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| **Vocational Rehabilitation Providers (“VRP”) and Nurse Case Managers (“NCM”): Perspectives from Both Sides of the Bar***Joel Young, Esq. and Jessica Hacker Trivizas, Esq.* |

1. **Vocational Rehabilitation.**
	1. **§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.

* 1. **Vocational Rehabilitation Guidelines.** (Appendix)

1. Effective October 1, 2015

* 1. **Vocational Rehabilitation Provider Licensure.**
		1. The Commission does not regulate the licensure or certification of vocational rehabilitation providers
		2. 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.”
		1. 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.”

* 1. **Job Descriptions and FCEs**.  They differ from what the employee actually does.
		1. **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.”

* + - 1. 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?
				1. Discovery: request a copy of the job description.
				2. 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.
				3. Explain the job description issue to the doctor, suggest an FCE if the doctor has concerns.
				4. 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.
				5. “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.

Consider site visit and depositions of co-workers

* + - * 1. “Office work” may involve more than just filing.

Treating doctor released my client to full duty because his understanding is that she just did administrative type work.

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.

An FCE resulted in 20 lb. lifting restrictions.

* + - * 1. 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.

Doing whatever it takes to help get the case resolved. Deposition page 13.

Perhaps 20 of 150 found a job. Deposition page 13.

I always consider myself an agent of the insurance company, whatever they request us to do. Deposition page 20.

* + - 1. 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.
			2. 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.
			3. 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.
		1. 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.
	1. **Unjustified Refusal of Vocational Rehabilitation**.
		1. **§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.

* + 1. 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.”
		2. The employer has the burden of proof on their application. J.A. Foust Coal Co. v. Messer, 195 Va. 762, 768 (1954).
		3. 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
		4. 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.
		5. 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).
		6. **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).
	1. **Practical Tips**.
		1. 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.
				1. That way, I can course-correct quickly, if necessary.
			4. Challenges to compliance:
				1. Motivation
				2. Schedule
				3. Transportation
				4. Child Care / Family Member Care
				5. Unrelated Medical Conditions
				6. Life events
				7. Traffic
		1. 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.

* + 1. 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)
				1. Staleness analysis applied to Vocational Rehabilitation
				2. Refusal to cooperate with reasonable vocational rehabilitation

Evidence must be reasonably contemporaneous with filing

Cannot be historically remote

Would encourage unfair gamesmanship

Three months prior to filing, evidence of a lack of cooperation, but evidence of cooperation at the time of filing.

* + - 1. 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)
			2. Defense Perspective: Build a strong case in support of your application.
		1. 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.
		2. 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.
		3. Referred to the docket?
			1. Creative Solutions: hire your own VRP to ensure the cure.
		4. 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
				1. Client missed one appointment
				2. Client now using walker
				3. Client only able to do sedentary duty
				4. Client has no computer skills
			4. VRP had provided zero job leads
				1. Referred to the docket
1. **Nurse Case Managers**.
2. **Role of NCM**.

1. NCM taking care into their own hands: unilaterally changing appointment dates and times, ordering urine tests. Using protective orders to deal with this.
2. Send a letter to the NCM informing her/him that you do not allow contact.
3. Inform client to be on the lookout for the NCM. I am fine with pleasantries being exchanged, but nothing further.
4. Tell your client to request that the NCM not be in the office while he/she is being examined.
5. The doctor makes the decision whether or not she/he will speak with the NCM.
6. Tell your client to request to be present if/when the NCM speaks with the doctor.
7. 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.
	* + 1. 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.
			2. The deputy commissioner removed the nurse case manager from the file.
8. **Perspectives**.
9. Claimant:
10. Good: gets things done quickly, gets appointments set quickly, helping profession.
11. Bad: interferes with medical treatment,
	* + - 1. Truly outrageous behavior?
				2. File a complaint with the Department of Health Professions
12. Defense:
13. 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.
14. 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.