

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT
Commissioner

Feb. 21, 2023

CARLOS CARCHERI v. M & A TRANSPORTATION SERVICES, LLC
VANLINER INS CO, Insurance Carrier
VANLINER INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA02000035709
Claim Administrator File No. 196717
Date of Injury: September 30, 2020

Richard M. Reed, Esquire
For the Claimant.

Stephen A. Marshall, Esquire
For the Defendants.¹

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

The claimant requests review of the Deputy Commissioner's May 2, 2022 Opinion denying his request of temporary total disability benefits beyond October 7, 2020. We AFFIRM in part, REVERSE in part, and MODIFY the Award.

I. Material Proceedings

On February 3, 2021, May 13, 2021 and July 28, 2021, the claimant filed claims alleging he suffered a compensable injury by accident to his left leg, head, and mid-back on September 30,

¹ The defendants stipulated Amilcar Chavez and M & A Transportation Services, LLC were "a statutory employer" for purposes of the Act, and there was coverage through Vanliner Insurance Company. (Tr. 5.) Amilcar Chavez is the owner of M & A Transportation Services, LLC. (Tr. 64.)

2020. The claimant sought medical benefits, payment/reimbursement of medical bills, and temporary total disability benefits from October 1, 2020 through January 4, 2021.²

The Deputy Commissioner held an evidentiary hearing to address the claims on February 9, 2022. The defendants stipulated the claimant earned a pre-injury average weekly wage of \$1,000, the Commission had jurisdiction, and the claimant was not an independent contractor. The defendants further stipulated to a compensable accident resulting in a left leg laceration, and the claimant stipulated there was no marketing evidence. Finally, the parties stipulated the defendants were entitled to a credit for voluntary payments made to the claimant.³

Pertinent to our review, the defendants defended the claims on the grounds the medical evidence did not support the period of disability alleged, the claimant was not disabled to the extent alleged, and the seven-day waiting period applied.

The Deputy Commissioner determined the claimant suffered a laceration to his left leg. She denied the claim for injuries to his head or back. She held the claimant was disabled from October 1, 2020 through October 7, 2020. She acknowledged the claimant testified he was out of work for three months and did not return to work until January 4, 2021, but she found there was no medical evidence to support the disability claim beyond October 7, 2020. After application of the seven-day waiting period pursuant to Virginia Code § 65.2-509, the claimant was awarded only medical benefits for the injury to his left leg.

² At the hearing, claimant's counsel confirmed the claimant was seeking temporary total disability benefits from September 31, 2020 through January 4, 2021. (Tr. 13.) Given that there was no date of September 31, 2020, the Deputy Commissioner amended the start date to October 1, 2020.

³ At the hearing, all parties agreed and stipulated that Able Moving & Storage and the Uninsured Employer's Fund could be dismissed as parties, since Amilcar Chavez and M & A Transportation Services, LLC stipulated that they were a statutory employer for purposes of the Act. Able Moving & Storage and the Uninsured Employer's Fund were dismissed from the hearing, and a dismissal order was issued on February 15, 2022.

The claimant requests review of the Deputy Commissioner's denial of temporary total disability benefits from October 8, 2020 through January 4, 2021, when he returned to work. He asserts he was held out of work until October 16, 2020 by Dr. Patel, and Dr. Patel's work restrictions should extend until October 27, 2020, when he was evaluated again. The claimant further contends his work would have been impossible when he was ambulating with crutches for one and one-half months and thereafter when he continued to have pain when walking.

II. Findings of Fact and Rulings of Law⁴

On September 30, 2020, the claimant was placed out of work until October 7, 2020 by Dr. Theodore Katz. On October 2, 2020 and October 5, 2020, Dr. Tushar G. Patel continued treatment of the claimant's left leg injury. During his October 9, 2020 evaluation, Dr. Patel advised the claimant not to work for "1 more week due to fresh wound on the left knee." He further opined, "After 1 week, he may return to work but keep elastic sleeve on the left lower leg." Accordingly, we find the record as a whole supports the claimant was totally disabled from October 8,⁵ 2020 through October 16, 2020, in addition to the initial period of total disability from October 1, 2020 through October 7, 2020.

We do not find the claimant proved continuing disability subsequent to October 16, 2020. Citing *Abouelhagag v. Pizza Hut*, # 747317, VWC File No. 199-24-50 (Jan. 21, 2004), the claimant alleges Dr. Patel's release of the claimant after October 16, 2020 was prospective and not valid. The case of *Abouelhagag* is distinguishable from the instant case as it involved an employer's

⁴ The record has been reviewed in its entirety, but we summarize the evidence only as necessary to explain our decision on review.

⁵ Based on the medical evidence, including Dr. Patel's October 9, 2020 specific placement of the claimant out for one *more* week due to his "fresh wound," we infer the claimant was totally disabled on October 8, 2020.

application to terminate a claimant's open award of benefits, which places the burden of proof on the defendants. Here, the claimant is not under an open award.

"[A] party seeking compensation bears the burden of proving his disability and the periods of that disability." *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997). Dr. Patel's October 9, 2020 opinion reflects the claimant could return to work as of October 17, 2020 with an elastic sleeve on his left lower leg. During the claimant's next evaluation, on October 27, 2020, Dr. Sunitha Venkatachallam did not address the claimant's disability, if any, from work. The record does not show additional medical treatment after October 27, 2020.

The dissenting opinion asserts this prospective release to work is insufficient to prove a lack of disability on a claimant's claim. The burden of proof in this case remains with the claimant. "There is no presumption in the law that once a disability has been established, a claimant will be assumed to remain disabled for an indefinite period of time." *Loehr*, 24 Va. App. at 679 (citing *Hercules, Inc. v. Carter*, 14 Va. App. 886 (1992)). We are not finding the claimant failed to meet his burden of proof based on the prospective release to work. The claimant simply failed to provide sufficient evidence to meet his burden of proving total disability after October 16, 2020. Here, the only evidence the claimant introduced shows he was totally disabled until a release to return to work as of October 17, 2020. The claimant failed to provide any evidence of total disability after this period. Given the lack of evidence, we would have to presume total disability continued through October 26, 2020, which is contrary to established law.

We also considered the claimant's hearing testimony about his use of crutches for six weeks, and his belief that he was unable to return to work before January 4, 2021, because his work was "heavy duty," he was in pain, and he could not walk. (Tr. 29.) Nonetheless, without

additional medical evidence of disability to support his testimony, we do not find the claimant met his burden of proving he was entitled to temporary total disability benefits after October 16, 2020 in this case.

We modify the award to include an award of temporary total disability entitlement from October 1, 2020 through October 16, 2020, subject to the waiting period pursuant to Virginia Code § 65.2-509. Additionally, the defendants are entitled to a credit for voluntary payments made to the claimant, pursuant to the stipulation by the parties.⁶

III. Conclusion

The Deputy Commissioner's May 2, 2022 Opinion is AFFIRMED in part and REVERSED in part. The following MODIFIED Award shall enter:

AWARD

An award is hereby entered in favor of Carlos Carcheri, claimant, against M & A Transportation Services, LLC, employer, and Vanliner Insurance Company, insurer, providing for payment of benefits as follows, based upon a pre-injury average weekly wage of \$1,000:

\$666.67 per week during temporary total disability beginning October 1, 2020 through October 16, 2020, inclusive.

This award is subject to the statutory seven-day waiting period as set forth in Virginia Code § 65.2-509. Pursuant to the parties' stipulation, the defendants are entitled to a credit for voluntary payments made to the claimant.

⁶ At the hearing, the claimant testified that Amilcar Chavez gave him \$800 for the first week after the accident, \$1,000 for the second week after the accident, and \$700 for the third week after the accident. (Tr. 30.)

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 his left leg in the September 30, 2020 accident.

An attorney's fee in the total amount of \$350, which includes the \$250 awarded by the Deputy Commissioner below, is awarded to Richard M. Reed, 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.

MARSHALL, COMMISSIONER, Dissenting in Part:

The majority's opinion elicits my respectful dissent. I join the majority in affirming the award of temporary total disability through October 16, 2020. But, on the facts in this record, the claimant proved his entitlement to temporary total disability through October 26, 2020. I depart from the majority in its attempt to distinguish the effect of a prospective release to return to work in the context of a claimant who seeks temporary total disability benefits.

The claimant failed to prove his entitlement to continuing disability after October 26, 2020. The absence of any work restrictions at the October 27, 2020 office visit supports the conclusion that evidence of continuing disability was lacking.

I do not join the conclusion that Dr. Patel's prospective release was insufficient to prove continuing disability until the next medical evaluation. The majority attempts to distinguish the effect of a prospective release by saying the rule is different where the employer bears the burden of proof. I respectfully disagree. Our case law is clear: where the employer bears the burden of proving disability has ceased, a prospective release to return to work is insufficient to meet that

burden. But, the majority posits where the claimant has the burden of proof, a prospective release is insufficient to prove continuing disability. This interpretation is incongruous and inequitable.

Our case law supports the opposite conclusion. In *Piedmont Foundry Supply v. Penn*, No. 0689-21-3 (Va. Ct. App. Jan. 18, 2022), the Court of Appeals of Virginia affirmed the Commission's decision that probable cause to refer an employer's application to the docket did not exist. Citing *Nickerson v. Coastal Chem. Corp.*, VWC File No. 185-65-13 (Dec. 19, 1997), the Court approved the Commission's consistent holding in prior cases "that a doctor's release more than seven days from an examination is prospective and is not sufficient to establish that the claimant is able to return to work at some future date."

We have relied on *Nickerson* and other cases for the same principle. "As noted in many prior cases, the Commission has consistently held that a doctor's release more than seven days from the examination is prospective and does not establish that the claimant was able to return to work on the future date." *ALAA Abouelhagag v. Pizza Hut*, # 747317, VWC File No. 199-24-50 (Jan. 21, 2004) (citing *Nickerson*); *Odom v. A & W Contractors, Inc.*, JCN VA02000007953 (Jan. 15, 2013). "The Commission does not credit prospective releases." *Id.* (citing *Camden v. Aramark Corp.*, VWC File No. 182-79-12 (Dec. 18, 1997); *Counterman v. Providence Elec. Corp.*, 71 O.W.C. 81 (1992)).

We consistently have held that prospective releases are not preponderating evidence disproving disability where a claimant is seeking indemnity benefits. *Camden v. Aramark Corp.*, VWC File No. 182-79-12 (Dec. 18, 1997) (original claim finding compensable injury by accident and refusing to credit a twenty-five day prospective release); *Hamilton v. Polymers*, VWC File No. 206-85-50 (June 10, 2003) (rejecting physician's eleven day prospective release where claimant

had burden of proving disability); *Richardson v. MV Transp.*, JCN VA00000999405 (Sept. 26, 2017) (rejecting prospective release where claimant had burden of proving disability); *Sinkfield v. Aerotech Contract Eng'g Serv.*, VWC File No. 173-75-47 (Dec. 17, 1997) (rejecting physician's prospective release on claimant's disability claim); *Cannon v. Deep Meadow Corr. Ctr.*, JCN VA00000463157 (Aug. 7, 2013) (in spite of lack of contemporaneous disability records, claimant proved temporary total disability from August 1 through August 29, 2011, and physician's prospective release rejected); *Finch v. Frazier & Mann Fuel Oil Co., Inc.*, JCN VA00000553431 (Sept. 12, 2013) (rejecting physician's prospective release on claimant's claim for disability); *Smith v. Fairfax Cty Gov't*, JCN VA00001311813 (Mar. 30, 2018) (rejecting physician's prospective release on claimant's claim for benefits).

I disagree with the majority's suggestion that prospective releases are insufficient to prove the lack of disability on an employer's claim for relief from an award, while at the same time they are sufficient to prove a lack of disability on a claimant's claim. If a prospective release is insufficient to prove disability is lacking on an employer's application, the same rule should apply on a claimant's application.

In *Loudoun County v. Richardson*, 298 Va. 528 (2020), the Virginia Supreme Court cited a longstanding maxim of our jurisprudence: "[T]he purpose of the Workers' Compensation Act is to protect employees. Courts construe it in a manner effectuating this remedial purpose." *Id.* at 535 (citations omitted). The new legal standard adopted in this case controverts that purpose.

For these reasons, I respectfully dissent in part.

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.