



JUNE 2021 E-NEWSLETTER

Recent Deputy Commissioner Opinions finding claimant marketing efforts unreasonable

As our clients know, when a claimant is partially disabled and is not on an open indemnity award, the claimant has the duty to market his/her residual work capacity and try to find a new job. The Commission must assess whether the claimant made a good faith effort to obtain work within the claimant's capabilities, including evaluation of the factors discussed in *Ford Motor Co. v. Favinger*, 275 Va. 83, 90, 654 S.E.2d 575, 579 (2008). The marketing evidence and analysis has evolved now that most claimants choose to apply for jobs online. The cases outlined below discuss recent opinions in which our firm has prevailed on the defense that a claimant's marketing was insufficient.

CASE 1: Through discovery, we obtained job descriptions for most job postings and copies of direct messages from employers to claimant within the Indeed website. In finding marketing unreasonable, the Deputy Commissioner noted that numerous job search efforts were repeated on the marketing log, that the claimant could not say whether she responded to direct messages from employers on Indeed, and that for the "cold calls" made to employers, the claimant did not prove she had a reasonable basis to believe a job within her restrictions might be available.

CASE 2: The vast majority of the claimant's job search efforts involved contact with employers for jobs that were similar to his pre-injury employment, which his restrictions prevented him from doing. In finding marketing efforts insufficient, the Deputy Commissioner held that "[f]rom the beginning of the claimant's search, what was or should have been readily apparent to the claimant is that restricting his searches to mechanical contracting would render few if any viable job opportunities."

CASE 3: The claimant applied for a sufficient quantity of jobs, but the job search was not done in good faith. The Deputy Commissioner stated that "during cross examination, the claimant essentially agreed that when he stopped receiving payments from the defendants, he learned that in order to receive temporary total disability, he had to go through the motions of appearing to look for work. He also agreed on cross-examination that he did not intend to accept any job offered to him as a result of his job search efforts because he wanted to work for [the employer] and knew that he would do so at some point."

The takeaway from these recent opinions?

Push for more documentation from the claimant through discovery requests by defense counsel or informal requests from the adjuster (such as Indeed internal messages and job descriptions for every job posting) and utilize cross-examination to point out facts that may demonstrate the claimant was not making a reasonable effort to find a job within his/her abilities.