



VWC
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**EDUCATIONAL
CONFERENCE**

Return to Work – Perspective from the Field



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RETURN TO WORK

- What is needed to show a full duty release to work?
 - Tied to how the work is actually performed, and not simply what the job description states.
 - Fact intensive inquiry
 - Timing of the information gathering is important
 - Strategies for getting ahead of the curve

- “[T]he threshold test of compensability is whether the employee is able to *fully* perform the duties of his preinjury employment.” *Celanese Fibers Co. v. Johnson*, 229 Va. 117 (1985) (quoting *Sky Chefs, Inc. v. Rogers*, 222 Va. 800, 804 (1981))
- A physician's release to regular work or full duty is not necessarily equivalent to an informed release to pre-injury work unless the evidence shows that the physician is fully aware of the nature and functional requirements of that pre-injury work. *Federow v. Borden Moores Quality Snack Foods*, VWC File No. 153-14-70 (Aug. 30, 1994) (citing *Morris v. Badger Powhatan/Figgie Int'l, Inc.*, 3 Va. App. 276, 348 (1986))

- Reports of attending physicians have little probative value on the issue of capability of returning to work unless the physician is apprised of the demands of the employee's work duties. *Rasnake v. Sandlick Mini Mart*, VWC File No. 120-20-51 (Sept. 30, 1989)

Weight?



Insert Name of Session here

- The Commission does not look at how the duties could ideally be performed, but rather how the duties were actually performed. *Clinchfield Coal. Co. v. Parrott*, 22 Va. App. 443, 446-47 (1996).

- ***Hester v. Country Club of Virginia, Inc., VWC File No. 154-65-86 (May 10, 1994)***
 - Assistant manager at country club
 - Voc Rehab Provider prepared job description: sedentary to light supervisory
 - Hester testified that she unpacked and shelved boxes of liquor, rolled out tables, etc., estimating she regularly lifted 35 – 50 pounds.
 - “...*the claimant’s preinjury job required her **to achieve results.***”

Getting Ahead of the Curve ...

- Anticipate the issue (pre full duty release)
 - Request a copy of the job description early in the case
 - Write to the Employer to request additional information
 - Request a Site Visit
 - Interview co-workers
 - Communicate with treating doctors regarding discrepancies between the written job description and the Claimant's description of the job (FCE prior to release?)
- Playing Catch-up (post full duty release)
 - The map is not the territory
 - “Return to Work” may not mean “Full Duty”
 - Do not assume the treating doctor knows how physical the job was
 - Do not assume HR knows how the job was actually performed
 - Depose co-workers, voc rehab provider, supervisors, owners, etc.
 - Functional Capacity Evaluation



Bona Fide Offer of Selective Employment

Ellerson v. W.O. Grubb Steel Erection Co., 1 Va.App. 97, 98, 335 S.E.2d 379, 380 (1985). To constitute a *bona fide* offer, the selective employment contemplated by Code § 65.2-510 must be upon terms and conditions sufficiently specific to permit informed consideration by an employee, *id.* at 101-02, 335 S.E.2d at 382, and comprised of duties consistent with employee's remaining work capacity. American Furniture Co. v. Doane, 230 Va. 39, 42, 334 S.E.2d 548, 550 (1985).

Explaining this standard, we have held that "[t]o constitute a *bona fide* offer, the selective employment contemplated by Code § 65.2-510 must be upon terms and conditions sufficiently specific to permit informed consideration by an employee, and comprised of duties consistent with employee's remaining work capacity." Hillcrest Manor Nursing Home v. Underwood, 35 Va. App. 31, 37, 543 S.E.2d 785, 788 (2001) (citing Ellerson, 1 Va. App. at 101-02, 335 S.E.2d at 382; American Furniture Co. v. Doane, 230 Va. 39, 42, 334 S.E.2d 548, 550 (1985)).



Bona Fide Offer of Selective Employment

- Review the work restrictions with the actual supervisor for the potential light duty job
- Be specific when it is conveyed to the worker – terms & conditions
 - Detail the kind of job
 - Days & hours
 - Physical requirements
 - Pay
 - Padgett Mfg. Co. v. Wilfong, No. 1608-89-4 (Ct. of Appeals Aug. 28, 1990)
- Avoid confusion – get the treating doctor involved in approving the position
 - Tender of limited employment must be based on informed medical opinion. Talley v. Goodwin Bros. Lumber Co., 224 Va. 48, 294 S.E.2d 818 (1982)



Refusal of Employment – 65.2-510 (A)

A. If an injured employee refuses employment procured for him suitable to his capacity, he shall only be entitled to the benefits provided for in §§ 65.2-503 and [65.2-603](#), excluding vocational rehabilitation services provided for in subdivision A 3 of § [65.2-603](#), during the continuance of such refusal, unless in the opinion of the Commission such refusal was justified.



Refusal of Employment – 65.2-510 (A)

- Must be procured by the employer/carrier
- If an uncured, unjustified refusal – then only eligible for potential
 - PPD benefits (65.2-503)
 - Medical benefits, prosthetics, and home modifications
- Refusal justified:
 - Not *Bona Fide* offer
 - Claimant not required to work on his Sabbath. Ballweg v. Crowder Contracting Co., 247 Va. 205, 440 S.E.2d 613 (1994).
- Unjustified Refusal:
 - Lack of child care . King v. Maryland Mae, Inc., N. 2245-91-4 (Ct. of Appeals June 30, 1992)
 - Unrelated disability . Eppling v. Schultz Dining Programs/Commonwealth, 18 Va. App. 125, 442 S.E.2d 219 (1994).



Refusal of Employment – 65.2-510 (B)(C)

B. If an injured employee cures his unjustified refusal by accepting employment suitable to his capacity at a wage less than that originally offered, the employer shall pay or cause to be paid to the injured employee during his partial incapacity pursuant to § [65.2-502](#), a weekly compensation equal to 66 2/3 percent of the difference between his average weekly wages before his injury and the average weekly wage the employee would have earned by accepting the original proffered light duty employment.

C. A cure of unjustified refusal pursuant to subsection A may not be established if the unjustified refusal lasts more than six months from the last day for which compensation was paid before suspension pursuant to this section; however, the six-month period may be extended by the number of days a claimant is totally disabled if the disability commenced during such six-month period. When an injured employee is precluded from accepting employment as a result of pregnancy, the six-month period for curing the refusal may be tolled during such period as a physician certifies medical disability.



Refusal of Employment – 65.2-510 (B)(C)

Claimant can cure the unjustified refusal

- 6 months to cure
 - Time to cure tolls for periods of total disability and pregnancy (with physician certificate of medical disability)

Complete cure is to get a job at the same (or more) rate of weekly compensation as refused

Partial cure is getting a job but not one that makes as much as the position refused. TPD owed at 2/3rds the difference from the job refused and the AWW (if any).

- AWW was \$1,000.00. Refused job paid \$400.00 weekly. New job (within 6 months) pays \$200.00. Worker is eligible for \$400.00 in TPD (not \$533.33)



Vocational Rehabilitation – Va. Code § 65.2-603(A)(3)

Vocational rehabilitation services may include:

- Vocational evaluation
- Counseling
- Job coaching
- Job development
- Job placement
- On-the-job training
- Education
- Retraining

These services shall take into account:

- Employee's pre-injury job and wage classifications
- His/her age, aptitude, and level of education
- The likelihood of success in the new vocation
- The relative costs and benefits to be derived from such services



VWCC Vocational Rehabilitation Guidelines (Effective Oct. 1, 2015)

Vocational rehabilitation should not be started until the claimant is medically released for work.

- However, the claimant may be required to meet prior to medical release in order to assess the potential for work, to prepare resumes, and to schedule other appropriate actions such as attending job preparation training in anticipation of employment.

Pre-screening jobs

- Vocational providers should assess potential job opportunities and/or research the labor market.
- The claimant should not be instructed to apply to jobs not suitable for the claimant with or without reasonable accommodation.



VWCC Vocational Rehabilitation Guidelines (Effective Oct. 1, 2015)

Types of Jobs

- Telemarketing and commission sales jobs are only appropriate when the employee “demonstrated aptitude or ability in this line of work.”
- “Sheltered workshops and selective employers who are subsidized by defendants are inappropriate if they do not provide the potential for legitimate rehabilitation, such as learning work skills or restoring the employee to a productive place in the labor market.”

Sabotaging the Interview

- The claimant cannot be advised to withhold information about his/her injury or job capabilities during interviews or on applications.
- However, the claimant may not discuss those topics in a way as to sabotage the interview or application process.



VWCC Vocational Rehabilitation Guidelines (Effective Oct. 1, 2015)

Disclosing Information to the Vocational Provider

- The claimant does not have to disclose information such as personal or financial information, credit history, or spouse's employment – unless the information relates to a bona fide occupational qualification for employment.
- The claimant does have to disclose whether he/she is legally eligible for employment (including providing the SSN), whether they have a driver's license, whether he/she has been convicted of a felony or misdemeanor, and his/her employment history.

Role of the Claimant's Attorney

- The claimant has the right to have his/her attorney present at the initial rehabilitation meeting. However, the attorney cannot delay that meeting for more than 10 business days after initial contact by the voc provider.
- The claimant can consult with his/her attorney at any time.
- Actions of the attorney will be imputed to the claimant for the purposes of determining whether the claimant is cooperating.



VWCC Vocational Rehabilitation Guidelines (Effective Oct. 1, 2015)

Vocational provider cannot medically manage the claimant's treatment.

- Medical management does not include monitoring treatment.
- Vocational provider can try to meet with the physician outside the claimant's presence, if the physician consents.
- The claimant can be required to submit to a functional capacity evaluation (FCE), if approved by the treating physician or an IME provider.

Transportation and Reimbursement of Expenses

- The claimant has the responsibility of notifying the voc provider if he/she does not have access to his/her own transportation. The defendants should then arrange for transportation, which can include advance mileage reimbursement or alternative transportation.
- The claimant is entitled to reimbursement such as mileage, costs for telephone calls, photocopying costs, postage, and costs associated with obtaining DMV and other records.



Unjustified Refusal of Vocational Rehabilitation - Va. Code § 65.2-603(B)

An unjustified refusal of vocational rehabilitation provided by the employer shall bar the claimant's receipt of compensation until such refusal ceases.

It is unlikely that an unjustified refusal will be found to exist if the defendants have not complied with the Commission's Vocational Rehabilitation Guidelines.

If the claimant cures the refusal, indemnity will be reinstated. (But see Va. Code § 65.2-510(C) and its interpretive case law.)



Unjustified Refusal of Vocational Rehabilitation

Frayer v. Williams Brothers Lawn & Tree Service, No. 1987-10-3 (Va. Ct. App. Feb. 1, 2011).

- Claimant wore a lumbar support brace outside of his shirt and used a cane to walk although there was no medical evidence that he needed either of these.
- Claimant had unkempt facial hair and wore inappropriate clothing.
- Claimant advised prospective employers they would have to provide a place for him to lie down after two hours although no medical evidence supported that statement.
- Claimant later agreed to cooperate so the vocational rehabilitation provider met with him again. The claimant again expressed an unwillingness to cooperate, and stated he would “take his chances at the Commission.”
- Court of Appeals affirmed the Commission’s finding of an unjustified refusal of vocational rehabilitation.



No Refusal of Vocational Rehabilitation

Big Lots Stores, Inc. v. Browning, No. 0095-10-2 (Va. Ct. App. Nov. 9, 2010).

- Claimant moved to a rural area of Alaska, and the vocational rehabilitation provider worked with the claimant remotely.
- Over a six month period, thirteen job leads were sent to the claimant, and the claimant did not apply to any of them.
- All but one of the job leads appeared to require the claimant to do more than the restrictions permitted.
- Most job leads had education, minimum experience, or certification requirements that the claimant did not meet.
- Court of Appeals affirmed the Commission's finding that there was no refusal of vocational rehabilitation. The Court noted the defendants' vocational rehabilitation services were inadequate.



Curing an Unjustified Refusal of Vocational Rehabilitation

A verbal statement to cooperate must be made in good faith in order to cure an earlier refusal. James v. Capitol Steel Construction Co., 8 Va. App. 512 (1989).

To cure, there should be more than a mere statement of willingness to cooperate. There must be an affirmative act such as contacting the rehabilitation provider, seeking light duty employment, or registering with the VEC. Climaco v. Inova Health System Foundation, Inc., VWC File No. 230-89-20 (Oct. 13, 2010).

A claimant's affirmative step of beginning to search for jobs established a cure of her prior unjustified refusal. Ayers v. Goodyear Tire & Rubber Co., VWC File no. 228-24-94 (Oct. 21, 2010).

In cases where the employee's failure to cooperate with vocational rehabilitation efforts is tantamount to a refusal of selective employment, the provisions of Va. Code § 65.2-510(C) apply, and he must cure his refusal within six months. Barnes v. Newport News Shipbuilding & Drydock Co., VWC File No. 147-16-25 (Jan. 23, 2001).



Barriers to Overcome with Vocational Rehabilitation

- Geography
- Education
- Language
- Felony/misdemeanor convictions
- Skills (or lack of skills) and employment history
- Nature of the injury and the resulting work restrictions



Ways to Facilitate Success with Vocational Rehabilitation

- Secure recent medical records and monitor ongoing treatment to ensure an accurate understanding of the current work restrictions.
- Establish a productive relationship between the claimant, attorneys, and the vocational rehabilitation provider.
- Timely address issues with translators, transportation, reimbursement, mileage, etc. to allow claimant to attend and participate in vocational rehabilitation.