TEMPORARY PARTIAL DISABILITY AND MARKETING STRATEGIES: A PANEL DISCUSSION

THE IMPACT OF FAVINGER AND THE COMMISSION'S GUIDELINES FOR MARKETING

VTLA FOURTH ANNUAL
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Stephen T. Harper, Esquire
REINHARDT & HARPER, PLC
1809 Staples Mill Road, Suite 300
Richmond, VA 23230
Telephone: (804) 359-5500
E-mail: harper@vainjurylaw.com

The ability of our client to get temporary partial disability benefits is become increasingly more difficult. 2008 and 2009 were bad years for the claimant's bar with *Shenandoah Motors v. Smith, 53 Va. App. 375, 672 S.E.2d 127 (2009)* and *Ford Motor Co., v. Favinger*, 725 Va. 83, 654 S.E.2d 575 (2008), creating significant impairments to the claimant's ability to get ongoing temporary partial disability benefits. (Wes Marshall addressed *Shenandoah* in our 2009 Workers' Compensation Retreat, so I am not going to reiterate *Shenandoah Motors* here.) This discussion will be devoted to *Favinger* and its impact.

I. Ford Motor Co. v. Favinger:

In *Ford Motor Co., v. Favinger,* 275 Va. 83, 654 S.E.2d 575 (2008), an employee of Ford Motor Co., suffered a compensable injury under the Virginia Workers' Compensation Act. Prior to his injury he worked 50 hours a week, to take advantage of the overtime. Post injury he returned to work for the defendant employer working 40 hours a week and sought temporary partial disability benefits for the difference in pay because he was unable to work overtime. The Commission ruled that *Favinger* did not have a duty to market his residual capacity and awarded temporary partial disability benefits. On Appeal to the Supreme Court, the Supreme Court held that *Favinger* did not make reasonable effort to market his work capacity. At the hearing, *Favinger* testified that he made no effort to market his residual work capacity. The Supreme Court concluded that the Commission was wrong in their decision and marketing was necessary. The Commission stated that it was unreasonable to expect *Favinger* to market his residual capacity beyond 40 hours a week at Ford, because if he did so such extra work would likely interfere with overtime which might become available at Ford. The Supreme Court held that the Commission's conclusion on this basis was not supported by any evidence that *Favinger* actually attempted to market his residual work capacity or that available jobs within his capacity would have interfered with his duties at Ford, including his ability to accept overtime for the work when offered by Ford. The Supreme Court held the fact that he had accepted light duty work for the defendant employer and was willing to work overtime when Ford offered it, did not "negate the requirement that he make a reasonable effort to market his residual work capacity, i.e. the additional 10 hours of overtime". In the absence of a reasonable effort to market his residual work capacity, he was not entitled to temporary partial disability benefits.

II. Fallout since ***Favinger*****:**

Almost every decision on marketing since *Favinger* has gone against the claimant. See, *CVS # 1549/ of Virginia v. Plunkett*, 57 Va. App. 373, 702 S.E.2d 578 (2010). In *Plunkett*, the claimant returned to work with the defendant employer accepting the employer's offer of selective employment. This was a position that met the claimant's work restrictions and complied with her request to work 20 hours a week or less. The Commission held that because she had accepted this position she had no duty to market her residual work capacity. The Court of Appeals reversed, holding that the claimant did have a duty to market her residual capacity to work and therefore was not entitled to temporary partial disability benefits.

In *John Quinn, Inc., v. Barry*, 08 Vap UNP 2229072 (2008), the claimant had 2 pre-injury jobs that were dissimilar employment. At his pre-injury job, he worked 40 hours a week, at the same time he worked an additional 25 hours a week at Lowes. After the injury he was unable to return to work with the original defendant employer. He continued to work at Lowes, and increased his hours to 40 hours a week. As a result of increasing his hours at Lowes his earnings at Lowes increased by $189. His total post-injury earnings at Lowes were $53 a week less than his pre-injury average weekly wage at the defendant employer. The Court of Appeals ruled that the claimant had a duty to market beyond working 40 hours per week at Lowes in order to receive temporary partial disability benefits.

In *County of James City Fire Dept. v. Smith*, 54 Va. App. 448 (2009), the claimant, a 61 year old gentleman, found himself light duty work 7 days before his hearing. He started seeking light duty work 10 days before the hearing. Once he found a light duty job he did not continue to market after that. At the original hearing the Deputy Commissioner found that the claimant had reasonably marketed his remaining work capacity when he found himself a light duty job and the Deputy Commissioner awarded him temporary partial disability benefits. The Full Commission affirmed the Deputy's findings, holding that although the job paid "considerably less than his pre-injury average weekly wage, he had not stopped looking for work. The claimant had submitted at least 2 applications the week before obtaining the part-time job with Wright, and was waiting to hear from those two employers". Furthermore, he had attempted to register with the VEC, but their computers were down. The claimant testified at the hearing that he intended to register and seek jobs through their web site. Based on all these circumstances, the Commission

held that the claimant adequately marketed his residual work capacity. On appeal to the Court of Appeals, they applied the logic of ***Favinger*** and held that the claimant had not adequately marketed his residual capacity of work after accepting a light duty job and therefore was not entitled to temporary partial disability benefits. The Court rather harshly noted that

> "because the claimant waited over 10 months to actively seek employment, his own inaction severely limited his ability to reasonably market his residual work capacity. Further, claimant offered no evidence as to what jobs, if any, were available considering his education, training, and limitations. He admitted, after accepting the part-time Wright job, he sought no further employment for higher pay. He presented no evidence as to why he did not seek employment for the ten-month period prior to November 2007. He produced no evidence that more lucrative jobs were not available. We therefore conclude, as a matter of law, claimant did not reasonably market his residual work capacity."

Favinger and its prodigy mention the six factors involved in analyzing marketing as originally enunciated in ***National Linen Service v. McGuinn***, 8 Va. App. 267, 380 S.E.2d 31 (1989).

1. The nature and extent of claimant's disability.
2. Claimant's training, age, experience, and education.
3. Nature and extent of claimant's job search.
4. Claimant's intent in conducting job search.
5. Availability of jobs in the area suitable for claimant considering claimant's disability.
6. Any of the matters affecting claimant's capacity to find suitable employment.

Since ***Favinger***, marketing appears necessary in every case when your client is not on an award for temporary total or temporary partial.

III. Can any case be distinguished from ***Favinger***?

Although a majority of the Commission has ruled on several occasions that a specific claimant's facts or circumstances allow their case to be distinguished from ***Favinger***.

Commissioner Williams has dissented in all of those cases. The Court of Appeals has consistently reversed the Full Commission, agreeing with Commissioner Williams and holding that *Favinger* did apply and that the claimant was not entitled to temporary partial disability benefits.

Atlas Van Lines v. Kerr, 11 Vap UNP 1345104 (2011), is a rare case that the Court of Appeals distinguished from *Favinger*. In *Atlas*, the Court of Appeals held that "*Favinger* is distinguishable from the instant case in several significant respects." In *Favinger* post-injury the claimant worked 40 hours a week, pre-injury he worked 50 hours a week, which included 10 hours of overtime. In *Atlas*, "the uncontroverted evidence in the instant case is that claimant testified that he worked approximately the same amount of hours post-injury that he worked pre-injury; however, his post-injury work was less lucrative, resulting in a smaller average weekly wage." The Court of Appeals went on to conclude "there is no basis to conclude that claimant somehow failed to market all of his residual overtime capacity in terms of whether he was working an appropriate number of hours – there was credible evidence that he was." A significant fact in *Atlas* was that the claimant's new job did provide "a relatively high income in comparison with other potential employers." The Court noted that the claimant's average weekly wage with the new employer was approximately $150 more than he had earned on average the last time he had worked for the defendant employer post-injury. Additionally, the claimant had testified in Atlas that he had no set schedule with the new employer, did not know the hours he was working until he called in each day, and therefore, any additional employment would interfere with his job with the new employer. In addition, he testified that if he worked for anyone else those hours would be considered in calculating whether he had worked over the legal limit of 70 hours per week (the legal limit in his job as a mover). Therefore, "accepting work with another company could potentially impact his regular work with E. F. Thompson (the new employer). Given the unique facts and circumstances presented in the record, the instant case is distinguishable from *Favinger*."

But see, *Kanczuzewski v. Jim Walter Homes, Inc.*, 11 WC UNP 2414889 (2011), where the Full Commission, with Commissioner Diamond dissenting, held that the claimant's marketing efforts were insufficient. The claimant had found work as a truck driver but the average weekly wage for this position was 30% of his pre-injury average weekly wage. The

claimant made no efforts to find more comparable employment during this time period. "Even assuming these hours were comparable to his pre-injury work hours, given the significant disparity in earnings, some additional marketing efforts were required. While a full-time job may have lessened the amount of marketing which would be considered reasonable, it did not eliminate the duty to market."

IV. Impact of the new Marketing Guidelines:

The Commissions new marketing guidelines, a copy of which are attached, appear to indicate that the claimant should be seeking 5 jobs a week. These guidelines and the relationship to *Favinger* were addressed by the Commission's in *Pittman v. Plant Partners*, 11 WC UNP 2317500 (2011)**.** At the time of the first hearing the claimant started job hunting for approximately two weeks before obtaining a light duty part time job for Ross Department Store working approximately 20 hours a week. Once she obtained that job she did not continue to seek alternative additional employment. In her pre-injury job she worked a 40 hour work week with Planned Partners. The Deputy Commissioner ruled in the claimant's favor finding that she had adequately marked and awarded her temporary partial. The Full Commission affirmed (with Commissioner Williams' dissenting). The Court of Appeals reversed, holding that under *Favinger* the claimant did not prove that she adequately marketed. The claimant then went back and began to market and filed a new claim which went before the Commission in 2011. The claimant was still working light duty with Ross Department Store. This time, she sought either a higher paying job or a second job while working for Ross Department Store. From the Commission's discussion it is apparent that her marketing during this period was not robust. Specifically, she documented three contacts per week, some of those were "in person" contacts. She also reviewed email messages from the VEC and did make online inquiries. Primarily, in person visits to retail establishments were her means of marketing. The Full Commission held that "in the circumstances in this case, we agree that this was reasonable". Here, only three of documented job contacts per week were sufficient, less than the 5 suggested by the guidelines

OTHER CASES OF NOTE:

1. *Ruffin v. Dover Corp.*, 10 WC UNP 2373993 (2010), (97 documented online contacts during 11 months). Full Commission affirmed Deputy Commissioner's denial of benefits on the basis that the claimant had not adequately marketed. Claimant's evidence included job searches at 97 locations between January 1, 2009 and November 25, 2009. The vast majority of her job applications were online, although she had sought employment locally, taken classes at a library and expressed a desire to be taught a new skill for employment. The Commission held that "we find that the claimant's computer searches were not adequate marketing. The fact that the claimant wanted to obtain work does not mean that she was doing what was legally necessary to find a job".

2. *Simon v. Kmart Corp.*, 10 WC UNP VA01002424530 (2010), (15 online applications during a three month period). In Simon, the claimant's dispute over marketing arose from a time period of June 14, 2009 until the time of the hearing, August 19, 2009. Claimant was seeking continuing indemnity benefits. During the time period of June to August 19, he had applied for 15 potential employers through online resources. He did not register with the VEC or directly contact any employer in person or by telephone. Even though the claimant increased his efforts beginning in early July 2009, the evidence as a whole did not substantiate a "reasonable, bonified effort to locate suitable employment".

But see, *Waldman v. Wal-mart Associates, Inc.*, 11 WC UNP VA00000057520 (2011). Testimony at the hearing was approximately 70% of marketing contacts were online, and of those places she filled out applications, 75% of those were done online. She estimated that only 2-3% of her entries involved travelling to the place of employment and asking about employment within her restrictions. During a 25 week period there was documentation of 110 prospective employers working out to 4.4 job contacts per week. While the majority were online, the remainder were from newspapers and in person. The Deputy Commissioner wrote,

> "**Online communications with prospective employers is permissible, in many cases may be the preference of the employers. Therefore, the quality of employer contacts is not**

> **an issue. While the average number of employers the claimant contacted for 25 week period is somewhat low, we find the fact that the claimant registered with the VEC in combination with the current state of the economy, that her efforts are reasonable for that period under the circumstances of this case.**"

Distinguishing this case from ***Ruffin*** and ***Simon***, the Full Commission held that the claimant adequately marketed her remaining work capacity. The claimant did document the source of her job leads, the majority were from the Virginia Work Force Connection, (VEC job search web site). She also reviewed the Free Lance Star online, used Craigslist, Fburg.com and a friend. Her documentation included where she sent resumes and applications or telephoned. She was also able to obtain at least 2 interviews, including notes indicating other information she learned about jobs. (example, training offered or required). The Commission went on to note "the economy is difficult for job seekers, in sum we find that the claimant's marketing efforts were adequate in number, quality and breath of work sought, and that her documentation establishes her intent to find suitable work.