

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

03/03/97

LENZIE LEWIS BOSWELL, Claimant

Opinion by the
FULL
COMMISSION

v. VWC File No. 175-37-92

BORG WARNER PROTECTIVE SERVICE, Employer
CONTINENTAL INSURANCE COMPANY, Insurer

Rhonda L. Overstreet, Esquire
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for the claimant

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for the defendants

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

The employer requests review of the November 21, 1996
Opinion of the Deputy Commissioner finding that the claimant
proved a compensable change in condition and awarding
compensation beginning March 19, 1996. The questions
presented are neither novel nor complex, and we find that oral
argument requested by the employer to consider issues that
were presented on the record is unnecessary and would not be
helpful. Williams v. Virginia Elec. & Power Co., 18 Va. App.
569, 445 S.E.2d. 693 (1994).

The claimant suffered a compensable right hip injury
while employed as a security officer on April 20, 1995.
Compensation was paid from April 21, 1995 through December 25,
1995, when those benefits were terminated by an Opinion issued

by Deputy Commissioner Phillips, who found that the claimant had returned to work with the employer on that day. While that case was pending, the claimant filed his application to reinstate compensation benefits on the grounds that orthopedic surgeon Dr. Lawrence X. Webb had certified him as unable to work.

The employer first argues that the claimant has proved no compensable change in condition. This argument is disingenuous. Deputy Commissioner Phillips found that the claimant had returned to his pre-injury employment on December 25, 1995. Dr. Webb thereafter determined that the claimant had early manifestations of post traumatic arthritis that required use of a cane "to un-weight the hip," and that he was no longer "capable of resuming his work even though there was an interval of time where he did return to work several months ago." This proves a compensable change in condition.

The employer also argues that the claimant voluntarily resigned himself from his employment. Assuming *arguendo* that this implies a refusal of employment, that would not bar compensation where the claimant is once again totally disabled. Rather, the total disability in itself is an effective cure to a refusal of work, since his disability thereafter is due solely to the residual work injury and not to any refusal. Blankenship v. K-VA-T Food Stores, Inc., VWC

File No. 144-14-05 (May 4, 1992). Cf. Potomac Edison Company of Virginia, 18 Va. App. 629, 446 S.E.2d. 155 (1994) [claimant entitled to compensation if he becomes totally incapacitated as a result of his work injury, even though benefits were previously suspended because of a *dismissal for cause*].

The employer next argues that the Deputy Commissioner "failed to comply with the 90 Day Rule in this case. . . . This award would be in violation of the jurisdictional limits imposed by the 90 Day Rule." We first note that this is *not* a jurisdictional defense, and it may be waived by the employer.

However, the claimant in his application made a claim for benefits beginning July 11, 1996, when he was restricted by his treating physician from all work activity. Although his counsel later amended the claim in his written statement on the record, he still conceded that benefits could not be awarded before the 90 day period set out in Rule 1.2 (B) of the Rules of the Virginia Workers' Compensation Commission. The employer is entitled to rely upon these representations of a limited claim.

Moreover, the medical evidence before July 11, 1996 is silent as to the claimant's residual work capacity. Although we may infer from the medical records that the claimant was unable to return to his pre-injury work unless accommodations were made, it does not prove total disability. The claimant

has not offered evidence to show that he marketed the presumed residual work capacity, so benefits during the interval before July 11, 1996 may not be awarded. Washington Transit v. Harrison, 220 Va. 598, 324 S.E.2d. 654 (1985). However, Dr. Webb in all reports subsequent to July 11, 1996 repeatedly advises that the claimant is incapable of returning to work, and that his disability is causally related to the work injury.

Accordingly, we AFFIRM the Opinion of the Deputy Commissioner, except that the Opinion shall be MODIFIED to reinstate compensation benefits beginning July 11, 1996. A total of \$750.00 shall be deducted by the employer from compensation accrued and paid to Attorney Rhonda L. Overstreet for services rendered the claimant in this case. The employer shall also pay judgment interest on the MODIFIED Award, pursuant to Virginia Code § 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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