31 July 2017
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"Marketing" Post-*King William County v. Jones*[1]

I.

A worker facing partial incapacity pursued compensation. She sought a market for her restricted capacity – a campaign before "numerous potential employers." The Court of Appeals of Virginia, deciding King William County v. Jones, 66 Va. App. 531, 789 S.E.2d 133 (2016), issued what might appear a sweeping holding:

> Although there is evidence that claimant unsuccessfully sought employment with numerous potential employers after being laid off by employer, there is no evidence that she was unsuccessful because of her partial disability. Claimant's testimony established that she applied for jobs at various employers; however, there was no evidence suggesting that her injuries rendered her unfit to perform the positions she sought or that she was not hired because of her partial disability, a showing that is essential to her claim.

Id. at 550-51, 789 S.E.2d at 143 (citing Pocahontas Fuel Co. v. Agee, 201 Va. 678, 684-85, 112 S.E.2d 835, 837-38 (1960)) (emphasis in original).

In the wake of King William County, participants within the Virginia workers' compensation arena awaited clarification: How widely would the decision stretch? For one facing partial incapacity and seeking a market for her residual faculty, must she also demonstrate the marketing campaign

[1] Not an endorsement, pursuing an assessment devoid of editorial comment, purposefully silent as to potential challenges or difficulties, this writing is simply my attempt to summarize recent decision clarifying King William County v. Jones, 66 Va. App. 531, 789 S.E.2d 133 (2016). My attempt should not replace independent deliberation.

failed "because of" her incapacity? The Commission, through two recent opinions, interpreted King William County's intended reach. See Sills v. Abacus, JCN VA00001156102 (June 27, 2017); see also Ball v. Spotsylvania, VA00001029817 (July 17, 2017).

II.

Consider, again, the cited language within the King William County decision:

> Although there is evidence that claimant unsuccessfully sought employment with numerous potential employers after being laid off by employer, there is no evidence that she was unsuccessful because of her partial disability. Claimant's testimony established that she applied for jobs at various employers; however, there was no evidence suggesting that her injuries rendered her unfit to perform the positions she sought or that she was not hired because of her partial disability, a showing that is essential to her claim.

Id. at 550-51, 789 S.E.2d at 143 (citing Pocahontas Fuel Co., 201 Va. at 684-85, 112 S.E.2d at 837-38) (emphasis in original). Undoubtedly, the phrase "because of" warranted attention. Yet, a second phrase may deserve still greater emphasis: The phrase is "after being laid off."

Deciding King William County, the Court noted a "typical" partial incapacity scenario:

> In a typical case of partial disability, the fact that a claimant's employment is terminated while on partial disability often may provide evidence of an economic loss. For example, if a partially disabled claimant cannot return to pre-injury employment with the employer even though her position continues to exist and the employer offers no selective employment consistent with the

> claimant's restrictions, a claimant has produced some evidence that she has suffered an economic loss as a result of her injury—but for her work-related injury, she would still be in her pre-injury position.
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> . . . .
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> The equation is different, however, when, as here, the claimant's employment with employer comes to an end because her position is eliminated along with the positions of her able-bodied colleagues. In such cases, although a claimant will have lost wages, evidence is required to establish that the loss of wages was caused by, or was in any way related to, her injury.

Id. at 542-43, 789 S.E.2d at 138-39.

The Court identified a normative class – a "typical" partial incapacity case and those apart from the "typical;" a different "equation." Id. Ms. Jones, facing partial incapacity, "unsuccessfully sought employment with numerous potential employers after being laid off by [her] employer." Id. at 550, 789 S.E.2d at 143 (emphasis added). Hers was the atypical case.

III.

Seizing upon the normative classification, the Commission through Sills v. Abacus, JCN VA00001156102 (June 27, 2017) and Ball v. Spotsylvania, VA00001029817 (July 17, 2017), interpreted King William County's breadth.

A. An Additional Factor for the Atypical Case.

Deciding Sills v. Abacus, JCN VA00001156102 (June 27, 2017), the Commission wrote, "[T]he Court of Appeals of Virginia's decision in King William County v. Jones, 66 Va. App 531, 789 S.E.2d 133 (2016), added an additional factor to consider in awarding . . . [compensation] benefits based upon adequate marketing." Id.

The "additional factor," a partially incapacitated worker must demonstrate her marketing campaign failed "because of" her incapacity. King William County, 66 Va. App. at 550-51, 789 S.E.2d at 143. The Commission, while describing cases within the atypical class ("layoffs," "furloughs"), determined the "additional factor" is not a component within a "typical" case:

> The matter before us presents "a typical case of partial disability." The partially disabled claimant initially returned to work with the employer. . . There is no evidence that the employer eliminated the claimant's pre-injury position or all of the similarly classified jobs. There was no layoff or furlough of employees. The employer provided the claimant with selective employment for a time. It then withdrew its offer of light duty employment.

Id. (emphasis added). A proclaimed "typical case," Mr. Sills was not required to prove his marketing campaign failed "because of" his incapacity.

B. A Clear Interpretation.

Deciding Ball v. Spotsylvania, VA00001029817 (July 17, 2017), the Commission wrote, "[W]e interpret [King William County v.] Jones as addressing the 'atypical' case of partial disability, where an employer-wide layoff or furlough has occurred." The Commission excused Ms. Ball from "marketing," the challenged period spanning five days. Id. (citing Holly Farms Foods, Inc. v. Carter, 15 Va. App. 29, 42, 422 S.E.2d 165, 171 (1992)) (a too short period). The Commission then added, "If the claimant was not required to market work capacity for a reasonably brief time, she likewise was not required to prove she was unable to do so because of her disability."

IV.

For workers facing partial disability, "[Va.] Code § 65.2-502 presumes . . . [the] employee can continue working either on restricted duty or in an

altogether new job. As a result, economic loss is the appropriate test for the compensation award." McKellar v. Northrop Grumman Shipbuilding, Inc., 290 Va. 349, 357, 777 S.E.2d 857, 861 (2015) (emphasis added). Post-King William County, the means by which a partially incapacitated worker proves "economic loss" (as interpreted by the Commission) will depend upon the circumstances surrounding employment suspension.

A. (As Interpreted by the Commission) If a "Typical Case."

In a "typical case," a partially incapacitated worker "cannot return to pre-injury employment . . . though her position continues to exist." King William County, 66 Va. App. at 542-43, 789 S.E.2d at 138-39. In a "typical case," the "[pre-injury] employer offers no selective employment consistent with the claimant's restrictions." Id. Thus, in a "typical case," the partially incapacitated worker has inherently "produced some evidence that she has suffered an economic loss as a result of her injury—but for her work-related injury, she would still be in her pre-injury position." Id.

In a "typical case," having inherent proof of an economic loss resulting from her injury, a partially incapacitated worker must still demonstrate "a reasonable effort to market . . . remaining capacity for work." White v. Redman Corp., 41 Va. App. 287, 292, 584 S.E.2d 462, 464 (2003); see also National Linen Serv. v. McGuinn, 8 Va. App. 267, 270, 380 S.E.2d 31, 33 (1989).[2] But having already produced inherent proof of an economic loss resulting from her injury, that worker need not also prove her marketing campaign failed "because of" her incapacity (she need not adduce further evidence of an economic loss resulting from her injury). See Sills v. Abacus,

[2] "[M]arketing is an analysis of . . . efforts in the context of reasonableness." Ridenhour v. City of Newport News, 12 Va. App. 415, 418, 404 S.E.2d 89, 90 (1991). There are no fixed guidelines for determining what constitutes a 'reasonable effort' by an employee to market residual work capacity" and the employee's endeavor will be weighed "'on a case by case basis, taking into account 'all of the facts and surrounding circumstances.'" Ford Motor Company v. Favinger, 275 Va. 83, 90, 654 S.E.2d 575,579 (2008) Id. at 90, 654 S.E.2d at 579 (quoting Great Atlantic & Pacific Tea Company v. Bateman, 4 Va. App. 459, 467, 359 S.E.2d 98, 102 (1987)).

JCN VA00001156102 (June 27, 2017); see also Ball v. Spotsylvania, VA00001029817 (July 17, 2017).

B. (As Interpreted by the Commission) If an "Atypical Case."

With the "atypical" case the partially incapacitated worker's "employment . . . comes to an end because her position is eliminated along with the positions of her able-bodied colleagues." King William County, 66 Va. App. at 542-43, 789 S.E.2d at 138-39. Unlike the "typical," with the "atypical" case a worker facing partial incapacity cannot produce the same inherent proof of an economic loss resulting from her injury. Thus, in addition to a suitable marketing campaign, the partially incapacitated worker must still demonstrate economic loss resulting from her injury. If she could establish her marketing campaign failed "because of" her incapacity, the worker would prove the requisite economic loss. Id. at 550-51, 789 S.E.2d at 143.[3]

[3] The "additional factor," as declared in Sills, is, perhaps, a misnomer. "Economic loss" is the common test for those seeking compensation and facing partial incapacity. The offer of proof (how one demonstrates economic loss) varies depending upon the case. If "typical," there is inherent proof of economic loss caused by the incapacity. If "atypical," absent inherent proof, the worker must still satisfy the economic loss test. Not truly an additional factor (but by alternate measure), in the "atypical" case the worker can prove economic loss if able to establish her marketing campaign failed because of her incapacity.