

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

JAMES PARNELL, Claimant

Opinion by MARSHALL  
Commissioner

v. JCN VA00000602926

**Aug. 7, 2013**

GRAYSON COUNTY SCHOOLS, Employer  
VIRGINIA SCHOOL BOARDS ASSOCIATION, Insurer

J. William Snyder, Jr., Esquire  
For the Claimant.

Ramesh Murthy, Esquire  
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The defendants request review of the Deputy Commissioner's September 14, 2012 Opinion finding the claimant's treatment was causally related to his compensable work accident and that he was entitled to temporary total disability benefits. We AFFIRM.<sup>1</sup>

**I. Material Proceedings**

The claimant filed July 16 and 23, 2012 claims alleging an injury by accident to the right lower extremity and back on April 11, 2012. He sought entry of an award for reasonable and necessary medical benefits and temporary total disability from May 16, 2012 and continuing.

Deputy Commissioner Blevins convened an evidentiary hearing on September 13, 2012. The parties stipulated to a compensable injury by accident on April 11, 2012 and that the

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<sup>1</sup> Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument 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, 428 S.E.2d 301, 303 (1993).

claimant sustained injuries to his right ankle and foot. The defendants defended the claim on the grounds that the claimant did not bear his burden of proving medical causation with regard to a back injury, that he was not disabled as alleged, that he was paid wages in lieu of compensation through August 2012, and that he failed to reasonably market his residual work capacity.

The Deputy Commissioner found the claimant sustained a compensable back injury, that he reasonably marketed his residual work capacity beginning August 8, 2012, and that he was entitled to temporary total disability benefits from August 8, 2012 and continuing. The defendants thereafter filed a timely request for review.

## **II. Summary of Evidence**

We have reviewed and considered the claims filed in this matter, the hearing transcript, the exhibits in the hearing record, the medical records, the Deputy Commissioner's Opinion, and the requests and statements filed by the parties on review. We rely upon these, including the parties' written statements and supporting medical documentation below. We incorporate by reference the Deputy Commissioner's summary of the evidence from the September 14, 2012 Opinion.

## **III. Findings of Fact and Rulings of Law**

Having reviewed the evidence and after considering the issues raised by the defendants on review, we do not find error and we affirm the Deputy Commissioner's findings below.

### **A. The Claimant Sustained a Compensable Back Injury**

The Deputy Commissioner correctly found the claimant met his burden of proving a compensable back injury in this case.

To prove an injury by accident, the evidence must demonstrate “(1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and bodily change.” Hoffman v. Carter, 50 Va. App. 199, 212, 648 S.E.2d 318, 325 (2007)(citing Chesterfield County v. Dunn, 9 Va. App. 475, 476, 389 S.E.2d 180, 181 (1990)).

It is the claimant's burden to prove that the medical benefits he is seeking are causally related to the accident. Va. Code § 65.2-603; Volvo White Truck Corp. v. Hedge, 1 Va. App. 195, 336 S.E.2d 903 (1985). Furthermore, the causation between a work accident and injury or disability is essentially a medical determination that is usually resolved by reference to medical reports. Reserve Life Ins. Co. v. Hosey, 208 Va. 568, 159 S.E.2d 633 (1968). “The testimony of a claimant may be considered in determining causation, especially where the medical testimony is inconclusive.” Hoffman, 50 Va. App. at 214-215, 648 S.E.2d at 326 (2007)(quoting Dollar Gen. Store v. Cridlin, 22 Va. App. 171, 177, 468 S.E.2d 152, 154-55 (1996)).

The medical evidence and the claimant’s testimony supported the Deputy Commissioner’s conclusion that the claimant suffered a back injury in the April 11, 2012 accident. Dr. Hawley’s June 21, 2012 note opined the claimant had a low back injury and that, “[u]ndoubtedly, when the student stepped on Mr. Parnell's foot, Mr. Parnell made a reflex movement of withdrawal from the pain, which caused his low back to twist or bend, in turn causing his bilateral L5-S1 painful radiculopathy.”

The defendants argue Dr. Hawley’s statement was speculation because the claimant did not give him a history of having moved backwards. From the claimant’s description of the student stepping on his foot and the application of medical training, Dr. Hawley stated the

claimant made a “reflex movement of withdrawal from the pain, which caused his low back to twist or bend, in turn causing his bilateral L5-S1 painful radiculopathy.” Dr. Hawley offered an opinion based upon the claimant’s history, his findings upon examination, and his application of an anatomical phenomenon well demonstrated in the medical literature, a withdrawal reflex.<sup>2</sup> The fact that Dr. Hawley did not provide a more precise description of the physiology of the claimant’s response is immaterial. The claimant’s description of quickly pulling back was consistent with the doctor’s opinion.

The defendants also argue because the claimant did not complain to Dr. Hawley about a back problem, the doctor’s diagnosis was flawed. This argument ignores the fact that Dr. Hawley’s statement that the claimant had “L5-S1 painful radiculopathy,” was premised upon the claimant’s symptoms in his foot. The claimant’s failure to appreciate that his foot symptoms could have been, and were, caused by a back injury is of no moment.

Finally, the defendants argue the Deputy Commissioner erred in finding a compensable back injury because the claimant never testified, as she found, that he “quickly pulled back,” when the student stepped on his foot. We have reviewed the transcript of the hearing. At page 10 of the transcript the claimant stated, “I mean, you know, I quickly pulled back, you know to move it back and to keep him from, I mean you know I just did the regular reaction you’d do if you got stomped on.” The claimant also demonstrated his movements to the Deputy

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<sup>2</sup> A withdrawal reflex is a nociceptive reflex in which a body part is quickly moved away from a painful stimulus. Once a danger receptor, or 'nociceptor' in the nervous system has been stimulated, a signal travels via a sensory nerve to the spinal cord. The nerve synapses with ipsilateral motor neurons that exit the anterior horn of the spinal cord and work to pull the injured body part away from danger within 0.5 seconds. Solomon; Schmidt; Adragna (1990) "13." In Carol, Field. *Human Anatomy & physiology* (2 ed.). Saunders College Publishing. p. 470.

Commissioner and she expressly found his testimony credible. The defendants' argument is without merit.

B. The Deputy Commissioner Properly Awarded Temporary Total Disability Benefits from August 8, 2012 and Continuing

The Deputy Commissioner's grant of temporary total disability benefits from August 8, 2012 and continuing was proper. On July 26, 2012, the claimant was placed under restrictions of, "minimal weight bearing, needs to sit when necessary" by FNP Hoffman-Goodson. Those restrictions were not retracted or modified when the claimant was examined by Dr. Paul Liebrecht on August 2, 2012. Two weeks later, the claimant was examined by Dr. Melody Counts and advised to remain out of work.

We reject the defendants' contention that the July 26, 2012 statement was not sufficient to constitute restrictions. We have held far less imposing instructions to constitute restrictions for the purposes of a disability claim. See Urias v. Winkler's, Inc., VWC File No. 234-48-44 (July 19, 2010)(doctor's instructions for breaks were sufficient to prove disability); Mallon v. Lincoln Educ. Servs., VWC File No. 232-94-63 (Mar. 2, 2010)(driving breaks considered restriction which supported claim for disability benefits); Merica v. Frank M. Sheesley Com. Inc. Proj., VWC File No. 227-99-35 (Apr. 14, 2008)(rejecting employer's allegation of release to pre-injury work and finding continuing disability where doctor stated claimant would require frequent breaks). We disagree that Dr. Counts released the claimant to unrestricted duty. A release could only be inferred from the doctor's prospective statements. Dr. Counts did not examine the claimant after August 16, 2012. As of the hearing the claimant was wearing an air boot on his right foot. He complained of difficulty walking and standing in excess of 15 to 20 minutes. The

Deputy Commissioner found him to be a credible witness. The totality of the evidence proved an ongoing partial disability due to the work accident.

In the written statement on review, the defendants do not challenge the Deputy Commissioner's findings with regard to marketing except to suggest the claimant imposed restrictions on himself and thus unreasonably restricted his marketing. In light of the medical records from FNP Hoffman-Goodson and Dr. Counts, the claimant's testimony, and the Deputy Commissioner's explicit credibility finding, this argument is without merit. The claimant reasonably marketed his residual work capacity.

C. Causation of Wage Loss

The defendants argue the claimant's wage loss is not causally related to his work accident since his pre-injury job was eliminated due to budget cuts in May 2012. A review of the hearing transcript and the Deputy Commissioner's Opinion does not reflect that this issue was raised before the Deputy Commissioner.<sup>3</sup> In light of due process concerns, we generally do not favor considering issues for the first time on review which were not raised before the Deputy Commissioner. See, e.g., Austin v. Dep't of Game & Inland Fisheries, VWC File No. 224-79-50 (Mar. 24, 2009); Eastman v. Va. Commonwealth Univ., VWC File No. 174-03-22 (Apr. 5, 2006); Jenkins v. Perkins Constr., VWC File No. 209-10-21 (Dec. 21, 2005); Wilfong v. Apple Valley Pool & Spa, VWC File No. 215-99-89 (Dec. 7, 2005); and Everett v. Wal-Mart, VWC File No. 218-67-22 (Nov. 15, 2005).

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<sup>3</sup> The hearing transcript reflects the claim was defended, "on the grounds of medical causation. That the Claimant was not disabled as alleged and that he was actually paid through August of 2012." (Tr. 2.) This issue also was not identified expressly in the defendants' request for review. The defendants' second assignment of error appeared to challenge whether the claimant established disability and did not specifically identify the nature of that challenge.

Because this issue was not raised or considered below, and since the claimant was not afforded the opportunity to present evidence with regard to it, we will not consider it for the first time on review.

**IV. Conclusion**

The Deputy Commissioner's September 14, 2012 Opinion is AFFIRMED.

An attorney's fee in the amount of \$1,000, in addition to the \$1,000 awarded by the Deputy Commissioner below, for a total of \$2,000, is awarded to J. William Snyder, Esquire, for legal services rendered the claimant, the payment of which shall be deducted from accrued compensation.

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

This matter is hereby removed from the review docket.

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 Appeals of Virginia.

cc: James Parnell  
Wells Fargo Disability Management  
Grayson County Schools  
Virginia School Boards Association