Workers Compensation: A Response
To the Recent Attacks on the Commission's
Authority to Suspend A Claimant's Benefits

by

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A number of claimants' attorneys are seeking to change the manner in which the Virginia Workers' Compensation Commission suspends open awards based upon an employer's application to terminate benefits. The suspension occurs after the Commission's staff has reviewed the employer's application and concluded there is probable cause to docket the application for a hearing on the merits. In the process of filing an employer's application, the Commission provides a 15-day comment period in which the claimant and/or his lawyer may object to the employer's request to suspend benefits and to have a hearing.

In a recent case, Home Depot had an open award that had not been paid for nearly four years. The claimant apparently had gone back to work with Home Depot. The employer then paid two years of compensation benefits pursuant to the Rules of the Commission in order to have its application to terminate benefits (on the basis that the claimant returned to work) docketed by the Commission.[1] The claimant was represented by Peter Sweeny. Mr. Sweeny went to Deputy Commissioner Colville in Northern Virginia and requested certification of the outstanding temporary total disability award. Deputy Commissioner Colville complied with this request. Mr. Sweeny then went to Circuit Court and had a writ of fieri facias issued and executed against the Home Depot store. Home Depot then reportedly paid the remaining two years of compensation (approximately $50,000) to avoid execution of the warrant against the store and the loss of potentially $1,000,000 of income over the weekend. In summary, the claimant was paid approximately $100,000 in indemnity benefits because the open award had not been earlier terminated, even though the claimant had been back to work for four years. This tactic employed by claimant's counsel is a direct attack on the Commission's procedures for suspending open awards pending an evidentiary hearing.

[1] Rule 1.4(E) provides that "no change in condition application under §65.2-708 of the Code of Virginia shall be accepted unless filed within two years from the date compensation was last paid pursuant to an award." Rule 1.5(C)(1) then provides that if the application is technically acceptable, the employer may suspend or modify compensation payments as of the date compensation was last paid.

To understand this latest development in the workers' compensation system an analysis of Section 65.2-710 is necessary. This statute states:

> Orders or awards of the Commission may be recorded, enforced, and satisfied as orders or decrees of the Circuit Court upon certification of such order or award by the Commission. The Commission shall certify such order or award upon satisfactory evidence of noncompliance with the same. (emphasis supplied)

It is clear that Home Depot had not complied with the order, having not paid compensation benefits for nearly four years while the award was outstanding. Hence, there were arguably grounds for a finding of noncompliance in this situation.[2]

The Courts have previously ruled that when the certified order from the Commission is presented to the judge of the Circuit Court for issuance of the writ of fieri facias, it is purely a ministerial act on the part of the Circuit Court. The Circuit Court does not inquire as to whether the claimant's condition continues to justify compensation.

Commissioner Roger Williams has recently advised defense counsel that the clerk's office of the Commission will not be certifying any award orders. Hence, the request must go to a deputy commissioner. If an employer files an application to terminate benefits which is then docketed for hearing, employers need to be aware that claimants lawyers may seek to have the award certified and take similar action to that in the Home Depot case. If there is a request that the award be certified, the employer should immediately seek a hearing on whether there has been noncompliance with the award. This clearly is within the discretion of the deputy commissioners and it is hoped that each deputy commissioner will seek to have a hearing on the issues of noncompliance.

The argument apparently being made by claimants attorneys is that there is no authority in either the rules of the Commission or in the Virginia Code for employers and insurers to suspend compensation pursuant to an award of the Commission except during the short but closed period during which the Commission is reviewing an employer's application under Rule 1.5 of the Rules of the Commission. Once a decision has been made to "accept" the application and refer it to the docket, the argument put forth by claimants attorneys is that compensation should be reinstated.

[2] Under this framework, an employer can argue that once benefits are paid through, and suspended as of, two years from the date of filing the application, it is in compliance with the award. This argument has not been litigated, however, and there is certainly no guarantee that it will ultimately be successful. It is, however, the best argument in support of the employer's position that has been presented to date.

Rule 1.4 of the Rules of the Commission provides the requirements an employer must meet to file an application for a hearing. The Rule states than an employer must make payment of disability compensation pursuant to an Award of the Commission typically through the date the application was filed and sometimes earlier; such as when a claimant has returned to work in which case payment is made through the date of the return to work.

Rule 1.5 of the Rules of the Commission states that "[p]ending acceptance or rejection of the application" the employer may suspend compensation payments. It goes on to state that if the application is "rejected" then "compensation shall be reinstated immediately." See Rule 1.5(C)(2). However, under Rule 1.5(C)(3), if the application is accepted it is referred to the Commission for a decision on the merits. Rule 1.5(C)(3) does *not* state that "compensation shall be reinstated immediately" if an application is accepted like it does under Rule 1.5(C)(2) for those that are rejected.

The Commission has interpreted Rule 1.5 of the Rules of the Commission to allow suspension of compensation upon filing of an Employer's Application for Hearing and "pending a hearing on the merits." Nathaniel v. Mason's Masonry, VWC File No. 223-27-73 (August 25, 2006). The Commission stated its understanding of Rule 1.5 as follows:

> Pending the acceptance or rejection of its Application for Hearing, an employer may suspend or modify compensation payments as of the date through which compensation was last paid. Rule 1.5(C)(1). Such a suspension of an award is not a permanent termination of award payments requiring the claimant to submit a claim for reinstatement of benefits, but rather is a "preliminary and temporary" suspension. Telesystems, Inc. v. Hill, 12 Va. App. 466, 404 S.E.2d 523 (1991). It is made pending a hearing on the merits and, if the employee is found "eligible, he or she will receive retroactively all the payments to which he or she was entitled."

Id. at 470, 404 S.E.2d at 526 (citation omitted).

The Commission's understanding of Rule 1.5 is also manifest on the face of the Employer' Application for Hearing which notifies the claimant as follows:

> If the Virginia Workers' Compensation Commission finds it appropriate to suspend benefits until a final determination can be made by a deputy commissioner, you will be notified either that

the case is being referred to the evidentiary hearing docket or that a final decision will be made based on the written record.

For the last 40 years the Virginia Workers' Compensation Commission has interpreted its rules to allow the suspension of benefits pending a hearing on an employer's application to terminate benefits if probable cause has been found. In addition, the General Assembly has previously rejected attempts by the claimants bar to require employers to pay benefits through the date of decision of a deputy commissioner relative to an employer's application to terminate benefits. In 2001, Senate Bill 1189, patroned by Senator Madison Marye, was introduced. If enacted, the bill would have prohibited the Workers' Compensation Commission from suspending benefits previously awarded to an employee prior to conducting an evidentiary hearing when an employer files an application to terminate benefits. We argued to the General Assembly that such a statute would materially increase the cost of doing business for employers and would result in abuse. For instance, the claimant goes back to work at his regular job for the original employer. The employee, if the statute was passed, would not enter into an agreement but would insist that an employer file an application to terminate benefits on the basis that the claimant returned to regular work. The employer would then have to wait approximately four to five months for a decision by a deputy commissioner that indeed its application to terminate benefits was appropriate. The claimant would then receive his normal wage from the employer and four to five months of additional compensation which would be unwarranted. Senate Bill 1189 was defeated in the Senate Committee on Commerce and Labor on a 14-1 vote.

All the above having been said, the claimant's bar is also relying upon a 1974 decision from the Supreme Court of the United States involving an appeal by various claimants attacking the power of the Virginia Workers Compensation Commission to summarily terminate benefits pending a hearing as well as litigating the right of a claimant to enforce an award that is outstanding. The decision in Dillard v. Industrial Commission, 416 U.S. 783, 94 S. Ct. 2028, 40 L.Ed. 2d 540 (1974) was written by Justice Powell, with Justice Douglas dissenting.

This was a class action lawsuit in which the claimants claimed that the due process clause of the Fourteenth Amendment prevented Virginia from permitting ex parte suspension of workers' compensation benefits prior to conducting an adversary hearing. The Federal District Court rejected the constitutional claim on the merits, but the Supreme Court stated that based upon the briefs and oral argument, the Court would not decide the merits of the claim because the claimant whose benefits had been suspended could under the law have them reinstated by a state trial court, which would act in a purely ministerial capacity, pending a full administrative hearing before the State Workers' Compensation Commission on the merits of the claim.

The predecessor to §65.2-710 merely stated that a claimant could have the Commission's award certified for enforcement by a Circuit Court. There was no requirement of a finding, as

now contained in §65.2-710, that the award should be certified "upon satisfactory evidence of noncompliance with the same." This change in the statute occurred in 1976, several years after the Dillard opinion was rendered by the U.S. Supreme Court.

Looking at the predecessor to §65.2-710 which did not require evidence of noncompliance with the award, the Supreme Court stated:

> Although it may be indisputable that a claimant is no longer entitled to benefits due to a change in his condition, if the claimant refuses to terminate voluntarily an award or agreement, an employer or insurer appears to have no defense against the State Court enforcement action until there is a formal determination by the Commission under this Section.

The Supreme Court also looked at the then existing rules of the Virginia Workers' Compensation Commission permitting employers to suspend benefits if there is a probable cause finding that the employer's application to terminate has a valid legal basis. The Court noted that the employer or insurer must pay benefits up to a certain date, must make application under oath, and must submit supporting evidence which constitutes a legal basis for changing the existing award. Only in that instance would the Commission find the probable cause to believe that a change in condition had occurred.

In the claim before the U.S. Supreme Court, the claimant was injured in the course of his employment in April 1972. In May 1972 the Commission approved an agreement between the claimant and his employer for the payment of weekly compensation benefits. In October 1972 the insurance company applied under Rule 13 of the Commission for a hearing to terminate benefits based upon a change in condition. The Commission determined that probable cause existed to believe that a change in the claimant's condition had occurred. The claimant did not seek to enforce the award in Circuit Court. After an adversary hearing, the Commission concluded that the insurance company had not met its burden of proof and reinstated benefits.

In April 1973 the insurance company again filed a petition claiming a change in condition and once again the Commission, on an ex parte basis, ruled for a second time that the benefits could be suspended. The claimant sought review in Federal Court of this type of suspension on an ex parte basis without a formal hearing or even notice to the claimant.

In reviewing Rule 13, the Supreme Court noted that the rules stated "benefits shall not be suspended" prior to meeting the requirements of the rule. Counsel for the Commission then conceded that even though the rule stated the benefits could be suspended, the rule did not trump the predecessor of §65.2-710 and the claimant could seek to have his benefits reinstated by

simply petitioning the State trial court to perform a ministerial duty. The Commission in its brief stated as follows:

> Virginia's statutory framework does not authorize the termination of benefits as alleged by plaintiff, it permits only the initiation of a procedure by which benefits may ultimately be terminated. Should plaintiff be dissatisfied with the temporary cessation of benefits pending an administrative hearing, he is entitled by the provisions of Section 65.1-100 (the predecessor of 65.2-710) to reduce his award to judgment in an appropriate Court of record and compel the resumption of benefits. It should be noted that in such a case the Court has no discretion and must enter judgment against the employer or his insurer.

The Court then concluded:

> The Rule is designed to serve as a screening device for eliminating obviously unmeritorious applications for hearings filed by insurers and employers. It is not an authorization for employer or insurer to suspend payments with assurance that a claimant may not have them reinstated under Section 65.1-100 of the Act.

In the Dillard case, there is question as to whether a claimant was subjected to an ex parte proceeding based upon the probable cause determination of the Commission relative to an employer's application based upon a change in condition. In the last 20 years, however, the employer, to meet the requirements of Rule 1.4, must certify that it has sent a complete copy of the employer's application to both the claimant and his lawyer. In addition, the Commission provides the claimant with 15 days comment time in which to respond to the employer's application and why it should not be docketed based upon a finding of probable cause. Based upon these clear improvements to the system, it is doubtful that there is a valid due process argument against the Commission's long-standing rules in permitting suspension of benefits based upon a probable cause finding.

Based on the foregoing, it would appear the Commission has the authority to suspend benefits pending a hearing on the merits but until the Full Commission has directly dealt with this issue, employers and carriers should:

1. Not allow outstanding awards to languish without properly filing an employer's application, if appropriate, to terminate benefits. The mere cessation of payments to the claimant without filing a corresponding employer's application to terminate

benefits could be a valid basis under §65.2-710 of evidence of noncompliance with the award;

2. When filing an application to terminate benefits, defense counsel needs immediately to be engaged to protect against claimant's counsel seeking to have the Commission certify the award order and thereafter execute against the employer's assets;
3. If claimant's counsel or the claimant seeks in any way to have an award certified, defense counsel and the carrier must respond immediately requesting an evidentiary hearing as to any noncompliance with the outstanding award; and
4. While the job of the Circuit Court is considered to be ministerial in issuing a writ of fieri facias, one Circuit Court has delayed issuing the writ pending an outcome/decision from the Commission on this procedural and substantive quagmire. Hence, employers will have to be diligent and aggressive in the defense of these attacks on the Commission's authority to suspend benefits.