VIRGINIA: 09/26/2003
IN THE WORKERS' COMPENSATION COMMISSION

MICHAEL ELKON, Claimant

v. VWC File No. 202-62-61 Opinion by TARR Commissioner

METROPOLITAN WASHINGTON AIRPORT AUTHORITY, Employer
TWIN CITY FIRE INSURANCE COMPANY, Insurer

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REVIEW on the record before Commissioner Tarr, Commissioner Dudley and Commissioner Diamond at Richmond, Virginia.

The employer requests Review of the Deputy Commissioner's May 13, 2003, Opinion finding the claimant entitled to compensation for partial work incapacity from September 12, 2001, and continuing. We AFFIRM the Opinion and AMEND the Award.

The claimant sustained a compensable work injury on October 4, 2000, while working for the employer as a mobile lounge operator, earning an average weekly wage of $1,133.41. Pursuant to executed memoranda of agreement, the Commission entered various Award Orders providing for payment of various periods of temporary total and temporary partial disability benefits through February 9, 2001.

On August 20, 2002, the claimant filed a claim alleging a change in condition and seeking temporary partial disability benefits from September 12, 2001, based on a return to work average weekly wage of $788.44.

On May 1, 2003, the Commission received stipulations from the parties. The parties stipulated that before the claimant's work accident, he and other mobile lounge operators regularly worked overtime and that this overtime was included in the claimant's average weekly wage of $1,133.41. The parties stipulated that since the claimant returned to his job as mobile lounge operator on January 27, 2001, he had worked 40 hours per week because his treating physician has restricted him to working only 40 hours per week, and, therefore, he has not worked any overtime from January 27, 2001, onward. The parties also stipulated that the carrier paid the claimant temporary partial benefits at the rate of $229.98 from January 27, 2001, through September 10, 2001, based on a return to work average weekly wage of $788.44, and that the carrier is entitled to a credit for these payments. The parties further stipulated that from September 11, 2001, to the present, "there has been a substantial decline in air travel and as a result of such economic conditions the amount of overtime available to mobile lounge operators has decreased by 35% from September 11, 2001 to the present."

The defendants maintain that effective September 12, 2001, the claimant's wage loss was caused by economic conditions rather than by the October 4, 2000, accident.

The Deputy Commissioner found that the claimant was entitled to the disputed compensation for partial work incapacity. The Deputy Commissioner based her decision on the holdings in Consolidated Stores Corp. v. Graham, 25 Va. App. 133, 486 S.E.2d 576 (1997) and of Carr v. Virginia Electric & Power Co., 25 Va. App. 295, 487 S.E.2d

878 (1997). In these cases, the Court of Appeals determined that the employer's economic condition or availability of alternative work was irrelevant in determining whether the claimant is entitled to temporary partial disability benefits. In Graham, the Court confirmed that the threshold test for compensability is whether an employee is able to fully perform the duties of his pre-injury employment. The employer is relieved of its duty to pay compensation when the employee is fully released from all restrictions or is released to perform his or her pre-injury job.

In this case, the claimant has never been released to perform his pre-injury job. Thus, the employer must pay partial wage compensation for reductions in earnings at the light duty job. As the court stated in Graham, "the employer's financial condition and the availability of alternative work do not affect the claimant's right to compensation." 25 Va. App. at 137, 468 S.E.2d at 578.

In Virginia Power v. Brueser, No. 1667-97-4 (Va. Ct. App., Dec. 16, 1997) (unpublished), the Court of Appeals explained:

> The underlying theory is that the partial incapacity has caused the employee to earn a lesser post-injury wage than his pre-injury wage. Thus, if a claimant who has not recovered his "pre-injury capacity" suffers a wage loss in the light duty position by virtue of the fact that overtime work, which was previously available, enabled the employee to earn a particular wage and the employee is not able to earn that same wage because overtime is unavailable in the light duty position, he is entitled to temporary partial disability benefits to compensate for the wage loss incurred.

The claimant was restricted from performing overtime work by his treating physician. The fact that the employer has reduced the amount of overtime it offers its other employees due to economic conditions is not relevant to a determination of the

employer's obligation to pay benefits to the injured worker. Therefore, we AFFIRM the Deputy Commissioner's decision to award benefits to the claimant.

The Deputy Commissioner erred in awarding benefits more than 90 days prior to the claimant's August 20, 2002 application. We AMEND the Deputy Commissioner's Award as follows:

AWARD

An award is entered in favor of Michael Elkon against Metropolitan Washington Airport Authority providing compensation for continuing partial work incapacity at the weekly rate of $229.98 beginning January 27, 2001, through September 10, 2001, inclusive, and from May 22, 2002, and continuing, based on a pre-injury average weekly wage of $1,133.41 and a return to work average weekly wage of $788.44. Credit against this award shall be allowed for benefits voluntarily paid at the weekly rate of $229.98 from January 27 through September 10, 2001.

Compensation having accrued shall be paid in a lump sum and the remainder each week thereafter.

From the compensation awarded a total fee of $5,200.00 shall be deducted and paid to Peter J. Jones for legal services rendered.

The employer shall continue to provide medical attention for as long as necessary pursuant to Section 65.2-603, Code of Virginia.

Interest is payable on the Award pursuant to Code § 65.2-707.

This case is hereby removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days of receipt of this Opinion.

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