

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 4, 2022

DANNY GRIPPER v. MCC
TRAVELERS INDEMNITY CO OF AMER, Insurance Carrier
TRAVELERS INDEMNITY CO OF AMER, Claim Administrator
Jurisdiction Claim No. VA00001725653
Claim Administrator File No. FPV9310
Date of Injury: April 27, 2020

Corey R. Pollard, Esquire
For the Claimant.

Chanda W. Stepney, Esquire
For the Defendants.

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

The claimant requests review of the Staff Attorney's June 10, 2022 referral of the defendants' May 25, 2022 Application for Hearing to the docket. We REVERSE.

I. Material Proceedings

The claimant suffered a compensable injury by accident on April 27, 2020. Pursuant to an agreement by the parties, on March 7, 2022, the Commission entered a Stipulated Order. It awarded the claimant "lifetime medical benefits for [an] L4-5 disc protrusion and L5-S1 disc bulge." It also granted temporary total disability from April 27, 2020 through May 10, 2020; from September 15, 2020 through September 21, 2020; from October 4, 2020 through December 5, 2020; from January 11, 2021 through May 1, 2021; from June 11, 2021 through September 2, 2021; and from October 4, 2021 and continuing.

On May 25, 2022, the defendants filed an Employer's Application for Hearing seeking termination of the outstanding award of temporary total disability benefits. The defendants alleged the claimant was released to pre-injury work on May 11, 2022 and that the claimant's current disability is unrelated to the accident, per Dr. John Aldridge's report dated May 11, 2022. The defendants filed Dr. Aldridge's May 11, 2022 independent medical examination report, in which he found the claimant suffered a workplace injury on April 27, 2020 consisting of a "temporary aggravation of pre-existing degenerative disk disease of the lumbar spine." Based on a review of records from the claimant's treating physician, Dr. Shuff, Dr. Aldridge opined that the temporary aggravation, including right leg radicular symptoms, was treated appropriately and resolved. He opined the claimant returned to a pre-injury status on May 27, 2020, when Dr. Shuff initially released him to full duty. Dr. Aldridge opined the claimant had a new issue when he returned to Dr. Shuff with left leg symptoms on October 19, 2020, at which time the claimant reported he had a new fall two months previously. When asked whether the claimant was able to return to work to his full duty job, Dr. Aldridge opined:

At this point, any restrictions Mr. Gripper is currently having are unrelated to the workplace injury of 04/27/2020. It is quite clear he had returned to full duty and was able to subsequently perform full duty from 05/2020 up and through his complaints of new onset left sided radicular pain with new fall somewhere around 08/2020. These new symptoms and new problems are the issue that are causing him significant problems now and the issue is non-work related and caused him to have two surgical interventions and the current condition and non-work related lumbar degenerative disk disease post laminectomy syndrome, also unrelated to the workplace injury of 04/27/2020.

On June 6, 2022, the claimant filed a statement in opposition to the defendants' application. The claimant asserted that the application attempts to relitigate issues already decided by the March 7, 2022 Stipulated Order, and therefore the preclusive doctrine of collateral estoppel bars the

employer from bringing the application. The claimant also contends that probable cause is lacking because the claimant's treating physician, Dr. Shuff, has continued to disable him from all work. The Commission referred the application to the hearing docket on June 10, 2022.

The claimant requests review of the referral to the hearing docket. He relies upon the arguments raised in his June 6, 2022 response to the application.

The defendants filed a written response to the Request for Review. They agree the claimant continues to be disabled per Dr. Shuff. They contend that the Commission's determination that probable cause exists to refer the Employer's Application to the hearing docket was proper. They argue, "The opinion of Dr. Aldridge that the claimant is no longer disabled and any ongoing disability is not causally related to the work accident can certainly be used as a basis for an Employer's Application." They maintain the claimant is not entitled to any further wage loss benefits after May 11, 2022.

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)). The Commission does not require the employer to establish a prima facie case, but weighs the evidence submitted by both parties in determining whether sufficient grounds exist to suspend benefits pending a hearing. *Crosby v. Cent. Coca-Cola Bottling*, VWC File No. 155-72-93 (Aug. 18, 1998).

Upon careful review, we find the defendants have not shown probable cause to support the May 25, 2022 application. While Dr. Aldridge opined that any current restrictions are unrelated to the April 27, 2020 accident, it is clear from his report that the basis for that opinion is his belief that the claimant's work injury resolved and the claimant was capable of full duty work as of May 27, 2020. However, that belief is contrary to the March 7, 2022 Stipulated Order. That the claimant suffered multiple periods of disability causally related to his compensable injury after May 27, 2020 was a fact agreed upon in the Stipulated Order. Thus, relitigating that fact is now barred by *res judicata*.¹ "An application to modify on account of a change in condition cannot avail to show that the facts were really different from what they were found to be at the time of making the original award." *Allen v. Mottley Constr. Co.*, 160 Va. 875, 880 (1933) (citations omitted). Because Dr. Aldridge based his opinion on a faulty premise regarding the extent of the claimant's compensable work injury and causally related disability, we decline to attribute weight to his opinion. *See Sneed v. Morengo, Inc.*, 19 Va. App. 199, 205 (1994); *Clinchfield Coal Co. v. Bowman*, 229 Va. 249, 252 (1985).

There was no other evidence submitted by the defendants to support their allegations that the claimant has been released to pre-injury work and that his current disability is causally unrelated to the accident. We therefore find the May 25, 2022 Application fails to demonstrate the requisite probable cause to justify suspending benefits and docketing the application for a hearing on its merits.

¹ It is well established that the doctrine of *res judicata* is applicable to the Commission, and "bars relitigation of the same cause of action, or any part thereof which could have been litigated between the same parties and their privies." *K & L Trucking Co., Inc. v. Thurber*, 1 Va. App. 213, 219 (citations omitted).

III. Conclusion

The Staff Attorney's June 10, 2022 referral of the defendants' May 25, 2022 Application for Hearing to the docket is REVERSED.

Compensation benefits, pursuant to the March 7, 2022 Award, are REINSTATED effective May 26, 2022, the date following the last date for which compensation was paid.

Pursuant to Virginia Code § 65.2-603, medical benefits shall continue for as long as necessary.

From accrued compensation, an attorney's fee of \$500 is awarded to Corey R. Pollard, Esq., for legal services rendered to the claimant on review.

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.