B R I E F

TO: Benjamin M. Wesson Jr., Esquire

FROM: National Legal Research Group, Inc.
W. Andrew McCaughey, Senior Attorney

RE: Virginia/Workmen's Compensation/Change In Condition/Causal Relationship

FILE: 57-26384-021 October 14, 1998

YOUR FILE: Patricia Jones v. Mary Adams Hospital

IN THE
COURT OF APPEALS OF VIRGINIA

RECORD NO. 1582-98-2

MARY ADAMS HOSPITAL
and
THE INSURANCE RECIPROCAL,

***Appellants*,**

v.

PATRICIA B. JONES,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE NATURE OF THE CASE

Patricia B. Jones, while employed as a registered nurse, suffered a compensable injury to her back while transferring a patient from a stretcher to a bed on September 7, 1994. (App. at 4, 41.) Workers' compensation benefits were paid pursuant to an Award of the Commission entered November 14, 1997. (App. at 35.) On November 25, 1997, the Employer filed an application alleging a change in condition and requesting that compensation benefits be terminated. (App. at 2.) In an Opinion by Deputy Commissioner Phillips dated February 25, 1998, the Employer's application was denied, and compensation pursuant to the November 14, 1997 Award of the Virginia Workers' Compensation Commission was reinstated effective November 26, 1997. (App. at 35-40.) The Employer sought review before the full Commission, and written statements were submitted to the full Commission by both parties. (App. at 41-52.) In an Opinion by the full Commission dated June 15, 1998, the Opinion of Deputy Commissioner Phillips was affirmed. (App. at 53-59.) The Employer has brought this appeal seeking reversal of the decision of the full Commission.

QUESTION PRESENTED

Whether any credible evidence supports the Commission's decision that the Employer had not met its burden of proving a change in condition such that Ms. Jones's current condition is not causally related to the original compensable incident of September 7, 1994.

STATEMENT OF THE FACTS

The determination that the Employer had failed to meet its burden of proving a change in condition such that Ms. Jones's current condition is not causally related to the original compensable incident of September 7, 1994 was made on the basis of a review of Ms. Jones's medical records. A significant fact that emerges from those records is that from the date of that incident to the present Ms. Jones has been able to obtain little or no relief from pain experienced in her back and buttocks area. Ms. Jones's attending physician throughout her ordeal has been orthopedist Andre Eagle Jr., M.D., who first saw Ms. Jones on September 9, 1994, two days after the work-related injury. (App. at 60.) In a report dated September 28, 1994, Dr. Eagle diagnosed Ms. Jones's condition as a lumbo-sacral spine sprain, which he specifically indicated was due to the occurrence described by Ms. Jones, i.e., that she injured her back helping transfer a patient. (App. at 69.)

On October 27, 1994, an MRI was conducted and compared to a previous MRI of June 10, 1991. This October 27 MRI showed a broad-based herniated nucleus pulposus (HNP) at the L4-5 level, considerably more prominent than on the previous examination, and a somewhat smaller HNP at L5-S1, also more prominent than on the previous examination. (App. at 71.) In a November 11, 1994 report, Dr. Eagle opined that Ms. Jones's injury warranted about a 10% disability and noted, "Obviously, lifting a patient may have caused the problem." (App. at 82.) On November 30, 1994, Dr. Eagle released Ms. Jones to return to part-time, light-duty work with temporary lifting restrictions. (App. at 84.)

On July 28, 1995, Dr. Eagle noted that Ms. Jones's progress had been exceptionally slow, and he thought that in reality she would never be able to be released to full-work status

and she would have a permanent disability. (App. at 108.) On November 20, 1995, he noted that she was still having the "same kind of pain that she usually experiences," and he opined that most of the pain "sounds like it may be related to fibromyositis." (App. at 109.) On January 26, 1996, he released her to full-duty secretarial work with a restriction of no bending at the waist and no lifting over 30 pounds. (App. at 109-10.)

In a report dated June 18, 1996, Dr. Eagle noted that Ms. Jones was in constant pain, and he suspected that her primary pain problem is fibromyalgia. He believed that the back problem was not fanning the fibromyalgia and that psychological factors were really more of an influence on her pain than the mechanical back problem. He felt that she could return to a level of work with restrictions such as not lifting over 30 to 40 pounds and avoiding a lot of repetitive bending. He noted that he felt these restrictions were fairly permanent and were based on her employment injury. He added that "fasciitis is a constant entity in her life and a lot of her inability to return back to her work is due to the fibromyalgia, not the mechanical back problem." (App. at 143.)

On September 5, 1996, Dr. Eagle stated that Ms. Jones had reached maximum medical improvement and was in a chronic pain pattern, "the pain emanating from fibromyalgia, chronic muscular pain, etc." (App. at 113.) He visualized no simple solution to her problem as far as her ability to tolerate pain and her level of activity. (App. at 113.) On January 30, 1997, he noted that she was seeing two doctors at the pain clinic and he also referred her to a chiropractor. (App. at 118.) By March 18, 1997, he agreed that the pain clinic was not helping her and that the chiropractor did not seem to be of any help. (App. at 118.)

On August 8, 1997, another MRI was taken for chronic left buttock pain. This showed a slight increase in the size of the small central HNP at L5-S1, with no change in the central HNP at L4-5. (App. at 122.) On August 18, 1997, he noted that there was no significant difference in the 1994 and 1997 MRI results. He did not believe she had a surgical back, but he agreed to refer her to two doctors at the pain clinic and to a neurosurgeon. (App. at 124.) She was seen by Dr. William R. White, a neurosurgeon, who offered no new suggestions and recommended continuation of her ongoing treatment as the best thing. (App. at 125-27.)

On October 9, 1997, Dr. Eagle noted his impression that Ms. Jones "has a chronic pain problem and it's not really clear what the source of the pain is; that is, it could be related to her chronic myofascial pain; it may be related to scar tissue in her back or just a chronic muscular problem." (App. at 129.) He reiterated that she had reached maximum medical improvement on September 5, 1996 and that she had not gained any improvement in all the years of treatment. He rated her at 2% impairment of the whole person, which was a 5% lumbar sacral spine impairment. (App. at 129.)

Despite Dr. Eagle's repeated observations in his reports that there were at least two, if not more, possible sources of Ms. Jones's continuing pain, and despite his admission on October 9, 1997 that he was not really clear what the source of her pain was, and without any further examination of Ms. Jones or any additional medical input appearing in the record, on November 6, 1997, he contradicted himself and reported:

> After treating Patricia Jones for several years and after evaluating her various tests, her various second opinions, and watching the course of her treatment,

> I have concluded that her present pain is not related to her accident of September 7, 1994.
>
> She is suffering from a chronic pain problem that stems from her fibromyalgia. I feel that this is a pre-existing condition and is not related to her industrial accident of September 7, 1994.

(App. at 3.)

On November 13, 1997, Ms. Jones was seen by Dr. Dale W. Pixel, a neurologist, to evaluate persistent left buttock pain. He noted several possibilities as sources of her pain:

> Left gluteal pain. Differential possibilities include strictly myofascial pain, may be piriformis syndrome. Cannot rule out sacroiliac joint pain referral, facet joint pain referral is a possibility and internal disk disruption would be yet another theoretical possibility. I do not think it is neuropathic in origin however.

.
(App. at 15.) He recommended a number of medical tests to be performed, stating: "Given her widespread musculoskeletal pain, would like to look for other causes other than fibromyalgia." (App. at 15.)

On December 11, 1997, Dr. Pixel noted that the X-rays from Dr. Eagle's office showed the disk space narrowing at L5-S1, and the MRI showed degenerative disks at L4-5 and L5-1 with some bulging both anteriorly and posteriorly, especially of L5-1. He decided to have a somatosensory evoked potential (SSEP) done, noting that "if the SSEP is abnormal, then only nerve root impingement either through the piriformis or from the disk would account for such an abnormality." (App. at 12.) In an addendum he noted: "The official radiology report of her August 8, 1997 MRI shows a slight increase in the size of the small HNP centrally at L5-S1. No change in the small central HNP at L4-5." (App. at 12.)

On December 17, 1997, Dr. Pixel reported on the results of the SSEP test: "Abnormal left sural SSEP. Such findings could be indicative of an abnormality between the point of stimulation to the S1 lumbar nerve root and could be seen in an S1 radiculopathy on the left." (App. at 11.)

ARGUMENT

I. THE FINDINGS OF THE FULL COMMISSION WITH RESPECT TO A CHANGE IN CONDITION AND WITH RESPECT TO CAUSATION ARE CONCLUSIVE AND BINDING ON THIS COURT WHEN SUPPORTED BY CREDIBLE EVIDENCE.

On this appeal, this Court is being asked to reverse the finding of the full Commission that Employer had failed to establish a change in condition such that Ms. Jones's current disability is not causally related to the original compensable accident of September 7, 1994.

The function of this Court on appeal from a finding of the full Commission is to determine whether credible evidence exists to support the finding of the Commission and, in making this determination, the appellate court does not retry the facts, reweigh the preponderance of the evidence, or make its own determination of the credibility of the witnesses. *E.g., Caskey v. Dan River Mills, Inc.,* 225 Va. 405, 302 S.E.2d 507, 510 (1983); *Wagner Enterprises, Inc. v. Brooks,* 12 Va. App. 890, 407 S.E.2d 32, 35 (1991); *Jules Hairstylists, Inc. v. Galanes,* 1 Va. App. 64, 334 S.E.2d 592, 595 (1985). As held by the Virginia Supreme Court in *E.C. Womack, Inc. v. Ellis*, 209 Va. 588, 166 S.E.2d 265 (1969), a finding with respect to a change in condition is a finding of fact. See also 3 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 80.21(b) at 15-656 to 15-666 (1994), where Professor Larson states in relevant part: "It is the Commission's function to

weigh the evidence and make findings on questions of fact, which includes such matters as . . . change in condition" (footnotes omitted).

The principles governing this Court's scope of review from a finding of fact by the full Commission are well established under Virginia law. Va. Code Ann. § 65.2-706 (Michie 1991 & Supp. 1994) provides that an award of the full Commission entered after review of an award at an initial hearing shall be conclusive and binding as to all questions of fact. The Virginia courts repeatedly have stated and applied the rule that the Commission's findings of fact are conclusive and binding on an appellate court if based on credible evidence. *E.g., Ohio Valley Construction Co. v. Jackson*, 230 Va. 56, 334 S.E.2d 554, 556 (1985) (noting that the Commission's finding with respect to a change in condition was a finding of fact, binding on appeal); *Caskey v. Dan River Mills, Inc*., 302 S.E.2d at 510; *Sky Chefs, Inc. v. Rogers*, 222 Va. 800, 284 S.E.2d 605, 607 (1981); *Batal Builders, Inc. v. Hi-Tech Concrete, Inc*., 18 Va. App. 401, 444 S.E.2d 555, 557 (1994); *Pantry Pride-Food Fair Stores, Inc. v. Backus*, 18 Va. App. 176, 442 S.E.2d 699, 702 (1994); *Barnes v. Wise Fashions*, 16 Va. App. 108, 428 S.E.2d 301, 302 (1993); *Wagner Enterprises, Inc. v. Brooks*, 407 S.E.2d at 35; *Island Creek Coal Co. v. Breeding*, 6 Va. App. 1, 365 S.E.2d 782, 788 (1988); *Jules Hairstylists, Inc. v. Galanes*, 334 S.E.2d at 595.

Similarly, the Virginia Supreme Court has held that a determination by the full Commission as to a causal relationship is conclusive and binding on appeal when the Commission's finding is supported by credible evidence. *Watkins v. Halco Engineering, Inc.,* 225 Va. 97, 300 S.E.2d 761 (1983).

II. THE EMPLOYER FAILED TO INTRODUCE ANY CREDIBLE EVIDENCE IN SUPPORT OF ITS POSITION THAT MS. JONES HAS EXPERIENCED A CHANGE IN CONDITION SUCH THAT HER CURRENT CONDITION IS NO LONGER CAUSALLY RELATED TO THE ORIGINAL COMPENSABLE INJURY OF SEPTEMBER 7, 1994.

As a preliminary matter, it is noted that Black's Law Dictionary at 366-67 (6th ed. 1990) defines "credible evidence" as follows:

> Evidence to be worthy of credit must not only proceed from a credible source but must, in addition, be "credible" in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates as to make it easy to believe it, and credible testimony is that which meets the test of plausibility.

It is not suggested here that Dr. Eagle is not a credible source. However, it is suggested that, although the Opinion of the full Commission in this case does not contain an express finding that the statement in Dr. Eagle's letter of November 6, 1997, in which he opined that Ms. Jones's condition at that time was a preexisting condition and was not related to her industrial accident of September 7, 1994, was not credible evidence, the Opinion does contain a clear inference that the Commission found this to be the case. In concluding that the Employer had failed to establish by a preponderance of the evidence that Ms. Jones's then-existing disability was unrelated to the September 7, 1994 compensable accident, the full Commission noted:

> In reaching this conclusion, we note that while Dr. Eagle is the treating physician, he noted as late as October 9, 1997, that it was not clear what the source of the claimant's pain was, and that it could be related to the chronic myofascial pain, scar tissue in her back or muscular problems. The record contains no medical report between that date and the doctor's November 6, 1997, letter indicating that the claimant's condition is solely unrelated to the accident. We note in his November 11, 1997, office note, Dr. Eagle still provides a diagnosis of chronic back pain.

(App. at 58.)

Now it may be that Dr. Eagle conducted additional medical examinations or tests or consulted some additional medical information during the short time period of less than 30 days between his notation of October 9, 1997 and his November 6, 1997 letter. If so, such evidence was not brought to the attention of Deputy Commissioner Phillips or the full Commission. On the evidence in the record in this case, Dr. Eagle suddenly changed his opinion from that which he had held for over three years, that there was more than one possible source of Ms. Jones's pain and that he was not sure what the source of her pain was, to the opinion that he knew precisely what the source of her pain was, without any indication whatsoever of even the slightest basis for such a change in his opinion.

The Employer attempts to gloss over this problem by asserting that "Dr. Eagle's October 9, 1997 office note is not in any way inconsistent with his November 6, 1997 opinion" in that, in both reports, he concludes that Ms. Jones suffers from a chronic pain problem and his "unequivocal November 6, 1997 opinion simply represents his logical conclusion regarding Ms. Jones's condition after studying her various second opinions and following her course of treatment for several years, a part of which was his October 9, 1997 office note." (Brief of Appellants at 6.) However, when Dr. Eagle wrote his office note on October 9, 1997, he also was expressing a logical conclusion regarding Ms. Jones's condition after studying her various second opinions and after following her course of treatment for several years. The question arises as to what possibly could have caused Dr. Eagle to make such a drastic change in his opinion. The record is silent on this point, and logic and reason are powerless to provide an explanation as to why such a significant change in opinion could

be made in such a short period of time in the absence of some evidentiary basis that was not before Deputy Commissioner Phillips or the full Commission.

It is submitted that the Commission recognized this fact and inferentially concluded that Dr. Eagle's November 6, 1997 opinion simply was not credible evidence. This Court also should hold that this evidence is not credible. Since it is the only evidence submitted by the Employer in support of its position that Ms. Jones's current condition is not causally related to the original compensable injury of September 7, 1994, there is a complete absence of credible evidence on this point. The Employer's position that the Opinion of the full Commission should be reversed should be rejected by this Court on this ground.

III. THERE IS CREDIBLE EVIDENCE TO SUPPORT THE FINDING OF THE FULL COMMISSION THAT THE EMPLOYER FAILED TO ESTABLISH MS. JONES'S ACCIDENT HAS NOT AT LEAST CONTRIBUTED TO HER CURRENT DISABILITY.

It is well established in Virginia that, where a disability has more than one cause, benefits will be allowed if it is proved that the employment is a contributing factor to the disability. *Smith v. Fieldcrest Mills, Inc.,* 224 Va. 24, 294 S.E.2d 805 (1982); *Bergmann v. L&W Drywall*, 222 Va. 30, 278 S.E.2d 801 (1981). It also is well established that it is solely within the province of the Commission to decide what evidence, if credible, is entitled to greater weight. *McPeek v. P.W.&W. Coal Co.,* 210 Va. 185, 169 S.E.2d 443 (1969); *Island Creek Coal Co. v. Honaker*, 9 Va. App. 336, 388 S.E.2d 271 (1990). As stated by the *Honaker* court:

> As fact finder, the commission is charged with evaluating all of the evidence presented, including the medical opinions, and reaching its decision based on its reasoned review of the evidence. A greater number of medical opinions does not necessarily constitute a preponderance of the evidence. In its review,

> the commission is entitled to decide what evidence, if credible, is entitled to greater weight. *McPeek v. P.W.&W. Coal Co.*, 210 Va. 185, 188, 169 S.E.2d 443, 445 (1969).
>
> The commission's findings of fact, if supported by credible evidence, are binding on appeal. *Dublin Garment Co. v. Jones*, 2 Va.App. 165, 167, 342 S.E.2d 638, 638 (1986). A question raised by conflicting medical opinions is a question of fact. *Eccon Constr. Co. v. Lucas*, 221 Va. 786, 790, 273 S.E.2d 797, 799 (1981).

388 S.E.2d at 273.

The Employer appears to argue that the Commission erred in giving consideration to the medical opinions of other physicians, such as Dr. Pixel. The Employer notes the general rule that the opinion of an attending physician will be given great weight when he is positive in his diagnosis of a disease. The Employer goes on to state that a "limited exception" applies to this rule when the attending physician's diagnosis is shaded by doubt and there is medical expert opinion contrary to the opinion of the attending physician, citing *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 339 S.E.2d 570 (1986). (Brief of Appellants at 4.)

However, it is noted that the rule states that the opinion of an attending physician will be given great, not conclusive, weight. In addition, as discussed above, Dr. Eagle's opinion is far more than merely shaded by doubt. Under these circumstances, the applicable rule is the rule stated above, that it is solely within the province of the Commission to decide what evidence, if credible, is entitled to greater weight. Thus, even if this Court should determine that Dr. Eagle's opinion of November 6, 1997, that Ms. Jones's chronic pain problem stems from her fibromyalgia and is not related to her industrial accident of September 7, 1994, is credible evidence, the opinions of other physicians were entitled to consideration by Deputy Commissioner Phillips and by the full Commission.

There is ample credible evidence to support the finding of the full Commission that the Employer failed to establish that Ms. Jones's accident did not at least contribute to her current disability. Dr. Eagle's medical opinions themselves are contradictory on this point. Dr. Pixel indicates a number of possible sources for Ms. Jones's pain, including the fact that the abnormal SSEP indicates "an abnormality between the point of stimulation to the S1 lumbar nerve root." The Commission properly weighed the medical testimony presented in this case and correctly concluded that the Employer had failed to carry its burden of proof.

CONCLUSION

For the reasons stated above, Appellee, Patricia B. Jones, respectfully requests this Honorable Court to affirm the Order of the full Commission affirming the Opinion of Deputy Commissioner Phillips reinstating, effective November 26, 1997, the November 14, 1997 Award of the Virginia Workers' Compensation Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Va. Sup. Ct. R. 5A:19(e), the undersigned hereby certifies that seven (7) copies of Appellee's Brief have been filed with the Clerk of the Court of Appeals of Virginia and further certifies that three (3) copies were mailed via first-class postage to all counsel of record on this the ____ day of October 1998.

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