COURT OF APPEALS OF VIRGINIA

Present: Judges Bray, Annunziata and Senior Judge Overton

PEPSI-COLA BOTTLERS OF WASHINGTON, D.C., INC. AND LUMBERMENS MUTUAL CASUALTY COMPANY

v. Record No. 2299-98-4

JOSEPH W. KANE

MEMORANDUM OPINION*
PER CURIAM
FEBRUARY 16, 1999

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(Robert J. Lowe, Jr.; Kimberly A. Karcewski; Lowe & Associates, on briefs), for appellants.

(Julie H. Heiden; Koonz, McKenney, Johnson, DePaolis & Lightfoot, on brief), for appellee.

Pepsi-Cola Bottlers of Washington, D.C., Inc. and its insurer (hereinafter referred to as "employer") contend that the Workers' Compensation Commission ("commission") erred in denying its request for a change in Joseph W. Kane's ("claimant") treating physicians. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. See Rule 5A:27.

> The commission has previously set forth several grounds upon which it will order a change in an employee's treating physician: inadequate treatment is being rendered; it appears that treatment is needed by a specialist in a particular field and is not being provided; no progress being made in

*Pursuant to Code § 17-1.413, recodifying Code § 17-116.010, this opinion is not designated for publication.

> improvement of the employee's health condition without any adequate explanation; conventional modalities of treatment are not being used; no plan for treatment for long-term disability cases; and failure to cooperate with discovery proceedings ordered by the Commission.

Powers v. J.B. Constr., 68 O.I.C. 208, 211 (1989) (construing Code § 65.1-88 (now Code § 65.2-603)). The commission's construction of the Act is entitled to great weight on appeal. See City of Waynesboro v. Harter, 1 Va. App. 265, 269, 337 S.E.2d 901, 903 (1985).

In denying employer's application, the commission found as follows:

> [T]he record establishes that Dr. [Leo] Goldhammer prescribed recognized conservative treatment, that he administered and ordered appropriate testing, that he procured consultations, and that he worked in conjunction with Dr. [Charles B.] Jackson, who obviously had no problem with Dr. Goldhammer's treatment plan. Moreover, in his recent medical report, Dr. [Anthony] Debs expressed no recommendations for treatment, and in fact felt that maximum medical improvement was reached back in 1993. The claimant's condition is obviously a deteriorating one as is to be expected with a degenerative spinal condition, and both Doctors Goldhammer and Jackson have addressed this in their recommendations. No physician at this time is recommending surgery.
>
> We find no basis to order a change in treating physicians, as Dr. Goldhammer has not endorsed the suggestion of a functional capacity evaluation and did not immediately address a question about such an evaluation. Even Dr. Debs has not recommended a functional capacity evaluation, but rather, only raised it as a possibility. Dr. Goldhammer has given sound reasons for his belief that the claimant should not physically have to undergo it. . . .

> Moreover, Dr. Goldhammer's failure to immediately respond to the insurer's inquiry about the functional capacity evaluation does not constitute a basis to order a change in treating physicians, when the record otherwise reveals that he has promptly forwarded his reports following evaluations, and he already completed a functional capacity evaluation. Further, there were other avenues to obtain this information either through interrogatories or a deposition.

Viewing the evidence in the light most favorable to claimant, who prevailed before the commission, we find that the commission's factual findings are fully supported by the medical records of Drs. Goldhammer and Jackson. Based upon those factual findings, the commission could reasonably conclude that Dr. Goldhammer, in conjunction with Dr. Jackson, has adequately treated claimant's condition and has devised an appropriate treatment plan.

Because the medical records were subject to the commission's factual determination, we cannot find as a matter of law that employer's evidence met its burden of proof. Accordingly, we affirm the commission's decision.

Affirmed.