

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Coleman and Willis

ARC ELECTRIC, INC. AND
SAFEGUARD INSURANCE COMPANY

v. Record No. 2037-97-2

JAMES A. GODWIN, JR.

MEMORANDUM OPINION*
PER CURIAM
DECEMBER 23, 1997

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

(Benjamin J. Trichilo; Trichilo, Bancroft,
McGavin, Horvath & Judkins, on brief), for
appellants.

No brief for appellee.

ARC Electric, Inc. and its insurer (hereinafter referred to as "employer") contend that the Workers' Compensation Commission erred in finding that employer failed to prove that James A. Godwin, Jr. was released to return to his pre-injury work. Upon reviewing the record and the employer's brief, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. See Rule 5A:27.

Pursuant to a memorandum of agreement, the commission entered an award in favor of Godwin for temporary total disability. In response to the employer's application for a hearing, the commission held that the medical reports of Dr. Rudolph Cejas, who examined Godwin while he was incarcerated, did not prove that Godwin's knee injury had sufficiently healed so

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

that he could return to his pre-injury employment. In so ruling, the commission made the following findings:

On July 19, 1996, Dr. Cejas evaluated Godwin for pain in the left ear, which was diagnosed as otitis externa. On August 29, 1996, a medical record entry was made by one of Dr. Cejas's assistants, that [Godwin] "[m]ay return to work v/o Dr. Cejas." Dr. Cejas again evaluated Godwin on September 4, 1996, for recurrent pain in the left ear. He diagnosed otitis media of the left ear, prescribed medication and opined that [Godwin] could "[r]eturn to work."

. . . Dr. [Stephen] McCoy [, Godwin's treating orthopedist,] found [Godwin] totally disabled before his incarceration and has not examined him since. There is no evidence that Dr. Cejas evaluated [Godwin's] knee. The only medical records from Dr. Cejas relate to treatment for [Godwin's] left ear infection. Because Dr. Cejas does not mention [Godwin's] right knee injury in his notes, we cannot conclude that the work release related to [Godwin's] knee and not the condition for which he rendered treatment, complaints of left ear pain.

"General principles of workman's compensation law provide that '[i]n an application for review of any award on the ground of change in condition, the burden is on the party alleging such change to prove his allegations by a preponderance of the evidence.'" Great Atl. & Pac. Tea Co. v. Bateman, 4 Va. App. 459, 464, 359 S.E.2d 98, 101 (1987) (quoting Pilot Freight Carriers, Inc. v. Reeves, 1 Va. App. 435, 438-39, 339 S.E.2d 570, 572 (1986)). The commission's findings are binding and conclusive upon us, unless we can say as a matter of law that the employer proved that Godwin's knee injury had sufficiently healed

so that he could return to his pre-injury employment. See Tomko v. Michael's Plastering Co., 210 Va. 697, 699, 173 S.E.2d 833, 835 (1970).

The commission articulated legitimate reasons for giving little probative weight to Dr. Cejas' reports. In light of Dr. Cejas' diagnosis, which was limited to Godwin's ear problem, the commission was entitled to conclude that Dr. Cejas' reports did not relate to Godwin's knee injury. No evidence in the record proved that Godwin's knee injury had sufficiently healed so that he could carry out all of the duties of his pre-injury employment.

Because the medical evidence was subject to the commission's factual determination, see Hungerford Mechanical Corp. v. Hobson, 11 Va. App. 675, 677, 401 S.E.2d 213, 215 (1991), we cannot find as a matter of law that the evidence proved that Godwin was capable of returning to his pre-injury employment. Accordingly, we affirm the commission's decision.

Affirmed.