

COURT OF APPEALS OF VIRGINIA

Present: Judges Moon,\* Willis and Elder  
Argued at Richmond, Virginia

JAMES A. ROBINSON

v. Record No. 0861-97-2

OPINION BY  
JUDGE NORMAN K. MOON  
NOVEMBER 25, 1997

TREGO STONE CORPORATION  
and NIAGARA FIRE INSURANCE COMPANY

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

Brian J. Cuscé for appellant.

James G. Muncie, Jr. (Midkiff & Hiner, on  
brief), for appellees.

James A. Robinson suffered a compensable injury in 1989. The commission awarded him temporary total disability benefits in 1989 but suspended that award in 1991 because of his third-party recovery. In 1996, Robinson applied for a new offset calculation based on Code § 65.2-313. Code § 65.2-313 was enacted in 1994 and requires offset calculations and proportionate payments of litigation expenses incurred in obtaining a third-party award which suspends, in whole or in part, an employer's workers' compensation obligations. Robinson noted that absent such recalculation, he would not be entitled to additional payments of the employer's pro rata share of his litigation expenses until he has expended the entire third-party award. The commission found that the 1991 order was final and thus rejected his application.

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\*When the case was argued Judge Moon presided. Judge Fitzpatrick was elected Chief Judge effective November 19, 1997.

We agree with the commission and affirm.

Modification of Final Orders

If an application for review of a final order of the commission is not made within twenty days of the date of the order, the commission has no jurisdiction to review the matter unless the petitioning party alleges fraud or mistake in the procurement of the award. McCarthy Electric Company, Inc. v. Foster, 17 Va. App. 344, 345, 437 S.E.2d 246, 247 (1993) (citing Code § 65.2-705(A)). Because Robinson failed to meet this time requirement and has not alleged fraud or mistake, the commission correctly found that it lacked authority to modify the 1991 order.

Robinson contends that the legislature intended that Code § 65.2-313 be applied retroactively. We need not address that issue because even if the statute could be applied retroactively, it could not be used to modify the 1991 order because Robinson failed to allege fraud or mistake. See Buenson Division, Aeronca, Inc. v. McCauley, 221 Va. 430, 434 n.2, 270 S.E.2d 734, 736 n.2 (1980) (noting that a new statute with retroactive applicability cannot act to revive a "dead claim"); Dan River, Inc. v. Adkins, 3 Va. App. 320, 326, 349 S.E.2d 667, 670 (1986) (citing Buenson Division, 221 Va. at 434 n.2, 270 S.E.2d at 736 n.2).

Robinson suggests that we avoid this rule by considering his request for a new offset calculation to constitute mere enforcement, rather than modification, of the 1991 order. He

further suggests that Code § 65.2-313 is procedural in nature, and thus the time limit imposed by the rule does not apply. No authority supports either suggested construction of the rule.

Affirmed.