Employer's Application for Hearing

The Honorable Linda Gillen, Deputy Commissioner
Casey Ariail, Esquire
Tenley Carroll Seli, Esquire

Va. Code § 65.2-708 provides the Commission with the power to review any award of compensation upon its own motion or upon the application of any party in interest. The Commission may make an award ending, diminishing or increasing the compensation previously awarded.

An employer cannot unilaterally terminate wage loss benefits when a claimant is under an open award, whether for temporary total or temporary partial disability benefits. If the claimant disagrees with the termination of the award, the employer must file an Employer's Application for Hearing to obtain a Commission ruling on the issue before benefits may be terminated.

Rule 1.4 of the Rules of the Commission governs the filing of an Employer's Application for Hearing and sets forth the technical requirements for the filing of an Application.

Commission's Process for Review of Employer's Application for Hearing

1. **Technical Review**. Upon filing, the Commission's Claim Services Department will screen an employer's application for hearing based on a change in condition for technical compliance with Commission Rule 1.4. Any technical deficiency will result in immediate rejection of the application and the issuance of an order directing the resumption of benefits pursuant to the outstanding award.

A. During the technical review process, the Commission will determine if the application satisfies all the various requirements of Rule 1.4:

- Subsection A requires that a copy of the employer's application and supporting documentation be sent to the employee and to the employee's counsel if represented.

- Subsection B requires that an employer's application for hearing based on a change in condition: (i) be in writing; (ii) be made under oath; (iii) state the grounds and the relief sought; and (iv) state the date for which compensation was last paid.

- Use of the current employer's application form available on the Commission's website (www.workcomp.virginia.gov) is recommended. This form does not require notarization because it contains a certificate stating that it is signed under penalty of perjury, which satisfies the requirement that it be made under oath.

However, if the Commission's prior application form is used, it must be notarized since it does not contain the penalty of perjury language. Variations on the penalty of perjury language are not sufficient. For example, in Dimas v. Town & Country Landscaping, Inc., JCN VA00000379161 (Dec. 1, 2014), the Commission held that an employer's application executed by counsel with the statement "I swear to the above" was technically defective because it was not submitted under oath as evidenced by either a notary public's seal or the certificate prescribed by the Commission. Note that applications for relief filed by an employer or carrier pursuant to other sections of the Virginia Workers' Compensation Act, such as Va. Code §65.2-712 for failure to report incarceration or a change in income, need not be made under oath.

- Subsection C requires that compensation be paid through the date the application was filed except in certain circumstances. If the same application alleges multiple grounds, payment may be suspended based on the payment requirements of the allegation allowing the earliest termination date.

- Subsection E and Va. Code §65.2-708 require that an employer's application based on a change in condition must be filed within two years of the date compensation was last paid under the award, even if the claimant returned to work. See, for example, Washington Post v. Fox, 49 Va. App. 692, 644 S.E.2d 105 (2007).

B. The most common reasons for technical rejections of employer's applications are:

1. The application was not completed, signed, and either notarized or signed under penalty of perjury;
2. Compensation was not paid through the proper date;
3. Compensation was not paid within two years of the date of filing;
4. The reason for filing was not clearly specified;
5. The application failed to specify the date through which compensation was paid (merely noting "on or about" is not sufficient);
6. The application alleged the claimant failed to market his or her remaining capacity when the employee is on an open award;
7. The application alleged the claimant failed to sign an agreement form; and
8. Anticipatory release to work (beyond seven days). See, for example, Counterman v. Providence Elec. Corp., 71 O.W.C. 81 (1992).

2. **Probable Cause Review.** If the employer's application is technically correct, it proceeds to a probable cause review. Per Rule 1.5, the injured worker has 15 days to submit evidence and argument concerning why the application should not be accepted. At the conclusion of this 15-day period, a Commission staff attorney will review the file to determine whether there is probable cause to suspend benefits pending a hearing.

A. **Lack of Probable Cause -- Rejection.** If the employer's application is rejected in whole or in part for lack of probable cause, the Commission will issue a written

decision outlining the reasons for the rejection. The employer will be ordered to reinstate benefits. Per Commission Rule 1.4(F), if rejected for lack of probable cause, at the request of the employer the application nevertheless will be referred to the docket and heard provided the payment of compensation continues in accordance with the outstanding award.

B. **Probable Cause Found – Docket Referral.** If probable cause is found, the employer's application will be referred for either an on-the-record or an evidentiary hearing. In such circumstances, the parties will receive either a Notice of On The Record Hearing or a Notice of Referral of Application to Docket depending on the docket to which the application was referred. This is the only notice that the Commission will issue. It will not issue a written decision explaining the reasons for the probable cause finding as it does when it rejects an application for lack of probable cause.

C. **Multiple Allegations.** If multiple allegations are made on an employer's application, each allegation will be examined separately. If probable cause is found on some allegations but not on others, a written decision will be sent to the parties noting which allegations are rejected and which are docketed.

D. **Successive Applications**. If an employer files successive applications, the first application filed for which probable cause is found controls the date through which compensation must be paid. An employer who files a second application while a rejection of a previous application is on review must comply with the payment requirements of Rule 1.4 if the full Commission affirms the first rejection. If the first application is rejected, payment must be made until the date the second application was filed. Each successive employer's application will be subject to the same technical and probable cause reviews as the initial application, even if the initial application was accepted and docket.

3. Appealing the Acceptance or Rejection of an Employer's Application

A. Either party may request review of a decision accepting or rejecting an employer's application within 30 days of the date of the decision in accordance with Rule 1.6 of the Rules of the Commission.

B. A Schedule for Written Statements will not be issued in connection with such reviews. Rather, the request for review should "specify each determination of fact and law to which exception is taken" and the appealing party should argue its position in the request for review. Upon filing of the review request, the Clerk will issue a Notice of Receipt of Request for Review, which triggers a 10-day period during which the opposing party may file a written response to the request for review. At the conclusion of the 10-day period, the record will close and the matter will proceed to a decision by the full Commission. Per Commission Rule 1.6(D), "[o]nly information contained in the file at the time of the original decision along with the review request and any response from the opposing party will be considered. Additional evidence will not be accepted."

C. A request for review is the only means by which a party may contest the acceptance or rejection of an employer's application. A Deputy Commissioner does not have jurisdiction or authority to overrule a decision accepting or rejecting an employer's application. Estate of Giers v. Francis N. Sanders Nursing Home Inc., VWC File No. 200-72-25 (Jan. 30, 2008), aff'd, No. 0332-0801 (Ct. of Appeals, June 3, 2008, unpublished). If referred to the docket, the Deputy Commissioner must consider the merits of the application unless it is withdrawn or dismissed on other procedural grounds such as a failure to comply with discovery.

D. A decision by the full Commission on a request for review of the acceptance or rejection of an employer's application is a final decision and is appealable to the Virginia Court of Appeals within 30 days of its issuance pursuant to Va. Code §65.2-706.

Traps for the Employer

1. **Technical Considerations**. Rule 1.4(C) of the Rules of the Commission state that compensation shall be paid through the date the application was filed, unless:

A. The application alleges the employee returned to work, in which case payment shall be made to the date of the return.

B. The application alleges a refusal of selective employment or medical attention or examination in which case payment shall be made to the date of refusal or 14 days before filing, whichever is later.

C. The application alleges a failure to cooperate with vocational rehabilitation, in which case payment must be made through the date the application is filed.

D. An employer files successive applications, in which case compensation shall be paid through the date required by the first application. If the first application is rejected, payment shall be made through the date required by the second application.

- If an employer files an application for hearing to suspend or terminate benefits while a deputy commissioner's decision awarding benefits is on review, the employer need not pay benefits at this time the application is filed. After a final decision on review or appeal is entered, the employer is in compliance with Rule 1.4 if at that time it makes payment of the benefits owed through the date it filed the employer's application. *Gallahan v. Free Lance Star Publishing*, 41 Va. App. 694, 589 S.E.2d 12 (2003).

- When first application is pending on review, employer does not have to pay to the date of the second application. *Nick Stone v. Oceanside Carpenters*, JCN VA000-0141-6702 (May 29, 2019).

- The same application asserts multiple allegations, in which case payment is determined by the allegation that allows the earliest termination date.

E. Where an Employer's Application for Hearing is filed more than two years after the claimant returned to work earning a wage at or above the average weekly wage, the employer must pay compensation through a date no less than two years prior to filing its application. *Diaz v. Wilderness Resort Ass'n.*, 56 Va. App. 104, 691 S.E.2d 517 (2010).

- A limited except to this general rule can be found in *Lam v. Kawneer Company, Inc*., 38 Va. App. 515, 566 S.E.2d 874 (2002). In that case, the defendants unilaterally ceased payment under an outstanding award without filing an Employer's Application for Hearing. The Commission found their equitable powers permitted the termination of an award six years later. "It is neither logical, reasonable, nor within the spirt of the Act to award benefits when a worker is not entitled to them." The claimant is not entitled to six years of back benefits or to penalties on this amount. *Lam v. Kawneer Company, Inc*., 38 Va. App. 515, 566 S.E.2d 874 (2002).

- See also *Ross v. Pony Express*, 71 O.I.C. 99 (1992), holding the Commission may accept "an otherwise proper application" alleging a violation of Va. Code § 65.2-711 if benefits were not paid within two years from the date of application because, otherwise, an employer would be unable to seek suspension of an award for an employee who could not be located.

F. Commission found benefits were timely paid pursuant to Rule 1.4 where the payment check and the application bear the same date and the payment is postmarked the following day, is not unreasonable in light of the purpose of the rule to police the tendency of employers and insurers to terminate first and litigate later. *Boyd v. People, Inc.*, 43 Va. App. 82, 596 S.E.2d 100 (2004). But the employer's untimely filing of an application for hearing may not be excused even where the result is to enrich the claimant. *Genesis Health Ventures, Inc. v. Pugh*, 42 Va. App. 297, 591 S.E.2d 706 (2004).

G. Failing to file a copy of an employer's application with the claimant's counsel may be a violation of due process. *Jones v. Goodwill Industries of Hampton Roads*, 79 O.W.C. 1 (2000).

2. **Probable Cause Standard**. An Employer's Application for Hearing must include documentation in support of the grounds alleged by the employer. This documentation must give probable cause to believe the employer's grounds for relief are meritorious. *Circuit City Stores v. Scotece, Inc*., 28 Va. App. 383, 386, 504 S.E.2d 881, 883 (1998).

The phrase "probable cause" does not appear in the Act or in the Commission's Rules but is commonly used to describe the standard for accepting an employer's application. The Virginia Court of Appeals has instructed that

> [a]n employer's application for hearing will be deemed not "technically acceptable" and will be rejected unless the employer's designated supporting documentation is sufficient to support a finding of probable

> cause to believe the employer's grounds for relief are meritorious. The Commission has defined the standard of "probable cause" as "[a] reasonable ground for belief in the existence of facts warranting the proceeding complained of." Circuit City Stores v. Scotece, 28 Va. App. 383, 504 S.E.2d 881 (1998).

In other words, the information submitted with the application must show the likelihood of success on the merits of the allegations contained in the application. In making a probable cause determination, the examiner may weigh the medical evidence presented by both sides. See, for example, Shelton v. Froehling & Robertson, Inc., VWC File No. 211-48-67 (Dec. 31, 2003).

Probable cause is defined as "[a] reasonable ground for belief in the existence of facts warranting the proceeding complained of." Circuit City Stores v. Scotece, Inc., 28 Va. App. 383, 386, 504 S.E.2d 881, 883 (1998). Probable cause exists if the facts and circumstances are sufficient to justify a prudent and reasonable person in the belief that the allegations, if true, would prevail. Giant of Va. V. Pigg, 207 Va. 679, 684, 152 S.E.2d 271, 276 (1967). The Supreme Court of Virginia has held that reasonable grounds for defending a case exists when existing facts would induce a reasonable mind to believe that compensation is at least doubtful. City of Norfolk v. Lassiter, 228 Va. 603, 606, 324 S.E2d 656, 658 (1985).

3. **Evidence of Probable Cause**.

A. Return to Work

- The employer filed an application alleging the claimant returned to light duty work, and in support of the application, filed a medical record with a handwritten note stated "Uber" and "Driving for living" next to a plus mark with a circle. The Commission found the note was sufficient to establish reasonable grounds for the claimant had returned to light duty work. Reversal of rejection of application. Marin v. CVS Pharmacy, Inc., JCN VA000-0114-6285 (Sept. 5, 2017).

B. Release to Work

- Employer filed application alleging the claimant was released to pre-injury employment, relying upon medical opinion of a neurologist who released the claimant to full duty work and stated any residual disability was unrelated to the work injuries. The claimant provided medical evidence in opposition, including opinions from her treating orthopedist, pain management physician, and orthopedic spine surgeon as well as evidence that she was referred for arthroscopic surgery just days before application was filed. Commission found that there was not probable cause to refer the claim to the docket because the claimant's condition was not just neurological, she was being seen by several specialists, and the evidence

did not address the other causes of disability related to the work accident. Reversal of referral to docket. Perez v. Federal Express Corp., JCN VA000-0043-5751 (Nov. 20, 2018).

- Parties entered a stipulated award order that included a stipulation that the parties agreed the claimant was not entitled to temporary total disability or temporary partial disability during any periods of partial work incapacity based on his immigration status. When claimant was released to work, employer filed application for hearing seeking termination of award, relying upon the light duty release and the parties' stipulation. In response, the claimant asserted that the stipulation incorrectly stated his immigration status and he filed multiple documents to support his allegation. The Commission found the parties' evidence established a factual dispute regarding whether the claimant was eligible for temporary total disability benefits and whether the stipulated order was a mistake. Reversal of rejection of application by staff attorney. Padilla Claros v. Skyline Concrete Plumping Inc., JCN VA000-0150-3301 (July 12, 2019).

- Employer filed application alleging a return to pre-injury work based on a Functional Capacity Evaluation (FCE) approved by the treating physician and a sworn affidavit provided by the employer stating that he had reviewed the FCE and disability ratings and that based on his personal knowledge, he believed the restrictions noted in the FCE were within the requirements of the claimant's pre-injury employment. The Commission found that the evidence from the employer described the physical demands of the pre-injury work and was the equivalent of an employer's affidavit upon an allegation of unjustified refusal of selective employment. Referral to docket affirmed. Carter v. Christopher Construction, JCN VA000-0137-0485 (Sept.7, 2018).

- Employer filed an application alleging the claimant was released to pre-injury work based on a Functional Capacity Evaluation (FCE) stating that the claimant could perform work at a "Heavy Physical Demand Level," she was capable of pre-injury work, and the treating physician stated "Agree [with] summary" on the FCE. The claimant objected, asserting there is no overhead lifting ability listed in the job description used for the FCE, but that the claimant was injured when he lifted a truck hood, which weighed in excess of his lifting ability. The Commission acknowledged the claimant's disagreement with the accuracy of the job description, but found that reasonable doubt existed because there was sufficient evidence that the claimant could perform the job duties that were listed on the FCE approved by the doctor. Affirmed referral to docket. Putman v. Nationwide Mutual Insurance Co., JCN VA000-0115-5955 (March 16, 2018).

C. Refusal of Selective Employment

- Employer filed application alleging the claimant refused selective employment based on a letter from the employer offering sedentary employment, reports form two IMEs stating the claimant could work, a letter from the claimant refusing the employment because it violated his work restrictions, and a note from the treating physician taking the claimant out of work. The claimant responded, attaching a note from the treating physician which took the claimant out of work for another three months, noting that the job offer did not include transportation when the claimant could not drive, and pointing out that one of the IME reports noted that the claimant needed to consider a below the knee amputation. The Senior Claims Examiner referred the Application to the hearing docket and the claimant requested review. The Commission held that even the Application indicated that the treating physician had taken the claimant out of work and that, at the time of the filing of the application, the offer of employment did not accommodate the driving restrictions. Reversal of referral to docket. Strickland v. LifeCare, JCN VA000-0121-5499 (Nov. 5, 2018).

D. Causation of Current Disability

- "[A]n employer has a right to apply for termination of benefits upon an allegation that the effects of the injury have fully dissipated and the disability is the result of another cause." Celanese Fibers Co. v. Johnson, 229 Va. 117, 120, 326 S.E.2d 687, 690 (1985).

- Questionnaire response from treating physician specifically stating that claimant's osteoarthritis was in the lateral compartment of the knee, a different location than the medial meniscus tear, which he had surgically resected. The treating physician agreed the claimant's continuing symptoms and need for additional treatment and physical limitations were attributable to osteoarthritis rather than the meniscal tear. He further that the claimant's osteoarthritis was not causally related to the accident. He placed no limitations on the claimant due to the medial meniscus tear. Kendrick v. K-VA-T Food Stores, Inc., JCN VA00001431486 (Jan. 10, 2018).

E. Refusal of Medical Treatment

- Documentation of two appointments with treating physician constituted a factual dispute as to whether the claimant unjustifiably refused medical treatment. Affirmed referral to hearing docket. Palmer v. Dominion Packing, Inc., VA000-0136-2994 (June 18, 2019).

F. Failure to Report Earnings

- Employer filed application alleging the claimant had violated Va. Code § 65.2-712 by failing to disclose a return to employment and/or a change in his earning status. The application relied upon affidavits from two private investigators attesting to the claimant's working at Red's Fish Lake, one of whom stated that he observed the claimant greeting customers, collecting money, selling supplies and bait and enforcing rules at the weigh-in area. The claimant asserted that there was no evidence that he experienced an increase in earnings that would need to be reported, and alleged that he did not perform any work or labor for which he was paid compensation and he had not been paid wages, compensation or money of any type to work. The Commission found that there was sufficient evidence to establish that probable cause existed that the claimant returned to employment or had an increase in earnings. Affirmed referral to docket. Goins v. McGraw Trucking, Inc., JCN VA000-0103-1990 (Nov. 20, 2018).

G. Failure to Cooperate with Vocational Rehabilitation

- A claimant's single absence at a single counseling session or interview is not sufficient to demonstrate a refusal to participate in vocational rehabilitation. The employer alleged the claimant missed a single job interview when he showed up so late that the prospective employer had to reschedule for the next day. The claimant attended the rescheduled interview. And the employer alleged no other facts demonstrating the claimant had a history of not cooperating with vocational rehabilitation. James Stone v. Skyline Automotive Inc., JCN VA00000262486 (May 22, 2019); see also Newport News Shipbuilding & Dry Dock Co. v. Lawrence, 38 Va. App. 656, 662-63, 568 S.E.2d 374, 376-378 (2002).

Claimant Considerations Upon Filing of Employer's Application for Hearing

1. Does the application meet all the technical requirements? Commission Rule 1.4(B).

   A. Be in writing
   B. Under oath
   C. State grounds of relief
   D. State date compensation last paid
   E. Not statutory, but always check the average weekly wage listed matches with the award.

2. If technically acceptable, the claimant **has 15 days** to respond to the application at the probable cause stage. Commission Rule 1.5(C).

3. Through what date was the claimant paid? Commission Rule 1.4(C).

A. Practical Pointers.

- Send request for production immediately to carrier for payment information for the last check paid, including the amount, date processed and issued. Also send requests for production for history of all prior payments.
- Ask client immediately for copy of last check.
- Check the amounts with the award order.

B. Rules.

- If return to work, must be paid through date of return.
- If refusal of selective employment, through date refused or 14 days before.
- Of failure to cooperate with vocational rehabilitation then must be paid through the date application was filed.
- If a successive application, then through the date of the first application.
- If multiple allegations, then the allegation that allows for earliest termination.

C. Governing Law on Payments.

- Can only reach back two years. Va. Code § 65.2-708

- "Filed" is when the application is actually received by the Commission. The date an application is faxed or mailed is irrelevant for purposes of determining the last date paid. McRea v. Int'l Sewer Service, Inc., 75 O.W.C. 71 (1996).

- The Commission and Court of Appeals strictly adhere to these payment rules. Payment after application of two days of temporary total due before the application held void. Specialty Auto Body v. Cook, 14 Va. App. 327, 329, 416 S.E.2d 233, 234 (1992).

- Compensation benefits are "paid" when payment is sent to the claimant at his current address. Stadtherr v. Southern Air, Inc., 74 O.W.C. 24 (1995)

- Commission found employer's application void because one day of prior temporary total was paid a day after the application was filed. Johnston v. Giant Food, VWC File No. 213-96-83 (May 1, 2007).

- Commission held that an Employer's Application was void because the adjuster processed the check on the date of the application, but the check was not issued until three days later. Cromer v. Unifirst Corp., VWC Fil No. 219-71-37 (Jul. 31, 2006).

- Commission held that an application was void and defective because the employer failed to pay the claimant for two weeks preceding the application as of the date of the application. Mullins v. T&J Trucking, VWC File No. 153-33-19 (Oct. 25, 1994).

- If payment improper, then the application is void ab initio (from the beginning) and this can be raised at any time, including at the hearing itself. “Nothing in Rule 13 [now Va. Workers’ Comp. R. 1.4(C)] requires that the defect in the application be assailed prior to the evidentiary hearing” See Cook, 14 Va. App. 332, 416 S.E.2d at 236.

4. Are the allegations sufficient for probable cause?

   A. If the application is technically acceptable and the claimant has properly been paid, then the claimant should turn his/her attention to the merits of the argument.

   B. Practical pointer: Do you want to divulge your arguments at this early stage? Many times, the application may have enough evidence to support a referral to the docket. In those circumstances, I try to weigh the benefits of filing a response versus waiting to develop the case in litigation.

5. Stale Evidence.

   - The Commission has a longstanding policy of rejecting “stale” medical evidence. Pritt v. Pittman's Tree & Landscaping, Inc., VWC File No. 234-48-35, 2009 WL 2204811, at *1 (Va. Workers' Comp. Comm. July 17, 2009).

   - The Commission reasons that the evidence is “too remote in point of time to justify suspension of compensation now.” Hall v. Mader Constr. Corp., VWC File No. 167-16-26 (July 2, 1997) (vocational rehabilitation failure to comply was a year old); see also Handy v. Am. Road Markings, Inc., VWC File No. 238-58-46 (Dec. 18. 2009) (medical evidence 7 months old); Dennis v. Air Wisconsin Airlines Corp., VWC File No. 224-64-07 (June 21, 2007) (medical evidence a year old); Alvarez v. WSC Warehousing & Packing, Inc., VWC File No. 223-54-19 (Sept. 6, 2006) (medical evidence over three months old rejected); McElvy v Cottman Transportation, VWC File No. 216-32-07 (October 20, 2004) (held that medical evidence that was more than three months old at the time of filing of the employer's application)

   - This is an important point for claimants to understand in contesting employer’s applications in the 15-day response time.

6. Medical evidence does not account for all body parts.

   - An application alleging a release to work or some other allegation must account for all body parts listed on the award. If not, the claims examiner will most likely reject the application.

7. Vocational Rehabilitation – failure to cooperate

    - Most of these claims, unless they fail for staleness, for lack of medical support or some other threshold finding, will find their way to the docket.

    - Practice pointer: Always take the deposition of the vocational rehabilitation counselor.

    - Successfully defending these applications lies almost solely on the claimant's ability to keep proper documentation. At the outset of any vocational rehabilitation, tell your claimant to **document**.