

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

12/08/95

ALBERT ROBINSON, Claimant

Opinion by the
FULL COMMISSION

v. VWC File No. 170-12-48

DYNALECTRIC COMPANY, Employer
PACIFIC EMPLOYERS INSURANCE COMPANY, Insurer

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REVIEW on the record before Commissioner Tarr, Commissioner Diamond, and Deputy Commissioner Dely at Richmond, Virginia.

The employer requests review of the June 27, 1995 Opinion of the Deputy Commissioner finding that the employer's offer of a panel of physicians to the claimant was untimely and that he was justified in refusing it in favor of continuing with the physician whose care he had already obtained.¹ The legal issues presented in this case are not novel or complex, and the relevant

¹In its petition for review, the employer also asserts that the Deputy Commissioner erred in finding the claimant established a compensable temporary total disability. It did not argue this issue in its written brief to the Commission, and we consider it has been abandoned. However, we note that the clear and uncontradicted medical evidence establishes that the claimant has been disabled from his work because of his compensable back injury since the industrial accident, and that the seriousness of the injury was confirmed even in a post hearing employer's

medical examination. Thus, we find no merit to this issue that was only tentatively raised in the petition for review. Rule 3.2 of the Rules of the Virginia Workers' Compensation Commission.

factual record was fully developed at the evidentiary hearing. Upon consideration thereof, and of the well considered written briefs filed by counsel, we find that oral argument requested by the employer is unnecessary and would not be helpful. *Barnes v. Wise Fashions*, 16 Va. App. 108, 428 S.E.2d 301 (1993).

The claimant was injured on July 13, 1994 while helping to unload large spools of wire from a truck. The Deputy Commissioner found that the injury and accident arose out of and in the course of his employment as an electrician with Dynalectric Company, which finding has not been appealed.

The claimant continued working that day, but his back symptoms increased. He advised his supervisor of the accident and injury and that he was going to a hospital emergency room for treatment. He obtained that treatment at the Hadley Memorial Hospital Emergency Room, where he was restricted from work and referred to an orthopaedic surgeon. The claimant testified that he was referred to orthopaedic surgeon Dr. Rida N. Azer, although the hospital discharge instructions indicate that he was referred to a Dr. Bovell. The claimant beginning July 20, 1994 came under the care of Dr. Azer, who initially diagnosed acute lumbosacral and sacroiliac strains and traumatic coccydynia and restricted the claimant from all work. The claimant continues under the care of Dr. Azer, who has reimposed and continued the total work restrictions on each subsequent visit.

On August 17, 1994, Dr. Azer noted that conservative

treatment had been ineffective, and a diagnostic MRI was scheduled. This was interpreted to show a herniated disc at L5-S1, compression of the nerve root at S1, and a bulging disc at L1-L2. Dr. Azer referred the claimant for a neurosurgical consultation, and that specialist initially recommended continued conservative care. When this continued to be ineffective, Dr. Azer referred the claimant to the neurosurgeon for reevaluation, and the neurosurgeon on January 6, 1995 recommended a lumbar laminectomy and possible fusion surgery. Orthopaedic surgeon Dr. Louis E. Levitt, who examined the claimant for the employer on April 27, 1995, agreed that he has a herniated disc at L5-S1 and that he is a viable candidate for surgery.

The claimant testified that he called his employer within a couple days of the accident to report that he could not work because of the back injury and the restrictions imposed by treating physicians. He also testified that he was not offered a panel of physicians by the employer until after he had been treated by Dr. Azer, and he has refused to accept the panel that has been offered.

The record shows that the carrier offered the claimant a panel of physicians by telephone on July 26, 1994. The claimant did not obtain the names of the physicians at that time, because he said he did not have pencil and paper to write the names down. He then inquired of claims personnel at the Commission and was advised that he could pick a physician of his own choice if a

panel was not offered. He did not thereafter telephone the carrier to obtain the panel names offered on July 26, 1994, and he has not accepted the offer of a panel later made by mail.

Genny Connor testified as the employer's safety coordinator that she learned of the accident the day after it occurred. She did not immediately contact the claimant, because she was investigating the incident first. She had difficulty making contact when she tried the following week, until she was given the claimant's pager number by the employer's payroll department. She did make contact during the week immediately following the accident. However, Connor admitted that she offered no panel of physicians at that time, apparently because the accident was still being investigated and because she did not want to act inconsistently with the carrier, which she assumed was making the offer. Connor first offered a panel on August 15, 1994 when she determined there would be no conflict.

Va. Code Ann. 65.2-603 requires the employer to provide medical care to an injured employee and to furnish a panel of physicians from whom he can obtain that care after a compensable accident. If the employer fails to offer a panel list within a reasonable time, the claimant is free to choose a physician of his own choice. *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 384 S.E.2d 333 (1989).

In this case, the claimant's supervisor was advised on the day of the accident that he had suffered an injury that required

emergency medical care. The employer's safety coordinator responsible for investigating these incidents learned of the accident and the request for medical care on the following day and initiated an investigation. The claimant thereafter advised the employer that his condition was serious enough to disable him from work, and the safety coordinator discussed this with him within a week of the accident. No panel list was offered at that time. The safety coordinator testified that she did suggest some physicians to him at that time, from which we conclude that the employer was advised of the claimant's need of follow-up medical care. However, no panel list was offered, since the safety coordinator presumed this would be done by the workers' compensation carrier. The carrier did not offer a panel until the following week.

Under these facts, we agree with the Deputy Commissioner that the claimant was entitled to specialized care recommended by emergency room physicians. Because the employer did not offer treatment from its panel physicians at the time it was aware of the need for further care, the claimant was entitled to seek it from whatever source available to him. The panel first offered by the employer almost two weeks after the accident was untimely. *Locke v. Kline Tysons Toyota*, 71 O.I.C. 207 (1992). The claimant selected and began treatment with Dr. Azer, and the carrier cannot now compel the claimant to select and receive treatment from a panel physician. *Chesapeake Masonry v. Wiggington*, 229

Va. 227, 327 S.E.2d 121 (1985).

The employer argues on review that Dr. Azer is not an authorized physician, because the claimant was referred by the emergency room to a different physician. However, it answers that argument in its own brief, noting the controlling adjective law in such cases that a referral by an emergency room or clinic physician is not a binding recommendation, since an emergency room or clinic is not a treating physician as contemplated by the Act. See also *Goodyear Tire & Rubber Co. v. Pierce*, supra.

The employer also argues that the offer of a panel was not untimely, because the employer had difficulty initially contacting the claimant after the accident. We have acknowledged that difficulty, but the employer's safety coordinator made that contact during the week following the accident. Had a panel been offered at that time, we would find that it was timely and that the claimant was bound by it. However, a panel was not offered until the following week and the delay was unjustified under the circumstances, where the employer was aware that the claimant was totally disabled because of his accident and needed further specialized care. The evidence does not show that the claimant could not be contacted through his pager in the interim, only that he refused to communicate and cooperate with the employer and carrier with regards to the panel offer after July 26, 1994. As previously noted, the offer first made on that date came too late. Upon consideration of the facts of record in this case,

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we agree with the findings and conclusions of the Deputy Commissioner. Accordingly, the June 27, 1995 Opinion is AFFIRMED. Interest is payable pursuant to Va. Code Ann. 65.2-707.

This case is REMOVED from the Review Docket.

APPEAL

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

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