VIRGINIA:
IN THE INDUSTRIAL COMMISSION

RONNIE ODELL BROOKS, Claimant

Opinion by O'NEILL
Commissioner

v. Claim No. 142-39-08

M. PRICE DISTRIBUTING COMPANY, INC., Employer
GREAT AMERICAN INSURANCE COMPANY, Insurer

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for the Claimant.

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for the Defendants.

REVIEW on the record before the full Commission at Richmond.

The employee requests review of the opinion of the Deputy Commissioner dated July 23, 1991, which suspended payment of compensation upon finding that the employee is partially disabled and has forfeited his entitlement to continuing benefits by withdrawal from the labor market due to incarceration. The employee contends that he was under an outstanding award for temporary total incapacity at the time he became incarcerated and that a medical determination of partial work incapacity after incarceration should not change his entitlement to continuing temporary total benefits.

The facts in this case are not in dispute. Brooks, age 32, injured his neck and back in an industrial accident on September 6, 1989 when he was employed as a truck driver and

salesman for the employer. An award for temporary total work incapacity commencing September 16, 1989 was entered and Brooks continued to receive compensation benefits under the award until February 21, 1991, when the employer made application for a change in condition. Brooks had been convicted of a felony and, as of November, 1990, he was incarcerated at the Greensville Correctional Center where he continued to receive temporary total benefits.

C. L. Fisher, Jr., M.D. examined Brooks during his incarceration, on February 12, 1991. A work restriction evaluation chart was executed and it was medically determined that Brooks was able to lift 20 to 25 pounds frequently, up to 50 pounds occasionally, and that he was otherwise able to engage in physical activity which would permit him to work an eight-hour day. Dr. Fisher stated that a work-hardening program would probably assist Brooks in reaching maximum medical improvement.

We find from the medical evidence, as did the Deputy Commissioner, that there has been a change in condition, that the employee, Brooks, is no longer totally incapacitated for work, and that since February 12, 1991, he has been partially incapacitated. When an employee is only partially incapacitated for work, he has the obligation to make reasonable effort to market his remaining physical capacity. In the absence of such reasonable effort, he is not entitled

to continuing compensation benefits. Washington Transit v. Harrison, 228 Va. 598, 324 S.E.2d 654 (1985).

The employee, by counsel, seeks to distinguish his case from a similar decision reached by the Court of Appeals in Baskerville v. Saunders Oil Co., Inc., 1 Va. App. 188, 336 S.E.2d 512 (1985). The Court of Appeals stated:

> ...In the case of temporary partial incapacity, when a claimant's incarceration for a criminal act rather than his physical incapacity causes the claimant's loss of earning power, the employer is relieved from paying benefits during the period of incarceration.

Id., 1 Va. App. at 193.

The employee contends that the court's ruling in Baskerville applies only when a claimant has been determined to have temporary partial incapacity prior to the time of his incarceration. Brooks states that he was under an award for total incapacity at the time of his incarceration, and that a determination that he has improved to the point where he is now only partially disabled for work should not place him in a position where he would be required to market his remaining capacity when, in fact, he is prevented from doing so by his incarceration. The employee contends that Baskerville holds that a claimant is entitled to continue receiving compensation benefits on the same basis as his entitlement at the time of his incarceration "regardless of any subsequent medical evaluations opining that the already incarcerated prisoner is able to return to light duty employment..."

We do not find the court's holding in Baskerville to be less applicable to Brooks because a determination of partial incapacity has been made after incarceration rather than before incarceration.

Because Brooks has, by his own actions, prevented his return to the labor market, he has become personally responsible for his loss of earning power and has effectively relieved the employer from responsibility for payment of benefits during his incarceration.

The opinion of the Deputy Commissioner is, therefore, AFFIRMED and this case is ordered removed from the Review Docket.