

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by WILLIAMS  
Commissioner

**Aug. 17, 2015**

ALLEN BURACKER v. CAM REPAIRS & GROUP CAM LLC  
AMCO INSURANCE COMPANY, Insurance Carrier  
AMCO INSURANCE COMPANY, Claim Administrator  
Jurisdiction Claim No. VA00000643071  
Claim Administrator File No. 52 19 WE 025367 071112 51  
Date of Injury July 11, 2012

Bryan G. Bosta, Esquire  
For the Claimant.

Adam E. Strauchler, Esquire  
For the Defendants.

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

The defendants request review of the Deputy Commissioner's June 17, 2014 Opinion. We REVERSE and VACATE the award of indemnity benefits.

**I. Material Proceedings**

The claimant suffered a compensable injury by accident on July 11, 2012. Pursuant to the agreement of the parties, on December 5, 2012, the Commission entered a Medical Only Award Order providing the claimant with lifetime medical benefits for a right knee/meniscal tear.

The claimant filed Claims for Benefits on September 10, 2012, November 13, 2012, December 3, 2013 and March 27, 2014. At the hearing, the claimant advised that he was seeking temporary total disability benefits from November 5, 2013 and continuing.<sup>1</sup>

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<sup>1</sup> Below, the Deputy Commissioner noted that the parties had advised that the total knee replacement requested within the March 27, 2014 Claim for Benefits was authorized.

The defendants defended the claim on the grounds that the claimant constructively refused selective employment and was terminated for cause on November 4, 2013.

The Deputy Commissioner conducted an evidentiary hearing on June 10, 2014. Within his Opinion, he held:

After carefully considering the entire record in this case, we find that the claimant was terminated for reasons unrelated to his work injury. We further find that he was responsible for the acts which prompted his termination and, therefore, the wage loss commencing on the date of termination is not attributable to his disability. We begin by crediting the claimant's testimony that, at the time of his termination, he told Rubin that he was having problems with doing his job due to the knee injury. We note that Rubin could not recall whether or not the claimant brought up the subject at that time; however, we note that Rubin did not deny the fact that the claimant occasionally told him about his knee problems before the termination and that the claimant required the help from other workers while working light duty for the employer. It was reasonable for the claimant to reiterate his difficulties at the time of the meeting. Notwithstanding, we find that the claimant was not fired because he was unable to physically perform his job. Rather, we credit the testimony of Rubin and Gordon that the claimant was let go for reasons unrelated to his disability. We credit Rubin's testimony that the claimant was not performing up to par with business expectations and growth. As noted above, Rubin testified that they felt as if they were losing control of the shop. This was in part due to the lack of communication between the claimant and the mechanic, which we find had a ripple effect in the maintenance, or lack thereof, of the trucks. We credit Rubin's testimony that despite admonishing the claimant, this was still an issue and note that the claimant's own testimony shows that there was still a lack of communication at the time of his termination. Contrary to the claimant's testimony, we believe that a lack of communication in the workplace can and does affect job performance, especially when the situation involves an employee with supervisory duties. We also credit Rubin's testimony that the claimant failed to provide the employer with information requested by DOT and the route updates. Here, we note that the claimant did not deny Rubin's testimony that he was asked to provide the updates on numerous occasions before the termination and that he never provided such updates. The claimant's testimony only reveals that he told Rubin "that he would work on it and fax it." We acknowledge that the facts in this case are not so clear cut, as the parties began having their issues some time prior to the date of termination. One can ask, for

example, why the employer did not terminate the claimant's job when they had reason to believe the claimant violated the company vehicle policy or when their other conflicts first came into existence. The answer to that question is simple: they gave the claimant the benefit of the doubt and tried their best to retain the long-term employee. As noted above, the claimant was a "terrific" employee in his early years of employment; however, we will not second-guess the employer's decision to fire the claimant due to reasons we believe amount to poor job performance preceding the date of termination. We wish to make it clear that, although we find that the claimant was terminated for cause, we do not find that he was terminated for "justified" cause which would permanently bar his entitlement to benefits while on restricted work duty. And while his termination is tantamount to a constructive refusal of selective employment, we find that the claimant cured such refusal when he began looking for comparable work on January 6, 2014.

(Op. 11-13.) The Deputy Commissioner also held that Dr. You placed the claimant completely out of work on January 31, 2014 and continued his total disability when he last examined the claimant on May 9, 2014. He awarded temporary total disability benefits beginning January 6, 2014 and continuing. The defendants timely appealed the Deputy Commissioner's decision.

## **II. Findings of Fact and Rulings of Law**

### **A. Forfeiture of Subsequent Compensation Benefits**

An employee on selective employment offered or procured by the employer, who is discharged for cause and for reasons not concerning the disability, forfeits his or her right to compensation benefits like any other employee who loses employment benefits when discharged for cause. Timbrook v. O'Sullivan Corp., 17 Va. App. 594, 597, 439 S.E.2d 873, 875 (1994) (citing Goodyear Tire & Rubber Co. v. Watson, 219 Va. 830, 833, 252 S.E.2d 310, 312-13 (1979); Marval Poultry Co. v. Johnson, 224 Va. 597, 601, 299 S.E.2d 343, 345 (1983)).

“[A]ll that is required [to establish a termination for cause and a forfeiture of subsequent compensation benefits] is a showing: (1) that the wage loss is ‘properly attributable’ to the

[employee's] wrongful act and (2) that the employee is 'responsible' for that wrongful act.'" Shenandoah Motors v. Smith, 53 Va. App. 375, 386, 672 S.E.2d 127, 132 (2009) (quoting Artis v. Ottenberg's Bakers, Inc., 45 Va. App. 72, 85, 608 S.E.2d 512, 518 (2005)). In determining whether an employee is responsible for a wrongful act, the Commission should ascertain whether the claimant's misconduct was voluntary or involuntary. Involuntary misconduct is misconduct beyond the claimant's control. Artis, 45 Va. App. at 91, 608 S.E.2d at 521.

In the present matter, the Deputy Commissioner found that the claimant was terminated for reasons unrelated to his work injury, specifically as a result of his poor job performance. He further held that the claimant was responsible for the acts which prompted his termination and, therefore, the wage loss commencing on the date of termination was not attributable to his disability. The claimant did not appeal these findings; thus, they are final. We further find that the Deputy Commissioner's findings are supported by credible evidence. In applying the Deputy Commissioner's factual findings in this case to the two-prong test articulated by the Court of Appeals of Virginia in Artis, we find that the claimant was terminated for cause and permanently forfeited his right to subsequent compensation benefits when partially disabled. Consequently, he was unable to cure his constructive refusal of selective employment and was not entitled to the disability benefits awarded from January 6, 2014 through January 30, 2014.

In Goodyear v. Watson, 219 Va. 830, 252 S.E.2d 310 (1979), the Supreme Court of Virginia held that a termination for poor work performance was a bar to the claimant's claim for disability benefits. Interestingly, in that case, the Commission had awarded benefits to the claimant on the ground that there had been no evidence that the claimant had performed his work

in an unsatisfactory manner and that his low work production could have been attributable to his compensable injuries. In reversing the Commission, the Court stated:

When Watson's actions and conduct in connection with his selected work following his return to work on July 28 are considered, it cannot be inferred from any evidence in the record that Watson was discharged as a result of his May 3 injury or his toe problem. Watson's frequent absences from his selective work station, poor work performance, and attitude toward his job justified his discharge.

Watson, 219 Va. at 833, 252 S.E.2d at 313.

Thus, Watson clearly held that a termination for poor job performance could constitute a bar to disability benefits. Watson did not directly address the question of whether a termination for cause could result in a permanent forfeiture of benefits.

This precise question was, however, addressed by the Court of Appeals of Virginia, en banc, in Chesapeake & Potomac Telephone Co. v. Murphy, 12 Va. App. 633, 406 S.E.2d 190 (1991). In that case, the claimant was terminated from a light duty position on the ground that he misrepresented his medical condition and ability to work. He later found a light duty job on his own, making less than he had been earning at C&P. He filed a claim for temporary partial benefits based upon this wage loss. The Commission found that the claimant had cured his refusal of selective employment and was, therefore, entitled to an award of temporary partial benefits. The Court of Appeals reversed, stating:

Moreover, where a disabled employee is terminated for cause from selective employment procured or offered by his employer, any subsequent wage loss is properly attributable to his wrongful act rather than his disability. The employee is responsible for that loss and not the employer. In this context, we are unable to find any provision within the Workers' Compensation Act which evidences an intent by the legislature to place such an employee in a better position than an uninjured employee who

is terminated for cause and by his wrongful act suffers a loss of income.

Murphy, 12 Va. App. at 639-40, 406 S.E.2d at 193.

The Court of Appeals did not discuss in Murphy whether the conduct resulting in the termination had to be of a specific nature, only describing the conduct as “wrongful.” Six years later, in Walter Reed Convalescent Center v. Reese, 24 Va. App. 328, 482 S.E.2d 92 (1997), the Court of Appeals provided guidance on the nature of the conduct which would support a forfeiture of benefits. In that case, the claimant, a licensed practical nurse, was terminated from her light duty job as a result of poor work performance. Prior to her termination, but while working at the light duty job, the claimant had been disciplined on numerous occasions for failing to properly perform her light duty job duties. The actions for which the claimant was disciplined included failing to put physicians’ orders in the proper book, failing to complete forms, failing to transcribe orders, erroneously transcribing orders and failing to hang up door cards. The claimant was ultimately terminated for repeatedly failing to transcribe physicians’ orders.

In reversing the Commission’s award of benefits to the claimant, the Court stated:

In this case, the evidence established as a matter of law that claimant’s wrongful acts, which jeopardized employer’s patients, and not her injury or disability, caused her wage loss. Thus, this loss was not employer’s responsibility. The evidence established that claimant’s termination was unrelated to her injury and was due solely to her misconduct. The facts in this case are distinguishable from those in Eppling, where we held that the claimant’s excessive absenteeism caused by a non-work-related injury beyond the employee’s control was not the type of wrongful act which, upon termination, justified a forfeiture of workers’ compensation benefits. 18 Va. App. at 129-30, 442 S.E.2d at 222. In Eppling, credible evidence proved that the claimant’s absences were due to non-work related health problems. Id. In this case, credible evidence established that claimant’s failure to properly perform her job was caused by her incompetence,

not her injury. No *credible* evidence showed that claimant's mistakes were caused by her injury or its residuals effects.

Reese, 24 Va. App. at 338-39, 482 S.E.2d at 97-98. (Emphasis in original.)

The Court specifically addressed the Commission's holding that, in order to support a forfeiture of benefits, the termination must have been caused by the claimant's willful or deliberate misconduct, stating:

The commission ruled that in order to terminate a partially disabled employee's compensation benefits due to the employee's termination, the employer must prove that the employee's termination was caused by the employee's willful or deliberate misconduct at work. Richmond Cold Storage Co., Inc. v. Burton, 1 Va. App. 106, 111, 335 S.E.2d 847, 850 (1985). This standard applies to a proceeding before the Virginia Employment Commission to determine whether an employee has been discharged for misconduct so as to bar unemployment compensation benefits. We have never held that a "wrongful act" which does not necessarily rise to the level of "willful or deliberate" cannot constitute justification for a termination for cause from selective employment so as to cause a forfeiture of workers' compensation benefits.

Reese, 24 Va. App. at 337, 482 S.E.2d at 97, n. 3.

Eight years later, in Artis v. Ottenberg's Bakers, Inc., 45 Va. App. 72, 608 S.E.2d 512 (2005), the Court, en banc, again addressed the nature of the conduct needed to support a forfeiture of benefits. Quoting from Reese, the Court stated:

[I]t is not necessary to prove "that the employee's wrongful act was intentional, willful, or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits." Reese, 24 Va. App. at 336-37, 482 S.E.2d at 97. Rather, all that is required is a showing: (1) that the wage loss is "properly attributable" to the wrongful act; and (2) that the employee is "responsible" for that wrongful act. Id. at 336, 482 S.E. 2d at 97.

Artis, 45 Va. App. at 85, 608 S.E.2d at 518.

In further explaining the factors to be considered on this issue, the Court stated:

In determining whether a claimant's termination was "attributable" to the claimant's wrongful act, the overriding inquiry is as follows: Was the claimant fired because of his disability, or was he fired because of his misconduct? In making this determination, the commission should "consider the nature of [the] conduct" alleged to justify the dismissal.

Id. at 85-86, 608 S.E.2d at 518. (footnote omitted.)

The Court specified the nature of the inquiry to be conducted when one is to "consider the nature of the conduct":

Here, then, we must consider whether Artis was fired because of his disability (*e.g.*, because his disability prevented him from adequately performing his duties), or whether he was fired for another reason entirely.

Id. at 86, 608 S.E.2d at 518.

Reese and Artis instruct, therefore, that in considering whether a termination justifies a permanent forfeiture of benefits, it is not the egregiousness of the conduct causing the termination which is to be considered, but rather whether the claimant was terminated for a reason related to his disability. This makes perfect sense, as the basis for the forfeiture is that the claimant's wage loss was not the result of his disability, but rather was the result of his own misconduct. Whether the termination is for stealing from the employer, or failing to properly follow company procedures, the loss of wages is the result of the actions of the employee, and not the result of his disability. So long as the employee was responsible for the misconduct, a forfeiture results.

Any doubt on this point was resolved by the Court's decision in Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 672 S.E.2d 127 (2009). In that case, the claimant was provided light duty work by her employer following her compensable injury. She was subsequently

terminated for failing to meet her sales quota and for poor work habits, i.e., poor job performance. The claimant later found a light duty job on her own and filed a claim for temporary partial disability benefits. In awarding benefits, the Commission, as it had done in Reese, adopted a test which took into account the severity of the misconduct causing the termination, stating:

An employer cannot be held responsible for an employee's wage loss when an employee's conduct is criminal or sufficiently egregious to prevent employment with them or any other similarly situated employer. The original employer cannot be forced to offer bona fide light-duty employment when the employee's wage loss is attributable to his or her criminal or egregious act.

Smith v. Shenandoah Motors, Inc., VWC File No. 228-11-19 (Mar. 17, 2008).

In reversing the Commission's award of benefits and remanding the case to the Commission, the Court stated the following regarding the Commission's "egregiousness" test:

In light of this resolution, we need not fully address employer's alternative contention that the commission erred in finding that the conduct for which claimant was terminated was not sufficiently egregious to negate the need for an actual bona fide offer of suitable employment and warrant a forfeiture of her disability benefits under *Code § 65.2-510(A)*. Suffice it to say, no such legal standard has been recognized by this Court. Indeed, as previously mentioned, we held in Artis that "all that is required [to establish a termination for cause and a forfeiture of subsequent compensation benefits] is a showing: (1) that the wage loss is 'properly attributable' to the [employee's] wrongful act; and (2) that the employee is 'responsible' for that wrongful act." 45 Va. App. at 85, 608 S.E.2d at 518 (quoting Reese, 24 Va. App. at 336, 482 S.E.2d at 97).

Shenandoah Motors, 53 Va. App. at 392, 672 S.E.2d at 135.

On remand, the Commission found that the claimant's termination for poor job performance was justified and that her claim was therefore barred. Interestingly, the claimant had found a light duty job, at which she was working during the period for which benefits were sought. She was not, however, permitted thereby to effect a "cure" so as to avoid a permanent

forfeiture of benefits. Smith-Plauger v. Shenandoah Motors, Inc., VWC File No. 228-11-19 (Nov. 23, 2009).

Similarly, in Chemical Producers v. Perry, No. 1716-08-4 (Va. Ct. App. June 9, 2009), the claimant was terminated for poor job performance and later filed a claim for disability benefits. The specific reasons for the claimant's termination were her failure to complete work in a timely manner, her poor attitude and her failure to comply with company policy. The Commission found that the claimant's misconduct "was not so egregious that she should forever lose the right to receive compensation benefits." Perry v. Chemical Producers & Distrib. Ass'n, VWC File No. 232-58-76 (June 13, 2008). The Commission awarded disability benefits to the claimant.

The Court of Appeals, in analyzing the issues before it, again adopted the two-part test enunciated in Artis. The Court noted that the first prong concerned the relationship between the claimant's termination and his disability and the second prong related to whether the claimant was responsible for the wrongful act. The Court accepted the Commission's determination that the claimant's termination was caused by her poor job performance and failure to contact the employer regarding her absences. However, in reversing the Commission's award of benefits, and in again rejecting the Commission's "egregiousness" test, the Court stated:

In this case, the commission made no findings and conducted no analysis with respect to the second prong of the Artis test. Instead, the commission concluded that Perry's "conduct was not so egregious that she should forever lose the right to receive compensation benefits." This was not the correct legal standard for the commission to apply. See Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 392 n.3, 672 S.E.2d 127, 135 n.3 (2009) (explaining that the Artis test is the correct standard to apply when "establish[ing] a termination for cause and a forfeiture of subsequent compensation benefits"). Therefore, we remand this case to the commission and direct it to determine whether Perry's

misconduct was voluntary or involuntary and to apply those findings to the correct legal standard as set forth in *Artis*.

On remand, the Commission reversed the earlier award of benefits, stating:

In this case, the claimant's poor work performance began before the accident and did not substantially change after the accident. The performance issue was not caused by the accident and was not beyond her control. The claimant's failure to remain in contact with the employer after her accident was also a voluntary act. She testified that she did not receive a copy of the employee handbook. However, even if we were to accept that as the truth, the employer made several efforts to contact the claimant and request the required information. She also was asked to contact the office to discuss the situation, but she did not respond. Accordingly, the claimant's failure to maintain contact with the employer was voluntary.

While we do not believe that the claimant's actions in the instant case are as egregious as those in *Artis*, we find that she was terminated for justified cause and is barred from receiving disability benefits.

Perry v. Chemical Producers & Distrib. Ass'n, VWC File No. 232-58-76 (Nov. 19, 2009).

Most recently, in Riverside Behavioral Centers v. Teel, No. 2143-14-1 (Va. Ct. App. May 12, 2015), the Court of Appeals of Virginia again reversed the Commission's finding that a claimant's termination as a result of poor job performance was not for a cause which would justify a permanent forfeiture of benefits. Quoting Richmond Cold Storage Co. v. Burton, 1 Va. App. 106, 111, 335 S.E.2d 847, 850 (1985), the Commission held, "We do not find his actions were 'of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.'" Teel v. Riverside Behavior Ctrs., JCN VA00000736931 fn. 2 (Nov. 4, 2014) (emphasis in original). In reversing the Commission, the Court of Appeals reiterated key findings within the principal cases addressing this matter, stating:

We find no case law to support the commission's holding that the employer must prove that the employee's wrongful act was intentional, willful or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits.<sup>1</sup> "[A]ll that is required [to establish a termination for cause and a forfeiture of subsequent compensation benefits] is a showing: (1) that the wage loss is 'properly attributable' to the [employee's] wrongful act; and (2) that the employee is 'responsible' for the wrongful act." Artis, 45 Va. App. at 85, 608 S.E.2d at 518.

<sup>1</sup> As employer asserts in its opening brief, in finding claimant's termination was not for cause that would justify a termination of workers' compensation benefits, the commission relied on and quoted language from Burton defining "the misconduct standard" applicable to a proceeding before the Virginia Employment Commission "to determine whether an employee has been discharged for misconduct so as to bar unemployment benefits." Walter Reed Convalescent Ctr. v. Reese, 24 Va. App. 328, 337 n.3, 482 S.E.2d 92, 97 n.3 (1997). "We have never held that a 'wrongful act' which does not necessarily rise to the level of 'willful or deliberate' cannot constitute justification for a termination for cause from selective employment so as to cause a forfeiture of workers' compensation benefits." Id.

Riverside Behavioral Ctrs. v. Teel, No. 2143-14-1 (Va. Ct. App. May 12, 2015). Upon considering the claimant's actions, the last of which involved the claimant's failure to administer a medication to a patient despite documenting that he had administered it, the Court held that the claimant's actions "undermine[d] an employer's confidence in the reliability of its medical records" and concluded, "as a matter of law, that claimant's termination was for 'justified' cause." Id. The Court vacated the award of temporary total disability benefits.

From the foregoing, it is clear that a termination for poor job performance is sufficient to support a permanent forfeiture of benefits. While we agree with the dissent that the Act should be liberally construed, the liberal construction for which the dissent argues is directly contrary to

the holdings in Reese, Shenandoah Motors, Perry, and Teel which directly held that poor job performance was sufficient to result in a permanent forfeiture of benefits.

In the present case, the claimant, a supervisor, was terminated for numerous and specific failures to perform his job duties. These failures, and the significant harmful effect they had upon the employer's business, are detailed in the testimony of Steven Rubin, the employer's president, at pages 30 through 36 of the hearing transcript. In summary form, the claimant failed to properly communicate with the mechanic responsible for truck maintenance resulting in a lack of maintenance on the trucks, and this failure continued despite the fact that the claimant had been admonished for it. Additionally, the claimant failed to provide the employer with information requested by DOT, and further failed to provide route updates. This conduct is no different in kind from that presented in Reese, Perry, Shenandoah Motors and Teel. Moreover, as previously stated, the Deputy Commissioner's findings that the claimant was terminated for reasons unrelated to his work injury, and that he was responsible for the acts which caused his termination, were not appealed, are supported by credible evidence and satisfy the requirements of the Artis test. It was the claimant's conduct leading to his termination, not his compensable injury or disability, which caused his wage loss, and his claim for disability benefits is accordingly barred.

The dissent's assertion that our ruling here "erases the analysis announced" in the Eppling case issued in 1994 is misguided. Our decision in this case is mandated by the more recent and applicable decisions of the Court of Appeals in Reese and Shenandoah Motors. We note that all of the cases relied upon by the dissent holding that certain conduct did not support a

forfeiture of benefits were decided before Shenandoah Motors, in which the Court of Appeals directly rejected the “egregiousness” test which the dissent now seeks to resurrect.

Finally, we see no value in responding to the policy arguments offered by the dissent aimed at reaching a result contrary to that required by the law clearly expressed by the Court of Appeals. Nevertheless, we fail to recognize any policy reason why an employee who fails to perform his job duties for reasons unrelated to his compensable injury should not be required to suffer the loss which he has brought upon himself. Unlike the dissent, we find no reason to place this loss, caused solely by the claimant, upon the employer. Indeed, as stated in Murphy, 12 Va. App. at 639-40, 406 S.E.2d at 193, this would place a terminated claimant who had been injured on the job in a better position than an employee terminated for identical reasons who had not been injured on the job.

B. Total Disability as of January 31, 2014

The claimant “bears the burden of proving his disability and the periods of that disability.” Marshall Erdman & Assocs. v. Loehr, 24 Va. App. 670, 679, 485 S.E.2d 145, 149-50 (1997)). There is not sufficient medical evidence in the record to support that the claimant was totally disabled as of January 31, 2014.

A careful reading of the evidence demonstrates that the claimant has remained capable of light duty work. On September 25, 2013, while the claimant was working light duty for the employer, Dr. You provided specific work restrictions. Subsequent to the claimant’s termination of his light duty employment, within his November 11, 2013 work note, Dr. You marked “no duty” but added “if the restricted duty is not available.” On November 18, 2013, a functional capacity evaluation revealed that the claimant was able to work light duty at the medium

physical demand level and a “good potential to return to work at his current capabilities.” Within his January 31, 2014 work note, Dr. You again marked that the claimant was on “no duty” but wrote “if the restricted duty is not available.” This note is not credible evidence that Dr. You determined that the claimant was totally disabled from work at this time. Instead, it is apparent that Dr. You opined that the claimant was capable of restricted duty if it was available.

On April 11, 2014 and May 9, 2014, Dr. You again marked “no duty” but also specifically noted “the restricted duty is not available.” Significantly, on June 9, 2014, Dr. You reviewed and agreed with the November 18, 2013 FCE results showing the claimant was capable of light duty at the medium physical demand level. Based upon the totality of the evidence in this case, we find that Dr. You’s most recent medical notes continued to preclude the claimant from returning to his pre-injury work but did not restrict him from all work. The claimant did not meet his burden of proving temporary total disability beginning January 31, 2014 and continuing.

### **III. Conclusion**

The Deputy Commissioner’s June 17, 2014 Opinion is REVERSED and the Award is VACATED.

In light of our finding, the attorney’s fee in the amount of \$4,500 is reduced to \$500 and is awarded to Bryan G. Bosta, Esquire, for legal services rendered the claimant, the payment of which shall be collected directly from the claimant.

This matter is removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting:

The majority opinion elicits my respectful dissent.

**I. Termination for Justified Cause**

Since its enactment in 1918, the Virginia Workers' Compensation Act has been considered highly remedial. As the Supreme Court of Virginia emphasized in Gobble v. Clinch Valley Lumber Co., 141 Va. 303, 305, 127 S.E. 175, 176 (1925), it "should be liberally construed in favor of the [worker.]" Workers' compensation is the sole and exclusive remedy against an employer for workplace accidents. Va. Code § 65.2-307. In exchange for limited benefits, employers do not have to respond to an action at law for damages. The fundamental compromise of the Workers' Compensation Act loses its effect when "poor performance equals voluntary wrongful conduct" which categorically results in a permanent forfeiture of benefits. Under the rule adopted today, every employer has far too great an incentive to document the most minute imperfections in work performance. By doing so, an employer may absolve itself from liability for wage loss benefits for a workplace accident.

The majority's ruling erases the analysis announced in Eppling v. Schultz Dining Programs, 18 Va. App. 125, 128, 442 S.E.2d 219, 221 (1994), which stated:

A 'justified discharge . . . does not simply mean that the employer can identify or assign a reason attributable to the employee as the cause for his or her being discharged. Whether the reason for the discharge is for "cause," or is "justified" for purposes of forfeiting benefits must be determined in the context of the purpose of the Act and whether the **conduct is of such a nature that it warrants** permanent forfeiture of those rights and benefits. "The Commission . . . must be mindful of the purposes and goals of the" Act. (citations omitted).

(Emphasis in original.)

We are required “to consider the nature of [the] conduct,” since not every discharge rises to a level requiring a permanent forfeiture of compensation benefits. *Id.* at 129, 442 S.E.2d at 221. The “egregious” footnote in Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 672 S.E.2d 127 (2009),<sup>2</sup> did not change this requirement. While we may not consider how bad the conduct was, the conduct must still be wrong to justify permanent forfeiture of benefits.

Here, the claimant’s alleged poor performance was not of such a nature to warrant permanent forfeiture of his rights and benefits under the Workers’ Compensation Act and he may cure his refusal by marketing his residual work capacity just as the Court found in Eppling.

The outcome in this case moves the balance point of the law to a position where any job-related explanation for terminating an employee equates to voluntary wrongful conduct and results in a permanent forfeiture of benefits.

Beginning with Goodyear v. Watson, 219 Va. 830, 252 S.E.2d 310 (1979), the following voluntary **wrongful** conduct has been defined as justified discharge from employment:

- Frequent absences from work station, indifference to work responsibilities, showing up late to work, and demonstrating an exceedingly high number of absences from work.<sup>3</sup>
- Lying to the employer about a previous work injury and report of a current injury.<sup>4</sup>
- Misrepresenting one’s medical condition and ability to work.<sup>5</sup>
- In health care services employment, failing to record physicians orders, failing to complete forms, failing to transcribe orders, erroneously transcribing orders, failing to hang up door cards, and jeopardizing the employer’s patients.<sup>6</sup>
- Staging a robbery.<sup>7</sup>

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<sup>2</sup> The Court of Appeals’ most recent analysis of termination for justified cause did not rely upon Shenandoah Motors. Barton v. Allied Waste Industries, Inc., No. 2215-12-4 (Va. Ct. App. July 23, 2013). Also, in Montalbano v. Richmond Ford, LLC, 57 Va. App. 235, 701 S.E.2d 72 (2010), the Court analyzed the alleged wrongful conduct under unemployment law for abusive language and willful misconduct.

<sup>3</sup> Watson, 219 Va. at 833, 252 S.E.2d at 313.

<sup>4</sup> Marval Poultry Co. v. Johnson, 224 Va. 597, 601, 299 S.E.2d 343, 346 (1983).

<sup>5</sup> Chesapeake & Potomac Tel. Co. v. Murphy, 12 Va. App. 633, 634, 406 S.E.2d 190 (1991).

<sup>6</sup> Walter Reed Convalescent Ctr. v. Reese, 24 Va. App. 328, 332, 482 S.E.2d 92, 94 (1997).

- Failing to pass a drug test.<sup>8</sup>
- Being a rude, unhelpful car salesperson, exhibiting inferior sales performance, sleeping, and playing solitaire at work.<sup>9</sup>
- Repeatedly harassing subordinates.<sup>10</sup>
- Dishonesty in receiving compensation payments.<sup>11</sup>
- Failing to complete work in a timely manner, poor work attitude and failing to comply with company policy by not contacting employer regarding absences.<sup>12</sup>

The following conduct has been defined as cause for termination **but not wrongful** conduct justifying a permanent forfeiture:

- Having a bad attitude.<sup>13</sup>
- Six “constructive advice” memos within two years.<sup>14</sup>
- Failing to report vandalism to a supervisor.<sup>15</sup>
- Refusing to perform tasks assigned by employer.<sup>16</sup>
- Excessive absences.<sup>17</sup>
- Failing to give notice of absence from work.<sup>18</sup>
- Working too slowly.<sup>19</sup>

In the present case, a 62-year-old employee with 17 years of service to the company understood his light duty job was terminated because “the work wasn’t getting done and they couldn’t trust me with the company.” (Tr. 42.) The company president, Rubin, gave these reasons the claimant was fired:

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<sup>7</sup> Artis v. Ottenberg’s Bakers, Inc., 45 Va. App. 72, 80, 608 S.E.2d 512, 515 (2005).  
<sup>8</sup> Richfood, Inc. v. Williams, 20 Va. App. 404, 410, 457 S.E.2d 417, 420 (1995).  
<sup>9</sup> Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 379, 672 S.E.2d 127, 128-29 (2009).  
<sup>10</sup> Montalbano v. Richmond Ford, LLC, 57 Va. App. 235, 250, 701 S.E.2d 72, 79 (2010).  
<sup>11</sup> Barton v. Allied Waste Industries, Inc., No. 2215-12-4 (Va. Ct. App. July 23, 2013).  
<sup>12</sup> Chem. Producers & Distribs. Ass’n v. Perry, No. 1716-08-4 (Va. Ct. App. June 9, 2009).  
<sup>13</sup> Transp. Safety Contracting v. Martin, No. 1713-00-1 (Va. Ct. App. May 22, 2001); Hayes v. Ravensworth Serv., Inc., VWC File No. 183-21-70 (Apr. 2, 1998).  
<sup>14</sup> Food Lion, Inc. v. Newsome, 30 Va. App. 21, 23, 515 S.E.2d 317, 319 (1999) (employer did not appeal finding conduct was not justified termination as in Murphy.)  
<sup>15</sup> Adams v. Huss, Inc., VWC File No. 168-75-07 (Oct. 10, 1995), aff’d, No. 2527-95-2 (Va. Ct. App. Apr. 30, 1996).  
<sup>16</sup> Acucal, Inc. v. Sienkiewicz, No. 2042-94-4 (Va. Ct. App. Apr. 11, 1995).  
<sup>17</sup> Eppling v. Schultz Dining Programs, 18 Va. App. 125, 128, 442 S.E.2d 219, 221 (1994); Hill v. Kramer Tire Co., Inc., VWC File No. 186-21-05 (Nov. 4, 1998).  
<sup>18</sup> Timbrook v. O’Sullivan Corp., 17 Va. App. 594, 597, 439 S.E.2d 873, 875 (1994).  
<sup>19</sup> Holloway v. Aconcagua Timber Co., VWC File No. 221-16-01 (Apr. 11, 2006).

- i claimant was unengaged.
- i failing to communicate with a mechanic.
- i failing to provide employer with information requested for DOT and route updates, both new tasks assigned after his return to work following the compensable injury.

The employer has assigned reasons for the discharge, but they do not rise to the level of justified cause for permanent termination of benefits. The second prong of the Artis test, “whether the claimant was ‘responsible’ for his wrongful act” Artis at 91, 608 S.E.2d at 521, is difficult to interpret. It presupposes a wrongful act because an employee was terminated from a light duty job. In some cases, poor performance could be due to wrongful acts, but in others, a perception of poor job performance may be due to changes in attitudes of both employer and employee and the passage of time. In construing the Act liberally in favor of the worker, this claimant’s alleged poor performance does not support a permanent forfeiture of benefits.<sup>20</sup>

## **II. Partially Disabled Employee and Marketing**

Because the claimant was terminated for cause, not justified cause, he could cure his refusal by marketing, and based upon his marketing he is entitled to temporary total disability benefits from January 6, 2014 through January 30, 2014. See Eppling v. Schultz Dining Programs, 18 Va. App. 125, 129, 442 S.E.2d 219, 222 (1994) (discharged for excessive absences related to non-work health problems; conduct did not justify forfeiture; remanded for

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<sup>20</sup> I respectfully disagree with the majority that in Shenandoah Motors, Inc. v. Smith, 53 Va. App. 375, 672 S.E.2d 127 (2009), the Court of Appeals, “directly rejected the ‘egregiousness’ test which the dissent now seeks to resurrect.” The Court held in light of its other findings, “we need not fully address employer’s alternative contention that the commission erred in finding that the conduct for which claimant was terminated was not sufficiently egregious to negate the need for an actual bona fide offer of suitable employment and warrant a forfeiture of her disability benefits.” Id., 53 Va. App. at 392, 672 S.E.2d at 135, n. 3.

Commission to decide if Epling was required or had reasonably attempted to market any residual work capacity).

A termination for cause from selective employment is treated no differently than if the employee had not been employed at all with the pre-injury employer since the termination was not for “justified cause.” Va. Code § 65.2-510; Va. Wayside Furniture, Inc. v. Burnette, 17 Va. App. 74, 79, 435 S.E.2d 156, 159 (1993). In Robertson v. Sun States Maintenance Corp., VWC File No. 210-95-35 (Sept. 12, 2003), the Commission held:

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

Since the Robertson decision, the Commission has routinely determined a claimant may cure an unjustified refusal of selective employment only by accepting a refused job or by finding comparable employment.<sup>21</sup> E.g. Seigla v. Briar Patch Rest., VWC File No. 233-60-13 (Sept. 24, 2008); Savage v. Cnty. of Prince William, VWC File No. 220-28-94 (July 13, 2007). These decisions were based upon MacWilliams v. Minton & Roberson, Inc., VWC File No. 192-19-71 (Feb. 9, 2001). When the employer offers selective employment which the employee refuses he must accept the refused job or find comparable employment. Dowden v. Hercules, Inc., 51 Va. App. 185, 655 S.E.2d 755 (2008) (partial cure by finding selective employment). This scenario fits the exact language of Code § 65.2-510.

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<sup>21</sup> Some Commission opinions suggest a claimant could cure a refusal of selective employment by marketing. See Mullins v. Big Laurel Mining, VWC File No. 220-35-89 (June 16, 2006) (“[E]ven if the claimant could cure his refusal by marketing, the claimant did not adequately market his residual work capacity during the four and one-half months at issue.”) Farmer v. D A S Constr., VWC File No. 215-74-81 (Feb. 1, 2005) (“Even if the claimant could cure by marketing, we find his evidence was insufficient.”).

When there is not a refusal of selective employment, the mandates of Code § 65.2-510 cannot be applied. A partially disabled employee may market his residual work capacity which is no different than any other injured employee who is partially disabled and has not been offered selective employment. When a partially disabled employee is terminated for cause, the parties are put in the same position they would have been had the selective employment never been performed and terminated.

This conclusion is consistent with the Commission's holding in Elliott v. C & S Door Corp., VWC File No. 208-38-14 (Mar. 10, 2006), which followed the decision in Artis:

Consistent with Robertson v. Sun States, the claimant should be able to cure his unjustified refusal of light duty by requesting his old job back and prove reasonable marketing if he is unable to return to work with his employer. [. . .] This should be an exception to the requirement set forth in MacWilliams v. Minton and Roberston, Inc., VWC File No. 192-19-71 (February 9, 2011).

For these reasons, we should find the claimant adequately marketed his residual work capacity from January 6, 2014 through January 30, 2014 and award benefits for that period.

### **III. Total Disability**

I agree the claimant was partially disabled beginning in November 2013, but Dr. You restricted the claimant from working on January 31, 2014. The medical note from January 31, 2014 indicated the claimant's right knee pain fluctuated but was slowly getting worse. The physical examination revealed "diffuse tenderness in both joints, more on the medial side with slight varus deformity." Dr. You took x-ray "for total knee replacement in the future," noting "[t]here is near bone-to-bone contact on the medial compartment." Dr. You wrote, "As soon as this is approved by workman comp, we will schedule it." In the May 9, 2014 evaluation, Dr. You noted the claimant was "walking with severe limping, and walking any extended distance is very

painful.” He concluded, “Due to his increasing symptoms and end-stage arthritis, he will require knee replacement as soon as it is approved by his Workers’ Compensation.” Dr. You continued to restrict the claimant from working. The May 9, 2014 work slip indicated, “The restricted duty is not available” whereas the January 31, 2014 and November 18, 2013 work slips added “if the restricted duty is not available.” Dr. You knew that in May 2014 restricted duty was not available and he took the claimant out of work as a result. The claimant reasonably perceived he was restricted from working and could not look for work.

There was no contrary medical opinion and Dr. You’s opinion was entitled to great weight. Pilot Freight Carriers, Inc. v. Reeves, 1 Va. App. 435, 439, 339 S.E.2d 570, 572 (1986). I would affirm the Deputy Commissioner’s award of ongoing total incapacity benefits.

Even if the claimant was terminated for “justified cause,” he was still entitled to benefits when he was totally incapacitated. Va. Code § 65.2-500 (when incapacity for work is total).

For these reasons, I respectfully dissent.

#### 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.