beyond the facts that Ms. Quick was the case manager and Dr. Truong was the treating physician.

Dr. Michael B. O'Brien performed an independent medical evaluation of the claimant on October 20, 2010. The claimant reported suffering ongoing post-traumatic headaches. Dr. O'Brien found no orthopedic problem and concluded that the claimant sustained no significant orthopedic injury as a result of the occupational accident.

[3] This report was undated but the claimant testified that the evaluation occurred in September 2010.

Dr. Truong testified by deposition take on January 26, 2011. Dr. Truong stated that she talked with the case manager, Ms. Quick, during the claimant's first and last visits. She said that the claimant was present for the conversations. Dr. Truong stated that she evaluated the claimant on May 10, 2010 and administered four trigger point injections. She said that the claimant reported persistent headache and neck pain. Dr. Truong understood that at the last visit the claimant did not want Ms. Quick to be present in the room, and then she changed her mind.

Dr. Truong asserted that she decided the claimant's work capacity status and that she had reached maximum medical improvement. Dr. Truong denied that she released the claimant to work pursuant to the insurer's desire. Dr. Truong agreed that she did not review a written job description of the claimant's pre-injury employment as an ICU nurse. She acknowledged that she did not discuss the requirements of the pre-injury job with the claimant. Dr. Truong understood that the claimant disagreed that she could return to work. Dr. Truong explained to the claimant that she could return "[b]ecause I didn't see any contraindications as to why she couldn't." (Dep. at 25). Dr. Truong knew that the claimant had returned to her other job as a cafeteria helper at her children's school. Dr. Truong stated that she wanted to ascertain how well the claimant returned to work, and then proceed from that determination. She did not know whether or not the claimant would be able to maintain her regular duty. Dr. Truong made no comment upon the claimant's current ability to perform work because she had not evaluated her.

During the deposition, Dr. Truong agreed that, on October 27, 2010, defense counsel sent her a letter. The letter referred to statements made by the claimant on September 7, 2010 during her deposition regarding Dr. Truong's treatment of her and interactions with Ms. Quick. Dr. Truong responded with her letter of October 27, 2010.

The Deputy Commissioner held that the employer offered the claimant a *bona fide* position within her capacity and that the claimant unjustifiably refused to return to acceptable light duty on March 29, 2010. He found that the claimant had not been released to return to all duties of her pre-injury employment. Lastly, the Deputy Commissioner found that the claimant adequately cured her refusal by reasonably marketing her residual work capacity after May 19, 2010 and awarded wage loss benefits.

On appeal, the claimant extensively argues that the employer did not offer a *bona fide* position of employment to which she could refuse. We disagree.

Virginia Code Section 65.2-510 provides:

> A. If an injured employee refuses employment procured for him suitable to his capacity, he shall only be entitled to the benefits provided for in §§ 65.2-503 and 65.2-603, . . . during the continuance of such refusal, unless in the opinion of the Commission such refusal was justified.
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> . . .
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> C. A cure of unjustified refusal pursuant to subsection A may not be established if the unjustified refusal lasts more than six months from the last day for which compensation was paid before suspension pursuant to this section.

To support a finding of refusal of selective employment, the evidence must establish that there was a *bona fide* job offer suitable to the employee's capacity, procured by the employer for the employee, and an unjustified refusal by the employee to accept the job. Atlas Plumbing & Mech., Inc. v. Lang, 38 Va. App. 509, 512, 566 S.E.2d 871, 872-73 (2002). To constitute a *bona fide* offer, the selective employment must be upon terms and conditions sufficiently specific to permit informed consideration by an employee, and comprised of duties consistent with

employee's remaining work capacity. Hillcrest Manor Nursing Home v. Underwood, 35 Va. App. 31, 37, 542 S.E.2d 785, 788 (2001) (citations omitted).

The record reflects that the employer telephoned the claimant, through Ms. Payne and Ms. Hamlin, and offered her a sedentary position matching the restrictions issued by her treating physician, Dr. Truong. Contrary to the claimant's representation, we believe she knew about the offer and refused it by at least March 26, 2010 when she left a voicemail message with Ms. Hamlin. We are hard-pressed to find that the job offer was somehow insufficient when the claimant illustrated that she knew enough information to refuse it. Furthermore, the claimant initially testified that she did not want the job because of pre-existing and unrelated problems. She did not state that no offer occurred, or that she somehow did not understand the requirements of the position. Finally, the Deputy Commissioner found, upon conflicting witness testimony, that the claimant did in fact receive the light duty job offer from the employer and that the offer was *bona fide*. The Commission typically gives great deference to factual findings by a deputy commissioner which are arrived at after evaluating contradictory testimony from the witnesses who appeared before him. By being able to observe the witnesses as their testimony was provided, the Deputy Commissioner here was in the best position to evaluate the credibility of such testimony, and we will follow our usual practice and defer to his determinations.

Moreover, we are not persuaded by the claimant's accusations that Dr. Truong was improperly influenced by Ms. Quick, or otherwise, in her decision-making. In fact, Dr. Truong specifically testified that she herself determined the claimant's work capacity. Nonetheless, as found by the Deputy Commissioner, the record did not prove that the claimant was fully capable of performing her pre-injury duties or a regular duty job in general.

Dr. Truong agreed during her deposition that the release to all employment was a "trial" release in that she could not predict whether the claimant would be able to perform at full capacity. Dr. Truong explained that she issued the release on the basis that there were no contraindications to a return to work; however, she similarly agreed that, potentially, the claimant would not be able to fulfill her regular job duties. We are simply not persuaded that Dr. Truong was fully aware of the nature and functional requirements of the claimant's pre-injury employment. See, i.e., Morris v. Badger Powhatan/Figgie Int'l., Inc., 3 Va. App. 276, 348 S.E.2d 876 (1986).

Additionally, other physicians concluded that the claimant could work, but with modifications. Dr. Squillante and his associate restricted the claimant's work capacity from June 2010 through September 2010. However, these restrictions resulted from a diagnosis of a cervical injury and whiplash. The claimant's compensable injury was post-concussion headaches. Accordingly, the restrictions issued by Dr. Squillante have no bearing on this case. In September 2010, Dr. Hensley suggested modified duty, and she correlated the claimant's problems to the occupational headaches. Dr. Hensley noted that the claimant should be able to return to full duty following injections. The record does not indicate that the claimant underwent such injections. Additionally, there is no medical record after September 2010 restricting the claimant's work capacity and causally relating the disability to the compensable injury, i.e., post-concussion headache. Hence, we find that the claimant proved causally-related disability for a reasonable period of time (approximately six weeks) following Dr. Truong's insufficient full-duty release and then for another six weeks in September 2010 following the evaluation by Dr. Hensley. Otherwise, the medical record does not support causally-related disability. See Reserve Life Ins. Co. v. Hosey,

208 Va. 568, 159 S.E.2d 633 (1968) (To establish the requisite causal connection, the Commission looks to the medical evidence.).

Next we consider whether the claimant effectively cured any refusal. The employer asserts that the selective employment would have fully replaced the claimant's average weekly wage, and thus she cannot cure a refusal with marketing. We agree.

A claimant cannot cure a refusal of selective employment by simply marketing her residual work capacity. Niday v. Hanover Direct, Inc., VWC File No. 196-80-52 (June 4, 2002). Instead, the partially disabled employee who refused selective employment must locate alternative employment. Then, if the employee cures the refusal by finding employment, the temporary partial disability rate is based upon what she would have earned at the job she refused. However, the employer has no liability under the partial cure provisions of Code Section 65.2-501(B) when it offered the injured employee selective employment at a wage greater or equal to her pre-injury average weekly wage. Adams v. Lakewood Manor, VWC File No. 241-27-01 (Jan. 13, 2010).

Therefore, in this case, the claimant would not be entitled to wage loss benefits during the period that she merely marketed. Moreover, the employer offered the claimant selective employment at a wage greater or equal to her pre-injury average weekly wage. The parties previously agreed that the claimant's pre-injury average weekly wage was $733.63, and there was no evidence that she worked overtime or greater than 40 hours per week. Ms. Payne and Ms. Hamlin similarly testified that before the accident the claimant worked the night shift, approximately one to two shifts per week. The claimant testified that she worked at least two 12-hour shifts per week and "almost full-time" when her children were not attending school. The offered light-duty position was initially a 20-hour week for four weeks and then a 40-hour week.

She would earn the same as her pre-injury hourly rate as a nurse.[4] Even presuming the highest number of hours worked per week, i.e., that the claimant worked 40 hours per week every week, the employer offered her a 40-hour week at her pre-injury hourly rate. Although the claimant eventually located alternative employment, she had refused the offered selective employment in which she would have earned, at a minimum, an amount equal to her pre-injury earnings. Accordingly, the claimant is not entitled to temporary partial benefits.

Lastly, we address the Deputy Commissioner's denial of the claimant's request for rebuttal when she learned at Dr. Truong's deposition of *ex parte* evidence never previously produced. The claimant argues that Dr. Truong reviewed and relied upon *ex parte* statements attributed to the claimant by defense counsel. We are perplexed by the claimant's assertions. The lower determinations were based upon Dr. Truong's conclusions in the spring of 2010. There was absolutely no evidence that Dr. Truong's opinion at that time period was influenced by a letter written months later in October 2010. Furthermore, Dr. Truong's responses did not indicate any type of improper influence. She simply detailed her previous reports and maintained that she had a professional relationship with Ms. Quick. We fully agree that, when a medical provider receives a subpoena requesting that all medical records be supplied, the request must be honored. However, we do not find that in this case there was any improper subterfuge to harm or sabotage the claimant's case as opposed to a mere oversight. Additionally, as held by the Deputy Commissioner, "the deposition was taken at the behest of the claimant, and Dr. Truong's presence in the case has

[4] Dr. Truong released the claimant for a 20-hour week for four weeks and then the work hours could increase to 40 per week.

been known since, at least, the employer's filing in April 2010." (See D.C. Tabb's 1/27/11 letter.) The Deputy Commissioner did not err in denying the rebuttal requested by the claimant.

For these reasons, we REVERSE any findings rendered regarding treatment with Dr. Pcsolyar and the award of wage loss benefits and the remainder of the Opinion below is AFFIRMED. We VACATE the lower Award and enter the following MODIFIED Award:

AWARD

Compensation benefits, pursuant to the March 12, 2010 Award Order, are hereby SUSPENDED effective April 23, 2010, the last day for which compensation was paid.

Medical benefits shall continue pursuant to Virginia Code Section 65.2-603 for as long as necessary for the November 8, 2009 post-concussion headache.

We award an attorney's fee of $500 to be paid to Wesley G. Marshall, Esquire, for legal services rendered the claimant.

This matter is hereby removed from the Review docket.

DIAMOND, COMMISSIONER, Dissenting in Part:

I respectfully dissent.

First, the claimant did not refuse without justification a bona fide job offer. To support a finding of refusal of selective employment "the record must disclose (1) a *bona fide* job offer suitable to the employee's capacity; (2) [a job offer that was] procured for the employee by the employer; and (3) an unjustified refusal by the employee to accept the job." Atlas Plumbing and Mechanical, Inc. v. Lang, 38 Va. App. 509, 512, 566 S.E.2d 871, 872-73 (2002) (*quoting* James v. Capitol Steel Constr. Co., 8 Va. App. 512, 515, 382 S.E.2d 487, 489 (1989) (alteration in original)).

"[E]mployment 'suitable to [the employee's] capacity' means employment within the employee's residual capacity resulting from the industrial accident." American Furniture Co. v. Doane, 230 Va. 39, 42, 334 S.E.2d 548, 550 (1985) (alteration in original). The employer must also show that the "tender of limited employment" is "based upon informed medical opinion." Talley v. Goodwin Brothers Lumber Company, 224 Va. 48, 52, 294 S.E.2d 818, 820 (1982).

In Clements v. Riverside Walter Reed Hospital, 40 Va. App. 214, 224, 578 S.E.2d 814, 819 (2003), the court reiterated the standard to be used in determining whether a refusal was justified as follows:

> To support a finding of justification to refuse suitable selective employment, "the reasons advanced must be such that a reasonable person desirous of employment would have refused the offered work." Furthermore, the determination of justification to refuse employment involves "a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable to the prospective employee." Justification to refuse an offer of selective employment "may arise from factors totally independent of those criteria used to determine whether a job is suitable to a particular employee." (*quoting* Johnson v. Virginia Employment Comm'n, 8 Va. App. 441, 447, 452, 382 S.E.2d 476, 478 (1989)).

Here, the claimant was told that the employer would be flexible, and the testimony shows that the employer offered her a job as a secretary with no actual reporting date and with no explanation of the job duties. The treating physician did not approve the job and had no information about the claimant's job duties. The claimant was not told what the rate of pay would be. She was released to work twenty hours a week for four weeks and Payne stated that she planned to break up the 12-hour shifts, but she did not explain what the schedule would be. This cannot be characterized as a specific job offer within the claimant's restrictions.

Furthermore, the employer was aware that the claimant was disputing the release and that she was not comfortable sitting for long periods of time. After that point, Dr. Truong continued to

treat the claimant. Neither the Deputy Commissioner nor the Majority have addressed whether the claimant was justified in not accepting the offered sedentary position even if we accept that the job met the requirements of specificity. Under the circumstances, she had good reason not to accept the job since she could not work consistently in a sitting position. The March 1, 2010, medical record from Neurology Associates of Fredericksburg confirms this concern, and Dr. Truong's initial evaluation also confirms the low back dysfunction. In addition, the claimant was working at Fredericksburg Christian School and is now working one day a week at Belvidere Plantation, showing that she was not opposed to returning to work. Those jobs demonstrate that she was willing to work, just not in a desk job. The defendants, therefore, did not meet their burden of proof.

Second, assuming the claimant refused the job without justification, she cured her refusal by (1) marketing, (2) by working for another employer at the time of the alleged job offer, and (3) by finding two jobs within her work capacity.

Virginia Code § 65.2-510(A) provides that "[i]f an injured employee refuses employment procured for him suitable to his capacity, he shall only be entitled to the benefits provided for in § 65.2-503 (permanent loss benefits) and § 65.2-603, excluding vocational rehabilitation services provided for in subdivision A 3 of § 65.2-603, during the continuation of such refusal, unless in the opinion of the Commission such refusal was justified."

Virginia Code § 65.2-510(B) provides that "**[i]f** 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." (emphasis added).

Let us start with her cure by marketing. The statute implies that the injured employee can cure by other means other than finding a job with another employer or the statute would not use the word "or." Instead it would have said, "when." The case law does not say that an injured employee cannot cure through marketing under no circumstances. The opposite is true.

The Majority cites Niday v. Hanover Direct, Inc., VWC File No. 196-80-52 (June 4, 2002). That case, however, involved an injured employee who was terminated for justified cause, and in that instance, based upon the current case law, the employee cannot cure by marketing and cannot cure by finding another job even if that job pays the same. See Montalbano v. Richmond Ford, LLC, 57 Va. App. 235, 701 S.E.2d 72 (2010) (termination for justified cause cannot be cured). An injured employee who actually refuses that same selective employment position does not permanently forfeit temporary partial incapacity benefits. This distinction is illogical, but it is not directly an issue in this case because the claimant here was not terminated for cause as defined in C & P Telephone Company v. Murphy, 12 Va. App. 633, 406 S.E.2d 190 (1991), *aff'd en banc*, 13 Va. App. 304, 411 S.E.2d 444 (1991). Instead, she is found to have refused selective employment.

To avoid permanent forfeiture of temporary partial incapacity benefits the injured employee must cure that refusal within six months. The question is whether she can cure her refusal by only marketing. Based upon the plain language of the statute and the case law, she can cure her refusal by marketing. The statute, however, does not mention the word "marketing" and the requirement that a partially disabled employee look for work is a judicially-created concept. In Virginia Wayside Furniture, Inc. v. Burnette, 17 Va. App. 74, 78, 435 S.E.2d 156, 159 (1993) (*quoting* National Linen

Serv. v. McGuinn, 8 Va. App. 269, 272, 380 S.E.2d 31, 33 (1989), the Court of Appeals affirmed this concept by explaining that "an employee who has reached maximum medical improvement and remains partially disabled must make a reasonable effort to market his remaining capacity to work in order to continue receiving workers' compensation benefits."

In Burnette, the Court of Appeals determined that one way an employee can cure his refusal is by finding a job. The Court also stated that even if the employee does not offer to accept the job he refused, there are other means to cure:

> The legislative intent of Code § 65.2-510 is to encourage injured employees to seek selective employment rather than to remain unemployed unless the employer finds such employment for them. (citations omitted) . . . [I]t logically follows that **if disability benefits are suspended because an employee unjustifiably refuses selective employment offered by the employer**, the employee, nevertheless, will be entitled to a **resumption of disability benefits** once he has procured comparable employment suitable for his disability **or has made a good faith effort to obtain suitable employment.** (Emphasis added).

Id. at 79, 435 S.E.2d at 159.

That opinion says that the injured employee can cure through marketing. The Majority has announced an opposite holding.

Subsequent to the holding in Burnette, the legislature amended Code § 65.2-510(C), reducing the amount of time a partially disabled employee has to effectuate a cure from two years to six months. It also clarified that benefits would be based on the refused job in cases where the injured worker finds a lower paying light duty job.

Years later, in Clements v. Riverside Walter Reed Hospital, 40 Va. App. 214, 226, 578 S.E.2d 814, 819 (2003), the Court explained:

> If claimant unjustifiably refused the selective employment offered her, her disability benefits do not cease permanently. If she can cure her refusal, then she is

> entitled to reinstatement of those benefits. (citation omitted); Food Lion, Inc. v. Newsome, 30 Va. App. 21, 25, 515 S.E.2d 317, 319 (1999). She can also partially cure her refusal. See Code § 65.2-510(B); Hillcrest Manor Nursing Home, 35 Va. App. at 37, 542 S.E.2d at 788.
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> A claimant can cure an unjustified refusal in several ways. She can continue working for the employer. *See* id. at 39, 542 S.E.2d at 789 ("Likewise, continued part-time, selective employment, with [employer], following the full-time offer, constituted a partial cure of her prior unjustified refusal of such employment . . . ."). **Reasonable efforts to market an employee's residual capacity can also cure an unjustified refusal of selective employment**. *Cf.* Greif Cos. v. Sipe, 16 Va. App. 709, 715, 434 S.E.2d 314, 318, 10 Va. Law Rep. 83 (1993) ("A disabled employee with residual marketable capacity who claims benefits . . . must prove that he or she has made a reasonable attempt to procure work . . . ."); Nat'l Linen Service v. McGuinn, 8 Va. App. 267, 269, 380 S.E.2d 31, 33, 5 Va. Law Rep. 2607 (1989) ("Code § 65.1-63 [recodified at Code § 65.2-510] . . . clearly requires a disabled employee to make a 'reasonable effort' to market his remaining work capacity in order to receive continued workers' compensation benefits."). **Finding other, comparable employment can cure a refusal as well.** *See* Virginia Wayside Furniture, Inc., 17 Va. App. at 76, 435 S.E.2d at 157 ("[A] partially disabled employee can cure an unjustified refusal of selective employment . . . by obtaining other comparable employment."); Food Lion, Inc., 30 Va. App. at 25-26, 515 S.E.2d at 319 ("Code § 65.2-510 allows employees to cure an unjustified refusal of selective employment by obtaining equivalent selective employment."). (emphasis added)

This explanation shows that there are many ways to cure a refusal of selective employment: adequately market, accept the refused job, find a job within one's capacity, or work for the employer. The employee can find employment to show that he or she reasonably marketed his or her residual work capacity, but the employee is not required to find employment as the only means to cure a refusal of selective employment. In fact, the procurement of a job is not necessarily a cure of a refusal of selective employment. Clements, 410 Va. App. at 226, 578 S.E.2d at 820 (2003) ("The mere fact that the employee obtained a new job, where the pay is substantially less than that received at the old job, is, standing alone, insufficient proof of making a reasonable effort to market one's remaining work capacity.").

Following the Clements' decision, the Commission in Robertson v. Sun States Maintenance Corp., VWC File No. 210-95-35 (September 12, 2003), wrote:

> 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.** (Emphasis added).

In Robertson, the employee was terminated for allegedly making threatening remarks to his physical therapist. He thereafter looked for a job. The Commission ruled that the employee could cure his refusal by marketing but the cure would not necessarily result in the award of disability benefits. We found that "benefits should be based upon the wages in the job that effectively was refused." I do not believe, however, that the Commission would reach the same conclusion today based upon the holding in the matter now before us. Nevertheless, I assert that in this matter the claimant is entitled to total incapacity benefits during the period that she adequately marketed, May 19, 2010 through August 19, 2010.

Next, let us look at her other employment and compare it to the offered position and pre-injury wages. The evidence in this case is that the claimant was going to earn the same **rate** of pay in the new secretarial position. The Majority opinion errs when it finds that she was offered selective employment at a wage greater or equal to her pre-injury average weekly wage. Those are not the facts in this matter. For 20 hours of work she would earn less than her pre-injury wages for 24 hours of work. If she worked more than those hours, then it is not in the record. It is simply not the case that the employer offered the claimant a job for 40 hours a week even if the treating physician later increased the work hours.

She cured her alleged refusal by obtaining work at Belvidere Plantation and at Fredericksburg Christian School. She continued to work at the school during the period of the alleged job offer. The pay records show that she earned $244.80 per week from August 20, 2010 through September 12, 2010, and earned $295.55 per week beginning September 13, 2010, and therefore she is entitled to temporary partial disability benefits for the difference.

That brings us back to the issue in this case of the offered job. If the new employment pays less than the offered employment, then the employer is required to pay only the difference. I do agree that if the employer offered employment at a wage equal to or greater than the pre-injury average weekly wage then there is no liability under Code § 65.2-510(B). In Dowden v. Hercules, 51 Va. App. 185, 193, 655 S.E.2d 755, 759, n. 4 (2008), a divided Court of Appeals noted that "an employer that offers an injured employee selective employment at a wage equal to or greater than the employee's pre-injury wages would have no liability under the partial cure provisions of Code § 65.2-510(B)." In the Dowden decision, the Court of Appeals explained the difference between a partial cure and a total cure:

> A full cure occurs when the injured employee procures "other selective employment at a wage equal to or greater than" the wage of the refused selective employment.

Id. at 192, 758.

> A partial cure occurs when the injured employee procures other selective employment "'at a wage less than that originally offered'" by the employer. (citation omitted)

Id. at 192, 759.

Here, if the defendants had presented the rate of pay, we could have divided that number into the pre-injury average weekly wage. This number is crucial to determining how much she

earned per hour and how much she was going to earn per hour in the new secretarial position. The evidence was that she would earn "the same rate of pay as a nurse" does not disclose how much the claimant "would have earned by accepting the original proffered light duty employment." Without such specific evidence, the Deputy Commissioner correctly awarded temporary partial disability benefits based upon Code § 65.2-502. Again, this lack of specificity shows that there was not a bona fide job offer, and the defendants should not be rewarded for failing to produce sufficient evidence and thereby allow the Commission to infer that there is no difference in the wages between the original proffered job and the pre-injury job.

The claimant here has cured her refusal of selective employment by marketing, by working at the time she was released to sedentary work, by obtaining other work which pays less than her pre-injury wages, and by continuing to market her residual work capacity. Thus, the claimant is entitled to ongoing temporary partial disability benefits as well as the short period of total incapacity benefits.

APPEAL

You may appeal this decision to the Virginia Court of Appeals by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Virginia Court of Appeals within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Virginia Court of Appeals.

cc: Kelley Absher
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