

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL  
Commissioner

**Aug. 6, 2020**

DAVID CARTER v. UPS  
LM INS CORP, Insurance Carrier  
LM INS CORP, Claim Administrator  
Jurisdiction Claim No. VA00001362958  
Claim Administrator File No. 80DD42371  
Date of Injury July 21, 2017

Richard Reed, Esquire  
Vanessa Reed, Esquire  
For the Claimant.

Joseph R. Coules, 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 Commission's May 4, 2020 partial rejection of their April 17, 2020 Employer's Application for Hearing. We AFFIRM.

**I. Material Proceedings**

After an evidentiary hearing, a Deputy Commissioner issued a March 19, 2019 Opinion. He ordered the defendants to provide medical treatment to the claimant's compensable July 21, 2017 low back injury. The claimant received temporary partial disability for one period and three periods of temporary total disability, with the last of these beginning December 3, 2018 and continuing.

The defendants filed a December 16, 2019 Employer's Application for Hearing. It alleged the claimant was unable to perform his preinjury job as a delivery driver, which required heavy

exertion. The defendants asserted the claimant was assigned permanent restrictions to medium duty. They stated they provided vocational rehabilitation, and the claimant accepted a medium duty job as a school bus driver with Prince William County Schools on October 4, 2018. The application alleged the claimant refused selective employment with Prince William County on November 25, 2019 when he underwent aortic valve replacement and bypass heart surgery due to a medical condition unrelated to his low back injury. Compensation was paid through December 16, 2019. The application sought termination of the outstanding award and a credit.

The claimant filed a December 19, 2019 Request for Hearing. He requested reinstatement of temporary total disability and an award of attorney's fees.

On January 2, 2020, the Commission referred the December 16, 2019 application and the December 19, 2019 hearing request to the docket. On January 14, 2020, the Commission scheduled a May 21, 2020 evidentiary hearing before Deputy Commissioner Jimese Sherrill.<sup>1</sup>

The employer filed a successive "Application for Hearing and/or Statutory Change in Condition Petition" pursuant to Virginia Code §§ 65.2-708 and 65.2-712 on April 17, 2020. First, the application alleged the claimant was held out of work from November 25, 2019 through March 9, 2020 due to heart surgery. It alleged the surgery was performed due to conditions unrelated to his compensable low back injury. The defendants filed copies of the claimant's Prince William County School Board payroll records and medical records in support. A February 24, 2020 medical report from a cardiologist, Ara Maranian, M.D., stated the claimant recovered and "[h]e can return to work on March 9, 2020 without restrictions."

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<sup>1</sup> The Commission continued the May 21, 2020 hearing until July 9, 2020 and from July 9, 2020 to August 11, 2020.

The April 17, 2020 application also alleged that Prince William County furloughed its entire class of bus drivers, including the claimant, regardless of disability status, and “said furlough was not individually applied to select bus drivers.” The defendants supported this part of the application with Governor Northam’s March 23, 2020 Executive Order #53-2020, *Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due To Novel Coronavirus (Covid-19)*. The Order stated Governor Northam ordered all K-12 schools in the Commonwealth closed for two weeks on March 13, 2020. It ceased all in-person instruction at public and private K-12 schools for the remainder of the 2019-2020 school year. Because of the alleged furlough, the defendants alleged the claimant’s work disability and no work status was completely unrelated to the July 21, 2017 injury. They sought suspension or modification of the March 19, 2019 award effective November 25, 2019.

A Staff Attorney notified the parties on May 4, 2020 that the April 17, 2020 application was partially accepted and partially rejected. She reviewed the application and its attachments. She found the defendants established probable cause for the allegation that the claimant had total disability for reasons other than his work-related disability during his heart surgery recovery period. She rejected the remaining allegation of the application, stating:

However, once released to return to work on March 9, 2020, the claimant’s partial disability was solely due to his occupational disability. The claimant has an award for temporary partial disability benefits based upon his work-related partial disability. A furlough does not change this existing disability.

The defendants requested review on May 28, 2020. They argue the evidence they submitted demonstrated the claimant was furloughed from selective employment as of March 13, 2020 for

reasons completely unrelated to his compensable lower back injury. They assert the Staff Attorney's May 4, 2020 probable cause determination disregards the nature of the claimant's furlough.

## **II. Findings of Fact and Rulings of Law**

An application for hearing must demonstrate the requisite probable cause to justify suspending benefits and docketing the application for a hearing on its merits. "Probable cause exists if the facts and circumstances are sufficient to justify a prudent and reasonable person in the belief that the allegations, if true, would prevail." *Hunt v. Cox Commc'ns, Inc.*, VWC File No. 240-27-37 (Oct. 1, 2010) (citing *Giant of Va. v. Pigg*, 207 Va. 679, 684(1967)). "In *City of Norfolk v. Lassiter*, 228 Va. 603, 606 (1985), the Virginia Supreme Court held that reasonable grounds for defending a case exist when the facts induce a reasonable mind to believe that compensation is at least doubtful." *Id.*

After review of the defendants' evidence and argument, we AFFIRM the rejection of the part of the application which alleged the claimant and all bus drivers were furloughed. The defendants provided no documentation of the alleged furlough.

The defendants also provided no proof that the claimant lost wages due to Governor Northam's Order closing K-12 schools for the remainder of the school year. The Coronavirus Aid Relief and Economic Security Act, 116 P.L. 136 (Mar. 27, 2020) ("CARES Act"), intends to support employment in segments of the U.S. economy during the pandemic. The Act provides grants to educational institutions for pandemic-related expenses through its Education Stabilization Fund. It requires "A local educational agency, State, institution of higher education, or other entity that receives funds under 'Education Stabilization Fund', shall to the greatest extent practicable, continue to pay its

employees and contractors during the period of any disruptions or closures related to coronavirus.” 116 P.L. 136, Sec. 18006.

Probable cause did not support referral of the second part of the application to the docket. We AFFIRM the Staff Attorney’s partial rejection.

### **III. Conclusion**

The May 4, 2020 partial rejection of the April 17, 2020 Employer’s Application for Hearing is AFFIRMED.

This matter is hereby 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 thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerk’s Offices of the Commission and the Court of Appeals of Virginia.