

## **AN EMPLOYEE'S DUTY TO MARKET HIS OR HER RESIDUAL WORK CAPACITY**

If your physician places you on light duty work restrictions and your employer cannot accommodate these restrictions (or you have been terminated) you may have a duty to search for work within your restrictions. This duty applies if you are not under an open award for temporary total wage replacement benefits.

Therefore, it is critical that you seek alternative employment while partially disabled from your pre-injury job until such time as your pre-injury employer can take you back, even if your disability is only temporary. A failure to seek work within your light duty work restrictions (i.e. a failure to market your residual work capacity) can result in denial of wage replacement benefits.

This "failure to market" defense arises from statutes and case law holding that if you are partially disabled, then you are required to search for work within your work restrictions in order to be entitled to wage replacement benefits. If you do not undergo the work search, then you are not entitled to wage replacement benefits. The "failure to market" defense is quite popular with defense counsel, because if they can show that an adequate job search was not undertaken they will be able to save the insurer wage replacement benefits for the period of time that the job search was not conducted. Medical benefits will continue unaffected.

An adequate job search means searching for at least five or more jobs per week within your work restrictions, and keeping track of your work search in a journal (the date you made contact or applied, name of company, some information about the job). You will likely be questioned about your work search at a deposition or hearing, and the journal will be of great use. Of course you are not quitting your regular employer; this work search is done to support your claim for total wage replacement benefits. Should you actually find work for less than you were making before, you may be entitled to partial wage replacement benefits, and you can return to your regular employer when they are able to accommodate you.

Should you find alternative employment, please promptly advise us so that we can determine whether or not you have a claim for partial wage replacement benefits (making up two-thirds of the difference between your pre-injury average weekly wage and the gross weekly wage of your alternative employment). If you have a partial wage replacement claim, you should be paid both from your alternative employer and from the insurer.

Please also register at the Virginia Employment Commission for their assistance in job leads; make sure they know of your restrictions so that any leads are appropriate. In a marketing defense, the question of whether you registered at the VEC is often asked.

Please bear in mind that your search efforts for substitute or alternative employment may be closely examined by opposing counsel or the insurance carrier. Therefore, all efforts to find work must be made in good faith. If potential employers advise the insurer/defense counsel that

you stated you were just looking for work because you had to and that you really didn't want to work, that evidence may well be sufficient proof that you failed to market your residual working capacity. This will result in the denial of workers' compensation benefits.

Accordingly, when first applying there is no need to advise employers of your restrictions. However, should you reach an interview stage, then a potential employer does need to know about your work restrictions both so that you are not expected to do work outside of your restrictions and so that the employer has an opportunity to decide whether or not to hire you with full knowledge of your restrictions.

This job search needs to be started when you are placed on light duty work restrictions (unless your doctor has informed you that you will be returning to full duty work in three weeks or less). I realize that it is difficult to find work on restrictions, but the standard isn't whether work was found, it is whether work within your restrictions was sought in good faith.

Once an award is entered in your case, there is no such duty to market, but only to cooperate with vocational rehabilitation (if they are assigned). However, if no award has yet been entered, we are vulnerable to this defense for as long as you are on light duty work restrictions (as opposed to total disability).

If your physician states that you are totally disabled, this requirement to search for work does not apply. However, please ask your physician for a work restriction note when you leave your appointment (and give a copy to your employer and to us). It is easy to confuse a doctor's instructions which provide for severe work restrictions and misinterpret those restrictions as a complete work release. Unless the doctor's note clearly states that you are totally disabled with no work to be done until your next appointment, you are likely to be partially disabled.

Should you have any questions, please feel free to contact us.