Shirlene Bailey
Petitioner, pro se
Virginia Workers' Commission: JNC VA00001323920
Appeals Court of Virginia: 0664 – 20 – 1
Virginia Supreme Court: 201472
v.

Suffolk Public Schools
Defendant

Opinions

The following are Opinions and or decisions made by the lower Courts

Appendix A-4

COMMONWEALTH OF VIRGINIA
WORKERS' COMPENSATION COMMISSION
1000 DMV DRIVE, RICHMOND VA 23220
1-877-664-2566
www.workcomp.virginia.gov

20-Day Order
Claim Filed

Date of this notice: September 13, 2017

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS

SUFFOLK CITY SCHOOL BOARD , Insurance Carrier

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC , Claim Administrator

Jurisdiction Claim No. VA00001323920

Claim Administrator File No. B785301311000101853

Date of Injury March 30, 2017

To Insurer:

On September 12, 2017, the Claimant filed a claim for benefits with regard to this injury. The Insurer must respond to the pending claim seeking **lifetime medical benefits and wage loss 3/30, 4/4-4/5, 4/17, 4/28, 5/18, 6/7, 7/1-8/28, 9/1, 9/5 to include lumbar epidural for injuries to back, bulging disc, lumbar pain, nerve pain, and legs.**

The Insurer is **ORDERED** to complete and return the attached Order Response Form to the Virginia Workers' Compensation Commission at the address listed above within 20 days.

The Insurer is also reminded that in accordance with Rule 4.2, copies of all medical records in their possession should be provided to the other party and all medical records relating to the claim should be filed with the Virginia Workers' Compensation Commission immediately.

To Claimant:

The Claimant is reminded that in accordance with Rule 4.2, copies of all medical records in his/her possession should be provided to the other party and all medical records relating to the claim should be filed with the Virginia Workers' Compensation Commission immediately.

The Claimant should contact the Commission toll-free at 877-664-2566 with any questions or concerns regarding this matter.

Additional Parties

CARLOS ALVAREZ
1800 Bayberry Ct Ste 200
Richmond, VA 232263774
US

SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Interested Parties

Injured Worker:
SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Insurance Carrier:
SUFFOLK CITY SCHOOL BOARD
DERAN R WHITLEY ED D
PO Box 1549
Suffolk, VA 234391549

Claim Administrator:
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington, KY 40512-4663

Appendix A-5

COMMONWEALTH OF VIRGINIA
WORKERS' COMPENSATION COMMISSION
1000 DMV DRIVE, RICHMOND VA 23220
www.vwc.state.va.us
1-877-664-2566

No Response
Need Meds

Date of this notice: October 10, 2017

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001323920
Claim Administrator File No. B785301311000101853
Date of Injury March 30, 2017

To the Claimant:

To date, the Insurer has failed to timely advise whether your claim is accepted as compensable. Upon receipt of supporting medical records, this case will be referred to the hearing docket.

We enclose a copy of our Attending Physician's Report form, the use of which is optional. You may wish to have your treating physician complete and file this form with this office.

Copies of medical records should promptly be filed with the Commission in order to expedite the processing of your claim. At your request, a subpoena may be issued by the Commission to assist in obtaining medical records. Address any request for a subpoena to the Clerk of the Virginia Workers' Compensation Commission, furnishing the name and address of each provider whose records are needed. A money order for $12.00 made out to "sheriff" must be provided for EACH subpoena requested. In addition, the health care provider may charge a reasonable cost for photocopying.

We will not refer your case to the hearing docket until we receive supporting medical records.

You are cautioned that your claim may be dismissed in accordance with Commission Rule 1.3 upon motion of the employer if supporting evidence is not filed within 90 days of the date you filed your claim.

Virginia Workers' Compensation Commission

CSD/pp

Appendix A-6

COMMONWEALTH OF VIRGINIA
WORKERS' COMPENSATION COMMISSION
1000 DMV DRIVE, RICHMOND VA 23220
www.workcomp.virginia.gov
1-877-664-2566

Contempt Letter

Date of this notice: October 10, 2017

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001323920
Claim Administrator File No. B785301311000101853
Date of Injury March 30, 2017
Dear Gentleperson(s) Listed Above:

You have failed to respond to the Commission's Order dated September 13, 2017. A copy is enclosed for your review. Due process requires that you be afforded an opportunity to be heard before sanctions are imposed. You are allowed ten (10) days from the date of this letter to inform us as to why you should not be held in contempt pursuant to Va. Code 65.2-202 and 902. We will rule on the contempt issue at that time. Alternatively, you may seek a hearing on this issue within the same period.

Attention Claimant: This order is not directed to you, a copy of this letter was sent to you for your records.

Virginia Workers' Compensation Commission

CSD/pp

SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Interested Parties

Injured Worker:
SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Appendix A-7

COMMONWEALTH OF VIRGINIA
WORKERS' COMPENSATION COMMISSION
1000 DMV DRIVE, RICHMOND VA 23220
1-877-664-2566
www.workcomp.virginia.gov

Order Response Form
Claim Filed

Date of this notice: October 17, 2017

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS

Jurisdiction Claim No. VA00001323920

Claim Administrator File No. B785301311000101853

Date of Injury March 30, 2017

To Claims Administrator:

This form must be completed, signed and returned to the Commission within 20 days from the date of this letter. Please make this form the cover page when responding to the 20-day Order.

Claim is accepted as compensable:

- ☐ Agreement forms signed by all parties are attached hereto.
- ☐ Agreement forms were/will be mailed to the Injured Worker or his/her Attorney on .
- ☐ Agree to causally related medical award only.

Claim is being investigated:

- ☑ Reason: the claim is being investigated

Claim is denied:

- ☐ Agreement forms will **NOT** be mailed to the Injured Worker/Injured Workers' Attorney. This claim will be docketed for a hearing. In accordance with Rule 4.2, you must file all medical records in your possession relating to this claim.

  Reason: _____

Loretta Lawrence	SEDGWICK CLAIMS MANAGEMENT SERVICES, INC	(846)735-817
Print Name of Individual Completing Form	Claim Administrator Name	Phone Number

Date this form was sent to Commission with copy to the injured worker/injured worker's attorney: 10/17/2017

Sedgwick Claims Management Services, Inc.

To: VWC
Fax: 8043672881

From: Lawrence, Loretta
Fax:

Date: October 17, 2017

Subject: 30177622493-0001 - BAILEY, SHIRLENE - 03/30/2017

CONFIDENTIALITY NOTE

The information contained in the facsimile message may be legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this telecopy is strictly prohibited. If you have received this telecopy in error, please notify us immediately by calling the number listed above and return the original message to us at the address above by the United States Postal Service.

Sedgwick Claims Management Services, Inc.
P O Box 14663
Lexington, KY 40512

Phone: 84-673-5817
Fax: 804-673-5400

10/17/17

Virginia Worker's Compensation
1000 DMV Drive
Richmond, VA 23220

SUBMITTED VIA WEBFILE

Re:	Claim #:	30177622493-0001
	Employer:	Suffolk Public Schools
	Employee:	BAILEY, SHIRLENE
	Date of Injury:	03/30/2017
	JCN #:	VA00001323920

To Whom It May Concern:

Sedgwick administers the workers' compensation claims for Suffolk Public Schools . As such, we are handling your above-referenced claim.

We are in receipt of the Contempt letter Order dated 10/10/17.

Please excuse our delay in responding to the 20 Day order. We have submitted the response to VWC on 10/17/17. It has been uploaded via web file.

The claim is currently under investigation.

Please feel free to contact me if you have any further questions at (800)368-8002#[redacted]. 35817

Sincerely,

Loretta Lawrence
Claims Representative
Sedgwick CMS
Loretta.Lawrence@sedgwickcms.com

COMMONWEALTH OF VIRGINIA
WORKERS' COMPENSATION COMMISSION
333 E FRANKLIN ST, RICHMOND, VA 23219
1-877-664-2566
www.workcomp.virginia.gov

20-Day Order Payments Made

Date of this notice: February 25, 2018

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD , Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC , Claim Administrator
Jurisdiction Claim No. VA00001323920
Claim Administrator File No. B785301311000101853
Date of Injury March 30, 2017

To All Interested Parties:

On December 25, 2017 you reported to the Virginia Workers' Compensation Commission that payments:

- beginning April 07, 2017 through September 19, 2017
- beginning September 20, 2017 through October 16, 2017

for wage loss and/or medical benefits have been made with regard to this injury. The Virginia Workers' Compensation Commission requires your position in this matter as to whether agreement forms will be offered to the Injured Worker for signature.

The Insurer is **ORDERED** to complete and return the attached Order Response Form to the Virginia Workers&apos Compensation Commission at the address listed above within 20 days. If agreement forms have not yet been sent to the Injured Worker, please use the enclosed form. A copy of your response must be sent to the Injured Worker.

To Injured Worker:

The Claim Administrator has notified the Commission that it has previously made payments to you or paid medical bills on your behalf with regard to your injury. Your accident is not covered until you file a claim with the Commission. If you choose to file a claim with the Commission, please use the attached Claim Form or submit a similar request for specific benefits. The Claim should be filed within two years of your work accident.

The injured worker should contact the Commission toll-free at 877-664-2566 with any questions or concerns regarding this matter.

To All Parties:

The parties are reminded that in accordance with Rule 4.2, copies of all medical records in their possession should be provided to the other party and not filed with the Commission at this time.

Claim for Benefits
VWC Form #5

Filing Instructions

1. If you have been paid by your employer or claim administrator for time missed from work because of your injury or for medical treatment for your injury, you must file a claim with the Virginia Workers' Compensation Commission to protect your right to benefits under Virginia law. Even if you are not requesting specific benefits at this time, you should still submit this form with Part A completed within two years of the date of your accident or diagnosis of disease.

2. If you are requesting specific benefits or if the claim administrator has denied your claim, complete Part B of this form and submit the medical reports either attached to the form, or as soon as possible. You may obtain copies of your medical records directly from your physician.
   Importance of Medical Records:
   Medical records showing that your accidental injury or disease is work related must be filed with the Commission. File these medical records with your claim or as soon as possible. If you are unable to obtain copies of your medical reports and bills, you may request a subpoena by sending the name and address of the medical provider to the Clerk of the Virginia Workers' Compensation Commission. A $12.00 money order made payable to "sheriff" must be included for each subpoena. The Commission cannot issue subpoenas outside of Virginia.

3. The parties are advised that Mediation and ADR services may be available upon request. For further information contact 804-205-3139, toll-free 877-664-2566, or visit www.workcomp.virginia.gov.

4. For questions or assistance with completing this form, please contact the Virginia Workers' Compensation Commission toll free at 1-877-664-2566 or visit our website at www.workcomp.virginia.gov.

Benefits Covered under the Virginia Workers' Compensation Act:

- Lifetime Medical Benefits - Payment for expenses related to the injury or occupational disease. Includes payment/reimbursement of out of pocket medical, prescription and transportation expenses.
- Wage Loss Replacement (Temporary Total/Temporary Partial Disability): Full or partial wage loss replacement for medically authorized disability from work.
- Permanent Partial Disability - Compensation for loss of use of a body part, loss of hearing/vision, amputation, lung disease or bodily disfigurement/scarring.
- Permanent Total Disability - Lifetime wage replacement for loss of both hands, arms, feet, legs, eyes or any two in the same accident, or is paralyzed or disabled from a severe brain injury.
- Death Benefits - In cases where injury results in death, surviving spouse, children, or certain other dependants may be entitled to wage loss replacement benefits and payment of funeral/transportation expenses.
- Other: Mileage reimbursement, Cost of Living Increases, if eligible. (total wage loss and fatal benefits)

Award Agreement
(Agreement to Pay Benefits)

Virginia Workers' Compensation Commission
1000 DMV Drive Richmond Virginia 23220
1-877-664-2566

SEE INSTRUCTIONS ON REVERSE SIDE

www.vwc.state.va.us

Jurisdiction Claim #: _____

Claim Administrator #: _____

Injured Worker's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Home Phone: _____ Work Phone: (___) ___-____

Employer's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Employer's Phone: _____

Body Parts/Injuries Accepted: _____

Date of Injury: _____ **Pre-Injury Average Weekly Wage:** _____

Payment of Compensation Check one: ☐ Initial period ☐ Additional period ☐ Corrected period
(Check all that apply)

☐ A. **Temporary Total** at the compensation rate of $_____ per week. This period of disability began on _____ (m/d/yyyy).

☐ B **Temporary Partial:** Please select option 1 or 2 below and complete.

☐ 1 - Will be paid at the compensation rate of $_____ per week. This period of disability began on _____ (m/d/yyyy)

☐ 2 - Was paid an averaged weekly compensation rate of $_____ per week from _____ through _____ and will continue to be paid at a compensation rate of $_____ per week beginning on _____ (m/d/yyyy)

☐ C. **Permanent Partial** at the compensation rate of $_____ per week. This period of disability began on _____ (m/d/yyyy) for _____%
☐ loss of use, ☐ loss, or ☐ disfigurement of the _____. **Note: Medical report(s) or amputation chart must be attached.**

Do the parties agree to have this award paid in a lump sum with the 4% discount deducted? ☐Yes ☐No

☐ D. **Permanent Total** the compensation rate of $_____ per week. This period of disability began on _____ (m/d/yyyy).

☐ E. **Medical Only.** The parties agree to an award for payment of medical benefits that are reasonable, necessary, authorized and causally related to the compensable injury.

THIS AGREEMENT IS SUBJECT TO ADJUSTMENT AND APPROVAL BY THE COMMISSION PURSUANT TO THE VIRGINIA WORKERS' COMPENSATION ACT

Signatures REQUIRED

By signing below, we certify that the facts relating to this accident are correct as presented on this form and agree that the Injured Worker shall receive compensation or benefits indicated until suspended in accordance with the provisions of the Virginia Workers' Compensation Act.

Signature of Injured Worker	Print Name	Date (m/d/yyyy)
Signature on behalf of the Employer/Insurer	Print Name	Date (m/d/yyyy)
Print Name and Address of Claim Administrator		Phone Number
Print Name and Address of Injured Worker's Attorney		Phone Number

This form is required by the Virginia Workers' Compensation Commission

VWC Form #4
Rev. 10/08

Award Agreement
VWC Form #4

Filing Instructions

1. This form is to be completed whenever a claim has been accepted as compensable and the Injured Worker is entitled to an award. This Award Agreement provides the basis for the award of compensation and contains sufficient information to establish the essential elements of a compensable claim. Submit the completed form to the Virginia Workers' Compensation Commission, 1000 DMV Drive, Richmond, VA 23220. For subsequent periods of compensation benefits, this form should be used or a Varying Temporary Partial Award Agreement (VWC Form No. 4G) must be filed.

2. Definitions of Benefit Types:

Temporary total (TT) disability – Injured Worker is totally disabled from work and is entitled to receive compensation for a period of total wage loss based upon 66 2/3% (.66667) of the pre-injury average weekly wage.*
Temporary partial (TP) disability – Injured Worker is partially disabled from work but is entitled to receive compensation for a period of partial wage loss based upon 66 2/3% of the difference between the pre-injury average weekly wage and the post (current) average weekly wage. Forms received without specific dollar amounts or those that reflect the word "various" will be rejected. *

Calculation of Temporary Partial Rate:			
		Average weekly wage before injury	$
	–	Current weekly wage	$
All Amounts are Based on Weekly Figures	=	Difference in wages before injury and now	$
	x	.66667	$
		Temporary Partial Compensation Rate	**$**

Permanent partial (PP) disability – Injured Worker is entitled to receive compensation based upon the loss of use or the loss of a ratable body part, based upon 66 2/3% (.66667) of the pre-injury average weekly wage for a specified number of weeks, pursuant to Va. Code §65.2-503. Please attach a copy of the medical report or the amputation chart that supports the permanency rating to the agreement form. If Permanent Partial is for disfigurement, the Commission must set the rating based on submitted photographs.*
Permanent Total – Injured Worker is permanently and totally disabled from work and is entitled to receive compensation for the remainder of his/her life based upon 66 2/3% (.66667) of the pre-injury average weekly wage.*
Medical Only – The parties agree that the Injured Worker sustained a compensable injury for which the employer and insurer will accept responsibility only for the medical expenses incurred as a result of a work related injury or occupational disease.

* Compensation rate is subject to yearly maximum and minimum allowances.
** All wage information and compensation rate(s) reflected on the form(s) should be based on weekly figures.

3. For questions or assistance with completing this form, please contact Customer Assistance using the Commission's toll-free number 877-664-2566.

Lorraine B. D'Angelo
7826 Shrader Rd
Richmond, VA 23294-4222

Interested Parties

Injured Worker:
SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Claimant Attorney:
Lorraine B. D'Angelo
7826 Shrader Rd
Richmond, VA 23294-4222

Insurance Carrier:
SUFFOLK CITY SCHOOL BOARD
DERAN R WHITLEY ED D
PO Box 1549
Suffolk, VA 234391549

Claim Administrator:
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington, KY 40512-4663

Claim Administrator Attorney:
Wendell M Waller
PO Box 1549
100 North Main St.
Suffolk, VA 23439-1549

Additional Parties

CARLOS ALVAREZ
1800 Bayberry Ct Ste 200
Richmond, VA 232263774

Appendix A-21

COMMONWEALTH OF VIRGINIA
VIRGINIA WORKERS' COMPENSATION COMMISSION
333 E FRANKLIN ST, RICHMOND, VA 23219
1-877-664-2566
www.workcomp.virginia.gov

Notice of Referral of Application to ADR - Change in Condition

Date of this notice: August 16, 2018

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD , Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC , Claim Administrator
Jurisdiction Claim No. VA00001323920
ADR Dispute ID VA00001323920-ADR-01
Claim Administrator File No. B785301311000101853
Date of Injury March 30, 2017

To All Interested Parties:

The Virginia Workers' Compensation Commission is referring the following items for ADR:

- Request For Hearing filed December 20, 2017
- Letter From Claimant filed November 08, 2017
- Letter From Claimant filed November 08, 2017
- Request For Hearing filed October 20, 2017
- Request For Hearing filed October 18, 2017
- Request For Hearing filed October 18, 2017
- Request For Hearing filed October 16, 2017
- Request For Hearing filed September 12, 2017

All parties will be notified of informal telephone conference(s) which will occur 30 - 45 days from the date of this notice. The purpose of the informal telephone conference is to determine which issues may be resolved without a judicial proceeding. Any issues unresolved at the informal telephone conference may be referred to an on the record or evidentiary hearing docket immediately.

Parties may arrange the telephone conference earlier by calling the ADR Department at (804) 205-3139 or emailing adr@workcomp.virginia.gov.

If the defendants file a Response to the Change In Condition Claim prior to the conference, the informal telephone conference may not be necessary. A form for this purpose may be found on the Commission's website at http://www.Workcomp.virginia.gov/sites/default/files/forms/Change-In-Condition-Claims-Response-Form.pdf

In addition to the informal telephone conference, parties may request Issue Mediation either in person or by telephone. Issue mediation is a confidential, voluntary process in which the mediator assists the parties by identifying issues, clarifying misunderstandings, exploring options, and reaching agreements. It may occur by telephone or in person and may include all parties and counsel, or may be conducted by counsel on behalf of parties.

7826 Shrader Road • Richmond, Virginia 23294 • phone (804) 755-7755 • (877) 755-7744 • fax (804) 612-1724

INJURED WORKERS
LAW FIRM

December 20, 2017

Via Webfile

The Honorable Lee Wilder
Deputy Commissioner
Virginia Workers' Compensation Commission
281 Independence Blvd.
Pembroke One, Suite 310
Virginia Beach, VA 23462

Re: Shirlene Bailey v. Suffolk Public Schools
JCN: VA00001323920
DOI: March 30, 2017
Claim No.: B785301311000101853

Dear Deputy Commissioner Wilder:

Please consider this letter as the claimant's Claim for Benefits. The claimant is seeking temporary total disability benefits from March 31, 2017 to April 3, 2017, temporary partial disability benefits for time missed for medical appointments on April 17, 2017, April 28, 2017, May 5, 2017, May 22, 2017, temporary total disability benefits from August 30, 2017 to September 3, 2017, and from September 14, 2017 to the present and continuing for medical treatment for injuries received to her low back, neck and headaches. The claimant is also seeking a change in treating physician from Dr. Fox and a panel of treating physicians.

The claimant is willing to attend issue mediation, but respectfully requests that a hearing be scheduled on these issues should issue mediation be unsuccessful.

Thank you for your attention to this matter.

Sincerely,

Lorraine B. D'Angelo

LBD/cea
Enclosure

cc: Loretta Lawrence (via E-mail & Facsimile: (952) 826-3785)
Sedgwick Claims Management Services, Inc.

Shirlene Bailey (via e-mail)

Archived By: Virginia Workers' Compensation Commission

CHANGE IN CONDITION CLAIM RESPONSE FORM

Virginia Workers' Compensation Commission
333 E FRANKLIN ST, RICHMOND, VA 23219
1-877-664-2566

www.workcomp.virginia.gov

JCN Number:

Date of accident:

Style of case:

Response of: ☐ Employer ☐ Insurer ☐ Other **Claim for Benefits filed on (date):**

1. **The claim is accepted.** ☐
   a. Payment was made on (date):
   b. Agreement forms were forwarded to: on (date):
   c. Counsel will be submitting a Stipulated Order. ☐
   d. Other:

2. **The claim is accepted in part and denied in part.** ☐
   a. The accepted portions of the claim are:
      i.
         1. Payment was made on (date):
         2. Agreement forms were forwarded to: on (date):
         3. Counsel will be submitting a Stipulated Order. ☐
         4. Other:
      ii.
         1. Payment was made on (date):
         2. Agreement forms were forwarded to on (date):
         3. Counsel will be submitting a Stipulated Order. ☐
         4. Other:
   b. The denied portions of the claim are:
      i.
      ii.

3. **The claim is denied.** ☐
   a. Denial Reason:
   b. This party does ☐ does not ☐ consent to Issue Mediation.

Signature:

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Date of this notice: February 13, 2019

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001323920
Docket ID VA00001323920-01
Claim Administrator File No. B785301311000101853

ORDER

The parties have advised the Commission that they have resolved the issues in controversy between them. The parties are ORDERED to submit the executed agreements or other settlement documents within 30 days to:

Virginia Workers' Compensation Commission
333 E Franklin St
Richmond, VA 23219

The hearing scheduled for 02/12/2019 is canceled. The case shall be rescheduled for hearing if the agreements are not submitted or approved.

Parties are encouraged to use WebFile to submit these and other filings electronically. WebFile is the Commission's free internet portal for conducting Virginia workers' compensation business with the Commission. You may find more information and learn how to request an account at https://webfile.workcomp.virginia.gov. WebFile allows you to upload a .pdf version of a document directly to your case file, and receive immediate confirmation of filing, which can occur at any time and wherever an internet connection is available. Parties may also file their written statements by fax at 804-823-6957, by U. S. mail or by other means of delivery. WebFile and fax submissions are deemed filed when successfully made. A document is not deemed filed by mail, or other delivery until it reaches a Commission office during normal business hours, except when posted via certified or registered mail, when it is deemed filed upon posting. ENTERED February 13, 2019

VIRGINIA WORKERS' COMPENSATION COMMISSION

Lee Wilder
Deputy Commissioner

SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Interested Parties

Injured Worker:
SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Claimant Attorney:
Charlene A. Morring
Paperless

Employer:
SUFFOLK PUBLIC SCHOOLS
WC CLAIMS MANAGER
PO Box 1549
Suffolk, VA 23439-1549

Insurance Carrier:
SUFFOLK CITY SCHOOL BOARD
DERAN R WHITLEY ED D
PO Box 1549
Suffolk, VA 234391549

Claim Administrator:
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington, KY 40512-4663

Claim Administrator Attorney:
Wendell M Waller
PO Box 1549
100 North Main St.
Suffolk, VA 23439-1549

Appendix-B

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by WILDER
Deputy Commissioner

January 6, 2020

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001323920
Claim Administrator File No. B785301311000101853
Date of Injury March 30, 2017

The Claimant
Appeared pro se.

Wendell M. Waller, Esquire
For the Defendants.

Hearings before Deputy Commissioner WILDER in Franklin, Virginia on June 4, 2019 and September 10, 2019.

PRESENT PROCEEDING

This case is before the Commission on the claimant's October 16, 2017, October 18, 2017, October 20, 2017, November 8, 2017, December 20, 2017, November 1, 2018, February 22, 2019, February 25, 2019, and March 1, 2019 applications, alleging an injury by accident to her back and legs on March 30, 2017. The claimant is seeking an award of medical benefits and compensation for temporary total disability beginning August 30, 2017 through September 13, 2017 and beginning October 17, 2017 and continuing, based on an average weekly wage to be calculated by the Commission if her claim is found compensable.

STIPULATIONS

The parties stipulated that the claimant suffered a compensable injury by accident on March 30, 2017, that the defendants voluntarily paid compensation without an award, and that on May 22, 2018, the claimant made the statements included in the responses to the defendants' Requests for Admissions.

DEFENSES

The defendants defend the claimant's application on the grounds that she is not disabled as alleged, that she refused selective employment on October 17, 2017, that she has received unauthorized medical attention, and that her average weekly wage is $264.15.

PRE-HEARING AND POST-HEARING EVIDENCE

Since the claimant appeared pro se and there were few medical records in the Commission's file, the requirement that the parties submit Designations of Medical Records was waived, and all medical records in the Commission's file were received in evidence as provided by Rule 2.2(B)(4) of the Rules of the Commission. The record remained open until December 18, 2019 to allow counsel for the defendants to produce additional wage information for the claimant. This information was submitted by December 18, 2019, and the record was closed at that time.

ISSUES

Was Bailey disabled as alleged? Did she refuse selective employment? Are the defendants responsible for the medical attention she received from physicians other than Dr. Bryan Fox? What is Bailey's average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The evidence presented establishes that Bailey was not totally disabled as alleged and that she unjustifiably refused selective employment. The medical records in the Commission's file reflect that Dr. Bryan Fox, Bailey's original treating orthopedic surgeon, initially allowed her to perform work within restrictions, then directed her to remain off work, once again allowing her to return to selective employment on October 16, 2017, commenting that she had focused "on the administrative and litigious aspects of this case but refuses to go to physical therapy or acknowledge that she has capabilities well in excess of what she claims despite multiple, lengthy attempts to reassure her as to the benign nature of her condition." Dr. Fox allowed Bailey to return to any work that did not require lifting over forty pounds.

Although Dr. Fox advised that he considered these restrictions permanent, he modified his opinion after Bailey failed to appear for a November 9, 2017 appointment:

> This appointment was specifically scheduled for a final review and discussion about her condition. As noted previously I have reviewed her MRI extensively and not found any acute injury or objective evidence of any condition that should significantly limit her activity. She sustained a very minimal injury which should have resolved after a few weeks and any residual pain she would have should not be significant. She has made no effort to attend physical therapy sessions that were coordinated for her. She has seemed very focused on the letiginous [sic] aspects of this and has made multiple request for new entries and changes into her medical record and seems to be very focused on the fact that she was asked to work, in a sedentary role, shortly after her injury. She feels that this has somehow caused an exacerbation of her injury. I would counter that this is absolutely incorrect, in fact she should have been encouraged to be more active, as sedentary activity is contraindicated after such a mild muscular injury. Increasing activity is widely considered as beneficial for such a condition.

On February 11, 2019, Dr. Fox responded to questions forwarded to him by the defendants' counsel, noting that Bailey declined a course of physical therapy that he had prescribed which he

believed would have improved her condition. Dr. Fox did not foreclose the possibility that Bailey might benefit from a surgical evaluation:

> Ms. Bailey has failed reasonable measures at nonsurgical management of her discomfort. It would be reasonable to seek a surgical consult, either from a neurosurgeon or an orthopaedic spine surgeon with regards to surgical options for treatment. I do not believe that fusion surgery would be appropriate for her, but a decompression surgery may be warranted. During the course of my evaluation and treatment of Ms. Bailey, the topic of surgery was discussed, specifically with regards to decompression, or laminectomy, at the L4-5 and L5-S1 levels. At that time, her primary complaint was of back pain, with her leg pain being only a minor secondary complaint. As such, a decompression surgery, the goal of which is relief of leg pain, would not address her primary complaint. She has no symptoms or MRI findings that support the need for a fusion surgery. Her pain magnification behavior and poor willingness to engage in physical therapy and other treatment modalities would make her a very poor candidate for surgery. The reported symptoms, and the reported disability that they caused her, far exceeded that which would be anticipated from both the relatively minor, benign nature of her injury as well as the benign findings on her MRI. As such, any surgical intervention should be undertaken very cautiously, as her disability may well come more from psychological reasons than structural ones.

Based on a review of these opinions, it is found that Dr. Fox provided reasonable treatment to Bailey and that his opinion that she could perform selective employment as of October 17, 2017 is persuasive.

In reaching this conclusion, the medical records and January 7, 2019 testimony of Dr. Arthur Wardell, the orthopedic surgeon who assumed Bailey's care on February 9, 2018, were considered. Dr. Wardell felt that Bailey was unable to work as a result of the back problems she had suffered after her March 30, 2017 accident. At his deposition, Dr. Wardell offered this testimony regarding Bailey's ability to work:

> Q. Would she have been able to perform a job with no lifting, do you think?
> A I think that there would be days when she could work for eight hours without lifting. I think that if that were the case, she would miss a significant amount of time in the course of a month. It would have to be primarily a sit-down job because standing and walking will cause even more compression of the nerves down her legs.

Q Would there be any limitations on her ability to sit for, let's say, an eight-hour work day?
A I think that she would have to be able to get up and walk around and stretch probably every fifteen or twenty minutes for three or four minutes.

Bailey denied awareness that Dr. Wardell felt that she could perform work within these limitations, averring that during a March 18, 2019 office visit, Dr. Wardell disavowed any release to return to work. While Dr. Wardell indicated on a March 18, 2019 "Patient Work Note" that Bailey could not work, Bailey also disclaimed knowledge of treatment recommendations Dr. Fox made or averred that certain recommendations, such as for physical therapy, were made contingent on the occurrence of other events, such as an MRI, and insisted that portions of his records were inaccurate. A review of Dr. Fox's records undermines this claim, however, and leads to the conclusion that by failing to attend physical therapy and medical appointments, refusing to undergo surgery, and not even selecting a treating neurosurgeon from a panel offered by the employer after both Drs. Fox and Wardell recommended a neurosurgical evaluation, Bailey has not reasonably pursued a course of medical attention that would allow her to return to work in any capacity.

Dr. Wardell's opinion that Bailey cannot work is found based on a misconception that prior to his treatment, she had cooperated with the medical attention offered to her. In combination with the Commission's general policy of according great weight to the opinion of a treating physician, such as Dr. Fox, *see C.D.S. Constr. Servs. v. Petrock*, 218 Va. 1064, 1071 (1978); *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 439 (1986); *Boston v. Prince William Answering Service*, 58 O.I.C. 9 (1978), Dr. Wardell's opinion regarding Bailey's ability to work is found insufficiently persuasive.

The defendants are not found responsible for the treatment Dr. Wardell provided to Bailey. Bailey established a course of treatment with Dr. Fox, and it is found that but for her resistance to his treatment recommendations, he would have remained her treating physician. Dr. Fox clearly felt that with the limited cooperation Bailey exhibited regarding his treatment recommendations, he had exhausted his ability to treat her, and it is found that he discharged her from any further treatment. Given Dr. Fox's suggestion that Bailey would benefit from a neurosurgical evaluation, it is also clear that Bailey required additional treatment.

Although Dr. Wardell provided additional treatment for Bailey, the defendants are not found responsible for this treatment. In *Powers v. J.B. Construction*, 68 O.I.C. 208 (1989), the Commission noted that it would order a change in treating physicians if it found that inadequate treatment was being rendered, that treatment was needed by a specialist in a particular field, that no progress was being made without adequate explanation, that conventional modalities of treatment were not being used, or that there was no plan of treatment for long-term disability cases. None of these grounds is found applicable to Dr. Fox's treatment in this claim, especially since other than feeling that Bailey could not work, Dr. Wardell's opinion regarding her treatment needs traced the recommendations Dr. Fox made. In fact, it would appear that Dr. Wardell's treatment course paralleled Dr. Fox's treatment course, including their agreement that Bailey needed neurosurgical care.

The defendants made offers of a panel of treating orthopedic surgeons on February 2, 2018 and a panel of neurosurgeons on February 15, 2019 upon learning that Dr. Wardell and Dr. Fox agreed she would benefit from neurosurgical treatment. Bailey provided an unsatisfactory explanation for her failure to choose physicians from either of these panels. While the defendants

are not found responsible for Dr. Wardell's care, it is found that Bailey may choose a neurosurgeon from the panel the defendants offered on February 15, 2019.

It is found that Bailey's average weekly wage is $264.15 and that the defendants have properly paid compensation for the dates Bailey missed from work, August 30, 2017 through September 1, 2017 and September 14, 2017 through October 16, 2017. In addition to her rejected contention that she was disabled beyond these dates, Bailey asserted that the defendants had not properly calculated her average weekly wage and had not paid her compensation as owed or that she had to use her accumulated leave to maintain her income. After reviewing the extensive records submitted by both sides, the defendants' records are found to demonstrate that Bailey was paid compensation for the dates she is found to have proven that she was unable to work.

The following award shall enter.

AWARD

An award is hereby entered on behalf of Shirlene Bailey, claimant, against Suffolk Public Schools, employer, and Suffolk City School Board, insurer, for the payment of compensation as follows: ~~$264.15~~ $249 per week during temporary total disability, based on an average weekly wage of $264.15, beginning August 30, 2017 through September 1, 2017, inclusive, and September 14, 2017 through October 16, 2017, inclusive. The defendants are granted a credit against this award in the amount of voluntary payments of compensation previously made to the claimant. Medical benefits pursuant to § 65.2-603 are awarded for as long as necessary for the injury the claimant suffered to her lower back as a result of her March 30, 2017 industrial accident. The remaining portions of the claimant's October 16, 2017, October 18, 2017, October 20, 2017, November 8,

2017, December 20, 2017, November 1, 2018, February 22, 2019, February 25, 2019, and March 1, 2019 applications are denied.

This case is ordered removed from the hearing docket.

REVIEW

You may appeal this decision to the Commission by filing a Request for Review with the Commission within 30 days of the date of this Opinion.

Appendix -B

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Apr. 21, 2020

SHIRLENE BAILEY v. SUFFOLK PUBLIC SCHOOLS
SUFFOLK CITY SCHOOL BOARD, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001323920
Claim Administrator File No. B785301311000101853
Date of Injury: March 30, 2017

Shirlene Bailey
Claimant, pro se.

Wendell M. Waller, Esquire
For the Defendant.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's January 6, 2020 Opinion which addressed applications alleging a March 30, 2017 accident with injuries to her back and legs resulting in ongoing total disability. Error is assigned to the Deputy Commissioner's findings that the claimant was not totally disabled as alleged, that she was not entitled to indemnity benefits after October 17, 2017, and that medical treatment provided by Dr. Arthur W. Wardell was unauthorized. We AFFIRM.

I. Material Proceedings

By the filing of multiple applications[1], the claimant alleged a March 30, 2017 accident resulting in total disability entitlement from August 30, 2017 through September 13, 2017, and beginning October 17, 2017. The claimant additionally sought reimbursement for medical treatment provided by Dr. Arthur W. Wardell and to have him recognized as her treating physician.

The defendant stipulated to a compensable accident resulting in a back injury. The remainder of the claim was defended on the grounds that the claimant was not disabled as alleged. They further contended that the medical treatment offered by Dr. Wardell was unauthorized.[2]

The Deputy Commissioner found the claimant had been released to work with restrictions beginning October 17, 2017. Having failed to undertake efforts to secure appropriate light duty employment, disability was denied. The Deputy also found treatment the claimant received from Dr. Arthur W. Wardell was unauthorized and consequently, not the defendant's responsibility.

The claimant requests review. She argues she remains totally disabled, that the defendant should be responsible for her treatment with Dr. Wardell, and that her average weekly wage was incorrectly calculated. She also contends that she was subjected to a "trial by ambush" thus warranting the Commission to consider evidence not introduced at hearing.[3]

II. Findings of Fact and Rulings of Law

The claimant, a teacher assistant, was lifting a box of books on March 30, 2017 when she felt a pop in her lower back. She sought treatment with Dr. Timothy N. Lee at Obici Occupational

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[1] The claimant filed applications on September 12, 2017, October 16, 2017, October 18, 2017, October 20, 2017, November 8, 2017, December 20, 2017, November 1, 2018, February 22, 2019, February 25, 2019, and March 1, 2019.

[2] The defendant also alleged the claimant unjustly refused an offer of selective employment.

[3] The Deputy Commissioner awarded medical benefits for a back injury, but did not find the claimant sustained an injury to her legs. The claimant does not except to this finding on review.

Medicine the following day and was diagnosed with a lumbar strain. Dr. Lee placed the claimant on restricted duty with no lifting greater than five pounds and the liberty to sit and stand as needed. The employer accommodated the claimant's restrictions, and she continued working through June of 2017. (Tr. 18, June 4, 2019.)

Obici Occupational Medicine referred the claimant to Dr. Bryan Fox, and she began treating with him on July 13, 2017. He read imaging studies demonstrating moderately diffuse degenerative changes in the lumbar spine for which he prescribed an epidural injection. Dr. Fox allowed the claimant to continue on light duty with no lifting greater than ten pounds and no repeated bending.

The claimant returned to Dr. Fox on October 2, 2017, stating that the epidural injection worsened her symptoms. Dr. Fox discussed the possibility of a laminectomy to treat her leg pain, but cautioned it would be "unlikely to help with back pain or her multitude of other complaints."[4] He found that the claimant's "[m]inimal injury and benign MRI findings indicate no injury beyond a lumbar strain and some radiculopathy . . . ." However, the claimant continued to "focus on her perception that her condition has worsened due to working after the injury and again after the injection." Dr. Fox placed the claimant on a no-duty status, prescribed physical therapy, and ordered a second MRI.

Dr. Fox discussed the claimant's condition with her nurse case manager on October 16, 2017. He compared the claimant's two MRIs, and found no changes or evidence of an "untoward effect of the epidural injection." He noted there was no evidence of an acute injury and that the

[4] The October 2, 2017 office note reflects complaints of blurred vision, headache, neck and shoulder pain and a generalized worsening of symptoms attributed to the claimant having to return to work post-accident.

claimant had refused to attend physical therapy "or acknowledge that she has capabilities well in excess of what she claims." Dr. Fox found no reason for work restrictions other than lifting in excess of forty pounds. He also stated that he would release the claimant from his care because the relationship had become contentious.

On November 9, 2017, the claimant was scheduled to return to Dr. Fox for a "final review and discussion about her condition." The claimant did not attend the appointment. Dr. Fox noted that the claimant had sustained a minimal injury which should have resolved after a few weeks, that the claimant made no effort to attend physical therapy, and she remained "very focused on the fact that she was asked to work, in a sedentary role, shortly after her injury." Dr. Fox also "evaluated and signed off on multiple job descriptions" provided by the claimant's case manager, and found that the claimant was capable of returning to full duty.

On February 1, 2018, the employer provided the claimant a new panel of orthopaedic specialists. The claimant declined to select a provider from the panel, electing instead to begin treating with Dr. Wardell on February 9, 2018. Dr. Wardell diagnosed the claimant with a lumbar spine sprain permanently aggravating pre-existing lumbar spondylosis and lumbar spinal stenosis. He prescribed physical therapy and took the claimant out of work for four weeks. On March 8, 2018, Dr. Wardell advised the claimant to continue physical therapy and continued her on a no-work status. On April 9, 2018, Dr. Wardell recommended the claimant be referred for a neurosurgical consultation.

On January 7, 2019, Dr. Wardell submitted to a deposition and testified that he had kept the claimant on a no-work status. However, during cross examination he stated that the claimant

could work an eight-hour day if the position was sedentary, she was not required to lift, and if she was provided opportunities to get up and stretch every fifteen to twenty minutes.

On February 11, 2019, Dr. Fox completed a questionnaire response to defense counsel. He noted that the minimal injury the claimant sustained was unlikely to cause permanent symptoms or disability. He also advised that the claimant did not participate in physical therapy, which he believed would have benefited her. Because the claimant had failed "nonsurgical management of her discomfort," he found that a consultation with a neurosurgeon or orthopaedic spine surgeon would be reasonable.

Though offered a panel of neurosurgeons on February 15, 2019, the claimant declined to make a selection. She was advised via letter that the employer "has not agreed to accept any unauthorized medical treatment provided by Dr. Waddell or any physician not on an approved panel." (Def.'s Ex. 4.)

The parties disputed the claimant's pre-injury average weekly wage. Both parties submitted wage charts, and the defendant also submitted direct deposit slips dating from March 24, 2016 through March 15, 2017. The Deputy Commissioner determined the claimant's average weekly wage was $264.15.

A. Additional Evidence

The claimant submitted a number of documents to the Commission after filing her request for review. A number of these were previously submitted and are therefore already a part of the record. However, the claimant also included two "transcripts" of conversations with Dr. Fox and his assistant, email exchanges between herself and the claims administrator, wage information,

and pictures of a cooler. She also included two out-of-work notes from Dr. Wardell dating from January and February 2020.

"[A] party requesting the admission of additional testimony or evidence must be able to conform to the rules prevailing in the Courts of this State for the introduction of after discovered evidence." *Miller v. Dixon Lumber Co.*, 67 O.I.C. 71, 72 (1988). In order for additional evidence to be considered it must be established that the proffered evidence was discovered after the Deputy Commissioner's hearing, that it could not have been discovered before through the exercise of due diligence, that it is material to the case and not merely cumulative, and that its admission at another hearing ought to lead to a different result. *Chenault v. Blue Roofing, Inc.*, No. 0405-85 (Va. Ct. App. Feb. 12, 1986).

The additional evidence that was in existence prior to the hearing could have been timely introduced by the claimant through the exercise of due diligence. Furthermore, the out-of-work notes from Dr. Wardell are not pertinent to the present review and will not be considered. We do not find the new evidence proffered by the claimant conforms to the Commonwealth's rules for the introduction of after-discovered evidence, and as a result, we may not consider it on review.

B. Disability and Indemnity Benefits

The claimant argues that the Deputy Commissioner erred by finding she was not totally disabled. The claimant bears the burden of proving both her "disability and the periods of that disability." *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997). "There is no presumption in the law that once a disability has been established, a claimant will be assumed to remain disabled for an indefinite period of time." *Id.* (citing *Hercules, Inc. v. Carter*, 14 Va. App. 886 (1992)). "Ongoing disability, like causation, may be proved by either direct or

circumstantial evidence, including medical evidence or 'the testimony of a claimant,' if found credible by the commission." *Chicks Constr. v. Torres*, No. 0864-08-2 (Va. Ct. App. Nov. 25, 2008) (quoting *Dollar Gen. Store v. Cridlin*, 22 Va. App. 171, 176 (1996)).

After reviewing the medical records, we do not find the claimant has established ongoing total disability. Dr. Fox found on October 16, 2017 that the claimant was subject to a forty-pound lifting restriction. He based this finding on a comparison of two of the claimant's MRIs, as well as his observation that the injury suffered by the claimant was minor and that she had capabilities beyond what she would admit. On November 9, 2017, he reviewed several job descriptions provided by the case manager and opined that her restrictions would not prevent her return to full duty.

The evidence presented by the claimant also demonstrates that she is partially, rather than totally, disabled. Although Dr. Wardell took the claimant out of work, he admitted during his deposition that she would be able to perform sedentary work as long as she was permitted to stand and stretch. He did not opine that the claimant was incapable of all work. (Def.'s Ex. 1-1.)

We also find that Dr. Wardell's change of opinion during the deposition serves to lessen the weight afforded his medical findings. *See Jones v. Dynax Am. Corp.*, JCN VA02000003865 (Apr. 30, 2013) (affording little weight to a physician's opinion that "evinces a lack of certainty and contradicts the diagnoses and conclusions in his own earlier report"). Regardless, we find the opinions of Dr. Fox far more persuasive. He opined the claimant was capable of restricted duty on October 16, 2017, and that these restrictions did not interfere with the claimant's ability to perform her pre-injury job on November 9, 2017.

While we have also considered the claimant's testimony, several statements she made at the hearing were contradicted by other evidence in the record. She denied being offered a second panel of orthopaedic physicians, even though she confirmed that one was offered in the defendant's Request for Admissions. (Tr. 23-24, June 4, 2019.) Although Dr. Fox's records indicate he prescribed physical therapy, at the hearing she averred that he never instructed her to do so. (Tr. 57, Sept. 10, 2019.) The claimant's testimony is insufficiently persuasive to allow her to prove, by a preponderance of the evidence, that she is totally disabled as alleged. Furthermore, we are unable to reconcile the claimant's refusal to undergo physical therapy ordered by Dr. Fox or to be examined by a neurosurgeon with a sincere desire for appropriate medical care to attend to her impressive catalogue of complaints. We find the claimant's conduct less indicative of a legitimate injury than a desire to receive disability. As to her allegation of total incapacity, we are entirely unpersuaded.

An injured employee who "remains partially disabled must make a reasonable effort to market his remaining capacity to work in order to continue receiving workers' compensation benefits." *Va. Wayside Furniture, Inc. v. Burnette*, 17 Va. App. 74, 78 (1993). "The employee must obviously exercise reasonable diligence in seeking employment, and what is reasonable in a given case will depend on all of the facts and surrounding circumstances." *Great Atl. & Pac. Tea Co. v. Bateman*, 4 Va. App. 459, 467 (1987). In the present case, Dr. Fox found the claimant had partial work capacity beginning October 17, 2019 through November 8, 2017, and that her restrictions did not prevent her from working full duty afterwards. Dr. Wardell found the claimant could perform sedentary duty. Despite having residual work capacity, the claimant presented no

evidence of marketing. We therefore agree with the Deputy that the claimant was no longer entitled to indemnity benefits after October 16, 2019.

C. Medical Treatment

The claimant contends that the defendant should be responsible for her ongoing treatment with Dr. Wardell. If a claimant sustains a compensable injury, the employer is required to "furnish, or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention." Va. Code § 65.2-603(A)(1). However, once a claimant has established a course of treatment with a physician, she may not change treating physicians unless provided with a referral from the treating physician, confronted by an emergency, or given permission by the employer, insurer, or the Commission. *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 130 (1989). "When an employee seeks treatment other than that provided by the employer or ordered by the commission, he or she does so at his or her own peril and risks not being reimbursed. The mere fact that the unauthorized medical treatment is an acceptable method of treating the condition does not mean that the treatment should be paid for by the employer." *Shenandoah Prods., Inc. v. Whitlock*, 15 Va. App. 207, 213 (1992).

In the present case, Dr. Fox released the claimant from his care based upon her non-compliance with his recommendations and the increasing contentiousness of their relationship. The defendant then offered the claimant a new panel of orthopaedists. The claimant declined to select a new treating physician from the panel. We find the defendant has complied with their obligations to provide medical treatment. Contrasted with this finding, the claimant's litany of conflicting excuses – that she didn't receive the panel, that the defendant refused to

provide a panel and that she was unaware that she refused to make a selection even after consulting with her attorney – are entirely unpersuasive. (Tr. 24-25, June 4, 2019.)

Dr. Wardell was not included on the panel of physicians offered the claimant. She was not referred to him, she was not seeking emergency treatment, and she did not seek the permission of the employer, insurer, or Commission before beginning a course of treatment with him. At the hearing, the claimant stated that she initially saw him because she wanted a second opinion regarding surgical treatment. (Tr. 25, June 4, 2019.) While the claimant is free to seek a second opinion, "an employer is not responsible for the payment of an employee requested independent medical examination." *Sheffer v. Flint Ink Corp.*, VWC File No. 209-31-73 (Aug. 14, 2006). We find the claimant's treatment with Dr. Wardell was unauthorized and is not the responsibility of the defendant.

We also find the claimant has failed to produce preponderating evidence demonstrating that Dr. Wardell should be appointed her new treating physician. When a claimant seeks to change treating physicians,

> [t]he Commission will order such a change if it finds 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 [is] being made in improvement of the employee's health condition without any adequate explanation; conventional modalities of treatment are not being used,

or if the physician has failed to implement a plan for the treatment of a long-term disability. *Powers v. J.B. Constr.*, 68 O.I.C. 208, 211 (1989). The claimant refused to select a new treating orthopaedist when the defendant offered her a new panel. She therefore cannot demonstrate that the medical care offered by the employer meets the criteria above. Furthermore, given that

Medicine the following day and was diagnosed with a lumbar strain. Dr. Lee placed the claimant on restricted duty with no lifting greater than five pounds and the liberty to sit and stand as needed. The employer accommodated the claimant's restrictions, and she continued working through June of 2017. (Tr. 18, June 4, 2019.)

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The parties disputed the claimant's pre-injury average weekly wage. Both parties submitted wage charts, and the defendant also submitted direct deposit slips dating from March 24, 2016 through March 15, 2017. The Deputy Commissioner determined the claimant's average weekly wage was $264.15.

A. Additional Evidence

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The additional evidence that was in existence prior to the hearing could have been timely introduced by the claimant through the exercise of due diligence. Furthermore, the out-of-work notes from Dr. Wardell are not pertinent to the present review and will not be considered. We do not find the new evidence proffered by the claimant conforms to the Commonwealth's rules for the introduction of after-discovered evidence, and as a result, we may not consider it on review.

B. Disability and Indemnity Benefits

The claimant argues that the Deputy Commissioner erred by finding she was not totally disabled. The claimant bears the burden of proving both her "disability and the periods of that disability." *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997). "There is no presumption in the law that once a disability has been established, a claimant will be assumed to remain disabled for an indefinite period of time." *Id.* (citing *Hercules, Inc. v. Carter*, 14 Va. App. 886 (1992)). "Ongoing disability, like causation, may be proved by either direct or

circumstantial evidence, including medical evidence or 'the testimony of a claimant,' if found credible by the commission." *Chicks Constr. v. Torres*, No. 0864-08-2 (Va. Ct. App. Nov. 25, 2008) (quoting *Dollar Gen. Store v. Cridlin*, 22 Va. App. 171, 176 (1996)).

After reviewing the medical records, we do not find the claimant has established ongoing total disability. Dr. Fox found on October 16, 2017 that the claimant was subject to a forty-pound lifting restriction. He based this finding on a comparison of two of the claimant's MRIs, as well as his observation that the injury suffered by the claimant was minor and that she had capabilities beyond what she would admit. On November 9, 2017, he reviewed several job descriptions provided by the case manager and opined that her restrictions would not prevent her return to full duty.

The evidence presented by the claimant also demonstrates that she is partially, rather than totally, disabled. Although Dr. Wardell took the claimant out of work, he admitted during his deposition that she would be able to perform sedentary work as long as she was permitted to stand and stretch. He did not opine that the claimant was incapable of all work. (Def.'s Ex. 1-1.)

We also find that Dr. Wardell's change of opinion during the deposition serves to lessen the weight afforded his medical findings. *See Jones v. Dynax Am. Corp.*, JCN VA02000003865 (Apr. 30, 2013) (affording little weight to a physician's opinion that "evinces a lack of certainty and contradicts the diagnoses and conclusions in his own earlier report"). Regardless, we find the opinions of Dr. Fox far more persuasive. He opined the claimant was capable of restricted duty on October 16, 2017, and that these restrictions did not interfere with the claimant's ability to perform her pre-injury job on November 9, 2017.

While we have also considered the claimant's testimony, several statements she made at the hearing were contradicted by other evidence in the record. She denied being offered a second panel of orthopaedic physicians, even though she confirmed that one was offered in the defendant's Request for Admissions. (Tr. 23-24, June 4, 2019.) Although Dr. Fox's records indicate he prescribed physical therapy, at the hearing she averred that he never instructed her to do so. (Tr. 57, Sept. 10, 2019.) The claimant's testimony is insufficiently persuasive to allow her to prove, by a preponderance of the evidence, that she is totally disabled as alleged. Furthermore, we are unable to reconcile the claimant's refusal to undergo physical therapy ordered by Dr. Fox or to be examined by a neurosurgeon with a sincere desire for appropriate medical care to attend to her impressive catalogue of complaints. We find the claimant's conduct less indicative of a legitimate injury than a desire to receive disability. As to her allegation of total incapacity, we are entirely unpersuaded.

An injured employee who "remains partially disabled must make a reasonable effort to market his remaining capacity to work in order to continue receiving workers' compensation benefits." *Va. Wayside Furniture, Inc. v. Burnette*, 17 Va. App. 74, 78 (1993). "The employee must obviously exercise reasonable diligence in seeking employment, and what is reasonable in a given case will depend on all of the facts and surrounding circumstances." *Great Atl. & Pac. Tea Co. v. Bateman*, 4 Va. App. 459, 467 (1987). In the present case, Dr. Fox found the claimant had partial work capacity beginning October 17, 2019 through November 8, 2017, and that her restrictions did not prevent her from working full duty afterwards. Dr. Wardell found the claimant could perform sedentary duty. Despite having residual work capacity, the claimant presented no

evidence of marketing. We therefore agree with the Deputy that the claimant was no longer entitled to indemnity benefits after October 16, 2019.

C. Medical Treatment

The claimant contends that the defendant should be responsible for her ongoing treatment with Dr. Wardell. If a claimant sustains a compensable injury, the employer is required to "furnish, or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention." Va. Code § 65.2-603(A)(1). However, once a claimant has established a course of treatment with a physician, she may not change treating physicians unless provided with a referral from the treating physician, confronted by an emergency, or given permission by the employer, insurer, or the Commission. *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 130 (1989). "When an employee seeks treatment other than that provided by the employer or ordered by the commission, he or she does so at his or her own peril and risks not being reimbursed. The mere fact that the unauthorized medical treatment is an acceptable method of treating the condition does not mean that the treatment should be paid for by the employer." *Shenandoah Prods., Inc. v. Whitlock*, 15 Va. App. 207, 213 (1992).

In the present case, Dr. Fox released the claimant from his care based upon her non-compliance with his recommendations and the increasing contentiousness of their relationship. The defendant then offered the claimant a new panel of orthopaedists. The claimant declined to select a new treating physician from the panel. We find the defendant has complied with their obligations to provide medical treatment. Contrasted with this finding, the claimant's litany of conflicting excuses – that she didn't receive the panel, that the defendant refused to

provide a panel and that she was unaware that she refused to make a selection even after consulting with her attorney – are entirely unpersuasive. (Tr. 24-25, June 4, 2019.)

Dr. Wardell was not included on the panel of physicians offered the claimant. She was not referred to him, she was not seeking emergency treatment, and she did not seek the permission of the employer, insurer, or Commission before beginning a course of treatment with him. At the hearing, the claimant stated that she initially saw him because she wanted a second opinion regarding surgical treatment. (Tr. 25, June 4, 2019.) While the claimant is free to seek a second opinion, "an employer is not responsible for the payment of an employee requested independent medical examination." *Sheffer v. Flint Ink Corp.*, VWC File No. 209-31-73 (Aug. 14, 2006). We find the claimant's treatment with Dr. Wardell was unauthorized and is not the responsibility of the defendant.

We also find the claimant has failed to produce preponderating evidence demonstrating that Dr. Wardell should be appointed her new treating physician. When a claimant seeks to change treating physicians,

> [t]he Commission will order such a change if it finds 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 [is] being made in improvement of the employee's health condition without any adequate explanation; conventional modalities of treatment are not being used,

or if the physician has failed to implement a plan for the treatment of a long-term disability. *Powers v. J.B. Constr.*, 68 O.I.C. 208, 211 (1989). The claimant refused to select a new treating orthopaedist when the defendant offered her a new panel. She therefore cannot demonstrate that the medical care offered by the employer meets the criteria above. Furthermore, given that

Dr. Wardell has recommended a similar treatment regimen as was prescribed by Dr. Fox, we do not find the care she previously received was inadequate.

D. Average Weekly Wage

The claimant also objects to the calculation of her pre-injury average weekly wage. Ordinarily the average weekly wage is computed by dividing the employee's earnings over the last year by fifty-two. However, "[w]hen for exceptional reasons the foregoing would be unfair either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." Va. Code § 65.2-101(1)(b). This provision of the Code "gives the Commission discretion in the methods to be used to determine the average weekly wage the employee was earning in the employment in which he was working at the time of the injury." *Hudson v. Arthur Treachers*, VWC File No. 111-88-73 (July 17, 1985).

In the present case, the defendant submitted a wage chart and direct deposit slips indicating that the claimant earned $13,736.05 during the year before her injury. This sum was divided by fifty-two to reach an average weekly wage of $264.15. The claimant argues this was error, and that her yearly earnings should have been divided by forty because she received a total of twenty bi-weekly payments over the course of the year. We disagree. The direct deposit slips submitted by the employer show that the claimant was not issued compensation while the school system was on its summer break and she was not working. That is the reason the claimant received twenty payments rather than twenty-four. "We recognize that determining an average weekly wage for a school employee is different that determining an average weekly wage for other employees who do not work according to a 'school calendar.'" *Seminario v. Fairfax Cnty. Pub. Schs.*,

JCN VA00000509959 (Jan. 28, 2014), *aff'd*, No. 0362-14-4 (Va. Ct. App. Dec. 9, 2014). However, calculating the claimant's wages in the manner she suggests "would artificially increase her average weekly wage." *Id.* Accordingly, we find no error in the Deputy's calculation of the claimant's pre-injury average weekly wage.

E. Due Process

Lastly, the claimant argues the defendant subjected her to "trial by ambush" and that counsel for the defendant engaged in willful misconduct. We have carefully reviewed the hearing transcript and the voluminous records submitted by the parties, and do not find that the claimant was denied any rights afforded to her under the Act. "Due process requires that each party have notice and an opportunity to be heard on issues that are decided." *Childress v. Appalachian Power Co.*, JCN No. 1204206 (May 9, 2012) (citing *Sergio's Pizza v. Soncini*, 1 Va. App. 370 (1986)). The parties were informed as to the issues to be decided, and the claimant was afforded ample opportunity to present evidence in support of her claims. The defendant was permitted to test the claimant's evidence through the process of cross-examination. We do not find the claimant's due process rights have been violated.

III. Conclusion

The Deputy Commissioner's January 6, 2020 Opinion below is AFFIRMED.

Interest is payable on the award pursuant to Virginia Code § 65.2-707.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Concurring:

I agree with the majority as to the result. I write separately to respectfully limit and clarify

my agreement with the legal reasoning.

The majority correctly concludes the defendants are not responsible for the claimant's treatment with Dr. Wardell. I do not join the majority's reliance on *Sheffer v. Flint Ink Corp.*, VWC File No. 209-31-73 (Aug. 14, 2006). It does not stand for the proposition stated. The quoted language is dicta which was unnecessary to the analysis. It is contradictory to the holding of the case. It is not buttressed by any reference to other legal authority.

I do not join the conclusion that because the defendants offered the claimant a panel of orthopaedists and she did not select from it, she "cannot" prove the defendants are responsible for requested medical care. The evidence in this case is insufficient to hold the defendants responsible for Dr. Wardell's care. But declining to select a physician from an offered panel is not universally and categorically inadequate to prove entitlement to a change in physicians under *Powers v. J.B. Constr.*, 68 O.I.C. 208, 211 (1989) or "other good reasons" for seeking medical attention pursuant to *Shenandoah Prods., Inc. v. Whitlock*, 15 Va. App. 207, 212-213 (1992).

I therefore concur.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Interested Parties

Employer:
SUFFOLK PUBLIC SCHOOLS
WC CLAIMS MANAGER
PO Box 1549
Suffolk, VA 23439-1549

Insurance Carrier:
SUFFOLK CITY SCHOOL BOARD
Dr. John Gordon Superintendent
PO Box 1549
Suffolk, VA 23439-1549

Claim Administrator:
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC
PO Box 14663
Lexington, KY 40512-4663

Claim Administrator Attorney:
Wendell M Waller
Paperless

Injured Worker:
SHIRLENE BAILEY
6000 Rollingwood St
Suffolk, VA 23435-3299

Appendix - B

Tab

VIRGINIA:

In the Court of Appeals of Virginia on **Wednesday** *the* **4th** *day of* **November, 2020.**

Shirlene Bailey, Appellant,

against Record No. 0664-20-1
Claim No. VA00001323920

Suffolk Public Schools and
Suffolk City School Board, Appellees.

Virginia Workers' Compensation Commission

AUG 11 2021

Clerk's Office

From the Virginia Workers' Compensation Commission

Before Judges Beales, Huff and Senior Judge Annunziata

Shirlene Bailey (claimant) appeals a decision by the Workers' Compensation Commission (the Commission), finding that she was not totally disabled, that she was not entitled to indemnity benefits after October 17, 2017, and that the medical treatment provided by Dr. Arthur W. Wardell was unauthorized. On July 17, 2020, claimant filed an opening brief. On July 23, 2020, Suffolk Public Schools and Suffolk City School Board (collectively "employer"), filed a motion to dismiss claimant's opening brief for failure to comply with Rules 5A:4, 5A:19, 5A:20, 5A:24, and 5A:25. On July 24, 2020 and July 27, 2020, claimant filed amended opening briefs correcting some of the issues raised by employer. On July 28, 2020, this Court ordered claimant to show cause on or before August 21, 2020 why this appeal should not be dismissed for her failure to file an appendix as required by Rule 5A:25. The Court also ordered that claimant file an amended opening brief on or before August 21, 2020 that complied with the requirements as set forth in Rules 5A:4, 5A:19, 5A:20, and 5A:24.

On August 21, 2020, claimant filed an amended opening brief. The amended opening brief cured some of the deficiencies in her other opening briefs, but the brief still violates Rule 5A:20. The amended brief does not comply with Rule 5A:20(c), which requires that the assignments of error noted in the brief address the rulings of the Commission that claimant is challenging and cite to the record where the claims

were preserved. Claimant lists four items as "assignments of error." In three of the assignments of error, rather than specifically identifying alleged erroneous rulings of the Commission, claimant sets forth argumentative statements. As the appellant, claimant must "lay [her] finger on the error" so that opposing counsel and the Court know the grounds on which she "intends to ask a reversal of the judgment, and to limit discussion to these points." Carroll v. Commonwealth, 280 Va. 641, 649 (2010) (quoting Yeatts v. Murray, 249 Va. 285, 290 (1995)). The purpose of assignments of error is to "point out the errors with reasonable certainty in order to direct [the] court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment . . . ." Lambert v. Commonwealth, 70 Va. App. 740, 752 n.2 (2019) (quoting Kirby v. Commonwealth, 264 Va. 440, 444-45 (2002)).

In her first assignment of error, claimant appears to address a ruling of the Commission where she contends, "The Court erred when they heavily relied upon the contradictory care of treatment plan from the previously treating physician opposed to considering the totality and suggested treatment and care plan of all." However, she provides no reference as to where this issue is preserved in the record. See Rule 5A:20(c).

In addition, Rule 5A:20(d) provides that the opening brief must contain a statement of facts with references to the pages of the transcript, written statement of facts, record, or appendix where such facts have been established. Claimant's statement of facts in her amended opening brief does not contain references to the applicable pages where the facts were established.

Claimant was provided with an opportunity to cure the defects in her opening brief and failed to do so. We find that claimant's failure to adhere to the applicable Rules of Court is significant, and thus we hold that she has waived her claims on appeal. See, e.g., Ducharme v. Commonwealth, 70 Va. App. 668, 674 (2019). Rules of Court are not mere "suggestions," and all litigants are expected to follow them. Bartley v. Commonwealth, 67 Va. App. 740, 746 (2017). Because we find that the claims raised on appeal are waived,

Virginia Workers' Compensation Commission

AUG 11 2021

the Commission's ruling is summarily affirmed.[1] Rule 5A:27. The appellant shall pay to the appellees $150 damages.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk

Virginia Workers' Compensation Commission

AUG 11 2021

Clerk's Office

[1] On July 23, 2020 and August 25, 2020, employers filed motions to dismiss this case. Because we summarily affirm the Commission's ruling, it is not necessary to rule on these motions. On October 19, 2020, claimant filed a motion to submit medical documents dated June 19, 2020. Her motion is denied.

Appendix - B

TASA

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **4th** *day of* **December, 2020.**

Shirlene Bailey, Appellant,

against Record No. 0664-20-1
Claim No. VA00001323920

Suffolk Public Schools and
Suffolk City School Board, Appellees.

Upon a Petition for Rehearing En Banc

Before the Full Court

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of November, 2020 and grant a rehearing *en banc* thereof, the said petition is dismissed as it was not timely filed pursuant to Rule 5A:34.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: _____

Deputy Clerk

Virginia Workers' Compensation Commission

AUG 11 2021

Clerk's Office

1 of 1

Appendix - B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 26th day of May, 2021.

Shirlene Bailey, Appellant,

against Record No. 201472
Court of Appeals No. 0664-20-1

Suffolk Public Schools, et al., Appellees.

From the Court of Appeals of Virginia

On May 12, 2021 came the appellant, who is self-represented, and filed a motion to request admission of evidence in this case.

Upon consideration whereof, the Court denies the motion.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: [signature]
Deputy Clerk

Appendix -B

Tab
VA000001333930

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 9th day of March, 2021.

Shirlene Bailey, Appellant,

against Record No. 201472
Court of Appeals No. 0664-20-1

Suffolk Public Schools, et al., Appellees.

From the Court of Appeals of Virginia

Finding that the petition for appeal does not contain a statement setting forth in what respect the decision of the Court of Appeals involves (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court dismisses said petition filed in the above-styled case. Rule 5:17(c)(2).

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

Virginia Workers' Compensation Commission

JUL 21 2021

Clerk's Office

Appendix -B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 28th day of June, 2021.

Shirlene Bailey, Appellant,

against Record No. 201472
Court of Appeals No. 0664-20-1

Suffolk Public Schools, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on March 9, 2021 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: _____
Deputy Clerk

Additional material from this filing is available in the Clerk's Office.