VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 30, 2022

GINGER HARRIS v. STATE POLICE
COMMONWEALTH OF VIRGINIA, Insurance Carrier
YORK RISK SERVICES GROUP, Claim Administrator
Jurisdiction Claim No. VA00001028775
Claim Administrator File No. 5278344
Date of Injury: January 29, 2015

Seth Carroll, Esquire
For the Claimant.

Adam L. Katz, Esquire
For the Defendant.

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

The claimant requests review of the Deputy Commissioner's March 14, 2022 Opinion finding there was no de facto award and the application of the statute of limitations of Virginia Code § 65.2-708(A) barred payment of indemnity benefits subsequent to March 23, 2017. We REVERSE. We AFFIRM the Deputy Commissioner's award of continuing medical benefits and wage loss benefits for April 21, 2015, July 15, 2015, August 10, 2016, and March 23, 2017.

I. Material Proceedings

On June 2, 2015, the Commission entered an Award Order for the payment of medical benefits for the claimant's head and cervical injuries and periods of indemnity benefits through April 14, 2015.

On May 19, 2021, the claimant sought to modify the current award to include wage loss benefits paid for individual days that she received medical treatment ranging from April 21, 2015 through December 15, 2017. The claimant maintained that a de facto award was appropriate as the employer had agreed to compensability of the claim and only denied benefits for the dates requested based upon the grounds that the statute of limitations had expired. The defendant agreed to the payment of indemnity benefits for the dates of April 21, 2015, July 15, 2015, August 10, 2016, and March 23, 2017.[1] However, the defendant contended the statute of limitations set forth in Code § 65.2-708 and the ninety-day rule set forth in Rule 1.2(B) of the *Rules of the Virginia Workers' Compensation Commission* barred the claims for indemnity benefits for June 27, 2017, September 26, 2017, October 16, 2017, October 19, 2017, November 14, 2017, and December 15, 2017.

Deputy Commissioner Cording conducted a WebEx Video Hearing on December 2, 2021. The Deputy Commissioner found that there was no de facto award as "[t]he employer asserts that the claim is time barred by the limitation in Code § 65.2-708. This defense challenges a 'critical aspect' of compensability. The claimant offered no evidence that the employer intended to waive its reliance on Code § 65.2-708." (Op. 6.) The Deputy Commissioner further held that benefits were last paid pursuant to an award on April 14, 2015, and therefore, the claim filed on May 19, 2021 was barred by Code § 65.2-708(A).

The claimant timely requested review.

[1]The Deputy Commissioner entered an indemnity award for these dates in accordance with the parties' stipulations, and also awarded continuing medical benefits pursuant to Virginia Code § 65.2-603. This portion of the Deputy Commissioner's Opinion was not challenged on review and is now final.

II. Findings of Fact and Rulings of Law

On review, the claimant argues that a de facto award is appropriate for the disputed payments. She maintains that to her detriment she "relied on a process established by her Employer for the submission of her missed time for workers' compensation reimbursement." (Cl.'s W.S. 3.) We agree. The defendant's actions worked an imposition on the claimant, and a de facto award for the indemnity benefits sought is appropriate. The defendant waived its right to defend the present claim based upon the limitation of Virginia Code § 65.2-708.

"[T]he doctrine of imposition 'empowers the commission in appropriate cases to render decisions based on justice shown by the total circumstances even though no fraud, mistake or concealment has been shown.'" *Tuck v. Goodyear Tire & Rubber Co.,* 47 Va. App. 276, 285 (quoting *Odom v. Red Lobster #235*, 20 Va. App. 228, 234 (1995)). "The application of the doctrine, however, requires a threshold showing of unfairness." *Id.*

> The key to meeting this threshold showing of unfairness is for the party arguing in favor of using the doctrine of imposition to show "a series of acts" by the opposing party or the commission upon which the party "naturally and reasonably relies to his or her detriment." Butler [v. City of Va. Beach], 22 Va. App. [601,] 605, 471 S.E.2d [830,] 832 [(1996)]. Thus, "the issue is whether under the totality of the circumstances shown, the actions of [one party] created an imposition on the commission and the [other party] which empowered the commission 'do full and complete justice.'" [Avon Prods., Inc. v.] Ross, 14 Va. App. [1,] 8, 415 S.E.2d [225,] 229 [(1992)].
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> "[T]he doctrine of imposition does not apply where a [party's] acts are consistent with an endeavor to comply with the [Workers' Compensation] Act." Odom, 20 Va. App. at 234, 456 S.E.2d at 143.

Miller v. Potomac Hosp. Found., 50 Va. App. 674, 687 (2007) (fifth, sixth, eleventh, twelfth, and thirteenth alterations in original).

The record in this case demonstrates the unfairness of the defendant's actions, which were plainly inconsistent "with an endeavor to comply with the Act," *Id.* (quoting *Odom*, 20 Va. App. at 234).

The claimant received an award of benefits on June 2, 2015. She was last paid pursuant to the award on April 14, 2015. The claimant testified that both before and after entry of the June 2, 2015 Award, she followed a similar process when she missed time from work due to her injury. She filled out her time sheet, using "workman comp leave" for two-thirds of the time missed, and vacation for one-third of the time missed. She was paid for use of the "workman comp leave." Erin Lynch, benefits coordinator for Sedgwick, the third-party administrator for the employer, explained that when a claimant remains on payroll with an agency, Sedgwick pays the agency for dates on which the claimant used leave.

The claimant also filled out weekly "supplementary reports" to accompany her timesheet. She gave the report to her secretary, who she understood would "file it." (Tr. 27.) Numerous supplementary reports were admitted into evidence. (Cl.'s. Ex. 6, 8, 11.) The form states at the top: "THE USE OF THIS FORM IS REQUIRED UNDER THE PROVISIONS OF THE WORKERS' COMPENSATION ACT."[2] The Commission's name and former address is listed below. The claim number, employer name, office addresses, name of insurer, the claimant's name, claimant's address, and date of injury are listed on the form. The form has some ambiguous language. It states, "NOTE: This form is not an agreement and its filing is not sufficient to terminate an outstanding award." There is a blank space for documenting appointments.

[2] This appears to be an outdated Commission form which is no longer in use by the Commission.

The Virginia Department of Human Resource Management Individual Claim Report reflects that Sedgwick issued indemnity payments to the Department of State Police on May 23, 2016 for disability on July 15, 2015, on September 2, 2016 for disability on August 10, 2016, and on April 14, 2017 for disability on March 23, 2017. (Defs.' Ex. 4.) Lynch did not know whether agreement forms for those dates were ever sent to the Commission. The Commission's file does not reflect any agreement forms were submitted for these payments. The defendant did not dispute the claimant's entitlement to benefits for these dates. At hearing, the parties stipulated the claimant was entitled to temporary total disability for April 21, 2015, and temporary partial disability for July 15, 2015, August 10, 2016, and March 23, 2017.

The defendant's actions in regards to these payments failed to comply with the Act. Virginia Code § 65.2-701 provides that if the employer and injured employee reach an agreement in regard to compensation, a memorandum of the agreement in the form prescribed by the Commission shall be filed with the Commission for approval. Furthermore, Rule 4.1 of the *Rules of the Virginia Workers' Compensation Commission* provides that: "All agreements as to payment of compensation shall be reduced to writing by the employer and promptly filed with the Commission." Had the defendant properly submitted agreement forms reflecting their agreement to pay compensation for the dates from April 21, 2015 through March 23, 2017, an award would have been entered. Instead, the defendant failed to comply with the Act, and the undisputed disability payments made through March 23, 2017 were not embodied by an award within the time limitation imposed by Virginia Code § 65.2-708.

It is unreasonable to expect the claimant, who was being paid through "workman comp leave" approved on her timesheets, and submitting to her employer "supplemental reports" on

Commission forms, to understand that she was not being paid pursuant to her award.[3] The claimant reasonably relied on the defendant's actions to her detriment. Given the circumstances, the claimant had no reason to believe she needed to file a claim by April 14, 2017 to preserve her entitlement to benefits. The defendant's actions worked an imposition upon the claimant.

The defendant's failure to comply with the Act continued after April 14, 2017. The claimant received pay for workman's compensation leave taken on June 27, 2017. (Cl.'s Ex. 3.) An Award Agreement for this date was completed and signed on the employer's behalf by Captain Jeffrey L. Baker on July 19, 2017. (Cl.'s Ex. 2.) It was not submitted to the Commission. The claimant also received pay for workman's compensation leave taken on September 26, 2017, October 16, 2017, October 19, 2017, and November 14, 2017. (Cl.'s Ex. 5-6, 8.) "Supplemental reports" in evidence reflect they were "submitted to document appointments" on October 16, 2017 (Cl.'s Ex. 7.), October 19, 2017, and November 14, 2017 (Cl.'s Ex. 9.)

On November 22, 2017, the Benefits Unit Workers Compensation Coordinator e-mailed the claimant advising her that the Department of State Police had been reimbursed for the leave taken on June 27, 2017.[4] The e-mail stated that for the other dates from September 26, 2017 to November 14, 2017, the agency was not being reimbursed because the claimant had no wage loss.[5] However, there was no indication that compensation was being denied to *the claimant* for any

[3]In fact, the language on the supplemental reports stated submission of the form was not sufficient to terminate an award. This could suggest to a claimant that she was continuing to receive benefits under an award already in existence. Given the wording and appearance of the supplemental reports, a claimant cannot reasonably be expected to know that additional agreements on a different form should be submitted, and that an additional Award Order is required for subsequent dates of disability.

[4] This payment was ultimately refunded to Sedgwick. (Defs.' Ex. 4.)

[5] This assertion was incorrect, as the defendant stipulated at hearing, subject to its defenses, that the claimant would be entitled to wage loss benefits for these dates.

reason,[6] or that receipt of benefits was time barred. And, even after that e-mail, the claimant received payment for workman's compensation leave taken on December 15, 2017 (Cl.'s Ex. 10.), and another supplemental report was completed **(**Cl.'s Ex. 11.)

Agreement forms were not submitted to the Commission for the payments from June through December 2017. It was not until February 2, 2018, *after* the payments were made, that the defendant advised the claimant that the statute of limitations had run to pay continued lost wages on the claim, and the claimant was told she was not eligible for lost wage benefits. Prior to February 2018, the claimant had no reason to believe there was not an agreement as to payment of compensation for her time missed due to medical appointments.

Under these circumstances, a de facto award for the disability benefits sought from June 27, 2017 through December 15, 2017 is appropriate. The de facto award doctrine was created to address a situation such as this, where an employer's voluntary payments without entry of an award misled the claimant and prejudiced her rights under the Act. *See Nat'l Linen Serv. v. McGuinn*, 5 Va. App. 265 (1987). In *Ryan's Family Steak Houses, Inc. v. Gowan*, 32 Va. App. 459 (2000), the Court of Appeals of Virginia discussed the factors to be considered in determining whether a de facto award should be created:

> In *McGuinn*, we held that where the employer has stipulated to the compensability of the claim, has made payments to the employee for some significant period of time without filing a memorandum of agreement, and fails to contest the compensability of the injury, 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. McGuinn, 5 Va. App. at 269-70 . . . .

[6] Whether Sedgwick reimbursed the employer for payments made to the claimant does not reflect a lack of agreement between the claimant and the defendant or effect the claimant's entitlement to a de facto award. The fact remains that the employer made payments to the claimant for work missed due to medical appointments.

Gowan, 32 Va. App. at 463. "[T]he concept of a de facto award is grounded in the well-established principle of estoppel." *Roske v. Culbertson Co*., 62 Va. App. 512, 521 (2013). "[I]n order for there to be any estoppel, there must be detrimental reliance by the party claiming estoppel." *Id.* at 522. Detrimental reliance requires that "the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which [s]he would have occupied except for that conduct." *Id.* (quoting *Ford Motor Co. v. Switzer*, 140 Va. 383, 395-86 (1924)). Accordingly, the de facto award doctrine is inapplicable "where an employee has neither suffered prejudice nor been placed in a more disadvantageous position as a result of the absence of an actual award." *Id*. at 523.

In this case, the defendant previously agreed to the compensability of the injury and the June 2, 2015 Award Order granted benefits accordingly. The defendant then made uncontested payments for disability through March 23, 2017. If agreement forms had been submitted as they should have, an award would have been entered, and the claimant would have been last paid pursuant to an award for March 23, 2017. In that scenario, the defendant would not have had a basis for asserting in February 2018 that wage loss benefits for the days of disability from June 27, 2017 through December 15, 2017 were barred by the statute of limitations.

The defendant's failure to comply with the Act should not place it in a better position than it would have been had it complied with the Act. *See McGuinn,* 5 Va. App. at 273. "The Workers' Compensation Act exists to protect employees, *not to facilitate a deprivation of an employee's rights by an employer who has not complied with the statutory requirements*." *Id.* at 270 (emphasis added) (internal citation omitted). The claimant was clearly prejudiced and placed in a more disadvantageous position as a result of the absence of an actual award for the uncontested payments made through March 23, 2017. A de facto award for the subsequent voluntary payments made from June through December 2017 is appropriate.

Furthermore, the defendant's actions in this case prove waiver of the statute of limitations in Virginia Code § 65.2-708. The defendant did not cease payments to the claimant with the expiration of the statute of limitations. Rather, after the statute of limitations had run in April 2017, the defendant continued to make payments to the claimant without contest for over seven months. The defendant completed an agreement form for temporary partial disability after the filing deadline had passed. Additionally, "supplemental reports" were executed documenting the claimant's disability. These actions are "clear, precise and unequivocal evidence'" that the employer "intended to surrender its right to rely on the statute," *Roske*, 62 Va. App. at 519 (2013) (quoting *Utica Mutual v. Nat'l Indemnity*, 210 Va. 769, 773 (1970)) (finding the record devoid of evidence of such intent). The defendant waived its right to rely upon the statute of limitations as to the dates of compensation sought by the claimant.

We also decline to apply the 90-day rule set forth in Commission Rule 1.2(B). Commission Rule 1.2(B) provides that for a claimant's change in condition claim, "Additional compensation may not be awarded more than 90 days before the filing of the claim with the Commission." The Commission has previously articulated that, "The purpose of the 90-day rule is to encourage an injured worker to obtain compensation as it becomes due. Where a claimant is aware of additional disability and has the opportunity to file a change in condition claim with the Commission, we cannot find any basis for not upholding the 90-day rule." *Burchett v. Big Lots #0276*, VWC File No. 192-61-57 (Feb. 6, 2011). As discussed above, the defendant's actions in this case misled the claimant to her detriment, giving her no reason to believe she needed to file a claim to preserve her entitlement to benefits for the dates she was disabled. Under these particular circumstances, it would be unjust to apply the 90-day rule to the claimant's claim.

For these reasons, we grant the claim for temporary partial disability for June 27, 2017, September 26, 2017, October 16, 2017, October 19, 2017, November 14, 2017, and December 15, 2017. In the event that an award was entered in favor of the claimant, the parties stipulated as to the amounts the claimant was entitled to for each of these dates. We therefore enter an award in accordance with the parties' stipulations.

III. Conclusion

The Deputy Commissioner's March 14, 2022 Opinion is REVERSED in part and AFFIRMED in part.[7]

The following Modified AWARD shall enter:

AWARD

An Award is hereby entered in favor of Ginger Harris, claimant, against State Police, employer, and Commonwealth of Virginia, insurer, providing the payment of benefits as follows, based upon a pre-injury average weekly wage of $989.15:

1. $93.82 per day during temporary total disability on April 21, 2015;
2. $21.88 per day during temporary partial disability on July 15, 2015;
3. $65.70 per day during temporary partial disability on August 10, 2016;
4. $5.40 per day during temporary partial disability on March 23, 2017;
5. $4.88 per day during temporary partial disability on June 27, 2017;
6. $9.76 per day during temporary partial disability on September 26, 2017;

[7] We incorporate those benefits previously awarded by the Deputy Commissioner into our modified award.

7. $9.76 per day during temporary partial disability on October 16, 2017;
8. $4.88 per day during temporary partial disability on October 19, 2017;
9. $4.88 per day during temporary partial disability on November 14, 2017;
10. $7.32 per day during temporary partial disability on December 15, 2017.

Pursuant to Virginia Code § 65.2-603, medical benefits are awarded for as long as necessary for reasonable, necessary, authorized, and causally related treatment for injuries the claimant sustained to the head and cervical spine in the January 29, 2015 accident.

An attorney's fee in the amount of $487.36, which includes the $37.36 awarded by the Deputy Commissioner below, is awarded to Seth Carroll, Esquire, for legal services rendered to the claimant, the payment of which is the sole responsibility of the claimant.

This case is ORDERED removed from the review docket.

RAPAPORT, COMMISSIONER, Dissenting:

I must respectfully dissent. I would affirm the Deputy Commissioner's finding that a de facto award is inapplicable and hence the claim is barred by Virginia Code § 65.2-708. I disagree with the majority's conclusion that the defendant waived its right to defend the claim with the statute of limitations and that its actions equated to an imposition upon the claimant.

The creation of a de facto award is premised upon Code § 65.2-701(A) which requires a memorandum of the agreement to be filed with the Commission when parties agree to the compensability of a claim. *Nat'l Linen Serv. v. McGuinn*, 5 Va. App. 265 (1987) (en banc). In *Ryan's Family Steak Houses, Inc. v. Gowan*, 32 Va. App. 459 (2000), the Court of Appeals of

Virginia discussed the factors to be considered in determining whether a de facto award should be created:

> In *McGuinn*, we held that where the employer has stipulated to the compensability of the claim, has made payments to the employee for some significant period of time without filing a memorandum of agreement, and fails to contest the compensability of the injury, 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. McGuinn, 5 Va. App. at 269-70 . . . .

Gowan, 32 Va. App. at 463. The award doctrine addresses a situation where an employer's voluntary payments without the entry of an award caused an unwitting claimant to forfeit her claim or prejudices her rights under the Virginia Workers' Compensation Act (Act). Thus, "the concept of a *de facto* award is grounded in the well-established principle of estoppel." *Roske v. Culbertson Co.*, 62 Va. App. 512, 521 (2013). A party seeking to establish estoppel must establish that she relied to her detriment on the representations or conduct of another. *See*, *e.g., Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 73 (1983). Detrimental reliance requires that "the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which [s]he would have occupied except for that conduct." *Roske*, 62 Va. App. at 522 (internal quotation marks and citations omitted). Accordingly, the de facto award doctrine is inapplicable "where an employee has neither suffered prejudice nor been placed in a more disadvantageous position as a result of the absence of an actual award." *Id*. at 523.

The facts are undisputed and controlling of the outcome. The claimant testified that when she missed work for receiving medical treatment, she completed her weekly timesheet as required by the employer and "explain[ed] that it [w]as for Workman's Comp and also include[d] the date of the accident and I submitted that every week with my reports." (Tr. 15.) This information was encoded as Workers' Comp on the payroll records, and the defendant paid for the time. The claimant's Leave Accounting Pay Period Leave Register also read "Workman Comp Leave Taken" when such occurred. *See* Cl.'s Exs. 3, 6, 8, 10. The claimant said that in February 2018 she was informed that she was not eligible for workers' compensation benefits as the "time lapse" had expired. (Tr. 35.) (Def.'s Ex. 4.) She agreed to not signing any agreement forms regarding the disputed dates.

Based upon these facts, a de facto award is inappropriate. The defendant filed a completed Award Agreement form in May 2015, and the Commission entered the corresponding Award Order. The defendant complied with the Act. I decline to view the defendant's voluntary payment of benefits thereafter as placing the claimant in a more disadvantageous position or misleading her. The defendant was simply paying her in recognition of compensability during the time period. Then, the defendant ceased payment with the expiration of the statute of limitations, which it may do, and illustrated its denial of compensability.

The defendant did not have an affirmative duty to forewarn the claimant of her statutory requirement of filing a change in condition claim under Code § 65.2-708 or that it would invoke the limitation. I recognize that the employer's internal leave reporting mechanism used terms referring to workers' compensation. However, this categorization of the leave time does not override the claimant's statutory burden to file a claim nor did it mislead her in a fashion that all her indemnity rights were fully secure under the Act. I decline to hold that the defendant acted unfairly or inconsistently with compliance under the Act. Clearly the claimant had knowledge of the necessary procedure – she had previously signed agreement forms and received an award order from the Commission for a finite time period. No one improperly misled her otherwise. Contrary to the majority's suggestion, the defendant had no responsibility to ensure that the claimant understood that she was not being paid pursuant to an entered award. The claimant's inactions – which are dictated by statute to be affirmative, active ones -- led to the tolling of the statute of limitations, not the defendant's.

Lastly, for completeness, I also agree that the evidence did not support that the claimant proved a waiver of the statute of limitations of Code § 65.2-708. The record failed to establish with "clear, precise and unequivocal evidence" that the defendant intended to waive the right to rely upon the statute of limitations in any fashion. *See Utica Mut. Ins. Co. v. Nat'l Indem. Co.*, 210 Va. 769, 773 (1970) ("[T]he burden rests on the party relying on a waiver . . . to prove the essentials of such waiver . . . by clear, precise and unequivocal evidence.").

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 Clerks' Offices of the Commission and the Court of Appeals of Virginia.