VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

06/24/94

WILLIAM MCLAUGHLIN, Claimant

Opinion by JOYNER
Chairman

v. VWC File No. 144-10-86

MANVILLE SALES CORPORATION, Employer
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Insurer

Mr. William McLaughlin
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Elkton, VA 22827
Claimant, pro se.

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10521 Judicial Drive
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for the Defendants.

REVIEW on the record by the Full Commission in Richmond, Virginia.

The claimant appeals the Deputy Commissioner's Opinion of January 24, 1994. The claim came to be heard upon the claimant's application seeking reinstatement of compensation previously suspended upon a finding that he failed to cooperate with vocational rehabilitation efforts. Compensation was not reinstated upon a finding that the claimant had not cured his earlier refusal. Upon Review, we agree with the Deputy Commissioner's findings.

The claimant was a 47-year-old long distance truck driver at the time of his injury. On December 13, 1989, he suffered injury

to his back, neck, left arm, and shoulder when he fell while attempting to tie down a load of lumber. The claim was accepted

as compensable and compensation paid for temporary total disability from the date of accident through September 25, 1992. On the latter date, the employer filed its application to suspend compensation upon a finding that the claimant had failed to cooperate with various rehabilitation efforts. Compensation was suspended by Opinion issued February 23, 1993. That Opinion was not appealed and became final.

The claimant filed his current Application for Hearing on May 24, 1993. Reinstatement of compensation is sought upon an allegation and the claimant's testimony that he is now willing to cooperate with vocational rehabilitation efforts in every regard. However, the claimant has had no contact with his rehabilitation counselor since compensation was suspended. This case is, therefore, distinguished from Bane v. Rosslyn Concrete Construction Company, et al., Record No. 2598-92-4 (February 15, 1994).

We have consistently held that something more than a mere statement of a willingness to cooperate is required. The claimant must take some affirmative action, such as contacting his rehabilitation counselor (Bane, supra), seeking light work on his own initiative, registering with the Virginia Employment Commission, and, in effect, demonstrating his willingness to cooperate. The claimant in this case has done none of the above. Upon this basis, the Opinion appealed from must be, and hereby

is, AFFIRMED.

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 25, 2014

TRACEY HUTCHERSON v. FRITO LAY, INC
ACE AMERICAN INS CO (TRAVELERS INDEMITY), Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00000646159
Claim Administrator File No. B264640096000101646
Date of Injury July 13, 2012

Philip B. Baker, Esquire
For the Claimant.

Kevin W. Cloe, Esquire
For the Defendants.

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

The claimant requests review of the May 28, 2014 referral of the defendants' May 1, 2014 Application for Hearing to the evidentiary docket. We REVERSE.

I. Material Proceedings

On July 13, 2012, the claimant suffered a compensable injury by accident. Pursuant to an agreement by the parties, on November 2, 2012, the Commission awarded temporary total disability benefits beginning August 6, 2012 and lifetime medical benefits for reasonable, necessary and authorized medical treatment for her "lumbar spine/strain/sprain with radiculopathy."

The defendants filed an Application for Hearing on May 1, 2014, alleging the claimant failed to cooperate with vocational rehabilitation efforts. The defendants attached an affidavit from Pam Seager, claimant's vocational case manager. Compensation was paid through May 3, 2014.

On May 16, 2014, the claimant responded to the Application. The claimant argued the defendants' supporting evidence was stale as it only addressed issues related to vocational services occurring between May 2013 and February 2014. She also disputed Seager's version of her efforts. Finally, the claimant noted the defendants and Seager failed to communicate to her that she was not cooperating with the process and any failure to cooperate was "cured" by her contemporaneous marketing during this same time period.

On May 28, 2014, the Senior Claims Examiner/Employer's Application Supervisor with the Claims Services Department referred the Application to the docket. She held:

> I have examined the Employer's Application for Hearing filed with the Commission on May 1, 2014. I have considered the Claimant's Response to the Employer's Application filed on May 16, 2014, per Commission Rule 1.5(C).
>
> The Employer's evidence is acceptable preliminarily and the Employer's Application will be referred to the hearing docket. The existing dispute should be considered by a Deputy Commissioner to weigh the evidence and make a decision on the merits.

II. Findings of Fact and Rulings of Law

We find the evidence presented in support of the Application for Hearing was stale and there was evidence of the claimant's current cooperation with vocational rehabilitation.

The Commission has a longstanding policy of rejecting stale evidence. The referral of this application to the hearing docket violates that longstanding policy and is not warranted based upon the defendants' evidence.

In Dunkelberger v. Eastern Technical Communications, Inc., VWC File No. 209-87-74 (May 11, 2004), the employer filed a March 12, 2004 application, relying on evidence of failure to cooperate with vocational rehabilitation services from July 2003. The Commission reversed

the Senior Claims Examiner's referral and found probable cause was lacking. We reach the same here. See Hall v. Mader Constr. Corp., VWC File No. 167-16-26 (July 2, 1997) (employer's application alleging non-cooperation with vocational rehabilitation, filed on April 9, 1997, relying on evidence from 1996, rejected; Commission held evidence was "too remote in point of time to justify suspension of compensation now."). See also Handy v. Am. Road Markings, Inc., VWC File No. 238-58-46 (Dec. 18. 2009) (stale medical evidence); Dennis v. Air Wisconsin Airlines Corp., VWC File No. 224-64-07 (June 21, 2007) (stale medical evidence); Johnson v. Newport News Shipbuilding & Dry Dock Co., VWC File No. 192-83-07 (Mar. 2, 2007) (stale medical evidence); Alvarez v. WSC Warehousing & Packing, Inc., VWC File No. 223-54-19 (Sept. 6, 2006) (stale medical evidence).

When an employer seeks a suspension of indemnity benefits based upon an unjustified refusal to cooperate with reasonable vocational rehabilitation, the evidence must be reasonably contemporaneous with the filing of the application. Otherwise, an employer may gather evidence without filing and then later use it to gain an unfair economic advantage through a suspension of benefits, even where a claimant was then cooperating. The statutory provision for a suspension of benefits imposes a penalty to discourage non-cooperation and to encourage cooperation consistent with the purposes of the Workers' Compensation Act. Those goals are not served by permitting an employer to suspend benefits now based on evidence of a historically remote period of non-cooperation. Instead, allowing a suspension of benefits pending a hearing based upon stale evidence encourages unfair gamesmanship through the exertion of inequities in economic bargaining power.

Employers might criticize this analysis because: (1) filing an application to suspend benefits based upon a single act of non-cooperation as soon as it occurs is not likely to be accepted; and (2) non-cooperation is best proven, and perhaps necessarily proven, through evidence of a course of conduct over time. While these concerns have merit, they do not conflict with the concept of rejecting applications which are based solely upon stale evidence, where there is no current evidence of non-cooperation.

In this case, the application was filed on May 1, 2014, alleging a failure to cooperate with vocational rehabilitation efforts beginning almost a year prior on May 13, 2013 and ending on January 31, 2014, over three months prior to the application. In addition, the evidence submitted by the claimant, including evidence from the employer, suggests at the time the application was filed, the claimant was cooperating. The May 2, 2014 letter from the insurer's Claim Examiner to claimant's counsel references the claimant being transported to meetings with the vocational rehabilitation counselor through March 19, 2014. This is a month and a half after the last date of alleged non-cooperation. Though the claimant may well have been uncooperative, the defendants may not sit on their right to file a timely application.

III. Conclusion

The May 28, 2014 referral of the defendants' May 1, 2014 Application for Hearing is REVERSED.

The defendants are ordered to reinstate compensation immediately pursuant to the November 2, 2012 Award Order. A penalty shall be added to unpaid compensation pursuant to Code § 65.2-524.

This matter is hereby removed from the review docket.

WILLIAMS, COMMISSIONER, Dissenting:

I must respectfully dissent from the decision of the majority.

While certainly there are circumstances where the alleged acts of non-cooperation are so far removed from the date an application is filed, so as to be "stale," I would not find a delay of barely three months to fall into this category.

The majority for some reason deems it necessary to address "unfair gamesmanship" without a single shred of evidence indicating that these defendants have engaged in such gamesmanship. Similarly, the majority refers to using an employer's application "to gain an unfair economic advantage through a suspension of benefits," again, without any evidence that these defendants have engaged in such conduct. Indeed, if anything, it is the claimant who has gained an economic advantage as, owing to the date the application was filed, she has received benefits for periods of time for which she would not have been entitled if the defendants proved her failure to cooperate.

Unlike the majority, I do not believe the May 2, 2014 letter from the carrier establishes that the claimant had cured any failure to cooperate. The letter fails to mention how many meetings the claimant attended from January 21 through March 19, 2014. Moreover, the acts alleged as non-cooperation by the defendants encompassed more than simply failing to attend meetings. For example, the defendants asserted that the claimant used a cane at all of her interviews, and that she failed to complete assignments which she was given. If this conduct was continuing, the claimant's failure to cooperate might not be cured by simply attending meetings with the vocational case manager. At the very least, the issue of whether the claimant cured a

failure to cooperate is obviously factually disputed by the parties and should be determined at a hearing.

In short, I believe the employer's application alleged facts, sufficiently contemporaneous with the filing of the application, so as to constitute probable cause for referral of the application to the hearing docket with a suspension of benefits until such time as the case is finally decided.

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

Jan. 2, 2020

PAMELA YANCEY-BELL v. DIDLAKE, INC.
TECHNOLOGY INSURANCE CO, Insurance Carrier
AMTRUST NORTH AMERICA, Claim Administrator
Jurisdiction Claim No. VA00001502669
Claim Administrator File No. 29630441
Date of Injury: August 9, 2018

Berkley D. Foltz, Esquire
For the Claimant.

Erica S. Blackman, Esquire
For the Defendants.

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

The claimant requests review of the October 31, 2019 referral of an October 15, 2019 Employer's Application for Hearing to the docket. We AFFIRM.

I. Material Proceedings

The claimant suffered a compensable injury by accident on August 9, 2018. A January 2, 2019 Award Order granted medical benefits for the right leg, right shoulder, and a lower back strain. It awarded temporary total disability beginning November 21, 2018 and continuing.

The defendants filed an October 15, 2019 Employer's Application for Hearing. They advanced alternative theories of relief, contending either the claimant returned to pre-injury work or light duty work on July 5, 2019. Attached to the application was a July 11, 2019 office visit note from Dr. David Goss, MD. It stated, "Mrs[.] Yancey-Bell returns with worsening lower back

pain[.] She reports having increased lower back pain following working 8 hours standing all day for 6 days straight[.]" The defendants sought termination/suspension of the outstanding award or modification of the award from temporary total to temporary partial disability. They also requested a credit for overpayments made to the claimant due to her failure to report her return to work pursuant to Virginia Code § 65.2-712.

The claimant filed an October 25, 2019 response to the application. She agreed she returned to work for a different employer from June 11 through June 16, 2019. She attached a pay stub indicating her earnings during that time. The response further asserted that on June 18, 2019, claimant's counsel notified the carrier of the claimant's brief return to work via e-mail and that counsel later sent the claimant's pay stub to the carrier. E-mail correspondence from claimant's counsel to Donia Robinson, insurance adjuster, was enclosed.

The Commission referred the application to the on-the-record hearing docket on October 31, 2019.

The claimant filed a November 4, 2019 request for review. She argues the employer's application is without merit for the reasons stated in her October 25, 2019 response.

The defendants filed a November 13, 2019 response. They argue the evidence was sufficient to establish probable cause to justify referring the application to the docket.

II. Findings of Fact and Rulings of Law

An application for hearing must demonstrate the requisite probable cause to justify suspending benefits and docketing the application for a hearing on its merits. "Probable cause exists if the facts and circumstances are sufficient to justify a prudent and reasonable person in the belief that the allegations, if true, would prevail." *Hunt v. Cox Commc'ns, Inc.*, VWC File No.

240-27-37 (Oct. 1, 2010) (citing *Giant of Va. v. Pigg*, 207 Va. 679, 684 (1967)). "In *City of Norfolk v. Lassiter*, 228 Va. 603, 606 [] (1985), the Virginia Supreme Court held that reasonable grounds for defending a case exist when the facts induce a reasonable mind to believe that compensation is at least doubtful." *Id.*

We find the defendants' evidence sufficient to establish probable cause. The medical report submitted by the defendants indicated the claimant returned to work for at least six days some time in recent proximity to the July 11, 2019 appointment. This evidence raised an allegation that the claimant returned to work. If true, it would call into question the claimant's entitlement to ongoing temporary total disability. However, the evidence submitted to the Commission reflects that immediately after the claimant's six days of employment, the carrier was advised of the brief return to work. Shortly thereafter, the carrier was provided with records of the claimant's earnings. Consequently, we are perplexed as to why the Commission's resources need be committed to resolution of a matter over which there appears to be no factual dispute and could easily be addressed by agreement. We acknowledge claimant's counsel's objection to the defendants' entitlement to a credit for the claimant's earnings. Without commenting on the merit of that contention, we would encourage the parties to ponder whether an amicable resolution might serve your respective clients' interests better than months of litigation over six days of employment.

III. Conclusion

We AFFIRM the October 31, 2019 finding of probable cause and referral of the application to the docket.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting:

The majority opinion elicits my respectful dissent. The evidence submitted by the defendants was insufficient to justify suspension of benefits. Benefits should only be suspended where the employer has filed sufficient supporting evidence to establish that probable cause exists to believe that a change in condition has occurred. *Telesystems, Inc. v. Hill*, 12 Va. App. 466, 470 (1991) (discussing former Commission Rule 13). Guided by precedent from the Court of Appeals of Virginia and the Commission, I would find the claimant's brief return to work did not constitute a change in condition sufficient for probable cause to suspend benefits pending an evidentiary hearing.

Direction is found in the Court of Appeals' decision in *Starbucks Coffee Co. v. Shy*, 61 Va. App. 229 (2012). Starbucks filed an application for hearing requesting termination or suspension of the claimant's award on the basis of the claimant's return to light duty work for one day. *Id.* at 235. The Court upheld the Commission's holding that the claimant's twelve-hour period of work was insufficient to prove a change in condition and return to work. *Id.* at 242-44.

Similarly, the Commission and the Court of Appeals have repeatedly held that an employer cannot terminate benefits based upon a short-term return to work and then seek to shift the burden to the claimant to prove entitlement to further benefits. For example, in *Telesystems Incorporated v. Hill*, the claimant unsuccessfully returned to light duty work for two brief periods. *Hill,* 12 Va. App. at 468. The employer filed an application for hearing and argued it was the claimant's burden to apply for additional compensation following the period of work. *Id.* at 468-69. The Commission granted the employer a credit for the period of work and found the claimant entitled to ongoing compensation under the outstanding temporary total disability award. *Id.* at 469. The Court held

the Commission did not err in continuing to recognize the claimant's temporary total incapacity. *Id.* at 472. They noted that the claimant's failed attempt to return to light duty work on his own accord did "not require a reclassification of his disability from total to partial." *Id.*

In *Lot Masters v. Gibbs*, 11 Va. App. 70 (1990), the Commission granted the employer a credit during the claimant's return to light duty work and continued payments under the original temporary total disability award. *Id.* at 72. The Court held that the Commission was not required to vacate an outstanding temporary total disability award "simply because there was a period of temporary work, limited in both duration and frequency." *Id.* at 73. They explained that "[s]uch a requirement would elevate form and procedure above substance and would run contrary to the purposes of the Workers' Compensation Act." *Id.* Likewise, in *Shaw v. Carroll's Foods of Virginia, Inc.*, VWC File No. 169-85-89 (May 3, 1999), the Commission found no error in the Deputy Commissioner's decision to grant a credit to the employer without amending the outstanding award where the claimant had returned to work for three days.

Here, there was no evidence submitted indicating that the claimant continued to work beyond the admitted six-day period or that he experienced a physical change in condition that would be a basis for suspending the open award. The claimant's brief, unsuccessful return to work under these circumstances would not constitute a change in condition that would call into question his entitlement to ongoing temporary total disability. While the defendants have established probable cause to believe that they are entitled to a credit for payments made during the period of the claimant's return to work, there is no indication that the claimant's entitlement to ongoing temporary total disability has changed. Thus, there is not probable cause to suspend the claimant's benefits.

Moreover, the policy behind suspending benefits pending a hearing "is to preserve the status quo ante." *Hill* at 470. A suspension " is simply preliminary and temporary, intended to protect both parties' interests until the commission resolves the noticed matter on its merits." *Id.*

A suspension of benefits in this case would not serve that purpose. The evidence submitted by the defendants indicated the claimant returned to light duty work for a very brief period, approximately three months before the Application was filed. There is no medical or other compelling evidence that the claimant's physical capacity changed. Preserving the status quo under these circumstances means allowing the claimant to continue to receive benefits pursuant to the outstanding award while the issue of entitlement to a credit is resolved. Furthermore, suspending benefits based upon this brief period of return to work is not necessary to prevent a windfall to the claimant. *But see Blankenship v. Philip Morris USA, Inc.*, VWC File No. 223-40-25 (June 16, 2010). Rather, allowing the defendants to suspend benefits based upon a historically remote, isolated period of return to work would encourage unfair gamesmanship of the system and would subvert the humanitarian purposes of the Act. *See Hutcherson v. Frito Lay, Inc.*, JCN VA00000646159 (Aug. 25, 2014).

For these reasons, the defendants' evidence of a brief unsuccessful return to work was insufficient to establish probable cause that a change in condition occurred. *See Chapman v. Koons Automotive, Inc.*, JCN VA00000907262 (Feb. 13, 2015) (no probable cause found based on a one-day unsuccessful return to work); *Schuldt v. United Parcel Service, Inc.*, VWC File No. 235-88-67 (Jan. 23, 2009) (no probable cause found based on a one-day unsuccessful return to work). *See Magano v. Fairfax Cnty.*, JCN VA00000316175 (Jan. 6, 2016) (unnecessary to terminate ongoing temporary total disability award based on claimant's failure to report brief and

discrete receipt of earnings); *Bonkowski v. Towne Air Freight, L.L.C.,* JCN VA00000481808 (July 31, 2013) (claimant answering phones and paying himself *de minimis* "expenses" of $ 733.68 over six month period was not a return to employment requiring modification of award to temporary partial disability or award of credit); *Mills v. Olsten Corp.,* VWC File No. 190-11-23 (Mar. 19, 2001) (no change in condition where claimant under an open temporary total disability award discontinued Department of Social Services mandated "volunteer" work for which she received $ 53.93 per week and the employer received a credit; open award for temporary total disability continued; issues relating to credits do not affect the claimant's awards).

I would therefore reverse the Staff Attorney's referral to the docket of the employer's application to terminate, suspend, or modify the claimant's temporary total disability award. However, consistent with *Gibbs*, *Hill*, and *Shaw*, I would refer the employer's application to the docket for determination of the claimant's earnings during the period of return to work and the defendants' entitlement to a credit.

APPEAL

Because this is an interlocutory issue, there is no right of appeal to the Court of Appeals of Virginia until the Commission has issued a final decision in this case.

Vocational Rehabilitation Providers ("VRP") and Nurse Case Managers ("NCM"): Perspectives from Both Sides of the Bar

Joel Young, Esq. and Jessica Hacker Trivizas, Esq.

I. Vocational Rehabilitation.

A. §65.2-603A3.

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. Vocational Rehabilitation Guidelines. (Appendix)

1. Effective October 1, 2015

C. Vocational Rehabilitation Provider Licensure.

i. The Commission does not regulate the licensure or certification of vocational rehabilitation providers

ii. Professional Judgment §54.1-3510

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.

1. Compare to Commission Guidelines §IA. "Vocational rehabilitation services…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."

iii. Copeland v. Stone Container Corp., VWC File No. 206-01-65 (7/19/04)

Employer's application for hearing on the grounds of refusal to comply with vocational rehabilitation is dismissed because the vocational rehabilitation provider is not certified. The vocational rehabilitation provider was in training under a supervising certified rehabilitation consultant.

"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 [the provider] 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 involved the carrier's suspension of workers' compensation benefits."

D. **Job Descriptions and FCEs.** They differ from what the employee actually does.

i. **Claimant's Perspective**:

1. I beat this drum all the time: the map is not the territory.

2. The legal standard is "the way the job was actually performed."

3. While you may win at a hearing on an errant full duty release, you do more to protect your client by getting out in front of this issue, to avoid the delay between the Employer's Application and the hearing. How?

    a. Discovery: request a copy of the job description.
    b. If the job description does not match what the client states she/he did, get an affidavit from the client and meet with the treating doctor.
    c. Explain the job description issue to the doctor, suggest an FCE if the doctor has concerns.
    d. Have your client carry the affidavit to the FCE. Many times the FCE provider simply uses the Dictionary of Occupational Titles to determine whether or not the claimant can do his/her job.
    e. "Driver" - There are plenty of job descriptions that say "Driver" that do not cover the full breadth of how the job was actually performed. e.g. assisting with freight, mechanical work, etc.
        i. Consider site visit and depositions of co-workers
    f. "Office work" may involve more than just filing.
        i. Treating doctor released my client to full duty because his understanding is that she just did administrative type work.
        ii. At hearing, my client testified that she carried a 56 lb box of copy paper up a flight of stairs once a month. In addition, she would lift boxes of files, which could be heavier that the copy paper.
        iii. An FCE resulted in 20 lb. lifting restrictions.
    g. If you think this is overkill, see the deposition excerpts in the materials. Note that this was prior to the 2015 Vocational Rehabilitation Guidelines, but the point remains, that VRP was not on my client's side. He did not ask my client what his full duty job involved.
        i. Doing whatever it takes to help get the case resolved. Deposition page 13.
        ii. Perhaps 20 of 150 found a job. Deposition page 13.
        iii. I always consider myself an agent of the insurance company, whatever they request us to do. Deposition page 20.

4. When an IME is scheduled, go ahead and schedule an appointment with the treating doctor and a functional capacity evaluation. There are a number of places that will perform FCEs without a

prescription. If a facility will not perform an FCE without a prescription, and you cannot get a script for an FCE from the authorized treating doctor, get one from a PCP. Then have the treating doctor comment on both the IME and the FCE.

5. I have recently had an Employer's Application rejected with this evidence on the basis that that the IME opinion was unreliable because it did not consider the FCE and a later office note from the treater. I also filed a questionnaire response from the treater disagreeing with the IME.

6. Carranza v. Young Chul Lee Service, Inc., VWC File No. VA02000029583 (Dec. 27, 2018). In Carranza the defendants filed an employer's application for hearing in September of 2018 based upon an IME from May of 2018. That application was rejected in October of 2018. The reviewing Staff Attorney determined that an intervening August 2018 FCE had not been considered by the IME doctor, rendering the IME unreliable.

ii. Remember the "law of the case" can apply. Lopez v. Macy's, VWC File No. VA00000868201, (Dec. 21, 2018)

1. If you are going to a hearing, put on evidence of how physical the job was. Be respectful of the Deputy Commissioner's time, but make sure you get it in. It becomes the law of the case.

E. **Unjustified Refusal of Vocational Rehabilitation.**

i. **§65.2-603(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.

ii. Rule 1.4(C)(3) of the Rules of the Commission. "The application alleges a failure to cooperate with vocational rehabilitation, in which case payment must be made through the date the application is filed."

iii. The employer has the burden of proof on their application. J.A. Foust Coal Co. v. Messer, 195 Va. 762, 768 (1954).

iv. James v. Capitol Steel Constr. Co., 8 Va. App. 512 (1989). A claimant fails to cooperate with vocational rehabilitation when he:

1. Does not attend meetings,

2. Refuses letters, or
3. Displays an unwillingness to participate in a job search

v. Crumpton v. City of Danville, JCN VA00001159204 (April 26, 2018). Claimant worked two full time jobs for more than 40 hours per week before a compensable heart disease diagnosis. After diagnosis the claimant retired from his pre-injury job and sought TTD benefits, but continued working the second full time job. The employer initiated vocational rehabilitation and the claimant flatly refused to comply. The Commission found that the claimant's employment at only the second full time job was not an adequate justification for his refusal to cooperate with vocational rehabilitation.

vi. After the defendant meets its burden of proving that the claimant refused vocational rehabilitation services, the burden shifts to the claimant to show that the refusal was justified. Ilg v. UPS, 284 Va. 294 (2012).

vii. **Cure**. There must be more than a mere statement of willingness to cooperate. There must be an affirmative act such as contacting the rehabilitation counselor, seeking light-duty employment or registering with the Virginia Employment Commission. McLaughlin v. Manville Sales Corp., VWC File No. 144-10-86 (June 24, 1994).

F. **Practical Tips**.

i. Claimant's Perspective.

Stay in compliance. Easy, right?

1. First, I meet with the VRP and client in my office to establish the baselines from the beginning.
2. I request a copy of the vocational rehabilitation plan.
3. I request a copy of the vocational rehabilitation reports as they are generated.
    a. That way, I can course-correct quickly, if necessary.
4. Challenges to compliance:
    a. Motivation
    b. Schedule
    c. Transportation
    d. Child Care / Family Member Care
    e. Unrelated Medical Conditions
    f. Life events
    g. Traffic

ii. Defense Perspective.

1. Ensure you are copied on the VRP's reports. Clients are busy and may not relay noncompliance to you timely.

2. Read between the lines. You may get more out of a conversation with the provider than just reading their reports.
3. Make sure the VRP is verifying the claimant's submission of job applications.
4. Difficult to prove refusal when a claimant is going through the motions.
5. Balance compiling evidence of refusal against ruining the claimant's job prospects.

iii. Employer's Application for Hearing stage

1. Both sides should be aware of Hutcherson v. Frito Lay, Inc., VWC File No. VA0000646159 (Aug. 25, 2014)
    a. Staleness analysis applied to Vocational Rehabilitation
    b. Refusal to cooperate with reasonable vocational rehabilitation
        i. Evidence must be reasonably contemporaneous with filing
            1. Cannot be historically remote
            2. Would encourage unfair gamesmanship
        ii. Three months prior to filing, evidence of a lack of cooperation, but evidence of cooperation at the time of filing.

2. Referral to the docket upheld in a case involving a six day return to work. Nevertheless, be mindful of the following, which is fairly direct:

    "[W]e are perplexed as to why the Commission's resources need be committed to resolution of a matter over which there appears to be no factual dispute and could easily be addressed by agreement…[W]e would encourage the parties to ponder whether an amicable resolution might serve your respective clients' interests better than months of litigation over six days of employment." Yancey-Bell v. Didlake, Inc. VWC File No. VA00001502669 (Jan. 2, 2020)

3. Defense Perspective: Build a strong case in support of your application.

iv. I have an ongoing case where the VRP required to apply to jobs within 3 days and provide written proof of the same. The client was initially slow in complying and the carrier filed an EAH. I immediately scheduled the VRP and client for an appointment at my office and was hoping to have the VRP sign off on something.

1. Instead, following that meeting, in her report, the VRP wrote that the claimant "failed to file for all of the job leads." He filed for 7 or 8 of the 10 leads, but the report sounded like he did not do any. She was shuffling papers around at the meeting and could not even confirm what she had sent him.
2. At that point, I thought we had a decent chance of showing cure.
3. By the next meeting, he was so frustrated with the leads he was getting, the client just told the VRP he would not meet with her, so it became and quite clear he was non-compliant.

v. Read the reports.
1. I confess that I do not always read the reports, but someone in my office does. That way I am able to make sure the client does not lapse into persistent non-compliance. Those are much tougher cases to dig out of. Those go to hearings.

vi. Referred to the docket?
1. Creative Solutions: hire your own VRP to ensure the cure.

vii. Watch out for: Failure to cooperate (constructive refusal) due to unrelated medical condition. UPS v. Ilg, 54 Va.App. 366 (2009)
1. My facts – old case. (not Ilg)
2. Client went out for thyroid surgery. Due to complications, he was placed in a medically induced coma and missed his vocational rehabilitation appointment.
3. VRP signs an affidavit that
    a. Client missed one appointment
    b. Client now using walker
    c. Client only able to do sedentary duty
    d. Client has no computer skills
4. VRP had provided zero job leads
    a. Referred to the docket

II. Nurse Case Managers.

A. Role of NCM.

B. NCM taking care into their own hands: unilaterally changing appointment dates and times, ordering urine tests. Using protective orders to deal with this.

i. Send a letter to the NCM informing her/him that you do not allow contact.
ii. Inform client to be on the lookout for the NCM. I am fine with pleasantries being exchanged, but nothing further.
iii. Tell your client to request that the NCM not be in the office while he/she is being examined.

iv. The doctor makes the decision whether or not she/he will speak with the NCM.

v. Tell your client to request to be present if/when the NCM speaks with the doctor.

vi. Additional Claimant pointers: If you have a rogue NCM, you can file to have the NCM removed. File for a show cause and request a protective order pending a determination on the motion.

5. I had a NCM changing my client's appointment and referring my client to physical therapy on her own when my client had not been able to get back to his treating doctor for five months.
6. The deputy commissioner removed the nurse case manager from the file.

C. **Perspectives**.

i. Claimant:

1. Good: gets things done quickly, gets appointments set quickly, helping profession.

2. Bad: interferes with medical treatment,
   a. Truly outrageous behavior?
   b. File a complaint with the Department of Health Professions

ii. Defense:

1. Good: gets things done quickly, gets appointments set quickly, easy access to the doctor, helps to fill in context about what is really going on, can recommend IME or panel physicians.

2. Bad: creates record of disability for claimant, badly worded medical questionnaires, creates evidence of MMI, gets in the way of attorney-client privilege, can exceed the scope of their role.

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whatever they request in the particular tasking.

Q Okay. So when you receive a file that comes with contact information for an insurance company --

A Uh-huh.

Q -- and you just -- do you discuss directly with the adjuster or the contact person for the file?

A Most of the time, yes.

Q Okay. In this particular case, did you have contact with the adjuster in this case?

A Originally, yes. The adjuster -- I can't remember her name. Yes.

Q Okay. And --

A I did.

Q Okay. Who sets the scope of your vocational rehabilitation services?

A I'm not sure if I understand the question.

Q Okay. Well, do you receive a written communication from the insurance company as to what your vocational rehabilitation services

Page 12

will involve?

A Sometimes.

Q Okay. Do you recall if you did in this case?

A Yes.

Q Okay. And do you recall what those directions were?

A Yeah. They were pretty clear. In this case, job placement.

Q Okay. As a vocational rehabilitation provider, what services are you supposed to provide in the State of Virginia?

A Job placement services, translation services when requested, since I speak Spanish and any sort of medical case management, if I'm requested to do so, primarily on behalf of the insurance company's request as well as, again, working with Hispanic claimants.

Q Okay. Help me understand about medical case management.

Were you requested to do medical case management in this case?

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A Specifically, I don't remember. Actually, I don't remember.

Normally, with a case where we're asked to do job placement in the -- with the idea of doing whatever it takes to help get the case resolved.

Q Okay. What does it mean to get the case resolved?

A To lead to resolution either by settlement, job placement or a full duty release return to work to the pre-injury job.

Q So of those 150 roughly people that you have assisted with vocational rehabilitation services, how many of those have ended in the finding of a new job?

A I couldn't say. Some. But I can't -- I can't tell you exactly how many. It's just --

Q Ten?

A More than that.

Q 20?

A Perhaps.

Q Do you have a ballpark figure of the

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150 that have ended in a settlement?

A Probably close to 60 to 70.

Q And is it fair to say that the remaining number would be those who have either received a full duty release or a release to -- well, of the remaining -- I'll strike that.

Of the remaining 150, how many of those have received a full duty release?

A Honestly, I could not give you an estimation on that.

Perhaps -- I don't -- I just don't know. Sometimes -- often, we're not -- as the case manager, I'm not necessarily made privy to that information.

Q Okay. Did you make an estimate of what your expenses were going to be in this case prior to getting involved?

A No.

Q Okay. Do you do a vocational management cost projection?

A No.

Q If I could show the witness a piece of

Page 15

paper here. I'm not going to mark it yet.

Do you recognize that document?

A Vaguely. It's been a long time since I've seen one of these.

I don't get a lot of Zurich files to begin with. But I believe that there is a cost projection.

I thought you were referring to something that we do ongoing, not initially.

The case -- this is something we do cost projection wise prior to even starting the case.

Q Okay. That was my intention is to ask if you do a cost projection ahead of when you get the file or starting the case.

A Well, I just did not remember. Again, Zurich is the only company that we deal with that requires this.

Q Okay.

A And I do them very, very seldomly. I have very few Zurich files.

Q Okay. Did you prepare this or did

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Zurich prepare this?

A The form itself?

Q Yes.

A I didn't prepare it. I don't know who did.

Q Okay.

A Oh, are you talking about the numbers that are in there?

Q Yes.

A I prepared that. The form itself, I did not. The template, no.

But I put the numbers in there. And even honestly, I can't even remember how I did that.

Q Okay.

A I'd have to go through it again. I'd have to go through the guidelines in how to do that and then resubmit it, if you will. But I just don't remember --

Q Okay.

A -- for how I came up with those numbers.

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Q Okay. Well, if it says estimated six hours for in person visits to M.D. with claimant, is that -- did you put in that six hour number?

A Possibly. Again, I would -- I don't remember the specifics of that --

Q Okay.

A -- how I came about those -- those numbers or what's even on the form.

Q Okay. If this has a date of October 13th on it -- of 2011, do you have any reason to disagree with -- that that was the date you filled that form in?

A No. But I don't know what the context of the date is.

Q Okay. Is this the only vocational case management cost projection you've done?

A It's probably the last one I've done.

I think I've had two other Zurich files in the past that were required as a prerequisite to beginning work.

Q Okay. When you say here that you have

Page 18

an estimated six hours in person visits to M.D. with claimant, was it your expectation at that time that you were going to be going to his medical appointments with him?

A Again, I have no idea what my expectations were at that time.

I just can't recollect with that -- with that form or any other case where I do an advance form. It's a prerequisite for the insurance company.

Q Was it your intention to go to his doctor's appointments with him?

A I have no idea.

Q Well, did you actually attempt to go to his doctor's appointments with him?

A I did once, yes.

Q Did you go and talk to Dr. R[redacted]as well or talk to him on the phone?

A I did.

Q Did you have any conversations with Dr. B[redacted]

A No.

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Q Did you have any conversations with Dr. P[redacted] or his office?

A No.

Q Did you have communications with Dr. P[redacted] or his office?

A Yes.

Q Who did you have communications with in Dr. P[redacted] office?

A I believe his assistant. I can't remember his name.

Q Would that have been N[redacted]?

A Perhaps.

Q Okay. Do you recall the content of any of those conversations with Dr. P[redacted] s office?

A Right off, no.

Q At any point in this case, did you inform Mr. [redacted] that your role had changed from assistance with vocational job finding to a medical management role?

A No. There's no reason why I would have or should have informed Mr. R[redacted] of that.

Q Did you consider yourself a medical

Page 20

case manager in this case?

A I always consider myself an agent of the insurance company, whatever they request us to do.

Q Did you provide anything in writing to my office or to Mr. R[redacted] that stated that you were working as an agent of the insurance company as a medical care manager?

A No, I did not.

Q Are you aware that most attorneys refuse to allow their clients to speak with nurse case managers?

MS. [redacted] Objection. Calls for speculation. You might not do it.

BY MR. YOUNG:

Q Are you aware that my office does not allow communication with nurse case managers?

A I think on a couple of occasions, you've given me letters but -- along those lines. But it's nothing I signed or concurred with.

Q In your role as a vocational case

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manager, do you consider yourself to have any duty to the claimant?

A Without question, absolutely, yes.

Q Okay. And what is that duty?

A That duty is to help the claimant to properly market his or herself for a job that's commensurate with his or her skills, their physical capabilities, wage earning capacity, education, all the things that we cover in initial vocational assessments, assuming that the claimant/client is willing to put his or her best foot forward and market his or herself appropriately for employment.

And then yes, absolutely, I'm beholding to assist that individual.

Q If that individual asks you not to discuss his medical information with treating doctors, do you have any obligation to honor that?

A Not only do I not understand the question, Mr. Young --

Q Did Mr. [redacted] ask you not to get

Page 22

involved in his medical treatment?

A Specifically, I can't -- I can't remember an instance when he asked me -- asked me to do that.

And even if he had, I'm under no obligation to do that.

Again, this is on behalf of the insurance company's request. I don't have to meet with the doctor the same time as Mr. [redacted]. I'm allowed to meet with the doctor, so long as the doctor approves.

Q Okay. Do you recall receiving an e-mail from Mr. [redacted] asking him to stay out of his medical business?

A I'm sorry. Say again.

Q Did you receive an e-mail from Mr. [redacted] telling you -- directing you to stay out of his medical business?

A I can't remember. I received a number of e-mails from Mr. [redacted]

Q Okay. But it's your testimony that you wouldn't have to honor such a request anyway,

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even if you had?

A Well, I'm not sure if I put it that way. I don't think I put it that way.

Q How would you put it?

A I'm not sure how to answer that question, honestly.

Again, I provide case management on behalf of the insurance company.

Q And part of that case management is managing his medical?

A I've never managed any of his medicals.

Q Well, did you arrange for a panel of -- strike that.

Did you send Dr. P[redacted] or his office a list of questions about Mr. [redacted] medical status?

A Well, if you're trying to define that as medical case management, that's not. Absolutely, I did.

Q Okay. Did you provide Mr. [redacted] with a panel of doctors?

A At his request.

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Q Did you schedule an appointment with one of the doctors on the panel for Mr. [redacted]?

A I don't remember if I scheduled an appointment or Mr. [redacted] did.

Q If Dr. R[redacted] office notes report that Mr. [redacted] -- or excuse me, that you referred Mr. [redacted] to their office, do you disagree with that?

A Mr. [redacted] referred himself to their office.

Q Okay. Did you have a conversation with [redacted] regarding Mr. [redacted] job duties?

A No.

Q Okay. Did you, at some point, receive a job description from [redacted]?

A Yes.

Q Okay. And what is your understanding of that job description and what it relates to?

A My understanding of that job description, when I looked at -- from looking at

Page 25

it -- and I see you have a copy of it right there -- that essentially outlines what Mr. [redacted] did in his pre-injury job.

Q Did you ever ask Mr. [redacted] what he did in his pre-injury job?

A Yes.

Q Did you take that into account when you were providing the doctors with information?

A I take everything into account.

Q Do you know who actually filled out this form for the job description?

A I don't.

Q How did you get the form?

A It was sent to me by the insurance company.

Q Do you recall when you had a conversation with [redacted] about Mr. [redacted] job description?

MS. [redacted] Objection. He said he had no conversations with [redacted] about the job description.

BY MR. YOUNG:

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Q Did you have a conversation with [redacted] about the job description?

A No.

Q Did you have a conversation with [redacted] about Mr. [redacted]

A Yes.

Q Okay. Do you recall who you spoke with?

A I can't remember the name.

Q Okay. Do you recall the content of that conversation?

A It happened in the fall of last year, I believe.

And at that time, I had contact -- and I can't remember the name of the person -- but to ask them if they had any position that might be made available to Mr. [redacted] to return to with his physical capabilities.

Q Okay. And was it before or after that conversation that you received a job description from [redacted] -- or from the insurer, excuse me?

Page 27

A It was before.

Q Is it your understanding -- well, strike that.

Is it your assumption that this is a description of his pre-injury work?

A Yes.

Q Okay. Are you familiar with physically what it takes to be a working superintendent of a job?

A It depends on how you define working. It depends on how you define superintendent and it also depends on the employer.

Q Okay. Well, in the construction trade, would you say that somebody has to lift more than ten pounds?

A Possibly.

Q Okay. For [redacted], are you aware of any position in [redacted] on site that requires --

(Thereupon, Mr. R[redacted] entered the deposition room.)

MR. R[redacted] Hey, everybody. Am I early

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or am I late?

MR. YOUNG: You're okay. You're actually early.

MR. R[redacted] Too early?

MR. YOUNG: Yeah. About a half hour.

MR. R[redacted] Okay.

MS. [redacted]: If you want to give us your cell phone, we'll call you.

MR. R[redacted] - I'll just check back later.

MS. [redacted]: Okay.

(Thereupon, Mr. R[redacted] left the room.)

MR. YOUNG: I think we're still on the record.

MS. [redacted]: Sorry. I didn't even think about that.

MR. YOUNG: Well, I thought about it too late. We're still on the record. All right.

BY MR. YOUNG:

Q When you spoke with someone at [redacted] about a light duty position or a position within Mr. [redacted] restrictions, do

Page 29

you recall what type of job you were looking for?

A Anything.

Q Okay. Did they indicate that they had something?

A They indicated they did not have something --

Q Okay.

A -- at that time -- whoever I spoke with.

Actually, it was to be researched. And I never heard back.

Q And so is it fair to say that the next communication you received or were aware of from [redacted] was this job description?

A Fair to say.

Q Okay. After receiving this job description, did you call anyone at [redacted] and ask whether this was a description of Mr. [redacted] pre-injury employment or if this was an offer for a position with -- basically a light duty position