

(Unpublished Opinion)

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Mar. 19, 2024

TONYA MACK v. HENRICO COUNTY PUBLIC SCHOOLS
HENRICO COUNTY OF AND HENRICO COUNTY OF, Insurance Carrier
PMA MANAGEMENT CORP., Claim Administrator
Jurisdiction Claim No. VA00001708299
Claim Administrator File No. 0029W84660
Date of Injury: February 21, 2020

Corey R. Pollard, Esquire
Kenneth Brent Jones, Esquire
For the Claimant.

Scott C. Ford, Esquire
Courtney Anderson, Esquire
For the Defendant.

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

Both parties request review of the Deputy Commissioner's August 15, 2023 Opinion. The defendant assigns error to the Deputy Commissioner's award of the requested functional capacity evaluation to establish an impairment rating due to the right knee injury. The claimant requests review of the Deputy Commissioner's denial of attorney's fees, pursuant to Virginia Code § 65.2-713. We AFFIRM.¹

¹ Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument as requested by the defendant is unnecessary 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

On February 21, 2020, the claimant suffered a compensable injury by accident. Pursuant to the parties' stipulations, Deputy Commissioner Gibbs entered an award for two periods of temporary total disability and injuries including that sustained to the claimant's right knee.

On June 27, 2023, the claimant filed a Claim for Benefits seeking authorization and payment of the Functional Capacity Evaluation ("FCE") and impairment rating as prescribed by Dr. Beach of Tuckahoe Orthopaedics. On July 18, 2023, the claimant supplemented her claim, seeking an assessment of an attorney's fee to be paid by the defendant, pursuant to Virginia Code § 65.2-713, contending the claim was being defended without reasonable grounds.

The defendant denied responsibility for the prescribed FCE, disputing that it qualified as medical treatment since it was recommended solely for the purpose of obtaining a permanent impairment rating. The defendant further denied its defense was interposed in bad faith and that an assessment of an attorney's fee was warranted.

The claimant's application was referred for an on the record decision before Deputy Commissioner Lee and the parties filed their respective position statements. On August 15, 2023, the Deputy Commissioner authorized the FCE and impairment rating, citing as authority the Commission's decision in *Elliott v. Sam Green Vault Corp.*, JCN VA00001108316 (Oct. 5, 2021). However, the Deputy Commissioner denied the claimant's motion for an assessment of attorney's fees noting that *Elliott* represented a departure from prior Commission rulings addressing the issue.

Both parties request review. The defendant challenges the findings that it is responsible for the FCE. The claimant disputes the denial of the assessment of attorney's fees pursuant to Virginia Code § 65.2-713.

II. Findings of Fact and Rulings of Law

A. The FCE

The issue before us requires that we measure the parameters of Virginia Code § 65.2-603, the statutory authority for imposing on the defendant a “Duty to furnish medical attention” to an injured worker. Framing this issue is the symbiosis between two familiar dynamics of workers’ compensation law; the extent an accident inflicts permanent injury on a body member scheduled in Virginia Code § 65.2-503, and an FCE, an assessment which measures the degree to which a compensable injury limits the claimant’s physical capabilities.

Code § 65.2-503(A) provides that, “Compensation for permanent partial and permanent total loss and disfigurement shall be awarded as provided in this section.” What follows is a listing of body parts and other compensable conditions the legislature has deemed worthy of awards of compensation for a designated number of weeks.² Conceptually, the application of Code § 65.2-503 could not be more straight-forward. To cite but one example, a claimant suffering a total loss of an arm in a work-related accident is entitled to 200 weeks of compensation. Va. Code § 65.2-503(B)(11). If, however, the accident causes a “permanent partial” loss of use of the arm measured at 50%, the claimant would be entitled to 50% of the total weeks assigned, or 100 weeks. Belaboring the simple math, a 30% permanent partial loss of use would entitle the claimant to 60 weeks of compensation. (30% of 200 weeks = 60 weeks).

The FCE, commonly ordered by a treating doctor, can serve several useful functions. As is the case here, it may be ordered to measure the permanent loss of use of a Code

² Specific weeks of compensation are awardable for total or partial loss of fingers, toes, hands, feet, arms, legs, vision, hearing and lung diseases. We omit discussion of the conditions necessary for awards of permanent and total disability as they are unrelated to the issue presented.

§ 65.2 503-scheduled body member. Calculating this permanent loss of use serves the interests of the injured worker by translating into the amount of compensation due for the permanent injury. Concurrently, the FCE may be ordered to establish injury-related physical restrictions, information critical to the defendant wishing to limit the payment of compensation by returning the claimant to gainful employment. In either case, whether measuring the degree of injury or the remaining work capacity, the FCE provides the treating physician and the parties with information regarding the extent to which the compensable injury impacts the claimant's ability to function.

At the heart of this review are two additional dynamics particular to a worker's entitlement to medical care for the compensable injury. If the care at issue does not qualify as Code § 65.2-603 medical attention, then the defendant does not have to pay for it. Conversely, if the care *is* Code § 65.2-603 medical attention, the defendant bears the cost. However, concomitant with that financial burden comes a useful stick the defendant holds over the head of a recalcitrant claimant who refuses care - the suspension of disability benefits during the period of refusal.

Here, establishing work restrictions is largely rendered moot as the claimant is not under an award for wage loss benefits. What remains is the question of whether, or to what extent, the claimant is entitled to compensation for permanent loss. The defendant argues that an FCE ordered for that purpose, to establish the claimant's entitlement to compensation under Code § 65.2-503, is not Code § 65.2-603 medical attention. Consequently, the defendant does not bear the cost of the FCE. However, when ordered to measure residual work capacity, the FCE *is* Code § 65.2-603 medical attention meriting suspension of disability if the evaluation is refused. Left to us is to decide whether this test is medical attention, is not medical attention, or, as the defendant avers, its status is conditional, depending upon who stands to gain.

The controlling statutory language provides, “As long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employee and such other necessary medical attention.” Va. Code § 65.2-603(A)(1). Here, the claimant is under the care of Dr. Beach, the recognized treating physician. Moreover, it is Dr. Beach who ordered the contested FCE. These undisputed facts allow us to bypass all but the last three words of the statute, “necessary medical attention.” Left to us is to decide when, if ever, an FCE falls within this statutory classification.

Confronted with a question of statutory construction, we defer to settled principles. “[T]he [Commission’s] main concern in statutory interpretation is to give effect to the legislature’s intent as evidenced by the plain meaning of statutory language, ‘unless a literal interpretation would result in manifest absurdity.’” *David v. David*, 287 Va. 231, 237 (2014) (quoting *Hollingsworth v. Norfolk S. Ry. Co.*, 279 Va. 360, 366 (2010)). If the language in a statute “is plain and unambiguous there is no room for construction by the court and the plain meaning and intent of the statute will be given it.” *Sch. Bd. of Chesterfield Cty. v. Sch. Bd of the City of Richmond*, 219 Va. 244, 250 (1978).

Application of the plain meaning standard to the statutory language before us is not very enlightening. Code § 65.2-603 is silent as to which of the arsenal of tests, evaluations, procedures, assessments, examinations, etc., available to a doctor fall within the parameters of the sweeping phrase, necessary medical attention. Yet, we are not without guidance.

“[E]very statute is to be read so as to ‘promote the ability of the enactment to remedy the mischief at which it is directed.’” *USAA Cas. Ins. Co. v. Alexander*, 248 Va. 185, 194 (1994)

(quoting *Bulala v. Boyd*, 239 Va. 218, 227, (1990)). The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects, and effects of the statute, in addition to its express terms. *Vollin v. Arlington Cty. Electoral Bd.*, 216 Va. 674, 679 (1976) (citing *Newhart v. Pennybacker*, 120 W.Va. 774 (1938)).

Informing our deliberations are such objectives of the Act’s purpose to be highly remedial and liberally construed in favor of the claimant. *Humphries v. Boxley Bros., Co.*, 146 Va. 91 (1926); *Gobble v. Clinch Valley Lumber Co.*, 141 Va. 303 (1925). Yet, we remain mindful that liberality of construction does not authorize the amendment, alteration, or extension of the Act’s provisions. *Van Gruder v. Commonwealth*, 192 Va. 548 (1951); *Humphries v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466 (1945).

Conscious of our charge to humanely interpret, but not reinvent the Act, we address whether an FCE to assess permanent disability qualifies as Code § 65.2-603 medical attention. We have previously assessed the parameters of Code § 65.2-603 in this context, answering the question in the affirmative. In *Elliott v. Sam Green Vault Corp.*, JCN VA00001108316 (Oct. 5, 2021), we offered four justifications for our conclusion. We first cited to policy, ruling that:

[O]bligating 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).

Elliott, VA00001108316 at 6.

Secondly, we held “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.” *Elliott*, VA00001108316 at 7. We noted that the Act does not define “necessary medical attention” and we cited circumstances wherein payment was compelled though the service at issue was not strictly medical treatment.

As a third ground, we ruled that designating an FCE ordered to assess work capability as medical attention while denying the same qualification to an FCE used to quantify permanent disability was fundamentally unfair. In the case of the former, the medical attention appellation weaponized a defendant, allowing for the termination of disability entitlement to any claimant who failed to undergo the test. However, when measurement of the claimant’s permanent disability disqualified the FCE as medical attention, the claimant was compelled to either bear the financial burden of paying for the test or to forego benefits due under the Act occasioned by the work-related injury. This, we deemed inequitable.

Finally, we ruled “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.” *Elliott*, VA00001108316 at 10.

Below, the Deputy Commissioner cited our ruling in *Elliott* as authority for awarding the claimant’s application. The defendant’s exceptions on review constitute challenges to that analysis. Therefore, we address the arguments in turn.

First, the defendant reminds us that we lack “the authority to expand the text of the Act,” and “[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.” *Humphries v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466, 479 (1945).”

(Def.'s W.S. 5.) The defendant further notes, citing to *Miles v. Petsmart, Inc.*, JCN VA00001276768 (June 4, 2020), "When the legislature has spoken plainly it is not the function of courts to change or amend its enactments under the guise of construing them."

As already noted, the legislature has not spoken "plainly" in a manner that allows us to view an FCE as either qualifying, or disqualifying as "necessary medical attention." Like any test ordered by the treating physician, but challenged by the defendant, we must adjudicate whether it satisfies the terms of the statute by taking a broader view of the Act's purposes and the harm it is designed to remedy. So viewed, we deem the defendant's criticism founded on the erroneous premise that the Code § 65.2-603 duty imposed on the defendant only applies to that which qualifies as "treatment," a word used in the defendant's statement on review some fifty times.

The word, "treatment" fits deftly into the defendant's contention that Code § 65.2-603 applies exclusively to such care as advances the claimant toward a return to work. Yet nowhere is the word "treatment" used in Code § 65.2-603. Rather, the legislature chose broader language, citing to "medical attention." "[W]hen the General Assembly has used words of a definite import, we cannot give those words a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed." *Dowden v. Hercules, Inc.*, 51 Va. App. 185, 193 (2008). If language is excluded by the legislature, "we must presume that the exclusion of the language was intentional." *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100 (2001). Furthermore, we may not "add language to the statute the General Assembly has not seen fit to include," *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313 (2005) (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599 (2003)).

To be clear, we acknowledge that treatment ordered by the authorized physician which advances the claimant toward recovery and a return to work qualifies as necessary medical attention. However, we do not read the statutory language so narrowly as to necessarily exclude any other medical attention. In *Elliott*, we addressed the defendant's constrained view, stating:

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 [Section] 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?

Elliott, JCN VA00001108316 at 7-8.

On review, the defendant contends the disputed FCE is distinguishable from transportation and diagnostic testing cited in *Elliott*. It maintains that the FCE is only for a quantification of permanent impairment to be converted into a quantity of money to be awarded the claimant. Consequently, the defendant contends the FCE has no diagnostic or therapeutic use. For the reasons above and as addressed in *Elliott*, we disagree.

Here, we note that the defendant's, it's-only-money, fueled contempt for the claimant's entitlement to an award for permanent injury, evaporates when it is the defendant's money at issue. When the FCE advances the cause of returning the claimant to work, thus limiting the defendant's obligation to pay compensation, then we are implored to take a much more charitable view of what constitutes medical attention. Otherwise, a claimant would be free to refuse an FCE, a refusal which "aggravates, rather than mitigates, an employer's liability If suspension of benefits were not available under these circumstances, returning a claimant to work would transform into [a]n almost insurmountable obstacle. . . . [and] claimants would be encouraged to remain out of work." (Def.'s W.S. 15-16.)

We are told to apply a legalistic, hairsplitting, interpretation of what constitutes Code § 65.2-603 medical attention when that translates into the claimant's receipt of a benefit intended under the terms of the Act. However, when the issue is relief from the payment of compensation, we are warned against applying that same pedantic interpretation because the consequences to defendants will be severe. Here, we agree with the defendant. If its analysis of what constitutes Code § 65.2-603 medical attention is ultimately proven correct, then claimant will be relieved of the obligation of cooperating with assessments of work restrictions because those assessments are not medical attention. Understanding what is at stake, the defendant seems ignorant that the harm it is bemoaning is the inevitable consequence of its argument, an entirely self-inflicted wound. There is much at stake over the cost of a single test.

Nevertheless, we have historically agreed that an FCE for that purpose *is* medical attention. As noted in *Elliott*:

[A]n 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).

Elliott, JCN VA00001108316 at 9.

Characterizing an FCE to establish restrictions to return the claimant to work as medical attention, while denying the medical attention appellation to an FCE measuring permanent disability, is a dubious double standard. This is not the defendant's "'apple to double cheeseburger with extra cheese and mayonnaise,' comparison." (Def's. W.S. 15.) We are told that the FCE to establish work restrictions prevents further deterioration or aggravation of a claimant's condition so as to allow a safe return to gainful employment whereas the latter only translates into the claimant's entitlement to money. We disagree. Necessary to the establishment of physical restrictions is comprehension of how an injury translates into a permanent loss of function. Such permanent loss is an indivisible part of, and inextricably subsumed into, the larger equation of what an employee can and cannot safely do. Stated more pragmatically, the medical professional who puts an employee's injury under a microscope to establish work restrictions, cannot ignore how the injury deprives the employee of the normal function of the injured body part. To apply disparate analysis based on whether the defendant versus the claimant stands to gain, is grossly

hypocritical and an insult to our duty to humanely interpret the Act for the benefit of the injured worker. “The purpose of the Workers’ Compensation Act is to protect employees. Courts construe it in a manner effectuating this remedial purpose.” *Loudoun Cty. v. Richardson*, 298 Va. 528, 535 (2020) (citing *E.I. du Pont de Nemours & Co. v. Eggleston*, 264 Va. 13, 17 (2002); *Ellis v. Commonwealth Dep’t of Highways*, 182 Va. 293, 303 (1944)).

Yet, the defendant’s argument is worse than an insult to the Act’s lofty ideals. It’s dangerous. The laser focus on the interconnectedness between Code § 65.2-603 and returning the claimant to employment illustrates a recurring, unsound theme; that a defendant’s duty to provide medical attention is solely limited to treatment which advances the cause of the claimant’s return to work; to avoid “further deterioration or aggravation of a claimant’s condition” *so as to allow a safe return to gainful employment*. (Def.’s W.S. 12.) We cannot view the defendant’s duty so narrowly.

Medical attention which the defendant is required to furnish, and the employee is entitled to receive under the statute is incidental to and a part of the compensation for which the employee is eligible under the Act. *Merrimac Coal Corp. v. Showalter*, 158 Va. 227, 231-32, (1932). This necessarily includes entitlement to benefits for permanent injury scheduled in Code § 65.2-503. Moreover, what the defendant conspicuously ignores is that the impact of an injury at work is not limited to what the claimant experiences at work. The claimant is entitled to know what the risks are of “further deterioration or aggravation” of the injury in all aspects of life, not just the work environment. The natural consequence of the defendant’s view that Code § 65.2-603 applies only

to treatment that advances the cause of a return to work, and the safe performance of that job, would render those to whom a return to work is irrelevant, disqualified from medical care.³

Finally, citing Code § 65.2-201, the *Elliott* majority found that holding a defendant liable for an evaluation of the claimant's permanent disability promoted the Commission's charge to administer the Act and to adjudicate issues and controversies. The Commission explained:

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 [Section] 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.

Elliott, JCN VA00001108316 at 10.

On review, the defendant emphasizes there is nothing to prevent either party from obtaining a second opinion, and the Commission may once again be left with contrary, disparate ratings. Regardless of this possibility, we continue to find that this decision to hold the defendant responsible for an FCE for the sole purpose of an impairment rating serves the interests of all parties, including defendants. As we noted in *Elliott*, a defendant's refusal to pay for an FCE to render an impairment rating frequently deprives the Commission of an opinion from the treating physician.⁴ The defendant's refusal to pay encourages claimants to seek opinions from any medical

³ Ironically, these would include those with minor injuries which do not impact work capacity and those unfortunates whose injuries are so severe as to render them permanently incapable of employment.

⁴ Treating physicians will normally approve, reject, or comment on the FCE's impairment rating findings.

provider who will provide a rating if the claimant is willing to pay them. An opinion from the treating physician, who is most informed about the claimant's condition and impairment, benefits all parties involved.

We address in conclusion what the defendant cites as a fundamental flaw in our "reasoning that a claimant should not bear the financial burden of securing a benefit under the Act." (Def.'s W.S. 6.) The defendant queries what would prevent the Commission from saddling the defendant with "100% [responsibility] for all claimant attorneys' fees in every case?" (Def.'s W.S. 6.)

We are uncertain whether this is posed as a serious question or rhetorically. If the former, then we note that our review here addresses whether an FCE, ordered by the treating physician, constitutes medical attention. For all the reasons stated in *Elliott* and addressed herein, we deem that it is. However, should the defendant harbor an honest anxiety that this case paves the way for the Commission to saddle defendants with all the claimant's attorney's fees in every contested case, then the defendant should know that this Commission knows that it does not enjoy that authority.

The question of a defendant's liability for the claimant's attorney's fees is addressed in the Act. Code § 65.2-713, reads in relevant part:

If the Commission or any court before whom any proceedings are brought or defended by the employer or insurer under this title shall determine that such proceedings have been brought, prosecuted, or defended without reasonable grounds, it may assess against the employer or insurer who has so brought, prosecuted, or defended them the whole cost of the proceedings, including a reasonable attorney's fee, to be fixed by the Commission.

We have not been granted the unfettered license the defendant fears. An attorney's fee may be awarded *only* when a case is prosecuted or defended "without reasonable grounds." *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 201 (1985), citing *Norfolk Dep't of Fire v. Lassiter*, 228 Va. 603, 606 (1985)(emphasis added). We take seriously our charge and limit the assessment of attorney's fees as authorized by the statute only to the circumstance addressed in the statute. As evidence, the defendant is encouraged to keep reading.

B. Attorney's Fees Pursuant to Virginia Code § 65.2-713

Virginia Code § 65.2-713(A) provides that, if we determine that an employer or insurer has brought or prosecuted proceedings without reasonable grounds, we may assess against that employer or insurer the whole cost of the proceedings, including a reasonable attorney's fee. *See Va. Polytechnic Inst. v. Posada*, 47 Va. App. 150, 159 (2005); *Lowe's of Short Pump Va. v. Campbell*, 38 Va. App. 55, 62 (2002). The determination of whether a case was prosecuted without reasonable grounds must be judged from the perspective of the employer, not the employee. *Lynchburg Foundry Co. v. Goad*, 15 Va. App. 710, 716 (1993). "The decision to assess fees or costs rests in the sound discretion of the commission and will be reversed only for an abuse of that discretion." *NiSource, Inc. v. Thomas*, 53 Va. App. 692, 721 (2009) (citing *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 200-01 (1985)).

The Deputy Commissioner did not abuse her discretion in declining to award attorney's fees pursuant to Virginia Code § 65.2-713. Given the nature of the issues, particularly the existing contrary case precedent prior to the *Elliott* decision, we find the claim was not unreasonably defended by the defendant at this time.

III. Conclusion

The Deputy Commissioner's August 15, 2023 Opinion is AFFIRMED.

An attorney's fee in the total amount of \$750, which includes the \$500 awarded by the Deputy Commissioner below, is awarded to the law firm of Jenkins Block & Associates, P.C., 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, Concurring:

I concur with the sound reasoning of Commissioner Newman, which assiduously upholds the beneficent purpose of obtaining a humanitarian end under the Workers' Compensation Act. *See Simms v. Ruby Tuesday, Inc.*, 281 Va. 114, 119 (quoting *A. Wilson & Co. v. Matthews*, 170 Va. 164, 167 (1938)). I write separately to express my continued reliance on the reasoning of my concurrence in *Elliott v. Sam Green Vault Corp.*, JCN VA00001108316 (Oct. 5, 2021), including the additional authority I recited therein.⁵

The dissent suggests the majority's opinion here fails to respect the doctrine of stare decisis and that its opinion does not correct, "sure error," citing *Hampton v. Meyer*, 299 Va. 121, 132-33 (2020) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362-63 (2010)). In *Citizens United*, the United States Supreme Court identified the factors affecting a decision to

⁵ See also *Lewis v. City of Fairfax*, JCNVA0000124144 (Dec. 6, 2017) (Marshall, Commissioner, dissenting); *Smith-Bartlett v. Univ. of Va. Health System*, JCN VA00000076617 (Jan. 7, 2014) (Marshall, Commissioner, dissenting in part); *Cortez v. Arlington Cty Schools*, JCN 2400328, VA00000206929, VA00000405232 (July 26, 2013) (Marshall, Commissioner, dissenting).

deviate from stare decisis. These include the “antiquity” of the precedent, the reliance interests at stake, and whether the decision was well reasoned. *Citizens United*, 558 U.S. at 362-63.

The time period of sixteen years from *Morgan v. Proffitts*, VWC File No. 180-18-10 (Dec. 28, 2005), to *Elliot*, is hardly an example of “antiquity.”⁶ This is particularly so considering the preceding eighty-seven and one-half years of contrary custom and precedent. *See Jamerson v. Coleman-Adams Constr., Inc.*, 280 Va. 490, 504 & n.4 (2010) (Mims, J., concurring) (opining that a twenty-five-year-old opinion was hardly ancient when issued by a court tracing its existence to at least 1776). The “reliance interests at stake” cannot be deemed significant. Prior to *Morgan*, injured workers had a reliance interest in not being unjustly saddled with the cost of medical attention. The analysis of what is and is not necessary medical attention under Code § 65.2-603 merely balances who should bear the cost for a physician to assess residual disability and loss of use. The most important factor is whether *Morgan* and its progeny were, “well reasoned.” *Morgan* was a strained interpretation; an uptight backward step which frustrated, rather than served the humanitarian and beneficent purposes of the Workers’ Compensation Act. This is ably demonstrated by Commissioner Newman’s majority opinion.

The dissent points to the Virginia Supreme Court’s admonition that the doctrine of stare decisis is more than a mere cliché. That doctrine plays a significant role in the orderly

⁶ As acknowledged in my dissent in *Cortez*, supra, there were a couple of cases preceding *Morgan* which suggested permanent partial disability evaluations should not be an employer’s responsibility. *See Sutherland v. Craft Mach. Works*, VWC File No. 194-35-92 (May 28, 2004) and *Harris v. Goodyear Tire & Rubber Co.*, VWC File No. 171-01-91 (Dec. 11, 2000). Nonetheless, *Morgan* historically has been cited in our case law as the foundational decisional precedent.

administration of justice by assuring consistent, predictable, and balanced application of legal principles. And yet, other factors merit consideration.

We must acknowledge the Commission, in interpreting and applying the Act, is not bound by statutory or common law rules of pleading or evidence nor by technical rules of practice. Va. Workers' Comp. R. 2.2; *see, e.g. Perdon Coal Co./United Coal Co. v. Stiltner*, 228 Va. 461, 465 (1984). The purpose of the Workers' Compensation Act is to protect employees. Courts construe it in a manner effectuating this remedial purpose. *Loudoun Co. v. Richardson*, 298 Va. 528, 535 (2020); *E.I. du Pont de Nemours & Co. v. Eggleston*, 264 Va. 13, 17 (2002); *Ellis v. Commonwealth Dep't of Highways*, 182 Va. 293, 303 (1944).

In enacting the Workers' Compensation Act, "the legislature intended to enact a complete statute, designed to supply an adequate remedy in every case which might arise under it" *Richmond Cedar Works v. Harper*, 129 Va. 481, 491 (1921). That the Workers' Compensation Act was enacted for a remedial purpose and to serve a humanitarian end is reflected in some of the earliest Virginia Supreme Court opinions interpreting it:

The workmen's compensation act (Acts 1918, chapter 400, page 637), although in derogation of the common law, *is highly remedial, and should be liberally construed in favor of the workman*. It is an effort on the part of the State to insure the workman to a limited extent against loss from accidents in his employment, to give him a speedy and expeditious remedy for his injury, and to place upon industry the burden of losses incident to its conduct. The compensation is furnished in weekly installments when most needed, promptly after the injury, and the immediate need of physicians and hospital service and supplies are furnished at the expense of the employer.

Gobble v. Clinch Valley Lumber Co., 141 Va. 303, 305-06 (1926) (emphasis added); *see also Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 106 (1926); *Farmers Mfg. Co. v. Warfel*, 144 Va. 98, 105 (1926).

These principles are not clichés destined to be more honored in the breach than the observance. The majority opinion remains faithful to the basic concept that the employer should, under this unique legislative scheme, bear the burden of the losses incident to the compensable accident. More simply, an injured worker should not be denied a benefit granted under the statute, or have it significantly reduced, because of an arbitrary interpretation apportioning transaction costs.

The majority opinion reflects a careful analysis and interpretation of the Act so as to serve fundamental fairness and to remain true to our guiding principles of interpretation.

RAPAPORT, COMMISSIONER, Dissenting:

I must respectfully dissent. For the reasons I set forth in my dissent of the majority's decision in *Elliott v. Sam Green Vault Corp.*, JCN VA00001108316 (Oct. 5, 2021), I disagree with the majority's decision to abandon longstanding, logical case precedent to find "such other necessary medical attention," pursuant to Virginia Code § 65.2-603(A)(1), includes an FCE for the sole purpose of obtaining an impairment rating.

As the Supreme Court of the United States has stated when considering whether *stare decisis* should bind it to a construction it adopted in an earlier case,

precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."

Hampton v. Meyer, 299 Va. 121, 132-33 (2020) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362-63 (2010)). Regarding the doctrine of stare decisis, the Supreme Court of Virginia additionally noted:

As we stated in another case where a party invited us to revisit an earlier decision and reach a different holding on an issue,

[i]n Virginia, the doctrine of stare decisis is more than a mere cliché. That doctrine plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles. . . .

Id., 299 Va. at 134 (quoting *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265 (1987)). Over the years, the Commission has consistently and reasonably interpreted the law in this matter, which took into account the interest of all parties involved. Significantly, this is certainly not a matter where adherence to our existing case precedent puts us on a course that is sure error.

Prior to *Elliott*, the Commission has consistently held that a visit to a physician for the sole purpose of providing a disability rating does not constitute medical attention under Virginia Code § 65.2-603 and is not the responsibility of the defendants. See *Wernitznig v. Step In Time, Inc.*, JCN VA00001387711 (Nov. 6, 2019); *Thompkins v. DBHDS \ E. State Hosp.*, JCN 2388388 (Feb. 19, 2014); *Harris v. Cty. 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 defendants’ 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)).

The majority opinion recognizes that the referral for the FCE in this case is solely to assess and assign a permanent partial disability rating. For Virginia Code § 65.2-603(A)(1) to apply, “[i]t is the claimant’s burden to demonstrate that the treatment for which [she] seeks payment is causally related to the accident, is necessary for treatment of [her] compensable injury, and is recommended by an authorized treating physician.” *Portsmouth (City of) Sch. Bd. v. Harris*, 58 Va. App. 556, 563 (2011) (citing *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 199-200 (1985)). Here, the claimant has not met her burden of proving entitlement to the FCE, pursuant to Virginia Code § 65.2-603(A)(1), because she failed to prove that the FCE ordered solely for an impairment rating 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” to determine whether the treatment constitutes “other necessary medical attention” within the definition of Virginia Code § 65.2-603).

The majority’s four reasons for the reversal of years of precedent set forth in the *Elliott* case fail to provide a sufficient basis for the Commission to find an FCE solely to render an impairment rating is necessary medical attention. The majority acknowledges that treatment ordered by the authorized physician which advances the claimant toward recovery and a return to work qualifies as necessary medical attention. I continue to find the evaluation to solely determine whether the claimant may have a ratable permanent partial impairment to merely support a claim for additional benefits is not necessary medical attention as is required by Virginia Code § 65.2-603. Unlike the majority, I do not find that the statute is ambiguous in this aspect. “When the language of a statute is clear and unambiguous, we are bound by the plain meaning of that language.” *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002) (citing *Vaughn, Inc. v.*

Beck, 262 Va. 673, 677 (2001)). The Commission must “ascertain and give effect to the intention of the legislature . . . gathered from the words used, unless a literal construction would involve a manifest absurdity.” *Watkins v. Hall*, 161 Va. 924, 930 (1934). The majority ignores the unambiguous language of Virginia Code § 65.2-603 regarding “other *necessary* medical attention” and unilaterally grafts onto the statute an additional cost which the legislature has declined to impose. (Emphasis added.)

I recognize the Act provides for possible permanent partial benefits based on an impairment rating in accordance with Virginia Code § 65.2-503. Nonetheless, this alone is not a sufficient reason to require the defendants to pay for this assessment if it is not deemed necessary medical attention. The fact the claimant may be entitled to a benefit does not require defendants to pay for the benefit in all circumstances. 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 “[j]ob retraining,” the employee was not to be reimbursed for his expenses because the doctor never suggested such a program was medically necessary.

Next, I find the majority’s holding takes a too expansive view of the benefits afforded under Virginia Code § 65.2-603. “While 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 defendants to determine what, if any,

permanent partial disability benefit may be assigned under Virginia Code § 65.2-503. Given the length of time that our case precedent held that this type of examination was not necessary medical attention and was not the defendants' responsibility, I find it is unreasonable to suddenly conclude that the legislature intended to shift the cost to the defendants.

The majority's reasoning conflates refusing a medical evaluation for purposes of returning to work to securing a permanency rating. Significantly, the recommended FCE has no bearing on possible work restrictions in this case. The claimant has been released to work without restrictions.

I do not agree with the majority's assertion that the characterization of an FCE to establish work restrictions to return the claimant to work as necessary medical attention, while failing to characterize an FCE measuring permanent disability as necessary medical attention, is a "dubious double standard." (Maj. Op. 11.) It is simply a valid, reasonable interpretation of what constitutes necessary medical attention under the Act.

The majority further contends this interpretation previously changed depending on who stands to gain. However, while it is possible for claimants to have their benefits suspended due to an unjustified refusal of medical treatment when they refuse to attend an FCE to determine their work restrictions, the defendants are also responsible for an FCE ordered by a claimant's treating physician where the evaluation has a dual purpose of both assessing the claimant's permanent impairment and determining the claimant's physical restrictions, which is part of the claimant's medical treatment and recovery. *Hall v. Kroger Ltd. Partnership I*, JCN VA00001034555 (Nov. 14, 2016).

Conversely, I would find the defendants would not prevail in a situation where a claimant refuses to attend an FCE solely for an impairment rating. In order to constitute a refusal of medical

services, there must be some evidence that the claimant has refused to undergo *medical treatment* or to participate in the plan of *treatment* recommended by the treating physician. *Davis v. Brown & Williamson Tobacco Co.*, 3 Va. App. 123, 127 (1986) (Emphasis added). In short, the Commission reviews each case to determine whether a claimant actually refused medical attention, pursuant to Virginia Code § 65.2-603. For instance, in *Manion v. Northwestern Regional Adult Detention*, JCN VA00000322305 (Aug. 5, 2019), the claimant did not attend an FCE ordered by the treating physician at the request of the nurse case manager. The Commission held the claimant did not unjustifiably refuse medical treatment, given that medical management of the claimant is to be directed by the treating physician, not the defendants. The Commission has previously applied a consistent interpretation of what constitutes medical attention under the Act. I find no inequity in this analysis, despite the enthusiastic assertions within the majority decision.

I also continue to find that the majority's contention that a defendant's refusal to pay for an FCE to render an impairment rating frequently deprives the Commission of an opinion from the treating physician to be an assumption with little foundation. Most cases will have an opinion from a treating physician unless, for some reason, the physician 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.

Finally, I agree with the majority that Virginia Code § 65.2-603 does not apply only to treatment that advances the cause of a return to work and the safe performance of that job. Regardless, the treatment sought must be medically necessary, pursuant to Virginia Code § 65.2-603. The Commission is bound by the language of the statute. There is clearly a difference between seeking necessary medical treatment for a work-related injury and seeking a permanency

rating simply to support a claim for additional benefits. As I stated in *Elliott*, if this were a case where the treating physician had ordered the FCE to determine the claimant's work restrictions or capabilities associated with her work injury, purposes other than to support a potential claim for monetary benefits, I would certainly find the defendants responsible. Those are not our facts here, 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