VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

**CORRECTED**[1]
Opinion by NEWMAN
Commissioner

**Oct. 5, 2021**

KENNETH ELLIOTT v. SAM GREEN VAULT CORPORATION
CINCINNATI INS CO (THE TRAVELERS), Insurance Carrier
THE CINCINNATI INSURANCE CO, Claim Administrator
Jurisdiction Claim No. VA00001108316
Claim Administrator File No. 2505897 TC
Date of Injury: August 16, 2015

Gregory P. Cochran, Esquire
For the Claimant.

Christopher M. Kite, Esquire
Roberta A. Paluck, Esquire
For the Defendants.

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

The Deputy Commissioner's March 29, 2021 Opinion denied the claimant's application seeking physical therapy, finding that the subject referral was for purposes of obtaining a functional capacity evaluation to establish a permanent partial disability rating to the claimant's injured leg. The claimant requests review.[2] We REVERSE.

[1] This Corrected Opinion replaces the Opinion issued on October 5, 2021, correcting the Deputy Commissioner's Opinion date from March 3, 2021 to March 29, 2021 in the Conclusion on page 11 . The issue date and time for filing an appeal remain the same.

[2] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is utnnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see Barnes v. Wise Fashions,* 16 Va. App. 108, 112(1993).

## I. Material Proceedings

The claimant sustained a compensable injury to his left leg on August 16, 2015. The Commission entered an August 31, 2016 Award providing for a period of compensation and medical benefits. Presently before us is the claimant's November 3, 2020 application, seeking authorization for physical therapy. The defendants disputed responsibility for the treatment contending it was not for medical treatment but solely for the claimant to undergo a Functional Capacity Evaluation (FCE) to obtain a permanent partial disability rating. The Deputy Commissioner agreed and on the strength of existing Commission authority, held that the defendants were not responsible for the physical therapy referral.

## II. Findings of Fact and Rulings of Law

The claimant was working for the employer as a grave digger on August 16, 2015, when a tombstone toppled over and fell on his left leg, causing a tibia fracture. He underwent surgery and thereafter began treating with Dr. Seth Yarboro at UVA Health System. Dr. Yarboro performed a second surgery on September 8, 2017, and inserted screws to stabilize the fractured bone. A third surgery was performed on January 17, 2019 to remove one of the screws. According to the claimant's position statement "Except for a short period following removal of the screw, Claimant has been working at his regular gravedigging job without specified restrictions since December 15, 2015." (Cl.'s Pos. S. 2.)

The claimant returned to Dr. Yarboro on May 11, 2020, with a complaint of sharp anterior left knee pain aggravated by short periods of quick ambulation. Dr. Yarboro noted the claimant was otherwise largely asymptomatic. X-rays demonstrated a healed distal tibia fracture without complicating features. Dr. Yarboro assessed persistent left knee pain and opined the claimant had

reached maximum medical improvement. Dr. Yarboro wrote: "Tibia well healed, patient has anterior knee pain related to this injury. Plan FCE, Impairment rating since at MMI with persistent difficulty. No other intervention planned." The claimant was provided a work note. His weight bearing status was listed as weight bearing as tolerated on the left lower extremity. The After Visit Summary included the following:

> PLAN:
> Discussed that patient has reached MMI, FCE and impairment rating ordered.
> Work note provided today
> WB status: WBAT LLE
> F/u appt as needed
> ---
> Referrals placed today
> Ambulatory referral to Physical Therapy
> Multiple visits requested (expires 6/11/2021)

Dr. Timothy Hoggard in Dr. Yarboro's office completed an Ambulatory referral to Physical Therapy on May 11, 2020. The form indicates the following reason for referral: "Workers compensation case. Patient has reached MMI s/p left tibia IM nail. Please complete impairment rating." Under Referral Type, the note states "Consult and Treat." Dr. Hoggard also completed a return to work Order stating: "Patient has reached MMI. FCE and impairment rating ordered today."

On December 23, 2020, Dr. Hoggard responded to claimant's counsel's questionnaire. He indicated that the physical therapy referral dated May 11, 2020, "remains valid and still in effect."

The claimant requested authorization for the physical therapy ordered by Drs. Yarboro and Hoggard. The Deputy Commissioner denied the request. She held:

> The claimant seeks authorization for physical therapy. The defendants denied the claimant's claim on the grounds that the physician's referral was only for a disability assessment.

> Generally, a visit to a physician for the sole purpose of providing a disability rating does not constitute medical treatment under Virginia Code § 65.2-603 and is not the responsibility of the employer. *See Thompkins v. DBHDS/E. State Hosp.,* JCN 2388388 (Feb. 19, 2014); *Harris v. Cnty. of Henrico*, JCN VA010-0242-5961 (June 22, 2011); *Anderson v. Atl. Waste Disposal*, VWC File No. 218-46-84 (Mar. 15, 2006); *Morgan v. Proffitt's, Inc.*, VWC File No. 180-18-10 (Dec. 28, 2005).
>
> If the purpose of the permanency rating evaluation is not related to treatment but to support the claimant's claim for additional benefits under the Act, it is not the employer's responsibility. *Sutherland v. Craft Mach. Works, Inc.*, VWC File No. 194-35-92 (May 28, 2004) (citing *Gaylor v. Altadis USA*, VWC File No. 206-55-56 (July 21, 2003).
>
> Thus, where the evaluation is not "part of ongoing care or as a follow-up to ongoing care," but instead solely to obtain a permanency rating, it is not considered medical care under Virginia Code § 65.2-603. *Id.*
>
> In the instant case, there is no dispute that the claimant received a referral to physical therapy. We have reviewed Dr. Hoggard and Dr. Yarboro's medical records including their responses to the claimant's questionnaires. Upon careful review, we find the evidence preponderates to show that that (sic) the purpose of the referral to physical therapy was so an FCE could be conducted to provide an impairment rating. We find it significant that Drs. Hoggard and Yarboro concluded that the claimant's injuries have reached maximum medical improvement. They provided no reason why therapy was ordered. We do find the purpose of the referral to physical therapy, the FCE, or the impairment rating was medical treatment for the claimant's compensable injuries. Accordingly, we DENY the claimant's November 3, 2020 claim seeking authorization and payment of physical therapy.

(Op. 4-5.)

On review, the claimant argues that the defendants should be held responsible to pay for the claimant's additional course of physical therapy and assessment as ordered by the treating physicians. The claimant argues that the Deputy Commissioner erred in concluding that the record showed the referral was for an FCE only. Instead, the claimant asserts that the record as a whole

demonstrated that the referral to physical therapy was for consultation and treatment and is therefore medical treatment and the responsibility of the defendants.

Below, the Deputy Commissioner was not persuaded that the referral was for treatment but was solely for assignment of a permanent impairment rating. Consequently, she denied the claim, citing longstanding Commission authority for the proposition that a visit to a physician for the sole purpose of securing a disability rating is not medical treatment under Virginia Code § 65.2-603. *See Thompkins v. DBHDS\E. State Hosp.*, JCN 2388388 (Feb. 19, 2014); *Harris v. Cnty. of Henrico*, JCN VA010-0242-5961 (June 22, 2011); *Anderson v. Atl. Waste Disposal*, VWC File No. 218-46-84 (Mar. 15, 2006); *Morgan v. Proffitt's, Inc.*, VWC File No. 180-18-10 (Dec. 28, 2005).

We agree that the evidence supports the Deputy Commissioner's conclusion that the referral was solely for the performance of a functional capacity evaluation (FCE) to assess and assign a permanent partial disability rating. We likewise agree that, in denying the claim, the Deputy Commissioner interpreted existing Commission authority appropriately. Indeed, the Commission has frequently held that FCEs for the sole purpose of providing an impairment rating are not the defendants' responsibility. "Since [an] evaluation to get a permanency rating is not related to treatment but to support [a] claim for additional benefits under the Act, we find it is not the employer's responsibility." *Sutherland v Craft Machine Works, Inc.*, VWC File No. 194-35-92 (May 28, 2004) (citing *Gaylor v. Altadis USA*, VWC File No. 206-55-56 (July 21, 2003)).

Heretofore, this Commissioner has adopted the rationale that examinations for the sole purpose of establishing a permanent partial disability rating are neither medical treatment nor the

employer's responsibility. *Thompkins*, JCN 2388388. It has been a position to which Commissioner Marshall noted his dissent.

I deem this question to merit further consideration, and I depart from my prior ruling. As justification for this reversal of course, I cite four grounds. First, obligating the claimant to pay the cost associated with securing a disability rating offends the Act's fundamental premise that the financial burden resulting from a worker's compensable accident or disease be borne by industry. *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 96 (1926). The Act's "intent and purpose" is to make "business bear the pecuniary loss, measured by the payment of compensation" for accidental injuries suffered by employees engaged in the employer's service. *Honaker & Feeney v. Hartley*, 140 Va. 1, 8 (1924). Consistency with this formative principle dictates that we not carve from the Act an exception so as to saddle the injured worker with the expense associated with securing a benefit expressly provided by the Act.

Virginia Code § 65.2-503 dictates the specific number of weeks of compensation to which an employee is entitled for the permanent loss of listed bodily members.[3] Securing that compensation mandates evidence that the claimant "has achieved maximum medical improvement and his functional loss of capacity be quantified or rated." *Cafaro Constr. Co. v. Strother*, 15 Va. App. 656, 661 (1993) (citing *Hungerford Mechanical Corp. v. Hobson*, 11 Va. App. 675, 677-78 (1991)). The evidence before us establishes the claimant attained maximum improvement but without a quantified rating, the claimant cannot obtain an intended benefit occasioned by his work-related injury. Consistency with the principle that the employer bears the financial burden

[3] For the loss of a leg, the claimant receives 175 weeks. Va. Code § 65.2-503(B)(13).

occasioned by the compensable accident mandates that the claimant not bear the cost necessary to secure a benefit intended under the Act.

Secondly, we conclude that our prior decisions which compel a permanently injured employee to finance the evaluation necessary to secure a disability rating applied too myopic a view as to what benefits are afforded under § 65.2-603. The rulings have been predicated upon the conclusion "that a visit to a physician for the sole purpose of proving a disability rating does not constitute medical treatment under Va. Code § 65.2-603." *Harris*, JCN VA010-0242-5961 (citing *Anderson*, VWC File No. 218-46-84) (additional citations omitted)). However, the Act does not define what is "necessary medical attention." We have not otherwise so narrowly interpreted that language as to limit what is covered to only that care which advances the claimant on the path to recovery. We have, for instance, read into § 65.2-603 an obligation for the employer to provide transportation to and from medical care, whether mileage reimbursement, the cost of taxi service, ambulance or airplane. *Hamil v. Lowe's of N. Manassas VA #0397*, JCN 2087339 (May 30, 2003); *Montgomery v. Hausman Corp.*, 52 O.I.C. 183 (1970); *Penley v. Handcraft One Hour Cleaners*, 49 O.I.C. 257 (1967). We have likewise held in numerous cases that necessary medical attention includes diagnostic tests to determine whether symptoms are causally related to an accident. Such testing remains the employer's financial responsibility *even if it establishes that the diagnosed condition is causally unrelated to a compensable injury*. *Deel v. Vansant Lumber Co., Inc.*, VWC File No. 176-45-42 (Dec. 21, 1999); *Smith v. Cameron Glen Care Ctr.*, VWC File No. 171-35-05 (May 29, 1997); *Donisi v. Branch Iron Works*, VWC File No. 165-41-72 (July 2, 1996); *Garcia-Arana v. Mary Washington College*, 70 O.I.C. 282 (1991). These rulings comport with our charge to interpret the Act's provisions liberally in harmony with its humane purpose and for the benefit

of employees. *Dixon v. Norfolk Shipbuilding & Dry Dock Corp.*, 182 Va. 185 (1944); *Chalkley v. Nolde Bros.*, 186 Va. 900 (1947); *Bailey v. Stonega Coke & Coal Co.*, 185 Va. 653 (1946). Why then discard humane and liberal interpretation when it relates to the treating physician's effort to assess the degree of injury so the claimant may receive a benefit offered by the Act?

One may argue that, while transportation advances the cause of treatment and so logically falls under the Act's medical provision, an FCE only assesses the degree to which the compensable injury impairs the claimant's ability to function. Consequently, the argument would go, it is impermissible for us to define as medical attention that which merely measures impairment. But yet, we regularly do just that. We confront the precise issue of whether an FCE is medical treatment in the context of employers' applications seeking to terminate the payment of compensation. Virginia Code § 65.2-603(B) reads in relevant part, "The unjustified refusal of the employee to accept such medical service . . . when provided by the employer shall bar the employee from further compensation until such refusal ceases . . . ."

We have defined an FCE as necessary medical attention when adjudicating an employer's application contending that a failure to attend or cooperate with the evaluation constituted a refused medical service justifying the termination of the payment of compensation. In *Devaughn v. Fairfax County Public Schools*, JCN VA00000940928 (May 25, 2017), the Commission addressed such an application, holding that "the FCE was a reasonable and necessary examination to evaluate the claimant's residual injury and work capacity" and that "the claimant's compliance at the FCE would have provided (the treating physician) with a basis for informed recommendations regarding work and activity limits . . . ." Consequently, "the claimant's refusal to undergo the [ ] FCE

prescribed by [the treating physician] was an unjustified refusal of medical treatment as contemplated by the Virginia Workers' Compensation Act."

Similarly, an employer's application seeking to terminate disability benefits for refusal of medical treatment was based upon inconsistent efforts during an FCE in *Wilson v. Wilson*, JCN VA00001230856 (Feb. 2, 2018). This Commissioner wrote, "A functional capacities evaluation is 'a reasonable and necessary diagnostic study to evaluate the claimant's residual injury, in that it would provide the physician with a basis for informed recommendations regarding work and activity limits, and potentially help him evaluate the claimant's credibility regarding subjective complaints for the purpose of more accurately diagnosing the nature of and appropriate treatment for the residual injury.'" *Id.* (quoting *Flinchum v. New Energy Bedrooms, Inc.*, VWC File No. 202-67-61 (July 2, 2002), *aff'd*, No. 2036-02-3 (Va. Ct. App. Apr. 1, 2003)). "Thus, a claimant's conduct at an FCE may be considered 'tantamount to a refusal of medical treatment' justifying suspension of his compensation benefits if the claimant's conduct or non-cooperation has affected his recovery . . . ." *Wilson,* JCN VA00001230856 (further citations omitted).

Consequently, our third reason for finding an employer responsible for an FCE to assess the claimant's impairment is a matter of fundamental fairness. A treating physician may order an evaluation to assess the claimant's ability to function before issuing a release to work. We cannot portray such an FCE as § 65.2-603 medical treatment for the purpose of suspending the compensation of the claimant who refuses to attend or fails to cooperate while concurrently denying that the same evaluation qualifies as medical treatment when it is needed for the claimant to secure compensation justly due under the Act.

Finally, we find that holding an employer liable for an evaluation of the claimant's permanent disability promotes our charge to administer the Act and to adjudicate issues and controversies. Va. Code § 65.2-201. We similarly find that such a rule serves the interests of all parties, including employers. Heretofore, an employer's refusal to pay for the evaluation liberates the claimant from the informed eye of the treating doctor and frees the claimant to seek an opinion from any medical provider the claimant is willing to pay, including those reputed to render suspiciously elevated ratings. Confronted with a claim for § 65.2-503 benefits predicated on such a rating, the employer is left with little choice but to finance an evaluation of their own thus rendering their parsimony for naught. This state of affairs deprives the Commission of a rating from the treating physician, the doctor most familiar with the claimant's injury and to whose opinion we customarily afford great evidentiary weight. We are frequently left to weigh wildly disparate ratings from competing professionals who saw the claimant only once, if at all.

We are mindful that the specific question before us – whether an FCE ordered by the treating physician to assess an injured worker's permanent injury qualifies as medical attention under § 65.2-603 - is not expressly addressed in the Act. We are similarly aware that we do not enjoy the latitude to enlarge, alter or amend the Act's provisions. *Humphries v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466 (1945); *Van Geuder v. Commonwealth*, 192 Va. 548 (1951). If, ultimately, we are told that we have exceeded the bounds of our charge to interpret the Act liberally and humanely then so be it. If so, however, an employer confronted with a claimant who frustrates efforts to secure work restrictions should consider this case before filing an application to suspend compensation. Absent a persuasive explanation as to why an assessment of

work capability is medical treatment but an assessment of permanent injury is not, the outcome may run headlong into the universal tenet of jurisprudence: what's sauce for the goose . . .

For these reasons, the decision below is REVERSED.

## III. Conclusion

**29** **RFN**

The Deputy Commissioner's March ~~3~~, 2021 Opinion is REVERSED. **10/8/2021**

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Concurring:

I join the wise reasoning of Commissioner Newman, who so artfully recites the common sense of our longstanding interpretation and practice. For 87- and one-half years preceding the 2005 decision in *Morgan v. Proffitts*, VWC File No. 180-18-10 (Dec. 28, 2005), no one seriously doubted that undergoing examination with a physician or his designate to obtain a rating of permanent partial disability was reasonable and necessary medical attention under the Workers' Compensation Act.[4] Unfortunately, that sound principle temporarily was derailed by a strained

[4] In *Morgan*, the Commission firmly established a new legal rule holding evaluations for permanent partial disability were not "necessary medical attention," under the Workers' Compensation Act. A couple of earlier decisions pointed in this direction, but either represented dicta or were distinguishable. In *Harris v. Goodyear Tire and Rubber*, 79 O.W.C. 198 (2000), which was cited in *Morgan*, the pronouncement that a permanent partial disability evaluation was not necessary medical attention was dicta. The primary basis for rejecting the claim for the evaluation was that the claimant sought it on his own, without any authorization or request from his treating physician. The Commission in *Morgan* noted this, admitting, "We have held in the past that *under some circumstances,* a visit to a physician for the sole purpose of proving a disability rating does not constitute medical treatment under Code §65.2-603." *Id.* (emphasis added).

and unreasonably narrow interpretation. Faced with a decision that plainly frustrates, rather than supports, what we are charged to do, it is fitting that we set the law right.

To hold that assessing the degree of permanent partial disability is a litigation cost, rather than a conclusory phase of medical treatment is, and always was, bunkum. I understand the reasoning of the dissent, but believe it rests upon a distinction without a difference. We cannot hold a physician's determination of what injured workers can and cannot do is "necessary medical attention," but ascertaining the quantity of their permanent disability is not. Both are of the same character; they are but two sides of the same coin. Both assess the injured worker's physical capacities – the former in terms of what, if any, residual capacity remains and the latter in terms of what has been lost. And both are a necessary antecedent to the awarding of compensation granted in the Workers' Compensation Act.

To illustrate the unbalanced and unjust nature of the holding in *Morgan*, an employer can insist that a claimant return to his physician to obtain physical restrictions in order to expedite a return to work,[5] and at the same time, it can deny responsibility for an assessment of permanent disability. Contrary to the holding in *Morgan*, the employer cannot have it both ways.

The Commission cannot thwart the just and fair administration of the Act by imposing arbitrary transaction costs and economic barriers which cannot be overcome by the very people the law was intended to protect.[6] I mean no disrespect to Commissioner Rapaport, who fairly has

[5]*See Va. Code* §65.2-603(B), providing for a suspension of compensation if an injured worker unjustifiably refuses necessary medical attention.

[3]The Commission nitpicked the issue of expenses in *Gaylor v. Altadis*, VWC File No. 206-55-56 (July 21, 2003). The claimant's counsel drafted a letter seeking the physician's opinion on permanent partial disability. The Commission held the employer was not responsible for the cost of a physician's report. However, there was *no* apparent dispute over the employer's responsibility for the physician's examination to determine permanent disability. *Gaylor* demonstrates how the Commission's rulings on report fees improperly morphed into a broader, but

attempted to lay out his position. It is the legal rule announced in *Morgan*, created out of nothing, that I find unconscionable and totally inconsistent with the purposes of the Workers' Compensation Act. Commissioner Newman's careful reasoning pays heed to our solemn duty to respect and uphold the beneficent and humane purposes of the Act.

I stand by the reasoning of my dissent in *Thompkins v. DBHDS Eastern State Hospital*, JCN 2388388 (Feb. 19, 2014), *Lewis v. City of Fairfax*, JCN VA00001241447 (Dec. 6, 2017), and my dissent in part in *Beasley v. Virginia Natural* Gas*, Inc.*, JCN VA02000019406 (June 2, 2016).

RAPAPORT, COMMISSIONER, Dissenting:

I must respectfully dissent.

I recognize and appreciate the explanations carefully crafted by my colleagues. However, I strongly disagree with the abrupt departure from longstanding, existing case law simply on current musings of what should qualify as necessary medical attention under the Act. One cannot overlook the resulting complexities of this unjustified desertion.

As acknowledged by the majority, and properly held by the Deputy Commissioner, the Commission has repetitively instructed that "a visit to a physician for the sole purpose of securing a disability rating is not medical treatment under Virginia Code § 65.2-603." (Maj. Op. 5.) These numerous, previous decisions were rendered by competent Deputy Commissioners and Commissioners interpreting the law as we all have been equally tasked to do.

The current matter comes before the Commission on the claimant's application. It is the claimant's burden to demonstrate that the treatment for which he seeks payment is causally related

unwarranted, pronouncement holding injured workers responsible for the cost of permanent partial disability examinations.

to the accident, necessary for the treatment of his compensable injury, and recommended by an authorized treating physician. *See Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 199-200 (1985).

The majority opinion agrees, and specifically acknowledges, that the referral was solely for the performance of the Functional Capacity Evaluation ("FCE") to assess and assign a permanent partial disability rating. Virginia Code § 65.2-603(A)(1) provides that "[a]s long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician . . . and such other necessary medical attention." An employer has a mandatory, statutory duty to compensate an injured employee for medical expenses causally related to the injury, but any recommended treatment must be "reasonable, necessary, and related to the industrial accident." *Dunrite Transmission v. Sheetz,* 18 Va. App. 647, 649 (1994). When an injured employee requests the payment of specific medical treatment, he must demonstrate that the treatment "is causally related to the accident, is necessary for treatment of his compensable injury, and is recommended by an authorized treating physician." *Portsmouth (City of) Sch. Bd. v. Harris*, 58 Va. App. 556, 563 (2011). Here, the claimant has not made the requisite showing because he failed to prove that the FCE was medically necessary. *See Haftsavar v. All Am. Carpet & Rugs, Inc.*, 59 Va. App. 593, 599 (2012) (stating the claimant must prove "by a preponderance of the evidence that disputed treatment was medically necessary").

The majority outlines four reasons for the reversal of years of precedent. None address the crucial question: Is the requested FCE "necessary medical treatment"?

First, the majority asserts that placing the financial responsibility for the FCE on the claimant "offends the Act's fundamental premise that the financial burden resulting from a

worker's compensable accident or disease be borne by industry." (Maj. Op. 5-6.) The legislature has made clear what the employer's responsibility is under the Act. The responsibility is to pay for necessary medical treatment. Seeking to ascertain an injured employee's work restrictions and capabilities is necessary medical treatment. Determining whether the claimant may have a ratable permanent partial impairment is not. The majority correctly notes that Virginia Code § 65.2-503 sets forth the number of weeks of compensation an injured worker may receive for a permanent partial loss of use. They reason that since the Act provides for a possible rating, then the employer should necessarily be responsible to determine whether the claimant has a ratable impairment under the Act and, if so, the percentage of any such rating. This rationale is flawed and inconsistent in other cases applying the Act. For example, Virginia Code § 65.2-603(A)(3) provides that an injured employee is entitled to vocational rehabilitation services under certain circumstances. In *Salem v. Colegrove*, 228 Va. 290, 294 (1984), the Supreme Court of Virginia held that although the claimant's treating physician had recommended "[job retraining," the employee was not entitled to reimbursement for his expenses because the doctor never suggested such a program was medically necessary. The facts of the case *sub judice* similarly lack any determination of medical necessity.

Next, the majority declares that the prior decisions on this very issue take "too myopic" a view of the benefits afforded under Virginia Code § 65.2-603. I find the majority's holding to be too expansive. I am mindful that "[t]he Workers' Compensation Act is to be liberally construed for the benefit of employees." *Gallahan v. Free Lance Star Publ'g Co.*, 41 Va. App. 694, 698 (2003) (quoting *Waynesboro Sheriff's Dep't v. Harter*, 1 Va. App. 265, 269 (1985)). Further, I recognize that the purpose of the Act is to protect the employee. *Ellis v. Commonwealth Dep't of*

*Highways*, 182 Va. 293, 303 (1944). Therefore, the Commission and the Courts have interpreted the Act consistent with the "beneficent purpose" for which the General Assembly enacted it: to attain "a humanitarian end." *Simms v. Ruby Tuesday, Inc.*, 281 Va. 114, 119 (2011) (quoting *A. Wilson & Co. v. Mathews*, 170 Va. 164, 167 (1938)). However, we cannot forget that, "[w]hile the provisions of the . . . Act are to be liberally construed in favor of the [worker], liberality of construction does not authorize the amendment, alteration, or extension of its provisions. It does not go to the extent of requiring that every claim asserted should be allowed." *Humphries v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466, 479 (1945).

The General Assembly did not provide for payment by the employer to determine what, if any, permanent partial disability may be assigned under Virginia Code § 65.2-503. Given the length of time that our precedent has so held such cost to be borne by the claimant, it is unreasonable to suddenly conclude that the legislature intended to shift the cost to the employer. Again, the statute tasks the employer with the responsibility of paying for reasonable and necessary medical treatment. The majority ignores the unambiguous language of Virginia Code § 65.2-603 regarding "necessary medical treatment" and unilaterally grafts onto the statute an additional cost which the legislature has clearly declined to impose.

The majority's third point relies upon "fundamental fairness." (Maj. Op. 9.) They point to the situation where a treating physician may refer a claimant for an assessment of their work capacity before issuing a release to return to work and that should the claimant fail to attend such an evaluation, the employer may suspend compensation for such refusal. Such reasoning conflates refusing a medical evaluation for purposes of returning to work, and if so, with what, if any restrictions, to securing a permanency rating that, in this case, has no bearing on the claimant's

work capabilities or possible restrictions. The majority fails to identify any obstacle to the claimant receiving medical treatment, or how his care or recovery from his injuries has been delayed or impaired. The record is clear that the claimant has been working at his regular pre-injury employment without restrictions since December 15, 2015. (Cl.'s Pos. S. 2.) While one can be empathetic, empathy does not allow judicial activism to expand legislative parameters or the prior adjudications of the scope of those parameters.

Lastly, the majority finds that holding the employer liable for an evaluation of his permanent disability promotes our charge to administer the Act and to adjudicate issues and controversies. Va. Code § 65.2-201. We have adjudicated permanency ratings for the past 100 years. Sometimes we are asked to weigh wildly disparate ratings from multiple physicians. The majority finds that by requiring the claimant to bear the cost of such evaluation, the Commission is "deprive[d]" of a rating from the treating physician. (Maj. Op. 10.) This is an assumption with little foundation. Indeed, it is the rare case where the treating physician has not rendered an opinion unless the doctor simply refuses to do so. In such instances, the party responsible for payment of the physician's fee is meaningless as it is not a question of payment but one of unwillingness to render such an opinion. The majority also overlooks Virginia Code § 65.2-606 which allows "[t]he Commission or any member thereof . . . [to] appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination and to testify in respect thereto . . . ."

The majority concludes with a veiled admonishment that, in the event a claimant is held responsible for the cost of an FCE for purposes of obtaining a rating, then employers in future cases may find an unsympathetic Commission if a challenge is made that a claimant is

"frustrat[ing] efforts to secure work restrictions." (Maj. Op. 10.) This statement highlights the majority's misunderstanding of the difference between seeking necessary medical treatment and seeking a permanency rating. If this were a case where the treating physician had ordered the FCE to determine the claimant's work restrictions or capabilities, I would certainly find the employer responsible. Those are not our facts, and that is not the issue before the Commission.

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.