

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

CORRECTED¹
Opinion by NEWMAN
Commissioner

Aug. 27, 2019

RIQUELME R. UMANA v. CLARK CONSTRUCTION GROUP
AMERICAN ZURICH INSURANCE CO, Insurance Carrier
AMERICAN ZURICH INSURANCE CO, Claim Administrator
Jurisdiction Claim No. VA00001413395
Claim Administrator File No. 2440287023
Date of Injury: November 17, 2017

Robert B. Adams, Esquire
For the Claimant.

Alan D. Sundburg, Esquire
For the Defendants.

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

The defendants requested review of the Deputy Commissioner's March 25, 2019 Opinion finding the claimant proved injury to the left knee beyond an abrasion and awarding ongoing disability from a compensable injury by accident. We AFFIRM in part and REVERSE in part.

I. Material Proceedings

The claimant filed claims on January 24 and August 17, 2018, alleging an injury by accident to his right shoulder, right arm, left arm and left knee on November 17, 2018. He sought an award of medical benefits and temporary total disability benefits from November 18, 2017, and continuing. The parties stipulated to a compensable injury by accident with injuries to the right shoulder and left elbow as well as a left knee abrasion. They also agreed to the claimant's

¹ This Corrected Opinion replaces the previous August 27, 2019 Opinion. The Corrected Opinion corrects the duplicate Conclusion language on page 8.

entitlement to an award of total disability benefits from November 18, 2017, through January 1, 2018, and from January 4 through January 19, 2019. The defendants argued that although the claimant remained partially disabled for the other periods claimed, he was not eligible for lawful employment in the United States and so his claimed disability entitlement would be barred by Virginia Code 65.2-502(A).² The defendants also asserted that the claimant did not injure his left arm or that he suffered a left knee injury beyond the stipulated abrasion.

The Deputy Commissioner held that the claimant proved he sustained injuries to the right shoulder, left elbow, and left knee. The Deputy Commissioner awarded medical benefits and continuing temporary total disability benefits beginning November 18, 2017.

The defendants filed a timely request for review.

II. Findings of Fact and Rulings of Law

The claimant worked for the employer as a plumber's assistant and suffered injuries in an accident on November 17, 2017. He testified that he injured his right shoulder, right arm, left elbow, and left knee. Regarding the left knee, he said "that's gotten better. That's no problem right now." (Tr. 10.) He testified that he had problems with the knee "for the first few weeks. The pain finally went away and I never received treatment." (Tr. 11.) The claimant received physical therapy for his right shoulder and left elbow. He also underwent surgery on his shoulder.

The medical evidence reflects that on the day of his accident, the claimant treated with Dinara R. Yambulatova, PA-C. The claimant reported falling on concrete and described pain in the right shoulder, wrist and elbow. He was also noted to have a left knee abrasion. The claimant's

² This section provides that "the employer shall not be required to pay, or cause to be paid, compensation under this section to any injured employee not eligible for lawful employment"

diagnoses included right shoulder injury, abrasion of the left knee, and sprains of the left wrist and elbow.

The claimant first saw Dr. Harvey N. Mininberg, orthopedic surgeon, on November 21, 2017. The claimant complained of pain in the right shoulder and left elbow. Dr. Mininberg ordered an MRI of the right shoulder and kept the claimant out of work. The claimant next treated with Dr. Mininberg's partner, Dr. Joel D. Fechter, on November 28, 2017. Dr. Fechter found right shoulder and left elbow injuries. After reviewing the MRI, Dr. Fechter diagnosed a right shoulder strain involving the rotator cuff with evidence of impingement and a left elbow contusion and strain with findings of lateral epicondylitis. He recommended: "Limited activities with limited bending, stooping, and reaching. He remains unable to work at this time."

Dr. Fechter examined the claimant again on December 13, 2017. The claimant noted "some discomfort in the anterior left knee. He noticed this kneeling in church about 2 weeks after his injury." Dr. Fechter examined the knee and found no bruising, discoloration, or abrasion. The claimant had mild peripatellar tenderness and mild pain on patellar grinding. Dr. Fechter wrote that the claimant's "patellofemoral pain in the left knee . . . does not appear to be causally related to the work injury." Dr. Fechter injected the right shoulder. He wrote: "He will continue with limited activities with limited bending, reaching, overhead work, lifting. He will see his primary care provider if his knee pain persists. The patient remains unable to work at this time."

The claimant returned to Dr. Fechter on January 3, 2018. Dr. Fechter noted continuing difficulties with some improvement after the subacromial injection. Dr. Fechter recommended the claimant "continue with limited activities with limited overhead work, lifting, and reaching" and "continue with physical therapy for the pain, to increase strength, range of motion, and function."

Dr. Fechter also “recommended an MRI arthrogram for further evaluation” and consideration of “an injection to the area overlying the lateral epicondyle and left elbow.” Dr. Fechter wrote: “There is no light duty work available, so he remains unable to work at this time.” Dr. Fechter, however, issued a Work Status/Disability Form in which he checked that the claimant was “Unable to work at this time – DISABLED.”

On January 17, 2018, Dr. Fechter again noted that the claimant “will continue with limited activities with limited lifting, reaching, and overhead work. There is no light duty work available, so he remains unable to work at this time.” In monthly office notes through July 2018, Dr. Fechter continued to indicate that because there was no light duty available, the claimant remained unable to work. Dr. Fechter also provided Work Status/Disability Forms in which he checked that the claimant was “Unable to work at this time – DISABLED.” Dr. Fechter last treated the claimant in July 2018. The claimant testified that Dr. Fechter never advised him that he could return to work. Instead, the doctor provided him a disability slip every few weeks keeping the claimant completely out of work.

On October 25, 2018, the claimant came under the care of Dr. Sameer H. Nagda. The claimant complained of right shoulder and left elbow pain. Dr. Nagda ordered an ultrasound of the right shoulder and limited the claimant to “sedentary work only.” Dr. Nagda eventually recommended surgery, and he performed a right shoulder arthroscopic debridement and subacromial decompression on January 4, 2019. He kept the claimant out of work through January 21, 2019. At all other times, Dr. Nagda imposed light duty work restrictions relative to the right shoulder and left elbow injury.

After reviewing the evidence, the Deputy Commissioner found that the claimant injured his right shoulder and left elbow in the work accident but that he did not injure his left arm. Regarding the left knee, the Deputy Commissioner found that the claimant “did sustain injury to his left knee beyond the abrasion to which the defendants agreed but only to a limited extent.” (Op. 6.) The Deputy Commissioner limited “any treatment for the left knee to that rendered at the time of his initial medical evaluation, on November 17, 2017. Inasmuch as he states that it was not a problem after a few weeks, any issues or treatment beyond the initial visit is not related to the accident.” (Op. 6.)

As to disability, the Deputy Commissioner made the following findings:

There is no question that Dr. Nagda has found the claimant capable of light work during periods for which he makes a claim for temporary total disability benefits. However, Dr. Nagda’s treatment focused on the claimant’s right shoulder. He did not treat the left knee which is also part of this claim. Dr. Fechter has treated the claimant for this knee injury almost exclusively since the accident. He never authorized a return to work in any capacity. Therefore, we find that the weight of the medical evidence sufficiently supports the claim for total disability. Given that the claimant was totally disabled, he did not have an obligation to market his remaining work capacity.

(Op. 7-8.)

The Deputy Commissioner awarded temporary total disability benefits beginning November 18, 2017, and continuing, as well as medical benefits “for the left knee, including but not limited to the left knee abrasion, left elbow and right shoulder” (Op. 8.) The Deputy Commissioner made no finding as to the defendants’ assertion that the claimant was not lawfully eligible for employment in the United States.

After careful review, we find the claimant sustained an injury to his left knee, but that his treatment was limited to the November 17, 2017 visit with PA Yambulatova. At that visit, the

claimant was diagnosed with an abrasion. There is no mention of any problems with the left knee again until Dr. Fechter examined the claimant on December 13, 2017. At that time, the claimant reported that about two weeks after his injury, while kneeling in church, he noticed “some discomfort in the anterior left knee.” Dr. Fechter opined that the claimant’s “patellofemoral pain in the left knee . . . does not appear to be causally related to the work injury,” and he recommended the claimant see his primary care provider if his knee pain persists. Accordingly, we award medical benefits limited to a left knee abrasion.

Regarding the claimant’s disability, we find the claimant failed to prove he was totally disabled beginning January 4, 2018, through January 3, 2019, and beginning January 21, 2019, and continuing. On January 3, 2018, Dr. Fechter provided restrictions but indicated that because there was no light duty work, the claimant could not work. We read Dr. Fechter’s predication of incapacity upon the unavailability of light duty work as necessarily meaning that the claimant could perform light duty if it were offered. Indeed, we can divine no other reasonable interpretation. Dr. Fechter continued with this conditional disability statement in all of his subsequent notes through the end of his treatment in July 2018. While Dr. Fechter issued no duty work status slips, his treatment notes contradict his statement that the claimant could not work in any capacity.

The claimant testified that Dr. Fechter never informed him that he could return to work in any capacity. Dr. Fechter provided disability notes, which the claimant provided to his employer. Therefore, the claimant argues, he had not been informed that he had been released to light duty work.

Virginia Code § 65.2-502(A) relieves an employer from paying temporary partial disability if an injured employee is not eligible for lawful employment. It also precludes temporary total disability for a partially incapacitated employee who is not eligible for lawful employment. If the claimant is not eligible for lawful employment, the employer is not required to pay disability benefits during the claimed periods of partial incapacity. The fact that the claimant may not have been aware of his release to light duty is not relevant where he is not eligible for lawful employment. *See De Garcia v. Interspan, Inc.*, JCN VA00001039154 (Feb. 10, 2017).

Here, the Deputy Commissioner found the claimant was not authorized to work in the United States in 2017 and 2018. (Op. 3.) She noted that he had been placed on a waiting list for a visa as of January 9, 2019. (Cl.'s Ex. 2.) Because the claimant was not eligible for lawful employment during the periods where he was only partially disabled, he is not entitled to an award of temporary total disability benefits during those periods. Va. Code § 65.2-502(A). Based upon the work status notes of Dr. Fechter, the medical evidence failed to support a finding of total incapacity beginning January 4, 2018, through January 3, 2019, and beginning January 21, 2019, and continuing. The claimant is not entitled to disability benefits during these periods of partial incapacity.

III. Conclusion

The Deputy Commissioner's March 25, 2019 Opinion is AFFIRMED in part and REVERSED in part. The Award is MODIFIED as follows:

AWARD

An Award is hereby entered in favor of Riquelme R. Umana, claimant, against Clark Construction Group, employer, and American Zurich Insurance Co., insurer, for payment of compensation as follows, based upon a pre-injury average weekly wage of \$790.91:

- (1) Temporary total disability benefits at the weekly rate of \$527.28 from November 18, 2017, through January 3, 2018; and from January 4 through January 20, 2019, inclusive.

Medical benefits are awarded for injuries to the right shoulder, left elbow, and left knee, limited to an abrasion, for as long as necessary pursuant to Virginia Code § 65.2-603.

Based upon the modified award, the Commission reduces the attorney's fee awarded to Robert B. Adams, Esquire, for legal services rendered the claimant, from \$8,200 to \$950, the payment of which shall be deducted from accrued compensation.

On July 22, 2019, the claimant filed a letter indicating that he is currently eligible for employment in the United States and has secured work within his light duty restrictions. The claimant requests permanent partial and temporary partial disability, as appropriate, and requests a hearing. This letter has been referred to the Claims Service Department for processing.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting in part:

I agree with the majority's award of medical benefits. I also agree the claimant failed to prove total disability from August 10, 2018 through January 3, 2019 and from January 21, 2019 and continuing.

However, I find the evidence sufficient to prove total disability from January 4, 2018 through August 9, 2018. The claimant reasonably relied upon his physician's instruction that he was unable to work during that period.

The Commission generally looks to the medical evidence to determine whether the claimant is disabled from work. We have repeatedly held that "we would not expect the claimant to work in violation of medically imposed restrictions, and we generally defer to the opinion of the claimant's treating physician in determining whether or not the claimant can reasonably be expected to perform any type of work." *Bethea v. Criterion Corp.*, VWC File No. 179-22-94 (May 26, 1998); *see also Waller v. Nat'l Interiors, Inc.*, VWC File No. 194-04-22 (Nov. 7, 2000); *Watts v. Integrity Staffing Servs., Inc.*, VWC File No. 192-60-37 (Jan. 27, 2000); *Hardy v. Tectonic Distrib. of Tidewater, Inc.*, VWC File No. 187-71-09 (Sept. 29, 1998); *Ellis v. City of Norfolk*, 68 O.I.C. 47 (1989). This is because if a claimant disregards his doctor's instructions and suffers further injury, his claim reasonably may be challenged and denied. *Biv v. Hair Cuttery*, VWC File No. 174-60-47 (Apr. 11, 1996); *Kimmel v. Washington Gas Light Co.*, VWC File No. 175-63-91 (Apr. 11, 1996).

Here, Dr. Fechter, the claimant's treating physician, noted the claimant's limited ability to perform overhead work, lifting, and reaching. Dr. Fechter's records stated that since there was no light duty work available, the claimant remained unable to work. Dr. Fechter provided disability slips on January 3, January 31, February 21, March 14, April 4, May 9, May 30, June 20, and July 18, 2018, stating the claimant was "unable to work." The claimant testified Dr. Fechter never told him he could return to work. (Tr. 12.)

While Dr. Fechter noted some of the claimant's functional limitations, he did not provide a release to work within certain restrictions. Rather, he repeatedly indicated the claimant was unable to work. Under these circumstances, the claimant could not have reasonably and objectively perceived an ability to return to gainful employment. *Reyes v. Fairfax Cty. Water Auth.*, VWC File No. 176-18-27 (July 2, 1996), *aff'd*, No. 1766-96-4 (Va. Ct. App. Dec. 3, 1996).

I disagree that Dr. Fechter's statement regarding the unavailability of light duty work "necessarily" meant the claimant could perform light duty if offered. Given the context, Dr. Fechter's statement can more reasonably be interpreted as meaning that if the claimant could not entertain a dialogue regarding possible accommodations with his current employer, he should remain out of work. I would find that from January 4, 2018 through August 9, 2018,³ the claimant could not look for or perform work elsewhere without violating his physician's instructions. Therefore, he was totally disabled.

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.

³ The July 18, 2018 disability slip indicated the claimant was scheduled to return to Dr. Fechter on August 9, 2018. I would therefore find total disability through August 9, 2018. There was no evidence of subsequent treatment by Dr. Fechter.