ROLE OF ADJUSTORS, NURSE CASE MANAGERS, VOCATIONAL REHABILITATION COUNSELORS PRESENTATION

BY

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WORKERS' COMPENSATION

- Medicare Secondary Payer Act ("MSP")
- Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA")
- Workers' Compensation Medicare Set Asides ("WCMSAs")
- HIPAA Compliance

EDUCATION

- Wake Forest University School of Law, J.D. 2007
- Virginia Commonwealth University, B.S. Psychology and Sociology, 2002

PUBLICATIONS & PRESENTATIONS

- CLE Instructor
  - Advanced Workers' Compensation
  - Benefits and Defenses Available Under the Virginia Workers' Compensation Act
  - Independent Contractors, Casual Employees, and Volunteers
- Medicare Set Asides and sCHIP: Navigating the Red Tape
- Brain Injuries in Workers' Compensation Cases
- Overlooked Defenses
- Understanding Virginia's "Arising Out Of" Requirement

PROFESSIONAL AFFILIATIONS

- Virginia Association of Defense Attorneys
- Virginia Workers' Compensation American Inn of Court, Barrister

COMMUNITY

- Board Member, Service Kids in Progress, 2012 - 2016
- Past Co-Chair, Virginia State Bar Young Lawyers Conference, Emergency Legal Services Committee

Jessica defends employers and carriers at the trial and appellate levels. Working with insurance carriers, third-party administrators, and self-insureds, she has represented employers in a broad range of industries including construction, manufacturing, transportation, hospitality, retail and healthcare.

Jessica advises clients on their duties under the Medicare Secondary Payer Act ("MSP") and the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA"). She also counsels clients on the submission of Workers' Compensation Medicare Set Asides ("WCMSAs"). Jessica has years of experience submitting MMSEA queries and quarterly reports. She has resolved Medicare and Medicaid liens, and reviewed documents and policies for HIPAA compliance.

Jessica worked on some of the largest settlements in the country, including the historic NFL Concussion Settlement Program, the BP Oil Spill settlement, and the Reglan/MCP Settlement Program. Her background on these mass claims resolution programs gives her unique insight into the work of claims adjusters.

ADMISSIONS

- Virginia
- United States District Court for the Eastern District of Virginia
- United States District Court for the Western District of Virginia

RECOGNITIONS

- Super Lawyers, Virginia Rising Star, Workers' Compensation, 2009 - 2013

MH | McCandlish Holton Attorneys at Law

Joel W Young

Joel W. Young, Esquire is a Director with Reinhardt|Harper|Davis, PLC and specializes in workers' compensation cases in the Fredericksburg office of the firm. He is a graduate of the University of Virginia, and the Marshall-Wythe School of Law at William & Mary. He is chair-elect of the VTLA Workers' Compensation Section. An active member of his community, he chairs the Fredericksburg Area Bar Association's Jazz4Justice committee, serves as Vice President of the Board of Legal Aid Works, is a member of the Lewis F. Powell, Jr., Inn of Court, and the Virginia Workers' Compensation Inn of Court. In addition, he is on the Board of the Workers' Injury Law and Advocacy Group (WILG). He is also active in his church, is a lifelong soccer enthusiast, and enjoys traveling with his family.

Role of Adjustors, Nurse, Case Managers, Vocational Rehabilitation Counselors

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Virginia Workers' Compensation Commission
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Phone: 1-877-664-2566
Website: http://www.workcomp.virginia.gov
WebFile: https://webfile.workcomp.virginia.gov

Vocational Rehabilitation Guidelines

Effective October 1, 2015

The Virginia Workers' Compensation Commission has issued these guidelines for vocational rehabilitation with the hope that the guidelines will provide better understanding between the parties, facilitate appropriate vocational rehabilitation, and eliminate needless conflict and litigation.

Neither the Virginia Workers' Compensation Act nor the regulations of the Commission have any provisions regarding the licensure or certification of rehabilitation counselors. Therefore, the Commission does no regulation on this point. Reference should be made to the provisions of Title 54.1 referenced in Section 65.2-603(A)(3) of the Workers' Compensation Act.

I. THE VOCATIONAL REHABILITATION PROCESS

Vocational rehabilitation services may only be provided by rehabilitation providers certified in accordance with Va. Code § 54.1-3510 *et seq.* Certified Rehabilitation Providers must comply with the Regulations Governing the Certification of Rehabilitation Providers, 18 VAC 115-40-10 *et seq.*, Part V Standards of Practice, or by rehabilitation providers certified in accordance with the laws of the state where the vocational rehabilitation services are provided.

A. Vocational rehabilitation services, including vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education, and retraining, shall take into account the employee's pre-injury job and wage classification; age, aptitude and level of education; the likelihood of success in the new vocation; and the relative costs and benefits of such services. Retraining should be considered if job placement efforts are not successful, or the employee's transferable skills are not readily marketable.

B. The provider should not ask the employee to engage in job development, job placement or on-the-job training until he/she is medically released for work. However, the provider may require the employee to meet in order to assess the employee's potential for work, and to prepare résumés and to schedule other appropriate actions, such as attending job preparation training, in anticipation of employment.

C. The two goals of vocational rehabilitation are to restore the employee to gainful employment, and to relieve the employer's burden of future compensation. Rehabilitation providers should attempt to find employment within the employee's medical restrictions consistent with the employee's pre-injury position and salary level, and the provider should take into account such factors as distance, transportation costs, and actual anticipated earnings from the potential job, when considering such alternative employment.

D. It is the rehabilitation provider's responsibility to assess employment opportunities by direct contact with potential employers when possible or through research in the labor market as to how the job is commonly performed in the local economy. The assessment should determine whether a suitable position is presently available that is within the employee's restrictions and for which the employee is qualified. The provider shall not send the employee to apply or interview for positions not suitable for the employee with or without reasonable accommodation, but the provider may ask the employee to develop résumés and to attend job preparation training as well as job fairs. The provider may ask the employee to attend interviews for present employment opportunities where the treating physician anticipates that the employee will be released to such work within a reasonably brief period.

E. Telemarketing and commission sales positions are only appropriate job placement, when the employee has demonstrated aptitude or ability in this line of work. Interviews with sheltered workshops and selective employers who are subsidized by employers/carriers are inappropriate, if they do not provide the potential for legitimate rehabilitation, such as

learning work skills or restoring the employee to a productive place in the labor market.

F. It is the responsibility of the provider to assist the employee in all aspects of the vocational rehabilitation process such as appropriate presentation, interviewing skills, discussion of limitations with employers, and other employability factors. The employee will be counseled in accordance with the Standards of Practice for Certified Rehabilitation Providers, 18 VAC 115-40-40. Requiring employees to look in newspapers, contact a specific number of potential employers per week, check listings at the VEC, or register with agencies for short-term jobs does not constitute appropriate "vocational rehabilitation."

G. Rehabilitation providers may not advise the employee to withhold information about his/her injury or job capabilities during job interviews or on applications. However the employee may not discuss them in such a way as to sabotage the interview or application process. Any discussion should be limited to the question of whether the employee can perform the job(s) at issue with or without reasonable accommodation.

H. Employees are not required to give rehabilitation providers personal or financial information, such as number of children, spouse's employment, or credit history, unless such information relates to a bona fide occupational qualification for employment. An employee is required to disclose whether he/she is legally eligible for employment, including their Social Security number, has a valid driver's license, or has been convicted of a felony or a misdemeanor, and to provide his/her previous employment history.

II. MEETINGS BETWEEN EMPLOYEES AND PROVIDERS

A. Meetings should be held at reasonable times and places for both the employee and provider. Employees are not required to invite rehabilitation providers onto their property or into their homes. Also, just as the employee must cooperate with reasonable demands of the rehabilitation provider that are likely to return him/her to gainful employment, the provider must make

reasonable accommodation for the employee's personal life, such as medical conditions and transportation problems.

B. Routine telephone contact should be made between 9:00 a.m. and 6:00 p.m. No calls should be made before 7:00 a.m. or after 10:00 p.m. except in cases of emergency.

C. The provider should give the employee advance notice, in writing or by phone, of meetings between the rehabilitation provider and employee, and of employment interviews. A minimum of two calendar days' notice of any meeting or employment interview is suggested, except for exceptional situations.

D. Prior to being released to selective employment, the employee does not have to seek employment. However, the employee must meet with the provider for the purpose of a vocational assessment.

III. ROLE OF EMPLOYEE'S ATTORNEY

A. Employees have the right to have their attorney present at the initial rehabilitation meeting. However, an attorney may not delay such a meeting for more than *10 business days* after initial contact by the rehabilitation provider with the employee's attorney.

B. An employee may consult with his/her attorney at any time. Actions of the attorney will be imputed to the employee for the purposes of considering whether the employee is cooperating.

IV. MEDICAL ASPECTS OF VOCATIONAL REHABILITATION

A. As the vocational rehabilitation provider's role is limited to providing vocational rehabilitation, the provider is prohibited from medically managing the employee's treatment in any way, even if requested by the physician.

B. Monitoring treatment is not medical management. Determining return to work status is part of the rehabilitation process intended to enhance communication between all parties involved

in the rehabilitation process. With the consent of the physician, the provider may meet with the doctor outside of the employee's presence. The employee is not required to sign a consent granting the provider access to the physicians. If the physician does not wish to communicate with the provider, information will have to be obtained by other means provided or permitted by law.

C. The employee has the right to a private examination by and consultation with the medical provider without the presence of any certified rehabilitation provider and/or nurse or case manager.

D. In order to determine the work capacity of the employee, the provider may require the employee to submit to a functional evaluation, if approved and authorized by the employee's treating physician or an independent medical examiner.

V. TRANSPORTATION AND OTHER COSTS

A. The employee is entitled to reimbursement for expenses incurred in rehabilitation efforts. This includes mileage costs for trips to rehabilitation meetings, obtaining or returning applications, attending interviews, and other travel at the direction of the provider. Costs incurred for telephone calls, photocopying, postage, and obtaining DMV and other records are also reimbursable, if such are requested by the rehabilitation provider or a potential employer.

B. If the claimant does not have access to transportation, it is the responsibility of the employee to notify the vocational rehabilitation provider. The vocational rehabilitation provider should contact the carrier regarding the issue and make appropriate arrangements as directed/approved by the carrier to insure the employee's attendance at meetings and interviews. This may include the carrier forwarding mileage payments in advance or arranging appropriate alternative transportation. The employee must provide information explaining why transportation is/is not available.

Code of Virginia
Title 65.2. Workers' Compensation
Chapter 6. Notice of Accident; Filing Claims; Medical Attention and Examination

§ 65.2-603. Duty to furnish medical attention, etc., and vocational rehabilitation; effect of refusal of employee to accept

A. Pursuant to this section:

1. As long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention. Where such accident results in the amputation or loss of use of an arm, hand, leg, or foot or the enucleation of an eye or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic or orthotic appliances, as well as wheelchairs, walkers, canes, or crutches, proper fitting and maintenance thereof, and training in the use thereof, as the nature of the injury may require.

In awards entered for incapacity for work, under this title, upon determination by the treating physician and the Commission that the same is medically necessary, the Commission may:

a. Require that the employer either (i) furnish and maintain modifications to or equipment for the employee's automobile or (ii) if there is a loss of function to either or both feet, legs, hands, or arms and if the Commission determines that modifications to or equipment for the employee's automobile pursuant to clause (i) are not technically feasible, will not render the automobile operable by the employee, or will cost more than is available for such purpose after payment for any items provided under subdivision b, order that the balance of funds available under the aggregate cap of $42,000 be applied towards the purchase by the employee of a suitable automobile or to furnish or maintain modifications to such automobile; and

b. Require that the employer furnish and maintain bedside lifts, adjustable beds, and modification of the employee's principal home consisting of ramps, handrails, or any appliances prescribed by the treating physician and doorway alterations.

The aggregate cost of all such items and modifications required to be furnished pursuant to subdivisions a and b on account of any one accident shall not exceed $42,000.

The employee shall accept the attending physician, unless otherwise ordered by the Commission, and in addition, such surgical and hospital service and supplies as may be deemed necessary by the attending physician or the Commission.

2. The employer shall repair, if repairable, or replace dentures, artificial limbs, or other prosthetic or orthotic devices damaged in an accident otherwise compensable under workers' compensation, and furnish proper fitting thereof.

3. The employer shall also furnish or cause to be furnished, at the direction of the Commission, reasonable and necessary vocational rehabilitation services; however, the employer shall not be required to furnish, or cause to be furnished, services under this subdivision to any injured employee not eligible for lawful employment.

Vocational rehabilitation services may include vocational evaluation, counseling, job coaching,

job development, job placement, on-the-job training, education, and retraining. Those vocational rehabilitation services that involve the exercise of professional judgment as defined in § 54.1-3510 shall be provided by a certified rehabilitation provider pursuant to Article 2 (§ 54.1-3510 et seq.) of Chapter 35 of Title 54.1 or by a person licensed by the Boards of Counseling; Medicine; Nursing; Optometry; Psychology; or Social Work or, in accordance with subsection B of § 54.1-3513, by a person certified by the Commission on Rehabilitation Counselor Certification (CRCC) as a certified rehabilitation counselor (CRC) or a person certified by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists (CCWAVES) as a Certified Vocational Evaluation Specialist (CVE).

In the event a dispute arises, any party may request a hearing and seek the approval of the Commission for the proposed services. Such services shall take into account the employee's preinjury job and wage classifications; his age, aptitude, and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services.

B. The unjustified refusal of the employee to accept such medical service or vocational rehabilitation services when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Commission, the circumstances justified the refusal. In any such case the Commission may order a change in the medical or hospital service or vocational rehabilitation services.

C. If in an emergency or on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than provided by the employer is called to treat the injured employee, during such period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Commission.

D. As used in this section and in § 65.2-604, the terms "medical attention," "medical service," "medical care," and "medical report" shall be deemed to include chiropractic service or treatment and, where appropriate, a chiropractic treatment report.

E. Whenever an employer furnishes an employee the names of three physicians pursuant to this section, and the employer also assumes all or part of the cost of providing health care coverage for the employee as a self-insured or under a group health insurance policy, health services plan or health care plan, upon the request of an employee, the employer shall also inform the employee whether each physician named is eligible to receive payment under the employee's health care coverage provided by the employer.

F. If the injured employee has an injury which may be treated within the scope of practice for a chiropractor, then the employer or insurer may include chiropractors on the panel provided the injured employee.

Code 1950, § 65-85; 1952, c. 385; 1960, cc. 310, 444, 580; 1964, c. 366; 1966, c. 388; 1968, cc. 377, 660, § 65.1-88; 1970, c. 470; 1972, c. 229; 1973, c. 542; 1975, c. 280; 1980, c. 600; 1982, c. 585; 1983, c. 471; 1987, cc. 455, 475; 1989, c. 540; 1990, c. 789; 1991, cc. 275, 355, 376; 1994, c. 558; 1997, c. 839;1998, c. 65;1999, c. 780;2000, cc. 473, 1018;2004, c. 271;2011, c. 656;2017, c. 491.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 54.1. Professions and Occupations
Chapter 35. Professional Counseling

§ 54.1-3510. Definitions

As used in this article, unless the context requires a different meaning:

"Certified rehabilitation provider" means a person who is certified by the Board as possessing the training, the skills and the experience as a rehabilitation provider to form an opinion by discerning and evaluating, thereby allowing for a sound and reasonable determination or recommendation as to the appropriate employment for a rehabilitation client and who may provide vocational rehabilitation services under subdivision A 3 of § 65.2-603 that involve the exercise of professional judgment.

"Professional judgment" includes consideration of the client's level of disability, functional limitations and capabilities; consideration of client aptitudes, career and technical skills and abilities; education and pre-injury employment; and identification of return-to-work options and service needs which culminate in the determination or recommendation of appropriate employment for the rehabilitation client.

1994, c. 558;1995, c. 343;1997, c. 839;2001, c. 483;2004, c. 10.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 54.1. Professions and Occupations
Chapter 35. Professional Counseling

§ 54.1-3513. Restriction of practice; use of titles

A. No person, other than a person licensed by the Boards of Counseling; Medicine; Nursing; Optometry; Psychology; or Social Work, shall hold himself out as a provider of rehabilitation services or use the title "rehabilitation provider" or a similar title or any abbreviation thereof unless he holds a valid certificate under this article.

B. Subsection A shall not apply to employees or independent contractors of the Commonwealth's agencies and sheltered workshops providing vocational rehabilitation services, under the following circumstances: (i) such employees or independent contractors are not providing vocational rehabilitation services under § 65.2-603 or (ii) such employees are providing vocational rehabilitation services under § 65.2-603 as well as other programs and are certified by the Commission on Rehabilitation Counselor Certification (CRCC) as certified rehabilitation counselors (CRC) or by the Commission on Certification of Work Adjustment and Vocational Evaluation Specialists (CCWAVES) as Certified Vocational Evaluation Specialists (CVE).

1994, c. 558;2000, c. 473;2004, c. 271.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

07/19/2004

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

BELMONDO COPELAND, Claimant

Opinion by DIAMOND
Commissioner

v. VWC File No. 206-01-65

STONE CONTAINER CORPORATION, Employer
- SELF-INSURED -

Zenobia J. Peoples, Esquire
422 E. Franklin Street, Suite 103
Richmond, Virginia 23219
for the Claimant.
(Copy sent Priority Mail)

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for the Defendants.
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REVIEW on the record before Commissioner Tarr, Commissioner Diamond, and Commissioner Dudley in Richmond, Virginia.

This case is before the Commission at the request of the employer for Review of a decision of the deputy commissioner, which dismissed its application alleging refusal to cooperate with vocational rehabilitation on the grounds that the rehabilitation consultant is not a certified vocational rehabilitation provider. We AFFIRM.

The claimant, age 35, is a high school graduate who injured his back and right arm on February 26, 2001, while employed as a machine operator. On May 19, 2003, he was released to medium duty work.

Mac McDonald, a rehabilitation consultant, testified that he first met the claimant in September 2002, and beginning in June 2003, started working with the claimant on a job search effort. The deputy commissioner summarized the conflicting testimony regarding the course of the job search, and we adopt this summary by reference. Briefly, there was disagreement between Mr. McDonald and the

claimant over whether the claimant dressed appropriately; whether clothing was discussed; whether the claimant turned in certain applications; and whether or why the claimant was late to certain interviews.

The deputy commissioner did not address the merits of the case because he found no evidence that Mr. McDonald is a certified rehabilitation provider. Section 65.2-603 of the Code of Virginia states that if the claimant refuses to cooperate with the employer's vocational rehabilitation consultant, benefits will be suspended. Rehabilitation services involving the exercise of professional judgment must be provided by a certified rehabilitation provider.

The deputy commissioner found that Mr. McDonald's efforts involved the exercise of professional judgment, as defined by Code Section 54.1-3510, i.e., "consideration of the client's level of disability, functional limitations and capabilities; consideration of client aptitudes, career and technical skills and abilities; education and pre-injury employment; and identification of return-to-work options and service needs which culminate in the determination or recommendation of appropriate employment for the rehabilitation client." Mr. McDonald has a master's degree in counseling. His letters to the claimant were co-signed by Robin Stromberg, who is a certified rehabilitation provider.

On Review, the employer argues that it was sufficient that Mr. McDonald's supervisor was a certified rehabilitation consultant. We disagree. The statute is clear in requiring a certified rehabilitation provider if the carrier intends to utilize the consultant in its effort to withhold benefit payments. We understand the employer's contention that Mr. McDonald would never be qualified to be certified unless he had the opportunity to get experience first, but he can obtain this experience in situations that do not involve the carrier's suspension of workers' compensation benefits.

The Opinion below is AFFIRMED.

This matter is hereby removed from the Review docket.

APPEAL

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

cc: Belmondo Copeland
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2900 Sprouse Dr.
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VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Dec. 27, 2018

REYES CARRANZA v. YOUNG CHUL LEE SERVICE INC
LM INSURANCE CORP., Insurance Carrier
LM INSURANCE CORP., Claim Administrator
Jurisdiction Claim No. VA02000029583
Claim Administrator File No. 324C00199
Date of Injury: December 12, 2017

Andrew S. Kasmer, Esquire
For the Claimant.

Gregory V. Chestnut, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The defendants request review of the Staff Attorney's November 26, 2018 rejection of their Employer's Application for Hearing. We AFFIRM.

I. Material Proceedings

On December 12, 2017, the claimant sustained injuries to his left foot and great toe when he fell off a ladder. He was awarded medical benefits and an open and continuing period of temporary total disability pursuant to a May 16, 2018 Opinion.

On September 17, 2018, the defendants filed an Employer's Application for Hearing alleging the claimant had been released to pre-injury work on May 22, 2018 by Dr. Gabriel Gluck. Attached to their application was a May 22, 2018 Independent Medical Evaluation ("IME") from Dr. Gluck who examined the claimant on one occasion and conducted a records review. Dr. Gluck

opined that the claimant's treatment had been excessive, he could return to work without restrictions, no functional capacity evaluation ("FCE") was necessary, and the claimant had reached maximum medical improvement with a 5% loss of use of his left lower extremity. On October 5, 2018, the employer's application was rejected on the grounds the medical evidence was stale. The reviewing Staff Attorney noted that the claimant underwent a separate FCE on August 30, 2018 that had not been reviewed by Dr. Gluck, and found the claimant's circumstances may have changed to an extent to make the May 22, 2018 medical opinion unreliable.

On November 9, 2018, the defendants filed a second Employer's Application for Hearing. It also alleged the claimant had been released to pre-injury work and relied upon Dr. Gluck's May 22, 2018 IME. However, the defendants also attached an October 30, 2018 addendum letter from Dr. Gluck stating that he had reviewed the claimant's August 30, 2018 FCE and that he found no reason why the claimant could not return to full-duty employment as a construction worker.

The employer's application was rejected on November 26, 2018. The Staff Attorney found that Dr. Gluck's May 22, 2018 medical record was stale and that "contemporaneous medical records in the file directly contradict Dr. Gluck's addendum of October [30], 2018."

The defendants filed a timely request for review.

II. Findings of Fact and Rulings of Law

When an employer files an Application for Hearing, the Commission "is charged with the responsibility of determining whether probable cause exists" to refer the matter to the hearing docket. Arzola v. Cherner Lincoln Mercury, Inc., 77 O.W.C. 12, 14 (1998). "An employer's application for hearing will be deemed not 'technically acceptable' and will be rejected unless the employer's designated supporting documentation is sufficient to support a finding of probable

cause to believe the employer's grounds for relief are meritorious." Circuit City Stores v. Scotece, 28 Va. App. 383, 386, 504 S.E.2d 881, 883 (1998) (citations omitted). "The commission has defined the standard of 'probable cause' as '[a] reasonable ground for belief in the existence of facts warranting the proceeding complained of.'" Id. at 387, 504 S.E.2d at 883 (quoting Mixon v. Bay Area Movers & Storage, Inc., VWC File No. 169-52-56 (Apr. 21, 1997).

We agree with the Staff Attorney that the defendants have not shown probable cause for their application to be referred to the evidentiary docket. The primary evidence they rely upon—Dr. Gluck's May 22, 2018 IME—was found to be stale when their previous Employer's Application for Hearing was evaluated. The only new evidence is a letter stating that Dr. Gluck disagrees with the conclusions presented in the claimant's August 22, 2018 FCE. In the absence of a contemporaneous medical examination, we do not find Dr. Gluck's medical opinion carries sufficient weight to demonstrate probable cause that the employer's grounds for relief are meritorious.

III. Conclusion

The Staff Attorney's November 26, 2018 rejection of the Employer's Application for Hearing is AFFIRMED. The defendants are ordered to reinstate benefits immediately, effective November 10, 2018.

Interest on the Award, pursuant to Virginia Code §65.2-707, and penalties, pursuant to §65.2-524, are payable in accordance with Commission Rule 1.6.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia 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 Court of Appeals of Virginia.

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Dec. 21, 2018

SUSANA LOPEZ v. MACY'S
MACY'S, INC., Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00000868201
Claim Administrator File No. 4866021819000101660
Date of Injury: November 27, 2013

Bryan G. Bosta, Esquire
For the Claimant.

Tenley Carroll Seli, Esquire
For the Defendant.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The defendant requests review of the Deputy Commissioner's July 26, 2018 Opinion denying their application seeking termination of the outstanding disability award on the ground that the claimant had been released to pre-injury work on March 6, 2018. We REVERSE.

I. Material Proceedings

On November 27, 2013, the claimant sustained a compensable injury when she fell while trying to unlock a cable lock box securing a rack of leather jackets. Pursuant to a November 5, 2015 Opinion, the Commission awarded her medical benefits for a lower back injury and temporary total disability beginning February 9, 2014 through December 2, 2014. On September 6, 2016, the claimant filed a change in condition claim seeking, inter alia, a resumption of temporary total disability beginning August 10, 2016. In a March 16, 2017 Opinion, Deputy

Commissioner Kennard found the claimant had proven she was subject to work restrictions that prevented her from returning to pre-injury employment. She was awarded temporary total disability during periods where she adequately marketed her residual work capacity, including ongoing disability beginning December 1, 2016.

The present matter came before the Commission upon an Employer's Application for Hearing filed on March 19, 2018. The defendant alleged the claimant had been released to pre-injury employment as of March 6, 2018 by Dr. Virgil Balint. The matter was docketed for an on-the-record adjudication, and the parties submitted written and responsive statements.

The Deputy Commissioner first noted that the issue of the claimant's pre-injury job description had been adjudicated in the March 16, 2017 Opinion, which found the claimant's job "routinely required the lifting of groups of suits and overcoats weighing more than 10-25 pounds." (Op. 13, Mar. 16, 2017.) The defendant's application was denied for the following reasons:

> This finding from Deputy Commissioner Kennard regarding the claimant's pre-injury duties was not appealed and became final. As a result, we find the job description presented to Dr. Balint was inaccurate and did not fully disclose all of the claimant's job requirements as found by Deputy Commissioner Kennard. Accordingly, we do not find any release to pre-injury work based on the defendants' job description to be credible or consistent with the pre-injury job duties determined by Deputy Commissioner Kennard.
>
> Therefore, we have to determine whether the evidence preponderates to establish the claimant is capable of the pre-injury work requirements as found by Deputy Commissioner Kennard rather than the inaccurate pre-injury job description that was provided to Dr. Balint. After a thorough review of the evidence of record, we find the evidence of record does not preponderate to establish that the claimant has been released to employment that requires "exerting 20-50 pounds of force occasionally, and 10 to 25 pounds of force frequently" or to work that "routinely required the lifting of groups of suits and overcoats weighing more than 10-25 pounds."

> We find the claimant has been released to selective employment that allows her to "occasionally" lift or carry up to 25 pounds and "occasionally" lift or carry up to 50 pounds. However, this is not consistent with the demands of her pre-injury job as found by Deputy Commissioner Kennard in that her employment requires "exerting 20-50 pounds of force occasionally, and 10 to 25 pounds of force frequently" or to work that "routinely required the lifting of groups of suits and overcoats weighing more than 10-25 pounds." As the medical evidence of record limits the claimant to "occasionally" lift up to fifty pounds, we find this is not equivalent to the demands of her pre-injury job that required "frequent" or "routinely" lifting up to fifty pounds.
>
> We find the evidence does not preponderate to find that the claimant is able to return to and perform all the tasks that were required or expected of her in her pre-injury work, the work that was required or expected at the time of her accident.

(Op. 6-7, July 26, 2018.)

The defendant filed a timely request for review by the full Commission.

II. Findings of Fact and Rulings of Law

When an employer seeks termination of an outstanding award on the grounds that the claimant is capable of returning to pre-injury work, it must be proven that "the employee is 'able fully to perform the duties of [her] pre-injury employment.'" Celanese Fibers Co. v. Johnson, 229 Va. 117, 120, 326 S.E.2d 687, 690 (1985) (quoting Sky Chefs, Inc. v. Rogers, 222 Va. 800, 284 S.E.2d 605, 607 (1981)). In order to determine if the employer's burden has been met, the Commission must examine how the claimant's job duties were actually performed, and "the normal and customary manner in which the pre-injury work was performed governs the determination of whether a claimant is able to return to that employment." Clinchfield Coal v. Parrott, 22 Va. App. 443, 447, 470 S.E.2d 597, 599 (1996).

In order to determine if the claimant can return to pre-injury work, we must first determine what those job duties are. This same issue was adjudicated in the March 16, 2017 Opinion by

Deputy Commissioner Kennard. After reviewing the hearing testimony and the medical designations submitted by the parties, he credited "the claimant's testimony that her job routinely required the lifting of groups of suits and overcoats weighing more than 10-25 pounds." (Op. 13, Mar. 16, 2017.) Neither party filed a request for review of the March 16, 2017 Opinion and it became final.

The law of the case doctrine is applicable to matters adjudicated by the Commission. Its definition, "briefly stated, is this: Where there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal." Meidan, Inc. v. Leavell, 62 Va. App. 436, 441, 749 S.E.2d 201, 204 (2013) (quoting Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917)). Both the claimant's September 6, 2016 change in condition claim and the March 19, 2018 employer's application involve the same parties, and the March 16, 2017 Opinion established facts regarding what the claimant's pre-injury job duties were. As a matter of law, we must find that the claimant's pre-injury job required routine lifting of more than ten to twenty-five pounds.

We agree that the job description as originally presented to Dr. Balint, did not reference the claimant having to lift more than twenty-five pounds and that this limitation is in conflict with the job duties as found in Deputy Commissioner Kennard's March 16, 2017 Opinion. Were this all the evidence before us, then we would likewise agree that the erroneous twenty-five pound lifting limitation would be fatal to the defendant's application. However, we find preponderating evidence that Dr. Balint's release was premised upon additional information provided by the claimant as to what her job actually entailed, including routine lifting of more than twenty-five pounds.

In an April 9, 2018 note, Dr. Balint referenced being advised by claimant's counsel that the claimant's job required lifting more than ten to twenty-five pounds. Dr. Balint acquiesced to the request for an FCE but stated that the referenced lifting requirement did not change his opinion regarding the claimant's capacity to do her regular job.[1] On July 11, 2018, Dr. Balint responded to the defendant's questionnaire, again acknowledging having spoken with the claimant and her counsel about her pre-injury job and the claimant's perception about her ability to perform the job. With information from the claimant regarding the actual job requirements, Dr. Balint continued in his opinion that the claimant was capable of performing her pre-injury work.

We are persuaded that Dr. Balint vetted his decision regarding the claimant's capacity to return to regular work against actual knowledge of what that regular work required, knowledge that came to him from the claimant. This actual knowledge renders moot any deficiency with the written job description.

We conclude that the claimant's pre-injury job description, as detailed in the March 16, 2017 Judicial Opinion, is not in conflict with the findings of Dr. Balint regarding the claimant's job duties. Dr. Balint, as the claimant's treating physician, found that the claimant's present physical capacity allowed her to return to pre-injury employment, and his opinion regarding the claimant's physical capability is supported by a plethora of medical evidence. Accordingly, we find the evidence in the record demonstrates that the claimant can return to pre-injury work, and we therefore REVERSE the Deputy Commissioner's Opinion.

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[1] Dr. Balint reviewed the Functional Capacity Evaluation performed on May 3, 2018 which indicated the claimant was limited to occasionally lifting less than five pounds. However, because the report indicated the claimant displayed submaximal effort, Dr. Balint discarded the FCE as invalid and found the claimant could continue in her regular duties as a sales associate.

III. Conclusion

The Deputy Commissioner's July 26, 2018 Opinion below is REVERSED. The claimant's March 16, 2017 temporary total disability award is terminated effective April 1, 2018.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia 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 Court of Appeals of Virginia.

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80 S.E.2d 533
195 Va. 762
J. A. FOUST COAL COMPANY AND COAL OPERATORS CASUALTY COMPANY
v.
MATT MESSER.
Record No. 4199.
Supreme Court of Appeals of Virginia
March 15, 1954.

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[195 Va. 763] Greear, Bowen, Mullins & Winston, for the appellants.

G. Mark French, Robert Lewis Young and Bremner & Young, for the appellee.

JUDGE: WHITTLE

WHITTLE, J., delivered the opinion of the court.

Matt Messer, hereinafter referred to as claimant, suffered a compensable injury on April 13, 1951, while working for J. A. Foust Coal Company, herein referred to as employer. On May 9, 1951, a memorandum of agreement was executed under Code, § 65-90, between claimant and employer. The agreement was approved by the Industrial Commission in an award dated June 1, 1951, which ordered payment of compensation at the maximum rate of $20 per week under Code, § 65-51, dealing with total incapacity for work.

The payments so ordered were made until March 3, 1952, at which time the employer filed with the Commission an application for hearing under § 65-95, alleging that there had been a change in the condition of claimant from total incapacity for work to that of partial incapacity compensable under § 65-52.

The application was heard by a hearing commissioner on September 13, 1952, and an award was entered which directed payment of compensation under § 65-52 at the rate of $7.73 per week during the remainder of the three hundred week period based on a finding of a 33 1/3 per cent general partial disability.

To review this ruling claimant sought a hearing before the [195 Va. 764] full Commission as provided in § 65-93. The case was heard on June 10, 1953, and a majority of the Commission (Commissioner Nickels dissenting) entered an award reversing the hearing commissioner, finding that the claimant had a general partial disability of 33 1/3 per cent as a residual of his accidental injury of April 13, 1951; that as a result he was unable to perform his usual work; that the claimant had not been offered or procured selective work within his capacity; that he had been unable to find selective work elsewhere; 'and that the wage loss by reason of the partial incapacity is total, in a sum sufficient to yield maximum benefits. ' Therefore the Commission held that the award should be modified and the employer ordered to pay claimant $20 per week beginning March 3, 1952, for the remainder of the three hundred week period, 'unless subsequent conditions shall justify a modification hereof '. From the award the employer prosecutes this appeal.

The employer charges that it was error for the Commission to base its award upon actual loss of earnings rather than upon claimant's loss of ability, power or capacity to earn.

The evidence consisted of several medical reports and the claimant's own statement as to his present condition. Dr. H. H. Wescott, in a report dated February 7, 1952, expressed the opinion that claimant had a general disability of 33 1/3 per cent. Dr. E. L. Gage, in a report dated September 23, 1952, after making some ngative findings, stated: 'Examination showed a very tremulous, edentulous man of about the stated age of 45

years. * * * As far as the neurological examination went,

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I could not demonstrate any organic evidence of true cord compression. There was evidence of hypertension, a very marked nervousness and obvious anxiety and verbosity. Certainly from the standpoint of employability the man is disabled, both because of his hypertension and his overall general reaction.'

The record shows that claimant at the time of the accident was a timber man in the mine of employer. His [195 Va. 765] duties required him to set the heavy shoring columns and timbers. According to his testimony he was injured by a falling rock 'about six inches thick, about six feet long', which 'hit me on top of the head, went down my left side '. Claimant stated that he was presently unable to do any work.

The Commission found, as aforesaid, that 'the wage loss by reason of the partial incapacity is total'; nevertheless, it found this to be 'A case for determination under section 65-52 of the Act'. The assignment of cross error also challenged this finding.

When the employer called for a hearing under § 65-95, alleging a change in claimant's condition, the burden of proof was upon it to show that there was such a change as would affect the claimant's ability to earn wages. While it is true that the medical reports indicate a partial physical disability, such are not necessarily proof positive that the claimant can work and earn wages as is argued by the employer. There is ample evidence, both from the medical reports and from claimant's own statement, to show that at the time of the hearing he was totally incapacitated, and when the Commission so found it should have held that no change in claimant's previously established total incapacity, such as is contemplated by the statute, had occurred, and the employer having failed in carrying the burden of proof, its application for a change in the prior award should have been denied, thus leaving claimant's award under § 65-51 which provides for total incapacity.

The Commission properly gives great weight to medical evidence in determining incapacity, but it is not conclusively bound by such evidence. Medical evidence is not the sole criterion. There have been and probably will continue to be cases where the medical evidence shows only a percentage of disability when in truth and in fact the disability so found renders the claimant incapable of working and therefore incapable of earning any wages. The loss of earning power as the result of an injury is not necessarily [195 Va. 766] proportional to the bodily functional disability. This interpretation of the Act is more in keeping with its humane legislative purpose than is the construction contended for by the employer that the Commission is bound by the percentage of disability found by medical evidence and that such evidence shall bind the Commission to the exclusion of all other facts and circumstances surrounding the claim.

Benefits awarded under §§ 65-51 and 65-52 cover losses occasioned by the impairment of the claimant's earning capacity. The first section (65-51) applies where the loss is total, and the second (65-52) where it is partial. In either case the extent of incapacity must be ascertained from the evidence, and such evidential ascertainment is not limited to or circumscribed by any special class of proof. All legal facts and circumstances surrounding the claim should properly be considered and due weight given them by the Commission.

When considering benefits under § 65-53, which covers 'loss or loss of use' of a bodily member, a different situation arises. Under this section the benefits provided for are fixed and payable regardless of the degree of disability and are not contingent upon employment, loss of wages or like

considerations. A claimant's injury is more or less rated in the various schedules in § 65-53, but there is no statutory requirement either under § 65-51 or § 65-52 that a claimant's injury be medically rated. As heretofore stated, under these sections, if the Commission finds from all the facts and circumstances surrounding the claim that claimant's loss of earning power is total he receives compensation under § 65-51; whereas, if the loss of earning power is

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found to be partial he receives compensation under § 65-52.

In Horovitz, Injury and Death under Workmen's Compensation Laws, it is said:

'One who has only a partial physical disability may obtain total incapacity payments on proof that he was unable to market his remaining capacity for work. (Page 270) * * * (Where) the injuries are so serious that it is obvious [195 Va. 767] ordinary employment is out of the question, and there is no affirmative evidence to show a job was available, a denial of a total and permanent award will be reversed as a matter of law. ' (Page 279)

In Schneider, Workmen's Compensation Law, 2nd Ed., Vol. 2, § 418, at page 1428, it is said:

'An employee may be said to be totally incapacitated when he is disqualified from pursuing the usual tasks of a workman in such a way as to enable him to procure and retain employment. The fact that he is not absolutely disabled for the performance of any kind of labor is not a prerequisite to a finding of total incapacity.'

In Larson's Workmen's Compensation Law, Vol. 2, § 57.10, appears the following:

'It has been stressed repeatedly that the distinctive feature of the compensation system, by contrast with tort liability, is that its awards (apart from medical benefits) are made, not for physical injury as such, but for 'disability' produced by such injury. The central problem, then, becomes that of analyzing the unique and rather complex legal concept which, by years of compensation legislation, decision and practice, has been built up around the term 'compensable disability'.

'The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions give rise to most controversial disability questions: the first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.'

Accordingly, we are of the opinion that the Commission properly found that claimant's wage loss was total by reason of the partial physical incapacity, yielding the maximum benefits under the Act. As indicated, however, the Commission [195 Va. 768] should have determined, for the reasons aforesaid, that there had been no change in claimant's condition as contemplated by the statute (§ 65-95), and the prior award should not have been disturbed.

The employer also contends that it is not obligated under § 65-60 to offer selective employment to or find selective employment for the claimant as was held by the Commission. The employer subscribes to the dissenting opinion which says, '(The) Commission * * * has treated section 65-60 as a rehabilitative measure to restore function and eliminate malingering, at the discretion

of the employer by tendering selective work in a proper case. There is nothing in the section to indicate selective work must be procured as a condition precedent to exercising the rights granted upon a change in condition.'

We agree that no such mandatory requirement is placed upon an employer. The section states: 'If an injured employee refuses employment procured for him suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal unless in the opinion of the Industrial Commission such refusal was justified. ' In the instant case the employer charges that the claimant, 'like all malingerers, would like to convert the * * * Act into a retirement fund', and that 'twenty or twenty-five dollars a week over a period of approximately ten years would be a sizable pension '. In the face of this rather harsh accusation the

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Commission might reasonably have expected the employer to avail itself of this 'rehabilitative measure' ordained to 'restore function and eliminate malingering' in order to put a stop to claimant's alleged iniquitous scheme. But such was not done. As aforesaid, the burden of proof was on the employer to show under § 65-95 that there had been a change in the condition of the claimant -- such a change as would enable him at least to do some kind of selective work within his then capacity. The employer did not attempt to prove nor did it suggest that such selective work was available. It is true, as stated, [195 Va. 769] that § 65-60 does not require that the employer make such work available, but the section expressly authorizes the employer to make the gesture. Under such circumstances it is to be presumed that if selective work had been available the claimant would have taken advantage of it.

We are of opinion that the award appealed from be modified as indicated and affirmed.

Modified and affirmed.

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382 S.E.2d 487
8 Va.App. 512
Edgar JAMES
v.
CAPITOL STEEL CONSTRUCTION CO. and Manufacturers Alliance Insurance Company.
Record No. 0924-88-2.
Court of Appeals of Virginia.
Aug. 8, 1989.

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[8 Va.App. 513] Susan E. Cummins (Ashcraft & Gerel, on brief), for appellant.

Mary Louise Kramer (Lynn Murphy Tucker, Sands, Anderson, Marks & Miller, on brief), for appellee.

Present BARROW, BENTON and KEENAN, JJ.

BENTON, Judge.

Edgar James raises two issues in this appeal: (1) whether the Industrial Commission erred in finding that he unjustifiably refused to cooperate with rehabilitation efforts pursuant to Code §§ 65.1-63 and 65.1-88; and (2) whether his statement at the commission hearing that he would cooperate was sufficient to cure [8 Va.App. 514] the refusal to cooperate. Finding no error, we affirm the decision of the commission.

I.

James' employment as an ironworker with Capitol Steel commenced August 14, 1984. Two months later, James suffered a compensable injury to the left knee during a slip and fall incident. He was awarded temporary total disability benefits. In 1986, Dr. William Fortune, James' treating physician for the knee injury, informed Capitol Steel's insurance carrier that James' knee injury left him partially disabled, and, as a result, James would not be able to return to his regular employment. Dr. Fortune recommended that James begin vocational rehabilitation pursuing light work options. In a "Work Capabilities Assessment" report that was sent to Rehabilitative Services and Vocational Placement, Inc., Dr. Fortune indicated that James was capable of only sedentary work which did not require heavy lifting.

In addition to the compensable knee injury, James also suffers from other unrelated ailments which pre-date both his industrial accident and his employment with Capitol Steel. As a result of a laryngectomy in 1976, James speaks with difficulty through a small opening in his throat. A medical report which was submitted to the commission stated that James "has to be very careful in that he free breathes and this is a common source of infection for him. He therefor [sic] cannot be around a lot of people...." James also suffers from hypertension, which he has had since 1974.

Delores Margeson, a rehabilitation counselor, met with James on June 17, 1987. Her notes from this first meeting reveal that James informed her that he was receiving Social Security Disability benefits and that he was "officially retired." Margeson offered James job applications for a position at the V.A. Hospital and for the food service contractor at the National Rehabilitation Hospital. James refused to accept the applications and made it clear that he was not planning to work. He also failed to attend any subsequently scheduled meetings and eventually ceased all communication with Margeson.

Capitol Steel filed an application with the Industrial Commission requesting suspension of James' compensation benefits due to his refusal to cooperate with rehabilitation efforts as required by [8 Va.App. 515] Code § 65.1-

88. At a hearing held before the deputy commissioner, James testified that the rehabilitation specialist had failed to consider all of his ailments in seeking suitable work for him. In response to inquiries whether he had informed Margeson of his other physical disabilities, James testified, "Nobody would listen to me. Last time she talked to me I told her I was retired." After reviewing the evidence, the deputy commissioner found that James "is poorly motivated to return to work and is apparently little-interested in securing even sedentary work suitable to his condition." Payment of compensation was suspended until James cured his refusal to cooperate. On review, the full commission affirmed the decision and also found that James' offer at the hearing to cooperate with rehabilitation efforts was not sufficient to cure his refusal.

II.

Factual findings of the Industrial Commission will be upheld on appeal if supported by credible evidence. Ivey v. Puckett Constr. Co., 230 Va. 486, 488, 338

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S.E.2d 640, 641 (1986). 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." Ellerson v. W.O. Grubb Steel Erection Co., 1 Va.App. 97, 98, 335 S.E.2d 379, 380 (1985); see also Code § 65.1-63; Johnson v. City of Clifton Forge, 7 Va.App. 538, 545, 375 S.E.2d 540, 544-45 (1989). Moreover, an employee's unjustified refusal to cooperate with placement efforts of the employer is tantamount to an unjustified refusal of selective employment under Code § 65.1-63. Johnson, 7 Va.App. at 547, 375 S.E.2d at 546.

James argues that he was under no obligation to cooperate with Margeson and that in view of his preexisting ailments, his refusal to do so was justified because the rehabilitation efforts were not within his residual capacity. The commission specifically held that American Furniture Co. v. Doane, 230 Va. 39, 334 S.E.2d 548 (1985), precluded consideration of James' other physical limitations in assessing whether his refusal to cooperate was unjustified. We do not read Doane to be as sweeping in its application as does the commission. In Doane, the claimant suffered an injury which was unrelated to employment and which occurred [8 Va.App. 516] after claimant was disabled and unemployed. Due to that injury, the claimant argued that the selective employment was unsuitable. The Supreme Court held that "[a]n employer ... is absolved of liability for compensation if the employee refuses selective employment because of a physical condition unrelated to the original industrial accident and arising since the accident." Doane, 230 Va. at 43, 334 S.E.2d at 550 (emphasis added). In this case, however, the circumstance relied upon to advance the claim that the job was unsuitable was a condition which pre-existed both the compensable injury by accident and James' employment with Capitol Steel. Neither the explicit language of Doane nor the beneficent purpose of the act, see Burlington Mills Corp. v. Hagood, 177 Va. 204, 211, 13 S.E.2d 291, 293 (1941), compels the conclusion that employment suitable to the employee's residual capacity does not require consideration of a condition which pre-existed the injury by accident and which was obvious to the employer when the employee was hired.

"[E]mployment 'suitable to [the employee's] capacity' means employment within the employee's residual capacity resulting from the industrial accident." Doane, 230 Va. at 42, 334 S.E.2d at 550. Obviously, a component of the determination of residual capacity is the characteristic of the

employee prior to the injury by accident. "Under the Virginia Workmen's Compensation Law, the employer takes the employee as he is...." McDaniel v. Colonial Mechanical Corp., 3 Va.App. 408, 414, 350 S.E.2d 225, 228 (1986) (quoting Hawkins v. Lane, 49 O.I.C. 144, 147 (1967)). Having employed James with his obvious, preexisting condition which causes him to speak with difficulty through a small opening in his throat, the employer cannot now be heard to claim that James' condition is not to be considered in determining his current residual capacity.

Having made these observations, we conclude, however, that based on the facts of this case the issue of James' preexisting condition is not dispositive. Although James asserts that Margeson failed to consider his preexisting physical condition in her job search efforts, rendering her efforts "unreasonable," the evidence in the record is to the contrary. Margeson testified that she used Dr. Fortune's Work Capacities Assessment as a guideline in her job search efforts on behalf of James. She initiated job development in accordance with Dr. Fortune's recommendations and restrictions. [8 Va.App. 517] James admitted at the hearing that Dr. Fortune was fully aware of all his physical limitations. He cannot now be heard to suggest that Dr. Fortune did not take into account his entire physical condition in encouraging vocational rehabilitation. Furthermore, Margeson's records suggest that she considered James' laryngectomy in her job search efforts. In one of her progress reports, Margeson observed that she located a sedentary job for

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James as a dispatcher but rejected it because "it is difficult to understand Mr. James when he talks."

The deputy commissioner found that James unjustifiably refused to cooperate with the employer's rehabilitation efforts. The commission also found that James told Margeson that he was unable to work and that he had retired. The record in this case contains abundant credible evidence in support of these findings. In the first scheduled meeting with Margeson which James attended, he informed Margeson that he was receiving Social Security and was "officially retired." James also refused to accept two job applications from Margeson at that time. Although Margeson scheduled five subsequent meetings with James, he failed to attend any of these meetings. In phone calls to James designed to encourage attendance at these meetings, Margeson testified that James reportedly told her "that he understood that [Margeson] had to do [her] job, but that, as he had told [her] before, he was not going to participate in the job search." Thereafter, James refused to accept Margeson's certified letters. At the hearing, James stipulated to the factual accuracy of Margeson's notes and fully acknowledged that he had failed to attend the scheduled meetings, stating only that he was "not able to work" and "was retired."

James' refusal to meet with Margeson in order to discuss his work options, experience, and limitations frustrated her job search efforts in his behalf. This evidence establishes that James' unconditional rejection of Margeson's efforts demonstrated an unwillingness on his part to cooperate with rehabilitation efforts. James' unilateral action thwarted Capitol Steel's efforts to secure employment within James' residual capacity. See Klate Holt Co. v. Holt, 229 Va. 544, 547, 331 S.E.2d 446, 448 (1985). Thus, the commission did not err in concluding that James refused to cooperate [8 Va.App. 518] with reasonable rehabilitation efforts.

III.

The commission's determination that James' offer to cure his unjustified refusal was insufficient is also supported by credible

evidence. Assuming that the refusal to cooperate with vocational rehabilitation could be cured by a verbal statement of willingness to cooperate, the commission could nevertheless find James' testimony at the hearing insufficient to cure the refusal. In order for a cure of a refusal to be effective it must be made in good faith. See Thompson v. Hampton Institute, 3 Va.App. 668, 671, 353 S.E.2d 316, 317 (1987). In response to his counsel's question whether he was presently willing to work with the rehabilitation counselor, James testified:

A. It's like I said, what they gonna find for me to do. I'm not educated. Sometimes I can't get around--what are they gonna find for me to do?

Q. Mr. James, are you willing to work with them if they can find something you can do? If they take into consideration all your disabilities?

A. If they can find that.

Q. Are you saying yes?

A. Yes.

Q. Okay.

A. If they can find that,.... find.... somebody.... you know.... my....

Q. Mr. James, have you always been willing to work with them to find something that you could do if they would take into consideration all of your disabilities if they were able to find something, were you willing always to work with them?

A. I'm a realistic man. I believe in facing the facts. Whatever I've told you I've faced the fact that I'm retired....

The deputy commissioner, who observed the appearance and demeanor of the claimant, was in the best position to judge from James' verbal and nonverbal responses to these questions whether his offer to cure was made in good faith. The determinations of the deputy and full commission on this issue will not be disturbed.

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[8 Va.App. 519] For the foregoing reasons, the opinion of the Industrial Commission is affirmed.

Affirmed.

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

April 26, 2018

DAVID CRUMPTON v. CITY OF DANVILLE
CITY OF DANVILLE, Insurance Carrier
CORVEL CORPORATION, Claim Administrator
Jurisdiction Claim No. VA00001159204
Claim Administrator File No. 0548 WC 16 0000031
Date of Injury January 14, 2016

Michael Kernbach, Esquire
For the Claimant.

T. Brent Gammon, Esquire
James A. Daniel, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman and Commissioner Rapaport at Richmond, Virginia.

A December 11, 2017 Opinion denied a change in condition claim for temporary total disability from October 1, 2016 and continuing. The claimant requests review. We AFFIRM.

I. Material Proceedings

The claimant suffers from compensable occupational heart disease. He worked for the City of Danville as a firefighter. A January 12, 2017 Stipulated Order awarded medical benefits and various periods of temporary total disability ending July 22, 2016. In the Order, the claimant reserved his right to seek disability benefits from October 1, 2016 and continuing.

A December 28, 2016 claim sought temporary total disability from October 1, 2016 and continuing. The claimant asked the Commission to determine the employer's vocational rehabilitation services were unreasonable.

The parties stipulated the claimant worked in dissimilar employment for Virginia International Raceway (VIR) both before and after his occupational heart disease diagnosis. They stipulated to his average weekly wages with VIR at various times.[1] Since July 1, 2017, his average weekly wage was $1,029.00. The claimant retired from the City of Danville Fire Department on October 1, 2016. The claimant agreed the employer was entitled to a credit from January 1, 2016 and continuing to account for his increased earnings with VIR.

The defendants denied the claimant was entitled to wage compensation because he refused to cooperate with reasonable vocational rehabilitation efforts. They asserted he did not market his residual work capacity.

The Deputy Commissioner concluded vocational rehabilitation offered by the employer was not unreasonable. Based on the claimant's failure to cooperate, she denied the claim for temporary total disability.

II. Summary of Evidence

The claimant retired from the fire department on October 1, 2016 after twenty years. Since 2000, the claimant worked for VIR in addition to his full time job as a firefighter. He worked at VIR part time in 2000 and began full time work in 2002. Due to his heart disease, his cardiologist limited him to lifting no more than 100 pounds, including firefighting gear, and forbade exposure to weather and temperature extremes. The claimant's restrictions prevented him from performing full duty work as a firefighter. After recovering from his heart attack, he continued to work full

[1] On the agreed diagnosis date, January 14, 2016, the claimant's average weekly wage at VIR was $909.06. On October 1, 2016, his VIR average weekly wage was $947.91. His VIR salary increased to an average weekly wage of $989.42 on February 15, 2017. His salary increased on July 1, 2017 to its present average weekly wage of $1,029. These figures were to be used for a credit to the employer. (Tr. p. 3-5).

time for VIR. He performed light duty work for the employer until September 30, 2016. He retired from the fire department when the employer stopped offering light duty. The claimant was able to work for VIR within his restrictions.

After retirement, the claimant continued to work 40 hours or more per week at VIR. His job was director of safety services and weekend manager. During VIR's large events in the spring and summer, he worked as much as 60 hours per week and earned, "comp time." The claimant told Pam Seager, the vocational counselor, he would not apply for any jobs because he had a full time job at VIR. He did not complete any job applications.

Pam Seager, a field vocational consultant[2] engaged by the defendants, performed an October 26, 2016 vocational assessment. Based on the claimant's education, interests, work history and restrictions, she identified potential jobs. These included Safety Administrator, Emergency Communications Director and Light Equipment Operator. These jobs paid an average of $20, $15 and $12 per hour, respectively. Those positions paid less than claimant's wages at VIR.[3] Seager stated the claimant possessed transferable skills and abilities which did not appear to be impaired by his work-related disease. The claimant repeatedly told her he had full time employment and no desire to find additional work. Seager was aware of his full time work with VIR. She understood her role was to replace his City of Danville employment.

Seager met with the claimant eight times. She identified job leads for customer service, janitorial, emergency operations specialist, and security officer positions. None of them was likely

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[2] By agreement, Seager qualified as an expert in vocational rehabilitation. (Tr. 38) Seager has the certification required by Va. Code section 65.2-603(A)(3). (Tr. 35)

[3] The VIR salary at the time of the hearing was equal to $25.725 per hour for a 40-hour week. His average weekly wage at the City of Danville was equal to $20.606 per hour for a 40-hour week.

to produce earnings equal to the VIR pay. Seager offered to assist the claimant in applying for jobs, but he refused. He never applied for any jobs. Meetings had to be canceled or rescheduled on five occasions. The claimant missed scheduled vocational meetings in November and December 2016. In May 2017, defense counsel instructed Seager to cease further efforts pending the hearing.

The claimant gave Seager a February 14, 2017 letter stating he would begin work on February 15, 2017 as landscape/ EMS supervisor, a second full time job with VIR.[4] The claimant testified the landscaping job at VIR fell through, but he never informed Seager. His duties at VIR remained the same as they had been before his diagnosis.[5] Seager testified the claimant advised her in March and May 2017 there was no need to look for local work as he planned to move to Florida. The claimant testified he told Seager his move to Florida would be "[n]ot anytime soon, and I don't know when that will be."

III. Findings of Fact and Rulings of Law

The claimant argues his full time work for VIR exhausted his residual work capacity. He asserts it was unreasonable for the vocational consultant to concentrate on replacing his City of Danville earnings. The claimant notes the defendants were entitled to a credit against compensation for the increase in wages at VIR resulting from his retirement from the fire department. He denies it was reasonable to expect him to work 80 to 100 hours per week to replace his Danville earnings. He argues Seager should have considered his VIR full time employment

[4] Def. Ex. 4 is a February 14, 2017 letter from Mary Ann Greer, Chief Financial Officer of VIR, which stated the start date and salary for this combined position.

[5] We have reviewed the November 17, 2017 depositions of Mary Ann Greer, Kerrigan Smith, and Michael Ricker, individuals with VIR, all of whom agreed the claimant's duties there have not changed for several years.

and worked to identify other employment which would decrease or eliminate the employer's burden to pay future compensation. We disagree.

Virginia Code § 65.2-603 provides the employer shall furnish, or cause to be furnished, reasonable and necessary vocational rehabilitation services. Vocational rehabilitation services may include vocational evaluation, counseling, job coaching, job development, job placement, on-the-job training, education, and retraining. The statute requires these services to "take into account the employee's preinjury job and wage classifications; his age, aptitude and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services." If a dispute arises, either party may request a hearing and seek the Commission's approval for proposed services.

The unjustified refusal of vocational rehabilitation provided by the employer bars an injured employee from further compensation until such refusal ceases "unless in the opinion of the Commission, the circumstances justified the refusal." Va. Code § 65.2-603(B). A claimant fails to cooperate when he does not attend meetings, refuses letters, or displays an unwillingness to participate in a job search. See James v. Capitol Steel Constr. Co., 8 Va. App. 512, 517, 382 S.E.2d 487, 490 (1989). Whether an employee has unjustifiably refused to cooperate with vocational rehabilitation is a question of fact to be determined from the totality of the evidence. Anderson v. Anderson, 65 Va. App. 354, 362, 778 S.E.2d 132, 136 (2015). Once the defendants show the claimant refused to cooperate, the burden shifts to the claimant to produce evidence demonstrating the refusal was justified. Ilg v. UPS, 284 Va. 294, 303, 726 S.E.2d 21, 26 (2012).

"[T]he purpose of vocational rehabilitation in workers' compensation is twofold: to restore the employee to gainful employment and to relieve the employer's burden of future

compensation." Salem v. Colegrove, 228 Va. 290, 294, 321 S.E.2d 654, 656 (1984) (quoting Lancaster v. Cooper Indust., 387 A.2d 5, 9 (Me. 1978)).

The vocational rehabilitation services offered by the defendants were reasonable. Seager's job leads took into account the claimant's age, restrictions and his remaining skills and abilities. The potentially lower pay if he had taken such a job could have been compensated with a temporary partial disability award.

The claimant utterly failed to cooperate with vocational rehabilitation services. He did not follow through on any job leads and missed appointments. He falsely claimed to have obtained a second full time job with VIR

He still worked full time at his VIR job, but the claimant sought temporary total disability based on wage loss resulting from his inability to perform his firefighter work. He worked two full time jobs before his heart disease diagnosis, which required more than 40 hours of work each week. There was no evidence of a medical restriction on the number of hours he could work.

The claimant's full time work for VIR was not an adequate justification for his refusal to cooperate with vocational rehabilitation efforts.

The VIR job did not justify his complete refusal to cooperate with the employer's efforts to find other work to restore his lost earning capacity.[6]

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[6] In order to receive disability benefits, a partially disabled employee must prove he made reasonable efforts to market his residual earning capacity. Nat'l Linen Serv. v. McGuinn, 8 Va. App. 267, 272, 380 S.E.2d 31, 34 (1989). What constitutes reasonable marketing effort depends on the facts and circumstances of each case. Greif Cos. v. Sipe, 16 Va. App. 709, 715, 434 S.E.2d 314, 318 (1993). "[T]he reasonableness of an employee's effort will be determined on a case by case basis, taking into account all of the facts and surrounding circumstances." Ford Motor Co. v. Favinger, 275 Va. 83, 89, 654 S.E.2d 575, 579 (2008) (citations omitted.)

The claimant is partially disabled. He offered no evidence of his marketing. Seager's vocational reports indicate his assertions he applied to Allied Barton in security, Interstate Batteries, VIR and 84 Lumber and requested a Florida State Veterans Affairs application for a transport position during the period from January 19, 2017 through May 4, 2017. These efforts reflect insufficient marketing of residual work capacity.

IV. Conclusion

We AFFIRM the Deputy Commissioner's December 11, 2017 Opinion.

This matter is removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia 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 Court of Appeals of Virginia.

726 S.E.2d 21

John A. ILG
v.
UNITED PARCEL SERVICE, INC., et al.

Record No. 111439.

Supreme Court of Virginia.

June 7, 2012.

Summaries:

Source: Justia

Employee suffered an injury during the course of his employment. Employer agreed to voluntarily pay workers' compensation benefits, and the Workers Compensation Commission issued an award order approving the agreements between Employee and Employer. Employer then filed an application with the Commission seeking to suspend Employee's benefits under the order for unjustifiably refusing to participate in vocational rehabilitation. The Commission denied the application. The court of appeals reversed. At issue on appeal was whether Employee should be permitted to offer evidence that his refusal to accept vocational rehabilitation services was justified because of a disabling injury that arose out of the same industrial accident for which he was awarded benefits, but which was not expressly designated in the award as a compensable injury. The Supreme Court reversed, holding that the court of appeals erred in determining that Employee was precluded from asserting that his refusal of vocational rehabilitation was justified. Remanded for an evidentiary proceeding so Employee could show his refusal was justified in light of his disabling injury.

[726 S.E.2d 22]

Craig A. Brown (Ashcraft & Gerel, Alexandria, on briefs), for appellant.

Sean J. Murphy (Patricia C. Arrighi; PennStuart, Richmond, on brief), for appellees.

Present: KINSER, C.J., LEMONS, MILLETTE, GOODWYN, and MIMS, JJ., and RUSSELL and KOONTZ, S.JJ.

Opinion by Senior Justice LAWRENCE L. KOONTZ, JR.

This appeal of a workers' compensation case involves an employer's application to suspend benefits pursuant to Code § 65.2–708 for the alleged unjustified refusal of an injured employee to accept vocational rehabilitation services provided by the employer under Code § 65.2–603. The issue presented is whether the employee should be permitted to offer evidence that the refusal is justified

[726 S.E.2d 23]

because of a disabling injury which arose out of the same industrial accident for which he was awarded benefits, but which was not expressly designated in the award as a compensable injury.

BACKGROUND

This case, which twice has been reviewed by the Workers' Compensation Commission and the Court of Appeals, has a lengthy and complex procedural history. For purposes of this appeal, however, we may confine our discussion of the facts and proceedings to those relevant to the issue presented, making reference to the more complete expression of the background of the injury, the award of compensation, and ancillary proceedings stated in the Court of Appeals' first review of the case in *United Parcel Service v. Ilg,* 54

Va.App. 366, 368–71, 679 S.E.2d 545, 546–47 (2009) (hereinafter "*Ilg I*").

On February 12, 2007, John A. Ilg, a delivery truck driver employed by United Parcel Service for twenty-three years, suffered an injury by accident when he fell from his employer's truck during the course of his employment. On April 26, 2007, Ilg, pro se, filed a claim for workers' compensation benefits with the Commission, stating in the claim that he had suffered an "injury to right hand and right knee." United Parcel Service and its workers' compensation carrier, Liberty Insurance Corporation (hereinafter collectively "UPS"), accepted the claim and voluntarily paid either temporary total or temporary partial disability benefits from February 13, 2007 to February 16, 2007 and temporary total disability benefits from February 17, 2007 going forward.

Subsequently, on June 29, 2007, Ilg and UPS executed an original agreement to pay benefits and three supplemental agreements memorializing the prior voluntary payments of benefits. The nature of the injury was listed in the original agreement only as "Pain in Right Knee" and in each of the supplemental agreements as "Pain in rt knee." No reference was made to an injury of the right hand. On July 12, 2007, the Commission issued an award order approving the original and supplemental agreements.

On November 6, 2007, an attorney retained by Ilg after the entry of the July 12, 2007 order sent a letter to the Commission requesting the records of Ilg's claim. The letter further advised the Commission that Ilg had suffered injuries to his right hand and his head in addition to the injury to his right knee and requested a hearing to determine whether Ilg was entitled to any additional benefits. The Commission responded by supplying the requested records, but neither referenced the assertion of the additional injuries nor took any action on the request for a hearing.

On February 25, 2008, Dr. Randall Peyton prepared and signed two fitness for duty evaluations of Ilg. In one form, Dr. Peyton opined that based on Ilg's continuing "knee pain" he was fit for restricted duty performing "[m]edium work." In the other form, Dr. Peyton opined that Ilg was "unable to work in any capacity" because of the injuries to his "R knee/R hand." Dr. Peyton further indicated that the condition of the hand was worsening because of "work-hardening therapy" Ilg was undergoing and that Ilg "is supposed to have this operated on." Based on the fitness for duty evaluation stating that Ilg could perform medium level work, UPS directed him to participate in vocational rehabilitation. Ilg declined to do so, citing Dr. Peyton's second report that Ilg was unable to work in any capacity.

UPS then filed an application with the Commission for a Code § 65.2–708 review hearing, seeking to suspend Ilg's benefits under the July 12, 2007 order for unjustifiably refusing to participate in vocational rehabilitation pursuant to Code § 65.2–603. UPS included in its application Dr. Peyton's report that Ilg was available for medium work. Ilg opposed the application, submitting Dr. Peyton's report that indicated Ilg was unable to work in any capacity. A senior claims examiner denied the application, finding that UPS had not established probable cause of an unjustified refusal. The examiner opined that the failure of the original and supplemental agreements to mention the injury to Ilg's right hand was "likely due to poor preparation" of the forms and that the injury to Ilg's right hand was included in the

[726 S.E.2d 24]

July 12, 2007 award of compensation benefits. The Commission upheld that decision.

UPS appealed the Commission's decision denying the application for a Code § 65.2–

708 review hearing to the Court of Appeals. In reversing the judgment of the Commission in *Ilg I,* the Court, relying on *American Furniture Co. v. Doane,* 230 Va. 39, 42–43, 334 S.E.2d 548, 550–51 (1985) (hereinafter *Doane*), expressed the view that "a medical condition not causally related to the work-related accidental *injury* for which benefits were originally awarded" could not serve as the basis for the employee refusing to cooperate with vocational rehabilitation. *Ilg I,* 54 Va.App. at 374, 679 S.E.2d at 549 (emphasis added). The Court further stated that UPS' "application to suspend benefits should have been granted unless [Ilg]'s hand condition, which prevented his cooperation with vocational rehabilitation, was the subject of an enforceable award finding that the hand condition was the result of the work-related accident." *Id.*

The Court further concluded that the claims examiner erred in presuming that Ilg's hand injury was included in the July 12, 2007 award of compensation benefits, and, as "that issue was never raised, or addressed, by the parties for ... consideration," it had never been established that Ilg's hand injury was causally related to the February 12, 2007 compensable accident. *Id.* at 379, 679 S.E.2d at 551. The Court also found that in reviewing the claims examiner's decision, the Commission had incorrectly placed upon UPS "the burden of presenting medical evidence in their application showing the hand injury was 'pre-existing' or was 'unrelated to' the industrial accident." *Id.* For these reasons, the Court reversed the Commission's decision denying UPS' application and directed the Commission "to place this case on the hearing docket." *Id.* Ilg did not appeal this decision to this Court.

Upon remand, a deputy commissioner found that Ilg justifiably refused to cooperate with UPS' rehabilitation efforts because he suffered from a total disability and, thus, had no obligation to participate in vocational rehabilitation. In a divided decision, the Commission reversed the deputy commissioner's decision. A majority of the Commission concluded that the decision in *Ilg I* required the Commission to consider only whether "to terminate an outstanding award which only covered the claimant's knee" because "[t]here was no award or agreement relating to the hand injury." The majority reasoned that "[t]o allow [Ilg] to establish a justification for his refusal by relying upon a causal connection between his hand injury and the compensable accident would allow [him] to convert this proceeding from one under Code § 65.2–708 to a proceeding under Code § 65.2–704, *which the Court of Appeals held was prohibited.*" (Emphasis added.) Thus, the majority concluded that Ilg was precluded from asserting the hand injury as a defense to UPS' assertion that his refusal to participate in vocational rehabilitation was unjustified.

Commissioner Diamond dissented. In her view, the majority had misinterpreted the decision in *Ilg I* as rendering "a final decision on [UPS'] application in which [Ilg] could not defend ... with evidence and testimony concerning his right hand." Rather, the Court in her view merely determined that the denial of the application *for a hearing* had been wrongly denied. Because the evidence plainly showed that Ilg had not been released by Dr. Peyton, Commissioner Diamond would have upheld the deputy commissioner's determination that Ilg's refusal to participate in vocational rehabilitation was justified.

Ilg appealed this decision to the Court of Appeals. In a memorandum opinion, the Court, again relying on *Doane,* 230 Va. at 42–43, 334 S.E.2d at 550, affirmed the Commission's decision suspending Ilg's benefits. *Ilg v. United Parcel Service, Inc.,* Record No. 2314–10–4, slip op. at 7, 2011 WL 2682681 (July 12, 2011) (hereinafter *Ilg II*). The Court agreed with the view expressed by the majority of the Commission that allowing Ilg to assert that his hand injury arose from the February 12, 2007 accident would convert

the Code § 65.2–708 proceeding to a proceeding under Code § 65.2–704. *Id.*, slip op. at 6. In

[726 S.E.2d 25]

a footnote, the Court indicated, however, that in its prior opinion in *Ilg I* "the pertinent question concerned whether 'the commission erred in rejecting the hearing application' ... and so only this ground of relief was properly before [the Court]. Moreover, our opinion left open the possibility that Ilg would seek a formal award for his hand injury" under Code § 65.2–704. *Id.*, slip op. at 7 n. 5.

We awarded Ilg an appeal to address the following assignments of error:

1. The Virginia Court of Appeals erred in its opinion of July 12, 2011, by holding that claimant cannot respond to the Employer's unjustified refusal of vocational rehabilitation allegation with evidence that he suffers from other accident-related conditions that render him totally disabled.

2. The Court of Appeals' decision erroneously held that claimant cannot prove justification for his refusal of vocational rehabilitation services by showing totally disabling accident-related conditions that render such services premature.

3. The Court of Appeals erred in affirming the Commission's implicit finding that claimant was guilty of an "unjustified" refusal of vocational rehabilitation services.

DISCUSSION

Before addressing the merits of Ilg's appeal, we first consider a challenge raised by UPS asserting that *Ilg I* decided the issue of whether Ilg's hand injury was causally related to the February 12, 2007 accident because the Court of Appeals found that the claims examiner erred in making the assumption that this was so and the Commission further erred in placing the burden on UPS to present evidence to the contrary in its application. UPS asserts that under the "law of the case" doctrine Ilg was prohibited from raising these issues on remand, especially as he failed to appeal the judgment in *Ilg I* to this Court.

This challenge is readily resolved by reference to the Court of Appeals' observation in *Ilg II* that "the pertinent question [in *Ilg I*] concerned whether 'the commission erred in rejecting the hearing application' ... and so only this ground of relief was properly before [the Court]." *Ilg II*, slip op. at 7 n. 5. Indeed, the Court had observed in *Ilg I* that the "issue [of whether Ilg's hand injury was compensable] was never raised, or addressed, by the parties for ... consideration" by the claims examiner or the Commission. 54 Va.App. at 379, 679 S.E.2d at 551. As no hearing had been conducted in the Commission prior to *Ilg I*, no determinations of fact or consideration of which party had the burden of proof on a given issue were necessary to the Court of Appeals' decision that UPS' application for a hearing had been improperly denied. Thus, the Court's observations on these matters were merely part of its discussion of the "pertinent question" and as such are not dispositive determinations of law or fact. Accordingly, the law of the case doctrine does not apply to these issues or limit their consideration by the Commission on remand or of the appellate courts in reviewing its decision.

We now begin our consideration of the merits of Ilg's appeal by reviewing *Doane*, the case relied upon by the Court of Appeals in both *Ilg I* and *Ilg II* to support its conclusion that an employee may not assert "a medical condition not causally related to the work-related accidental injury for which benefits were originally awarded" as the basis for the employee refusing to cooperate with vocational rehabilitation. The Court of Appeals reasoned that allowing the employee to do so would convert a Code § 65.2–708 proceeding to a proceeding under Code §

65.2–704 by making a de facto award for the injury that was not the subject of the prior award.

In *Doane,* the employee was awarded temporary total disability for a back injury arising out of and in the course of employment. After a deputy commissioner found that an arm impairment which prevented the employee from performing selective employment was not causally connected to the

[726 S.E.2d 26]

industrial accident for which an award of benefits had been made, the employee's compensation was suspended because of her unjustified refusal of selective employment. *Doane,* 230 Va. at 42, 334 S.E.2d at 550. The Commission reinstated benefits, concluding that the offered selective employment must be within the employee's capacity at the time offered, regardless of whether that capacity was affected by an unrelated injury. *Id.*

Reversing the Commission, we held that employment suitable to an employee's capacity meant employment within the employee's residual capacity resulting from the industrial accident because an employer "is liable for the condition of an employee *resulting from an industrial accident.* But an employer is not liable for conditions not causally related to the employee's work." *Id.* (emphasis added). Thus, we concluded that "[a]n employer, therefore, is absolved of liability for compensation if the employee refuses selective employment because of a *physical condition unrelated to the original industrial accident* and arising since the accident." *Id.* at 43, 334 S.E.2d at 550 (emphasis added).

As indicated by the emphasized language in the passages quoted above, our focus in *Doane* was on whether the employee's asserted justification for refusing selective employment was a condition causally related to the original industrial accident, not whether it arose from the specific injury described in the award of compensation benefits which the employer sought to suspend. The rationale of *Doane* does not resolve the inquiry in this case because Ilg's asserted justification for refusing to participate in vocational rehabilitation is not "unrelated to the original industrial accident." Indeed, both UPS and the Commission were aware from his original application that Ilg claimed benefits for "injury to right hand and right knee" resulting from the industrial accident. Accordingly, under the facts presented here, the inquiry is whether it was necessary for Ilg to first obtain an award of benefits under Code § 65.2–704 for his hand injury in order to assert a disability arising from that injury as justification for refusing to accept and participate in vocational rehabilitation offered under an earlier award of benefits for his knee injury arising from the same industrial accident.

The Commission and the Court of Appeals found that permitting an employee to justify a refusal to accept vocational rehabilitation services based on a disabling injury arising from an industrial accident, but not expressly denominated as included in a prior award, would amount to a "de facto" award for the injury which would convert a Code § 65.2–708 proceeding into a Code § 65.2–704 proceeding. Thus, they concluded that Ilg's failure to have the July 12, 2007 order reflect that he had suffered a compensable injury to his right hand in addition to a compensable injury to his right knee in the February 12, 2007 accident barred him from asserting his hand injury as a justification for refusing to participate in vocational rehabilitation. We disagree.

Previously, we have not had occasion to address a case in which the issue presented was whether an employee receiving workers' compensation benefits for partial or total disability has unjustifiably refused to participate in vocational rehabilitation offered

by the employer under Code § 65.2–603. There are obvious differences between what may be reasonably expected of the employee to participate in vocational rehabilitation and that which may be reasonably expected when selective employment is offered by the employer under Code § 65.2–510. Nevertheless, in *Doane* and subsequently in *Ballweg v. Crowder Contracting Co.*, 247 Va. 205, 209, 440 S.E.2d 613, 615 (1994), we stressed that when an employer offers selective employment to an injured employee "suitable to his residual capacity, the burden of persuasion shifts to the employee to show justification for refusing the offer." We are of opinion that this principle is equally applicable to cases involving the refusal to participate in vocational rehabilitation offered under Code § 65.2–603.

In the present case, Ilg had filed a claim with the Commission for injuries to his right knee as well as his right hand. UPS accepted that claim and voluntarily paid disability benefits to Ilg. Dr. Peyton provided UPS with his medical opinion that Ilg was "unable to work in any capacity" because of

[726 S.E.2d 27]

injuries to his right knee and right hand. Ilg sought to justify his subsequent refusal to participate in vocational rehabilitation based on his hand injury. Under such circumstances, it would be the height of form over substance to find that an asserted injury *related to the industrial accident for which benefits have been awarded* cannot justify the employee's refusal of the employer's offer of selective employment or of vocational rehabilitation unless that injury is also the subject of a prior award pursuant to Code § 65.2–704. If the Commission in considering an employer's application under Code § 65.2–708 concludes that the refusal is justified, this does not result in an award of benefits for the asserted injury. Rather, the result is merely that the employee continues to receive benefits in accord with the original award.

Accordingly, we hold that the Court of Appeals erred in determining that Ilg was precluded from asserting that his refusal of vocational rehabilitation was justified because he remained fully disabled by his hand injury related to the industrial accident for which he was receiving benefits for his compensable knee injury. Because there has not yet been a determination by the Commission as to whether the disability related to Ilg's right hand in 2008 was, in fact, causally related to the February 12, 2007 accident, we express no opinion on that issue, but will remand the case to the Court of Appeals for remand to the Commission for an evidentiary proceeding where the burden will be on Ilg to show that his refusal to participate in vocational rehabilitation was justified in light of his hand injury.

In the Commission and in the Court of Appeals it was suggested that Ilg might have been, and might yet be, entitled to request a Code § 65.2–704 proceeding to determine if he is entitled to compensation for the injury to his hand, or any other injury, arising from the February 12, 2007 accident. However, that issue has not been raised by either party in this appeal. We express no opinion thereon except to note that nothing herein should be interpreted as barring Ilg from seeking to pursue such a claim if he chooses to do so.

CONCLUSION

For these reasons, we will reverse the judgment of the Court of Appeals and remand the case to the Court with instruction to remand the case to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Justice MIMS, concurring.

I concur with the Court's analysis and in the judgment but write separately to stress that this case is decided narrowly. Reading

the holding broadly, one might conclude that an employee who relies on an injury that is related to an accident for which benefits have been awarded, but which injury is not itself the subject of the award, could prolong his receipt of benefits by foregoing or delaying treatment. That is beyond the scope of the Court's holding today. Accordingly, persistent failure to treat, or unreasonable delay in treatment of, an injury found to justify an employee's refusal of selective employment or vocational rehabilitation may be a change of condition under Code § 65.2–708, thereby affording the employer the opportunity for a review hearing to assert that benefits should be suspended if the failure or delay is found to be unjustified under Code § 65.2–603(B).

Notes:

* Essentially, Code § 65.2–704 addresses an original determination that an employee has suffered a compensable injury, whereas Code § 65.2–708 addresses a change in condition which permits the Commission to make an award ending, diminishing, or increasing the compensation previously awarded.