

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

12/01/2004

LINWOOD RAY WETHINGTON, Claimant

Opinion by DIAMOND
Commissioner

v. VWC File No. 211-53-32

SMITHFIELD PACKING, Employer
FIDELITY & GUARANTY INSURANCE COMPANY, Insurer

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

This case is before the Commission at the request of the employer for Review of the deputy commissioner's decision, which awarded continuing temporary total disability benefits commencing July 31, 2003. We AFFIRM.

A hearing below was held initially on August 5, 2003. The deputy commissioner denied the claim on the grounds of willful misconduct, pursuant to § 65.2-306 of the Code of Virginia. This decision was reversed by the Full Commission, which remanded the case to the deputy commissioner "for a determination regarding the employer's remaining defenses to the claim."

On Remand, the deputy commissioner found that the claimant was disabled from performing his

pre-injury job, and that he made reasonable efforts to market this residual capacity. The deputy commissioner noted that the claimant contacted the Virginia Employment Commission, reviewed newspaper ads, contacted numerous potential employers, and as a result of these efforts, the claimant secured employment from June 9, 2003, through July 30, 2003.

On Review, the employer argues that the claimant presented no evidence that he marketed his residual capacity from July 31, 2003, until the hearing on August 5, 2003. In response, the claimant notes that at the hearing counsel for the employer stated, “Your Honor, I’m going to drop my marketing defense . . . just to clarify the issues for the Commission.” (Tr. 20-21).

The employer counters that the Commission is not bound solely by the defenses proffered by the employer, and that the employer was merely clarifying the issues, not waiving the defense. We find that this argument is disingenuous, and that the employer’s explicit statement that marketing was not an issue after hearing the claimant’s testimony about his marketing efforts is in the nature of a stipulation.

We further find that the evidence supports the deputy commissioner’s finding. National Linen Service v. McGuinn, 8 Va. App. 267, 380 S.E.2d 31 (1989), outlines a series of factors that may be considered in determining whether the claimant has made a good faith effort to secure work. Despite restrictions on standing and walking, the claimant registered with the Virginia Employment Commission, checked two newspapers, contacted potential employers beyond those required by the Virginia Employment Commission. Specifically, he sought work with two temporary service agencies twice a week, and performed work until that job stopped on July 30, 2003. The claimant also submitted records of job contacts at Wal-Mart, Firestone, Suffolk Iron Work, Nansemond Cold Storage, Planters, Big Lots, Chilton Auto Service, Hud-Warehouse, two Dollar Stores, Sentry Food Mart, J. P. Bore T.V., Master Cleaners, Carolina Cleaners, Butler Paper Co., Red Barn Store, Coastal Lumber Co., BP Station, QVC, City of Suffolk, Smithfield Packing, Food Lion, Howard Cleaners, Suffolk Quality Cleaners, and Performance Tire.

We find that the claimant has demonstrated a good faith effort to find work, and we infer that this good faith continued in the five days between the end of his job and the hearing.

The Opinion below is therefore AFFIRMED.

This matter is hereby removed from the Review docket.

APPEAL

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

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