

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN  
Commissioner

**Aug. 5, 2019**

JENNIFER MANION v. NORTHWESTERN REGIONAL ADULT DETENTION  
VIRGINIA ASSOCIATION OF COUNTIES GROUP S, Insurance Carrier  
RISK MANAGEMENT PROGRAMS, INC., Claim Administrator  
Jurisdiction Claim No. VA00000322305  
Claim Administrator File No. WC034D047351  
Date of Injury: August 16, 2010

Jennifer Manion  
Claimant, pro se.<sup>1</sup>

Lisa Tulusso, 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 February 28, 2019 Opinion denying their Employer's Application for Hearing. We AFFIRM.<sup>2</sup>

**I. Material Proceedings**

The claimant sustained a compensable injury to her back as the result of a workplace accident on August 16, 2010. She was awarded an open period of temporary total disability benefits beginning July 19, 2011, pursuant to a September 7, 2011 Award Order. On May 30, 2018, the defendants filed an Employer's Application for Hearing seeking suspension of her

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<sup>1</sup> The claimant appeared pro se at the evidentiary hearing, but she did not file a written statement on review.

<sup>2</sup> Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see Barnes v. Wise Fashions*, 16 Va. App. 108, 112, 428 S.E.2d 301, 303 (1993).

outstanding award. As clarified at the hearing, they alleged the claimant refused medical treatment by failing to attend a functional capacity evaluation ordered by Dr. Raymond Harrell, her treating physician.

The Deputy Commissioner denied the employer's application and ordered reinstatement of benefits for the following reason:

After carefully considering the evidence presented by the defendants, we find the claimant did not unjustifiably refuse medical treatment ordered by Dr. Harrell. In reaching this decision, we find that the defendants did not establish that the FCE was necessary for the treatment of the claimant's injuries. Ms. Brown repeatedly testified that the insurer desired the FCE so they could update their records and her assignment was, in part, to obtain a written order from Dr. Harrell for such an evaluation.

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Based on the evidence presented, it is apparent that Dr. Harrell issued the referral, without any stated medical reason, at the request of the defendants. We base this determination on Ms. Brown's repeated statements that she requested the referral from Dr. Harrell because the insurer desired the FCE to "update their records" and the lack of any statement in the medical records concerning the referral and its medical necessity. Accordingly, we find that the FCE the defendants scheduled for April 6, 2018 was not medically necessary treatment; therefore, the employer's application must be DENIED.

(Op. 8-9.) (Footnote omitted.)

The defendants filed a timely request for review and argue the Deputy Commissioner erred by finding that the FCE ordered by Dr. Harrell was not medically necessary treatment. They also contend the claimant's refusal to submit to the FCE was unjustified and should result in a suspension of benefits.

## II. Findings of Fact and Rulings of Law

Section 65.2-603(B) of the Code of Virginia bars a claimant from receiving benefits for the unjustified refusal of medical treatment provided by the employer. “The policy behind suspension of benefits during the period of a claimant’s refusal of medical services is to compel the employee to take all reasonable steps to reduce the liability of the employer by seeking prompt medical attention where it is indicated.” *Davis v. Brown & Williamson Tobacco Co.*, 3 Va. App. 123, 128 (1986). However, “[i]n order to constitute a refusal of medical services, there must be some evidence that the claimant has ‘refused to undergo medical treatment or to participate in the plan of treatment recommended by the treating physician.’” *Philip Morris United States v. Marshall*, No. 0832-96-2 (Va. Ct. App. Jan. 21, 1997) (quoting *Davis*, 3 Va. App. at 127). “The carrier may not independently schedule treatment appointments for a claimant.” *Eames v. Williamsburg Soap & Candle Co.*, 76 O.W.C. 7, 12 (1997) (citing *Taylor v. Capital Milk Producers Coop*, 60 O.I.C. 439 (1981)). “A refusal to attend a treatment session scheduled by the carrier is not a refusal that is actionable under Va. Code Ann. § 65.2-603.” *Id.*

Following her back injury, the claimant submitted to two surgeries and was then referred to pain management treatment. She came under the care of Dr. Michael J. Poss and treated with him through November 21, 2017, at which point Dr. Poss began focusing his practice on regenerative medicine and stopped performing chronic medication management.

The claimant attended a comprehensive pain consultation with Dr. Raymond M. Harrell on February 28, 2018. He agreed to begin treating her and noted that she had not had any imaging studies performed for several years. He ordered an MRI and asked the claimant to consider having a spinal cord stimulator implanted, and instructed her to return for a follow up appointment in one

month. When the claimant returned to Dr. Harrell on April 4, 2018, he reviewed her MRI results and recommended she allow the physician who performed her back surgeries to review them as well. He continued her medication regimen and again recommended a spinal cord stimulator. When the claimant followed up with Dr. Harrell on May 2, 2018, he again referred her to her back surgeon for a review of her MRI results and continued her prescriptions. Absent from Dr. Harrell's records is a referral for a FCE or encounter notes indicating he needed such an examination in order to formulate a plan of treatment for the claimant. The claimant also testified that she never discussed obtaining an updated FCE with Dr. Harrell.

Louisiana Brown, the insurer's Workers' Compensation nurse case manager, testified that she was informed that Dr. Poss would no longer be treating the claimant and was asked to "find and coordinate a new pain management provider for [the claimant] and to obtain a functional capacity evaluation from the physician." (Tr. 15.) Ms. Brown contacted the claimant once her first appointment with Dr. Harrell was scheduled and informed her that "the Carrier needs [an] updated functional capacity evaluation," and she would obtain an FCE referral from Dr. Harrell. (Tr. 16-17.) Ms. Brown subsequently followed up with Dr. Harrell and obtained a FCE order for an April 6, 2018 examination. Although Ms. Brown left the claimant several voice messages and spoke to her personally about the upcoming FCE, the claimant stated she would not attend. The claimant also called the FCE provider and cancelled her upcoming appointment.

"A long held principal of the [Workers' Compensation] Commission . . . is that medical management of the claimant is to be directed by the treating physician, not an employer's representative." *Jensen Press v. Ale*, 1 Va. App. 153, 158 (1985). While a claimant may be "required to attend an FCE in order to avoid suspension of [her] benefits based upon a refusal of

medical treatment,” a claimant is not required to attend unless it is was ordered by the treating physician as a necessary diagnostic test. *Wykle v. Shelor Motor Mile Chevrolet Subaru*, VWC File No. 218-02-15 (June 17, 2009). In the present case, there is no evidence that Dr. Harrell found it medically necessary to obtain a FCE in order to develop a plan for the claimant’s pain management treatment. He did not discuss obtaining an FCE at any appointments with the claimant. Furthermore, Ms. Brown’s testimony indicates that she was ordered to obtain an updated FCE by the insurer and was not advised to do so by a medical professional involved in the claimant’s care. The claimant was not obliged to attend the FCE, and her benefits may not be suspended for failing to do so.<sup>3</sup>

### **III. Conclusion**

The Deputy Commissioner's February 28, 2019 Opinion below is AFFIRMED.

Interest on the Award, pursuant to Virginia Code §65.2-707, and penalties, pursuant to Virginia Code § 65.2-524, are payable in accordance with Commission Rule 1.6(E).

This matter is hereby removed from the review docket.

#### MARSHALL, COMMISSIONER, Concurring:

I agree with the majority’s well-reasoned result in this case.

“It is well settled that an employer cannot engage in medical management” *Williams v. YRC Inc.*, JCN VA00000589382 (Jan. 21, 2014) (citing *Colindres v. J. Swigart Constr.*, 76 O.W.C. 503 (1997)). “Medical management of a claimant is to be directed by the treating physician, not

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<sup>3</sup> Because the FCE was not medical treatment as contemplated by Virginia Code § 65.2-603, we make no findings regarding whether her failure to attend was justified.

by an employer's representative." *Deel v. Yogi Mining Co., Inc.*, VWC File No. 147-99-89 (May 22, 1992) (citing *Jensen Press v. Ale*, 1 Va. App. 153 (1985)).

Medical management of a claimant cannot be undertaken by an employer or their insurance carrier. A carrier cannot limit the treatment or the treating doctor's medical management of the case, or dictate the referral of a patient to a medical specialist or facility by its approval or disapproval of medical expenses. *Prince v. E E Lyons Constr. Co., Inc.*, VWC File No. 156-51-00 (Mar. 12, 1997) (citing *Robinson v. Omni Constr., Inc.*, 69 O.I.C. 137 (1990)).

"[A]n employer cannot require an employee to attend a FCE on its own." *Wykle v. Shelor Motor Mile Chevrolet Subaru*, VWC File No. 218-02-15 (June 17, 2009). The employer's application was premised solely upon its improper attempt to medically manage the claimant and to direct her medical attention.

For these reasons, I concur.

#### 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.