VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT
Commissioner

**Oct. 20, 2017**

ANTHONY WISE v. TITAN MID-ATLANTIC AGGREGATES
INS CO OF THE STATE PA (THE), Insurance Carrier
ESIS, INC, Claim Administrator
Jurisdiction Claim No. VA00001082364
Claim Administrator File No. 66348770078419
Date of Injury June 4, 2015

B. Mayes Marks, Jr., Esquire
For the Claimant.

Amanda Tapscott Belliveau, Esquire
For the Defendants.

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

The defendants request review of the Deputy Commissioner's May 22, 2017 Amended Opinion. We AFFIRM.

## I. Material Proceedings

On June 4, 2015, the claimant suffered a compensable injury by accident. Pursuant to an agreement by the parties, on March 4, 2016, the Commission entered an Award Order entitling the claimant to lifetime medical benefits for reasonable, necessary, and authorized medical treatment causally related to his compensable lower back injury and temporary partial disability benefits from June 29, 2015 through August 23, 2015, based upon a pre-injury average weekly wage of $1,017.69.

On April 15, 2016, the claimant filed a Claim for Benefits seeking disability benefits. The claimant sought temporary partial disability benefits beginning August 24, 2015 through March 1, 2016 and continuing temporary total disability benefits beginning March 2, 2016.

The parties stipulated the defendants paid temporary partial and temporary total disability benefits to the claimant beginning August 24, 2015 and continuing, and the defendants were entitled to a credit for all payments made from March 2, 2016 through November 16, 2016.

The defendants defended the claim on the grounds a de facto award was not appropriate, the claimant did not suffer a compensable change in condition, he was not disabled as alleged beginning September 29, 2016, he failed to make reasonable efforts to market his residual work capacity, he failed to report post-injury earnings as required by Virginia Code § 65.2-712 of the Virginia Workers' Compensation Act, and he performed services for an employer for which wages should be imputed.

Deputy Commissioner Wilder conducted an evidentiary hearing on December 13, 2016. He also considered post-hearing position statements submitted by the parties on March 8, 2017. Within his Opinion, he determined a de facto award existed in the case, and, therefore, the claimant was not required to establish the extent of his disability or market his residual capacity. He found the evidence did not show he earned any wages with employers other than the pre-injury employer; thus, he did not violate Virginia Code § 65.2-712. He determined the defendants did not prove the claimant performed unpaid work for which wages should be imputed as the claimant only performed "limited and sporadic duties" 10 to 20 hours per month. (Op. 6.) The Deputy Commissioner also held the defendants did not prove the claimant unjustifiably refused selective employment or that the claimant was released to his pre-injury work. He awarded temporary partial disability benefits from October 24, 2015 through November 15, 2015 and temporary total disability benefits beginning March 2, 2016. He granted the defendants a credit for all voluntary payments of compensation.

The defendants request review of the Deputy Commissioner's decision.

## II. Findings of Fact and Rulings of Law

### A. De Facto Award

Virginia Code § 65.2-701(A) authorizes de facto awards, which may be applied in a change-in-condition context. See Henrico Pub. Utils. v. Taylor, 34 Va. App. 233, 540 S.E.2d 501 (2001) ("Va. Code Ann. § 65.2-708 does not require a claimant to file an application for change of condition if she can reach a satisfactory agreement with her employer regarding her entitlement to continuing disability benefits."). Where the employer has made payments to the claimant for some significant period of time without filing a memorandum of agreement, and the compensability of the injury is uncontested, it is "'reasonable to infer that the parties have reached an agreement as to the payment of compensation,' and a *de facto* award will be recognized." Ryan's Family Steak Houses, Inc. v. Gowan, 32 Va. App. 459, 463, 528 S.E.2d 720, 722 (2000) (citing National Linen Serv. v. McGuinn, 5 Va. App. 265, 269-70, 362 S.E.2d 187, 189 (1987) (en banc)).

Here, the defendants paid temporary partial disability benefits to the claimant from October 26, 2015 through November 15, 2015, during the time the claimant was working light duty for the employer and experiencing wage loss.[1] The defendants next began payment of temporary total disability benefits on March 2, 2016, after the claimant underwent low back surgery. The defendants continued payment of the temporary total disability benefits until November 16, 2016, over eight months, without submitting agreements.

Despite the defendants' assertions on review, we find the evidence reflects an agreement by the parties to the claimant's entitlement to the payment of disability benefits in this case. The defendants had accepted the claimant's lower back injury and paid temporary partial disability benefits for a closed period in 2015 and temporary total disability benefits beginning March 2, 2016, prior to the filing of the April 15, 2016 Claim for Benefits.

Although the claimant's April 2016 claim lists a slightly different pre-injury average weekly wage than the agreed upon pre-injury average weekly wage and a left leg injury in addition to the lower back injury, we are not persuaded an actual dispute related to these issues existed to prevent the entry of a de facto award. At the hearing, claimant's counsel withdrew the claim for a left leg as a separate injury with prejudice. We also find the initially agreed upon pre-injury average weekly wage was not disputed. This case is distinguishable from Watts v. P & J Hauling, 41 Va. App. 278, 584 S.E.2d 457 (2003). The Court of Appeals determined:

> The parties . . . stipulated to the compensability of the injury, but the amount of compensation clearly remained in dispute. Even after claimant signed and returned the agreement form, he continued to dispute employer's average weekly wage calculation up to and at the hearing. Credible evidence in the record supports

[1] For the first time on review, the defendants argue the claimant earned more than his pre-injury average weekly wage from August 24, 2015 through March 6, 2016, which would encompass the awarded periods of temporary partial disability benefits from October 24, 2015 through November 15, 2015 and temporary total disability benefits from March 2, 2016 through March 6, 2016. Arguments raised for the first time on review will not be considered by the Commission. See Jenkins v. Perkins Constr., VWC File No. 209-10-21 (Dec. 21, 2005); Wilfong v. Apple Valley Pool & Spa, VWC File No. 215-99-89 (Dec. 7, 2005); Everett v. Wal-Mart, VWC File No. 218-67-22 (Nov. 15, 2005). Regardless, we note the contention the claimant earned more than his pre-injury average weekly wage during the periods awarded is unsupported by the evidence in the record.

> the commission's finding that the parties never reached agreement as to the amount of compensation. Therefore, the commission did not err in holding that claimant was not entitled to a *de facto* award in this case.

Id. at 286, 584 S.E.2d at 461. "In Watts . . . we held that the finding of a de facto award requires that the parties are in agreement as to the amount of compensation." White v. Redman Corp., 41 Va. App. 287, 292, 584 S.E.2d 462, 464 (2003). Unlike Watts, here, the record does not reflect the amount of compensation remained in dispute. The claim in question was filed by the claimant, pro se. It is apparent from the Deputy Commissioner's opinion and the evidence in the record that the established pre-injury average weekly wage was not challenged by the claimant. Within the pre-hearing statement, admitted as Commission's Exhibit 1, claimant's counsel indicated the claimant agreed the average weekly wage was "per wage chart," and the wage chart supports the pre-injury average weekly wage of $1,017.69. Moreover, the defendants made all payments of disability benefits in accordance with this pre-injury average weekly wage. Claimant's counsel agreed that the defendants were entitled to a credit for the benefits paid pursuant to the average weekly wage set forth in the initial agreement.

We agree with the Deputy Commissioner that a de facto award is applicable under the circumstances of this case.[2] As a result, the claimant is not required to prove he marketed his residual work capacity, and the "90-day rule" pursuant to Rule 1.2 is not applicable.

B. Release to Pre-injury Work

In light of the finding that the claimant was under a continuing, open award of temporary total disability benefits beginning March 2, 2016, the defendants had the burden to prove the

[2] We do not find the claimant's testimony related to looking for work after the defendants discontinued disability payments in November 2016 indicative that he did not suffer prejudice or was not in a more disadvantageous position as a result of the absence of an actual award.

claimant was released to his pre-injury employment. The defendants were required to show the claimant was able to carry out all of the duties of his pre-injury employment. Celanese Fibers Co. v. Johnson, 229 Va. 117, 120, 326 S.E.2d 687, 690 (1985); Crystal Oil Co. v. Dotson, 12 Va. App. 1014, 1021, 408 S.E.2d 252, 255-56 (1991)).

The job description for heavy equipment operators, admitted as Claimant's Exhibit 2, reflects the claimant's pre-injury employment requires lifting 75 to 100 pounds once a week. The September 29, 2016 Functional Capacity Evaluation indicates the claimant demonstrated the ability to function in the heavy physical demand level. The FCE describes the requirements of the heavy physical demand category according to the U.S. Department of Labor, Dictionary of Occupational Titles, as, "Exerting 50 lbs. to 100 lbs. of force occasionally, and/or 25 lbs[.] to 50 lbs. of force frequently, and/or 10 lbs. to 20 lbs. of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work." Nonetheless, the FCE also clearly states, "He did not demonstrate the ability to perform the essential duties required for a Heavy Equipment Operator. He was unable to lift 75-100 lbs. listed in the job description." Instead, the FCE found the claimant demonstrated the ability to occasionally lift up to 60 pounds.

On November 8, 2016, Dr. Vanichkachorn, the claimant's treating physician, agreed the claimant was able to perform within the heavy physical demand category. On December 2, 2016,[3] Dr. Vanichkachorn agreed the claimant was released to return to work according to the restrictions and limitations set forth in the FCE. Dr. Seeman, the physician who performed an independent medical examination, similarly agreed the claimant could do heavy physical demand work based

[3] While it appears the questionnaire was signed on "12/2/2016," it was most likely signed on 12/12/2016 given the franking on the fax from claimant's counsel dated 12/8/2016 and the return date of 12/12/2016.

upon the FCE and Dr. Vanichkachorn's recommendations, but he also opined the claimant could return to full duty work after reviewing the claimant's job description.

After reviewing the record in its entirety, we find the preponderance of the evidence shows the claimant was unable to perform the lifting duties of his pre-injury employment,[4] especially in light of the 60-pound lifting restriction provided within the FCE, which was affirmed by Dr. Vanichkachorn. The defendants did not meet their burden of proving the claimant was released to his pre-injury employment.

C. Refusal of Selective Employment

Under Virginia Code § 65.2-510(A), an employee is not allowed to collect temporary disability benefits during any period when the employee "refuses employment procured for him suitable to his capacity," unless the refusal was "justified."

> To support a finding of refusal of selective employment "the record must disclose (1) a *bona fide* job offer suitable to the employee's capacity; (2) [a job offer that was] procured for the employee by the employer; and (3) an unjustified refusal by the employee to accept the job." James v. Capitol Steel Constr. Co., 8 Va. App. 512, 515, 382 S.E.2d 487, 489 (1989) (quoting Ellerson v. W. O. Grubb Steel Erection Co., 1 Va. App. 97, 98, 335 S.E.2d 379, 380 (1985)).

Atlas Plumbing & Mech., Inc. v. Lang, 38 Va. App. 509, 512, 566 S.E.2d 871, 872-73 (2002).

The claimant initially returned to work in a light duty capacity for the employer but discontinued this light duty work in March 2016 when he was rendered totally disabled after his low back surgery. There is no evidence in the record the employer provided the claimant with a

[4] We note Lou Rieder, the claimant's supervisor, testified the maximum weight that an individual would lift would be in the "50 to 75 pound range," which is above the 60-pound occasional lifting capabilities of the claimant. (Tr. 54.) Additionally, Rieder testified that the pipe that the claimant was lifting at the time of his injury weighed 175 pounds. (Tr. 67, 70.) While Rieder testified that the claimant would not be required to lift this weight on his own, he would still have been required to lift 87.5 pounds.

bona fide job offer suitable to his capacity after he was released to light duty work by Dr. Vanichkachorn. Accordingly, the claimant did not refuse selective employment.

D. Return to Work/Imputed Earnings/Va. Code § 65.2-712

Virginia Code § 65.2-712 provides, in pertinent part:

> So long as an employee . . . receives payment of compensation under this title, any such person shall have a duty immediately to disclose to the employer, when the employer is self-insured, or insurer in all other cases, any . . . return to employment, increase in his earnings, . . . . Any payment to a claimant by an employer or insurer which is later determined by the Commission to have been procured by the employee . . . by fraud, misrepresentation, or failure to report any . . . increase in earnings, . . . may be recovered from the claimant . . . by the employer or insurer either by way of credit against future compensation payments due the claimant . . . or by action at law against the claimant . . . .

The claimant's uncontradicted testimony, which the Deputy Commissioner found credible, reflects he did not earn any wages at an automobile parts recycling business as asserted by the defendants. The claimant testified he was "hanging out with friends" at Russell's Auto where he spent 10 to 20 hours each month helping to pull parts. (Tr. 42.) He testified he would turn any "tips" from customers over to the business and never received any wages. (Tr. 43.) The evidence in the record does not preponderate to show the claimant earned wages from this business.

Even if the claimant does not receive wages for the work he performs, under certain circumstances, wages may be imputed. See Nisource, Inc. v. Thomas, 53 Va. App. 692, 710-20, 674 S.E.2d 581, 590-96 (2009). Given the claimant's uncontradicted testimony related to his activities at this auto parts business, we agree with the Deputy Commissioner that the claimant's services were limited and sporadic and not sufficient to necessitate imputing a wage. Accordingly, we find the claimant did not fail to report any return to work in violation of Virginia Code § 65.2-712.

## III. Conclusion

The Deputy Commissioner's May 22, 2017 Opinion is AFFIRMED.

From the claimant's accrued compensation, $2,000 in addition to the $2,750 awarded by the Deputy Commissioner below, for a total of $4,750, is to be deducted and forwarded directly to B. Mayes Marks, Jr., Esquire, as an attorney's fee for legal services rendered to the claimant.

Interest is payable on the Award pursuant to Virginia Code § 65.2-707.

This matter is removed from the review docket.

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.