**Newbies and Besties: Update on
New Workers’ Compensation Decisions and the VWC**

The Honorable Wesley G. Marshall[[1]](#footnote-1)
The Honorable R. Ferrell Newman
The Honorable Robert A. Rappaport
Virginia Workers’ Compensation Commission

Presented at the Virginia Workers’ Compensation American Inn of Court Meeting
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1. NEWEST AND HOTTEST CASES IN THE WORLD OF VIRGINIA WORKERS’ COMPENSATION
	1. Animal Bites and Arising Out Of

**Rohr v. Greenfront Furniture, JCN VA00001120790 (Jan. 10, 2017)[Commission].** The claimant was bitten by a cat at Greenfront, a furniture store in Farmville. Claimant arrived at desk to find cat on pizza box. Claimant tried to pick up cat and was bitten. Work area was a warehouse with an open door. The cat had entered the store several times earlier that day and claimant’s supervisor “tossed it out,” only to have it return. He called animal control but was told they did not have “jurisdiction” over cats. He posted information on the cat on Facebook and called a local radio station. Previously, a possum, a snake and birds had entered the building through the big open door. **HELD**: The full Commission affirmed the Deputy Commissioner’s opinion holding the accident arose out of the employment. The open doors of the warehouse allowed animals to enter the work space and increased the risk of a toothy encounter.

* 1. Commission Ordered Examination Pursuant to Va. Code § 65.2-606

**Hall v. Pittsylvania County Board, JCN 0619440 (Jan. 4, 2017)[Marshall]**. In this interlocutory Request for Review, the Employer challenged the Deputy Commissioner’s denial of its Motion for a Va. Code 65.2-606 Commission ordered medical examination. The claimant had a 1978 injury and was on a long term course of medication. The defendants took the deposition of the new treating physician, who refused to comment upon the opinions of two defense medical examiners that disputed the need for continuing treatment. The new treating physician declined to comment, “out of respect,” for the prior treating physician. The Deputy Commissioner denied the motion, stating the Commission would not micro-manage claimant’s medical care, IME’s were available, and disagreement with IME’s was not a basis for a Commission ordered examination. On review, defendants argued since the claimant was not receiving, “compensation,” they were not permitted to require an IME. **HELD**: A unanimous Commission affirmed the Deputy Commissioner on the grounds that the risk of substantial prejudice was not proven. The Commission noted while it was tempting to consider the employer’s argument, it could not envision the legislature meant to limit IME’s only to cases where indemnity compensation was being claimed or paid.

* 1. Commission Will Not Consider Issues Raised for the First Time on Review, Particularly Where They Were Denied or Opposed at Hearing

**Medrano v. NewTech, LLC, JCN VA02000023023 (Dec. 28, 2016)[Commission].** Claimant alleged he was employee of an employer. Deputy Commissioner asked at hearing whether he was advancing any other theory including that claimant was a statutory employee since there was a middle man between claimant and the employer. Claimant’s counsel, per Deputy Commissioner, “resisted,” that theory. On review, claimant alleged Deputy Commissioner erred in failing to decide *sua sponte* whether he was a statutory employee. **HELD**: Deputy Commissioner did not err in failing to consider or decide the case on a theory that was denied by the claimant at hearing. **PRACTICE POINTER**: Carefully consider whether or not to plead in the alternative, particularly at the invitation of the Deputy Commissioner who may have informed himself about the facts of the case.

* 1. Commission May Dismiss Review for Failure to Specify Assignments of Error in Request for Review and Failure to File Written Statement

**Castellanos v. Northern Virginia Community College, JCN VA00001091945 (Dec. 27, 2016)[Newman]**. Claimant did not prevail at hearing. Claimant by counsel filed blanket Request for Review, “in all issues decided by the Deputy Commissioner.” The claimant did not file a Written Statement on Review. **HELD**: Claimant waived error on review. Pursuant to case law and Rule 3.2, failure to assign error in Request for Review and to file a Written Statement amounted to waiver of error.

* 1. Permanent and Total Disability Benefits May Be Suspended Based on Unjustified Refusal of Medical Treatment

**Withers v W. A. Fisher & Son, Inc. Electrical Co., JCN 1825974 (Dec. 22, 2016)[Marshall]**. Claimant was under final open award for Permanent and Total Disability benefits. Employer filed Application for Hearing seeking suspension of benefits based upon unjustified refusal of medical treatment. Claimant filed interlocutory Request for Review alleging permanent and total disability benefits could not be suspended for a refusal of medical treatment. Defendants alleged Va. Code § 65.2-603(B), which states, “The unjustified refusal of the employee to accept such medical service… when provided by the employer shall bar the employee from further **compensation** until such refusal ceases,” Va. Code § 65.2-503(C) classified permanent and total incapacity benefits as compensation, and Va. Code § 65.2-708 empowered the Commission to “review **any** award of compensation” based upon a change in condition. **HELD**: The Commission denied interlocutory review, noting the hearing was imminent and the claimant could raise the error subsequent to a hearing.

* 1. Arising Out Of – Exiting Truck

**Smith v. Commonwealth Cargo, Inc., JCN VA00001148295 (Dec. 22, 2016)[Newman]**. Claimant was descending iron rung step, like a ladder, on a truck. Distance from bottom step to ground exceeded 18 inches, well above the height of a normal step. The truck was parked on an incline, making the distance from the bottom rung of the ladder to the ground greater than it would have been on a level surface. **HELD**: The full Commission affirmed the Deputy Commissioner and found the accident arose out of the employment. The Commission surveyed the case law and noted the claimant was descending the ladder backward and was unable to see the ground. He misstepped and this was an actual risk of his employment. Commissioner Marshall concurred but did not join the statement that the mere act of entering or exiting a truck without more did not constitute a risk of the employment because this was not an immutable principle of law.

* 1. Arising Out Of – Police Officer Traveling to Private Gym Off-Duty

**Kelley v. County of Henrico, JCN VA00001046469 (Dec. 16, 2016)[Commission]**. Defendants requested review of decision that accident arose out of employment. Claimant police officer was in a motor vehicle accident en route to a gym facility. Claimant was driving a county police car to a county-owned gym. Claimant was permitted to take police car home and to drive it off duty conditional upon his agreement to respond to an emergency if one arose. Physical fitness was strongly encouraged by the employer and considered an asset to the police department. Claimant had access to gym facility at all times. On the date of accident, he left home and planned to go to the gym, return home, and then drive to work. The claimant typically went to the gym 2.4 times per week. Claimant could have worked out during work hours but found it more convenient to do so outside of work hours. **HELD**: Full Commission affirmed Deputy Commissioner’s decision that accident arose out of employment. Claimant’s accident occurred in employer-owned vehicle on route to employer-owned gym. Fact that claimant was exercising out of work hours increased the benefit to the employer and this did not undermine the arising out of analysis. Commissioner Marshall concurred.

* 1. Arising Out Of – The Gym Class Footrace

**White v. Virginia Beach City Public Schools, JCN VA00001058697 (Dec. 9, 2016)[Marshall]**. Defendants requested review of decision that accident arose out of employment. The claimant was a physical education teacher. Immediately after a student‑faculty basketball game, the students challenged the teacher to race the length of the court against his student teacher during school hours. The claimant was unable to stop at the end of the sprint and injured himself striking the wall. The claimant explained he did, “a lot of racing,” with students to keep them active and engaged. Defendants alleged the accident did not arise out of the employment because it was not a required task. **HELD**: Full Commission affirmed Deputy Commissioner’s decision that accident arose out of employment, noting the race was an “accepted and normal activity,” in claimant’s employment. The footrace was like the basketball game which preceded it, advanced the virtue of physical activity, and modeled good sportsmanship.

* 1. Arising Out Of – Police Officer Traveling to Private Gym Off-Duty

**Taylor v. Loudoun County, JCN VA000010926589 (Dec. 7, 2016)[Newman].** Claimant requested review of decision denying claim due to willful misconduct. Claimant police officer suffered injuries in a motor vehicle accident and was not wearing seatbelt. County had rule for officers to wear seat belts at all times operating county vehicles. The Deputy Commissioner believed claimant’s testimony that she thought a state statute governed the situation and granted an exception where it was impractical for her to wear her seatbelt, but relied on the rule. **HELD**: The unanimous full Commission reversed, holding the accident was not barred by willful misconduct. The claimant believed the statute provided an exception and that, “law enforcement was exempt,” and took precedence over the rule and, therefore, she did not know she was engaging in a forbidden act.

* 1. Statute of Limitations – Part A Assertion of Rights Does Not Toll Statute of Limitations for Permanent Partial Disability

**Maldonado v. Federal Express, JCN VA0000053924 (Dec. 6, 2016)[Marshall]**. Claimant was injured in 2009, and within three weeks filed a Part A Assertion of Rights. Subsequently, the Commission entered a medical only award based on agreement of the parties. In 2015, claimant filed two permanent partial disability claims. The Deputy Commissioner rejected the claim holding it was time barred. On review, the claimant argued the Part A form tolled the statute in accord with Cochran Industries VA v. Meadows, 63 Va. App. 218, 755 S.E.2d 489 (2014). **HELD**: The unanimous full Commission affirmed, holding the claimant did not file a timely claim. Within the statute of limitations, the claimant did not file a request for permanent partial disability benefits. The Commission distinguished Meadows, holding the Part A Assertion of Rights was not sufficient to toll the statute for a change in condition claim seeking permanent partial disability.

* 1. Arising Out Of – Police Officer Traveling to Private Gym Off-Duty

**James v. Gabriel Brothers, Inc., JCN VA00000972120 (Dec. 7, 2016)[Newman]**. Claimant requested review of decision granting Employer’s application for hearing. Claimant suffered compensable back injury and award was entered for continuing TTD. Employer filed application for hearing alleging claimant was able to return to regular work based on treating physician’s May 11, 2015 report. A Deputy Commissioner and the full Commission denied the application, nothing the doctor’s questionnaire response without accompanying medical records was insufficient to meet the burden of proof. The Employer filed another application for hearing relying on the same questionnaire response and including the contemporaneous office notes. The Deputy Commissioner granted the application and terminated the award of benefits. On review, the claimant asserted the Employer could not re-litigate the same issue twice. **HELD**: The unanimous full Commission reversed, holding the second application was barred by *res judicata*. “Simply stated, the defendants seek a second bite of the apple as a result of their failure to produce sufficient evidence to prove their application at the prior hearing. This is precisely the type of re-litigation of decided matters that *res judicata* was intended to prevent.”

* 1. Willful Misconduct – “Aggressor Defense” is not an Affirmative Defense Requiring Rule 1.10 Notice

**Wilson v. Heart Havens, Inc., JCN VA00001046555 (Dec. 5, 2016)[Marshall]**. Defendants requested review of decision denying willful misconduct defense on the ground that they did not comply with Rule 1.10’s notice requirement. Defendants alleged they could assert the, “aggressor defense,” without providing the notice required for an affirmative defense. The Employer had responded to the Commission’s 20-Day Order denying the claim because, “ [a] witness statement confirmed that the Injured Worker was the aggressor.” The Deputy Commissioner rejected the defense, concluding no Rule 1.10 notice was given. **HELD**: The unanimous full Commission reversed, relying on previous case law for the proposition that overcoming the “aggressor defense” was part of the claimant’s burden of proof rather than an affirmative defense. The Commission noted Commissioner Joyner’s dissents from two cases suggesting the “aggressor defense” was merely a way to circumvent the notice requirement for willful misconduct but accepted the Commission precedent. It also relied on more recent Court of Appeals authority holding the “aggressor defense” was “not an affirmative defense at all.”

* 1. Willful Misconduct – Emergency

**Sundance v. Republic Services, Inc., JCN VA02000022644 (Dec. 5, 2016)[Newman]**. Defendants requested review of decision denying willful misconduct defense. Claimant driving trash truck involved in rollover accident. Claimant testified he was confronted with emergency necessitating immediate action to avoid collision. He said vehicle obstructed his route and he could not go around it due to oncoming vehicle. Deputy Commissioner accepted claimant’s testimony as credible. Employer argued improper driving conviction proved willful misconduct and the fact that claimant’s confrontation with an emergency was irrelevant. **HELD**: The unanimous full Commission affirmed, holding the claimant did not intentionally decide to disobey the improper driving statute when he reacted to an emergency. Claimant did not willfully violate statute or employer’s driving rules or act “in a reckless or wanton manner in utter disregard of probable consequences.”

* 1. Arising Out Of – Reaching Around Furniture

**Talley v. J. C. Penney Co., Inc., JCN VA00001036632 (Nov. 29, 2016)[Commission]**. Defendants requested review of Deputy Commissioner’s opinion holding claimant’s accident arose out of the employment and was not barred by willful misconduct. Claimant injured right shoulder when squatting down in space between chair and rolling wooden caddy to access light socket. **HELD**: The unanimous full Commission affirmed, holding the accident arose out of the employment. The claimant’s act of squatting between furniture, reaching out and moving caddy away from the wall were a risk of her employment. Willful misconduct defense denied. Claimant had been instructed not to plug or unplug equipment as a result of pre-existing back injury. No one was available at the time, ergo, the safety rule was not reasonable and claimant had a valid reason for not abiding by it.

* 1. Arising Out Of – Architectural Anomaly Not Proven to Cause Fall

**Sturgell v. Prince William County, JCN VA000010926589 (Oct. 24, 2016)[Marshall]** Claimant was walking into building where she worked and tripped on the curb and fell. Claimant testified curb is lower at one end than the other because driveway abutting it was slanted. She said curb where she fell was higher than she expected. Deputy Commissioner denied claim, indicating a measurement of 7 inches for curb height did not establish an unusual difference in height sufficient to constitute a defect. **HELD**: The unanimous full Commission affirmed, holding the claimant did not prove the accident arose out of the employment because she did not prove her fall was caused by an architectural defect. The Commission disagreed with the Deputy Commissioner’s reasoning, finding the claimant did misjudge the height of the curb but did not prove that the curb height where she fell had an anomaly.

* 1. Court of Appeals – Arising Out Of – Insufficient Proof that Idiopathic Condition Contributed to Fall

**Mojares v. RK Chevrolet, Inc., No. 1016-16-2 (Va. Ct. of App. Nov. 22, 2016) (unpublished)** Claimant appealed denial of benefits. The Commission majority concluded the claimant did not prove an accident arising out of the employment. Commissioner Marshall dissented on the grounds the claimant’s pre-existing condition increased the risk of injury. The claimant had a prior gunshot injury which left him permanently disabled with a gait disorder, limited use of the right hand, and need for a cane. **HELD**: The Court affirmed the Commission decision concluding the claimant did not meet his burden of proof and that he “simply and inexplicably fell.” The Court held the claimant’s interrogatory answer that he “tripped [him]self” supported the Commission’s holding.

* 1. Arising Out Of – Police Officer’s Body Camera Audio Did Not Prove Stairway Caused Injury

**Echevarria v. City of Chesapeake, No. 0105-16-1 (Va. Ct. of App. Oct. 18, 2016) (unpublished)** Claimant police officer fell on a stairway. Body camera videos showed claimant walking down carpeted stairs that appeared to be in good order. Immediately after the fall, body camera audio caught a homeowner saying, “Don’t hurt yourself! I just slipped down the stairs. I just slipped down earlier.” The homeowner said to another individual, “I told you to call that man.” Later, the homeowner told another officer that she had fallen on the stairs earlier that day.” Commission held evidence was insufficient to establish a risk of the employment caused claimant’s injuries. Commissioner Marshall dissented, believing circumstantial evidence proved the claimant slipped due to a defect in the stairway. **HELD**: The Court of Appeals affirmed, holding the homeowner’s statements did not establish that a defect caused the claimant to slip, and the statements were ambiguous as to the cause of her fall.

1. VIOLATION OF MEDICAL RESTRICTIONS / “EXPECTED” INJURY

**Staton v. The Brothers Signal Co., 66 Va. App. 185, 783 S.E.2d 539 (2016) (Defendants appealed to the Supreme Court of Virginia).**

The claimant stepped into “quicksand” type ground while walking on a worksite and his left leg sank into the mud 15 inches. His knee buckled and hyperextended. He sought benefits for a resulting knee injury. The claimant had pre-existing left knee problems including surgeries. His physician issued statements such as “if he returns to a job that involves walking on unlevel terrain, that he would be at risk for a re-injury to the knee” and suggested jobs not involving walking on unlevel terrain. In 2008, the physician advised that the claimant must “use a cane or a walking stick when in the woods or on long distances.”

The Commission (split vote) upheld the Deputy Commissioner’s finding that the knee injury was “not medically unexpected” because claimant “did not follow reasonable adherence to his physician’s repeated instructions” to “stay off of unlevel terrain” and to “use a cane or walking stick when in the woods or on long distances.” The Commission concluded that the claimant’s injury “d[id] not qualify as an accidental injury because it was the expected result of the claimant’s failing to heed his physician’s multiple recommendations.” Staton v. The Brothers Signal Co., JCN VA00000894747 (July 6, 2015).[[2]](#footnote-2) The Court of Appeals reversed and advised “to warrant the denial of benefits, the evidence must prove more than the employee’s violation of a medical restriction; it must also prove that the violation is the activity that caused employee’s injury.”

The Court emphasized that “medical restrictions must be clearly communicated and specific before a claimant’s violation of such restrictions may bar the recovery of benefits. Generalized medical admonitions are insufficient . . . [W]hen a medical restriction has been communicated to an employee, the evidence must clearly demonstrate that the violation of the specific restriction caused the employee’s injury.” Staton, 66 Va. App. at 195-96, 783 S.E.2d at 543-44. The Court noted that the record did not support that the physician expected the claimant to refrain from ever walking down a hill or a set of stairs. Moreover, even if the physician’s instructions were sufficiently specific to constitute ongoing medical restrictions, and the claimant violated such, the evidence failed to prove that any violation caused the knee injury or that the injury was an “expected” result of not heeding restrictions. Rather, the claimant injured his knee afterhe had successfully walked down the hill. He injured his knee when placing his foot on a concealed hazard that no one reasonably anticipated.

1. EMPLOYER/EMPLOYEE RELATIONSHIP

**The Uninsured Employer’s Fund v. Jeffreys, No. 1676-15-3 (Va. Ct. App. Apr. 26, 2016) (unpublished).**

The Court of Appeals held the Commission erred in holding that the Fund waived its argument that the claimant was an employee of the Church or any other named defendant. The Court explained:

[T]he Fund’s written statement explicitly argued against the deputy commissioner’s conclusion that Mosby exercised sufficient control over the claimant to make her an employer of the claimant . . . The deputy commissioner then found that Mosby was an agent of the Historical Society, and thus the Historical Society, acting with Mosby as its agent, was claimant’s employer. And, because the Historical Society was a part of the Church, the Church was claimant’s employer. This principal-agent relationship between the Historical Society/Church and Mosby was the sole basis for the deputy commissioner’s finding. No grounds independent of this agency relationship were given to support the finding that the Historical Society/Church was claimant’s employer. We therefore agree with the Fund’s argument that under the theory adopted by the deputy commissioner, if the agent Mosby was found not to be claimant’s employer, it necessarily follows that Mosby’s principal, the Historical Society/Church, could not be claimant’s employer. Thus while the Fund did not explicitly argue in the body of its written statement that the Historical Society/Church was not claimant’s employer, it was the only logical conclusion one could draw from the Fund’s argument; the agent was not the employer therefore the principal could not be found to be the employer.

 (Op. 9.)

1. INJURY BY ACCIDENT

**Van Buren v. Augusta County, 66 Va. App. 441, 787 S.E.2d 532 (2016) (Petition for Appeal denied by Supreme Court of Virginia)**

The Commission found that the claimant did not suffer a compensable injury by accident as the injury gradually occurred and resulted from repetitive or cumulative trauma. The Court reversed. The Court noted that “reviewing the Commission’s determination that [the claimant] did not suffer an ‘injury by accident’ presents a mixed question of law and fact, because it involves both factual findings and the application of law to those facts.” (Op. 4.)

The claimant, a firefighter, was assisting a 400-pound elderly man who fell in the shower and broke his leg. For 45 minutes, the claimant and his colleagues moved the man from the shower to the ambulance. They used a sheet as a sling in the shower area, maneuvered the man onto a towel, and then onto a flat-bottomed, flexible stretcher. The claimant plus others slowly dragged/pushed this stretcher the length of the hallway, along the floor. The claimant testified: “I had stabilized his broken leg with my left arm and had to pull down the hallway towards the cot with my right arm.” Next, the claimant helped hoist the man onto a wheeled stretcher. The claimant and others moved the wheeled stretcher out of the house, down a hill and into the back of the ambulance. Thereafter, the claimant noticed for the first time “a pain on the outside [o]f [his] arm.” The claimant also testified that he did not initially notice the pain because the injured man was “hollering” and due to “the adrenaline with the call and everything.” The claimant noticed pain after closing the ambulance door and walking around the vehicle.

The Court instructed that, contrary to the Commission’s finding, Morris v. Morris, 238 Va. 578, 385 S.E.2d 858 (1989), did not control the outcome of case: (1) the claimant was not engaged in repetitive activity, (2) the injury did result from cumulative events and the 45 minutes of providing aid to the injured man provided the necessary “rigidity of temporal precise to constitute one ‘event,’” and (3) the claimant’s physician diagnosed an injury “resulting directly from work undertaken on a date certain, during a specific event.” (Op. 9-10.)

The Court summarized as follows:

We find the entire rescue undertaken by [the claimant] was one “piece of work,” and the entire forty-five-minute period was one event, not numerous discrete events. We find that this event was an “identifiable incident” and that [the claimant’s] disc herniation was a “sudden mechanical or structural change in the body.” Hoffman v. Carter, 50 Va. App. 199, 212, 648 S.E.2d 318, 325 (2007) (quoting Chesterfield County v. Dunn, 9 Va. App. 475, 476, 389 S.E.2d 180, 181 (1990)). Finally, we find “a causal connection between the incident and the bodily change.” Id.

(Op. 13.)

1. UNEXPLAINED MOTOR VEHICLE ACCIDENT

**Burney-Divens v. Community Corrections Administration, No. 1588-15-2 (Va. Ct. App. May 3, 2016) (unpublished).**

In August 2012, the claimant sustained a compensable injury by accident and injured her low back. On September 17, 2012, she had a medical appointment regarding her back pain. She did not take her pain medication that morning because the side effects hindered her driving. After her appointment, she drove her employer-provided vehicle to Staunton for a meeting. During the commute, the claimant’s vehicle left the road and went down an embankment. The claimant testified that, after driving past a sign for Boones Mill, her vision diminished and started blurring. Next, she simply remembered crawling out of the car and hearing an assisting bystander. The claimant did not remember what caused her to run off the road.

At the evidentiary hearing, the claimant alleged that an idiopathic condition of blurred vision due to her pre-existing migraine headaches caused the accident. Alternatively, she asserted that the accident occurred because she experienced a black-out episode due to her severe back pain. The Deputy Commissioner found the evidence insufficient to prove either of these theories and that the accident was “unexplained.” On review, the Commission rejected the claimant’s argument that she suffered visual problems as a result of an idiopathic condition. The Commission also found that, even assuming she had visual problems, it remained unknown whether such played a causative role in the incident. (Commissioner Marshall dissented stating the claimant was at liberty to plead alternative facts and theories of recovery, and state as many claims as she had, regardless of consistency.)

The Court found that the Commission did not err in finding that an idiopathic condition did not cause the accident, emphasizing that the claimant’s testimony and the medical evidence were inconclusive as to whether the claimant experienced a migraine-induced vision loss. The Court noted that the Commission did not hold that an employee could not advance two alternative theories of compensability and still meet her burden of proof. Instead, the Commission simply found that the presented medical evidence and testimony did not prove either theory.

The Court determined that the claimant did not establish a causal connection between the injury and her employment. The claimant’s only asserted cause for the accident was that her vision “blacked-out.” However, she did not remember the cause of her accident and did not present medical evidence affirmatively establishing a cause. Rather, the claimant merely speculated that the vehicle left the road because she experienced vision problems. The medical evidence described the claimant’s amnesia and memory problems surrounding the accident, but did not identify vision loss or another cause of the accident. The claimant testified that she was unsure what caused the accident.

1. INJURY BY ACCIDENT

**Singh v. Loudoun County Public Schools, JCN VA00001108875 (July 5, 2016)**

The claimant, a bus attendant for students with special needs, injured her back while assisting a kindergartener. The Deputy Commissioner awarded benefits when the claimant credibly testified that she bent over to pick up a child, lifted him and turned to put him in his car seat. As she was bending over and reaching for the buckle to buckle him in, she felt pain in her low back. The claimant was unsure whether she felt pain when placing the child in the seat or when bending and reaching to buckle him with seat belt. The Commission affirmed, finding that the claimant suffered a compensable low back injury “when she engaged in a series of movements which were instantaneous and simultaneous” and there was a causal connection between the conditions required by her work and the injury. The claimant was not simply bending. See Sarbou v. York County, JCN VA00001069738 (May 31, 2016) (Claimant performed a series of fluid, yet distinctive, movements while tying an approaching boat to the pier.)

1. COMING AND GOING RULE

**Gonzalez v. HEI Hospitality, JCN VA02000019517 (Apr. 1, 2016)**

The claimant’s injury did not occur during the course of the employment. The claimant’s injury occurred as she was walking to work on a public sidewalk that was not part of the employer’s extended premises. The claimant rode the public bus to work. She walked on a public sidewalk from the bus stop towards the employee entrance of the employer’s hotel where employees were required to enter. Prior to reaching the employee entrance, the claimant crossed the entrance for the driveway to the employer’s lobby and parking lot and was hit by a car turning into the entrance. The Commission emphasized that the claimant’s “route from the bus stop also did not represent an essential means of ‘ingress and egress’ to the employee entrance since the employer did not require the claimant to walk this particular route to work. She was making her way to work by a method of her own choosing at the time of the incident.” (Op. 5.) (Commissioner Marshall dissented: The sidewalk was a part of the employer’s extended premises.)

1. ASSAULT
2. **Ghazarian v. Bob Windsor Construction, LLC, JCN VA00001014518 (Apr. 8, 2016)**

The claimant was conducting an interior demolition while renovating a house. He was shot during the course of a robbery. The Commission found that “it does not appear the assault was connected to his work. The assailant did not attempt to steal either tools or discarded material, and was only interested in obtaining cash from the claimant and his coworkers . . . The claimant’s work did not present a special opportunity to the assailant.” (Op. 4.) The Commission discounted the claimant’s argument that the neighborhood in which he worked was particularly dangerous, noting that “we do not find sufficient evidence in the record to demonstrate that the . . . neighborhood was significantly more dangerous than those surrounding it.” Id.

1. **Huck v. Extended Stay America, Inc., JCN VA00001095597 (Aug. 12, 2016)**

 Assault compensable: The assailant was not known to the claimant and the assault was not “personal to the employee.” The claimant dressed in a work uniform, pushing a laundry cart and was attempting to open a door to which only employees had access when accosted. The Commission found there was sufficient evidence to infer that the claimant was targeted because of her employment status. Additionally, the claimant’s employment required her to work in a high-crime environment. The claimant’s testimony, corroborated by the local police department’s records, adequately demonstrated that the location of the workplace placed her at a heightened risk of assault.

1. INTOXICATION/WILLFUL MISCONDUCT

**Nimmo v. Anderson Interior Contracting, JCN VA00001071207 (July 6, 2016)**

The defendants failed to prove by a preponderance of the direct and circumstantial evidence that the claimant’s intoxication or violation of a safety rule caused his fall and injuries. The claimant drank alcohol the night before his shift and worked without an incident for 2.5 hours in the morning. He fell from a ladder that “kicked out” or “wobbled.” No co-worker suspected alcohol as a cause of the fall until after a positive toxicology report. There is an inherent risk of ladder injuries in the workplace. Regardless, the claimant was discharged for justified cause (scientific evidence established that he was intoxicated at work) and not entitled to temporary total or partial disability benefits when released to light duty.

1. VA. CODE § 65.2-402(B)

**Ezell v. James City County, JCN VA02000013694 (July 7, 2016)**

The claimant is entitled to the presumption of Va. Code § 65.2-402(B) based upon his disability from work while hospitalized from May 6 to May 10, 2011 when he could not perform his work and was disabled. Moreover, while the claimant also may have been out of work due to his attendance at the conference and his use of vacation time, he was unable to work during this period because of his heart catheterization procedures and follow up. The claimant does not need to show “entitlement to some form of economic indemnity.” In Samartino v. Fairfax County Fire & Rescue, 64 Va. App. 499, 508-09, 769 S.E.2d 692, 696-97 (2015), the Court held:

All that is required to invoke the statutory presumption is proof of the disease and proof of a disability resulting from that disease. A right to economic indemnity is only one factor that a fact finder may consider in determining if a person is disabled as a result of his illness—in other words, whether he has reached ‘the stage when the disease prevents the employee from performing his work efficiently.’ Tomes v. James City Fire, 39 Va. App. 424, 431-32, 573 S.E.2d 312, 316 (2002) (quoting Salyer v.  Clinchfield Coal Corp., 191 Va. 331, 338, 61 S.E.2d 16, 20 (1950)). Proof of entitlement to economic indemnity may be used to support a finding that a claimant is disabled, however its absence is not dispositive of a finding that a claimant is not disabled.

**See also Cohn v. Virginia Beach, JCN VA00000796047 (June 15, 2016).**

1. ORDINARY DISEASE OF LIFE
2. **Olinger v. Bath, Dr. Greg, JCN VA00001105071 (June 30, 2016), aff’d, No. 1203-16‑4 (Va. Ct. App. Dec. 27, 2016)**

The Commission agreed with the Deputy Commissioner that the claimant proved that she suffered an ordinary disease of life – reactive airway disease – causally related to her occupational exposure to an overheated battery from August 3-6, 2015. The claimant’s credible testimony established she did not suffer from this disease before the exposure. Three physicians diagnosed her as suffering reactive airway or lung injury resulting from chemical exposure. The claimant did not have a pre-existing disease. No evidence established that the claimant was ever diagnosed with reactive airway disease, asthma or a lung injury. The defendants offered no proof that the claimant had a substantial exposure to contracting reactive airway disease from a chemical exposure outside of her employment.

1. **Barker v. Utility Trailer Manufacturing, JCN VA02000021182 (June 13, 2016)**

The claimant proved compensable carpal tunnel syndrome with clear and convincing evidence that the disease arose out of his employment, was characteristic of the employment and caused by conditions peculiar to the employment. The Commission relied upon the claimant’s testimony and physician’s “opinion there was ‘a high probability’ the bilateral carpal tunnel syndrome was caused by claimant’s ‘repetitive use of an impact driver at work,’ coupled with the physician’s reference to orthopedic hand literature.” (Op. 6.) There was no evidence non-work activities caused the disease.

1. VA. CODE § 65.2-603 MEDICAL TREATMENT

**Roberson v. Peninsula Auto Painting, JCN 1353552 (Apr. 28, 2016)**

The defendants were not responsible for payment of modifications to claimant’s motorcycle. The Virginia Workers’ Compensation Act does not define “automobile.” The Commission reviewed the Virginia Code for guidance on the meaning of automobile in Va. Code § 65.2-603. The Code does not define “automobile.” The Commission noted that Va. Code § 6.2-2200 defines “motor vehicle” as “automobile, motorcycle, mobile home, truck, van or other vehicle operated on public highways and streets.” Regardless, the term “automobile” does not indicate what the legislature’s intent was when subdivision (i) was added to Va. Code § 65.2-603(A)(1) in 2011. The Commission instructed that the Supreme Court recognized in USAA Casualty Insurance Co. v. Yaconiello, 226 Va. 423, 309 S.E.2d 324 (1983), the term “motor vehicle” was broad and included motorcycles. The Code uses the definition of “motor vehicle” and subdivides that term into categories such as “automobiles” and “motorcycle.” For example, registration and licensure under Title 46.2 separates “automobile” from “motorcycle.” Va. Code § 46.2-357. In summary, the Commission concluded that a motorcycle was a motor vehicle but not an “automobile” for purposes of Va. Code § 65.2-603.

1. UNAUTHORIZED MEDICAL TREATMENT

**Blanco v. Aramark, JCN VA00001009381 (June 13, 2016)**

The defendants not responsible for payment of unauthorized medical treatment. On June 17, 2015, Dr. Kebaish opined that surgery was not indicated in the claimant’s case. He noted, “However, the patient may benefit from a second opinion, which she has requested. I sent her for a second opinion. She will follow-up with us as needed.” (Op. 6.) Although the claimant had already treated with Dr. Blundon on June 22, 2015, on June 23, 2015, Dr. Kebaish noted, “For now, the patient wanted a second opinion. She asked to be referred to Dr. Blunden [sic]. She is to return back after his recommendation.” Id. On July 28, 2015, Dr. Kebaish wrote a prescription slip indicating, “Patient to see Dr. Blundon orthopedist for knee pain.” Id. The Commission declined to interpret Dr. Kebaish’s statements within his June 23, 2015 treatment note and July 28, 2015 prescription note as referring the claimant to Dr. Blundon for continuing treatment. The Court explained that, on June 23, 2015, Dr. Kebaish was unaware the claimant had already treated with Dr. Blundon, and he specifically requested that she return for evaluation after the second opinion. The defendants were not required to pay for Dr. Blundon’s treatment subsequent to the June 22, 2015 visit.

1. DE FACTO AWARD
2. **Kelley v. Monticello Area Community Action, JCN VA00000748221 (May 31, 2016), aff’d, No. 1083-16-3 (Va. Ct. App. Dec. 23, 2016)**

The Deputy Commissioner found no de facto award and the Commission affirmed. The defendants paid for the claimant’s medical treatment after the accident and paid indemnity benefits for a period of time. However, the defendants asserted defenses relevant to the components of an initial award, including that the accident did not arise out of the employment. Imposing a de facto award where there was no compensable accident would be contrary to the Virginia Workers’ Compensation Act and would discourage defendants from making voluntary payments. Also, the withdrawal of an agreement to an award on the same day a signed agreement form is filed was not in bad faith. Notably, the claimant had preserved the statute of limitations with her already filed claims and was afforded a hearing on the merits within five months of the withdrawn agreement. Commissioner Marshall dissented.

1. **Krieger v. City of Virginia Beach, JCN VA00000717025 (June 8, 2016)**

A de facto award was appropriate: (1) defendants paid medical expenses, (2) defendants paid wage loss benefits, and (3) affirmative representations were made by the employer’s representative. The adjuster remained in contact with the claimant for a year after surgery and advised that the claim was accepted and he would take care of it. Specifically, Claimant’s Exhibit 2 was the adjuster’s note indicating that “the claim is to be accpeted [sic], will submit award agreements once I have wages.” (Op. 7.)

1. RULE 2.2 (A)

**Reid v. Ikea Industry Danville, LLC, JCN VA00001025197 (June 10, 2016)**

The Commission found no reversible error in the Deputy Commissioner’s denial of the defendants’ motion to order the claimant to postpone her surgery and leave the medical record open an additional 30 days to obtain the neurosurgical IME. The evidentiary hearing was scheduled for December 1, 2015. The defendants filed a motion to instruct the claimant to delay her surgery and to leave the record open an additional 30 days. On November 16, 2015, the claimant requested that Dr. Brown’s October 2015 recommendation for cervical spine surgery be addressed at the scheduled hearing. The claimant advised that the recommended surgery was scheduled for December 28, 2015. On November 24, 2015, the defendants requested that the claim for surgery not be considered at the December 1, 2015 hearing, or in the alternative, the record be left open for the deposition of Dr. Brown and an IME by a neurosurgeon to determine whether fusion surgery was reasonable, necessary and causally related to the claimant’s compensable condition. On November 30, 2015, the Deputy Commissioner granted the defendants’ motion and held the record open 30 calendar days for Dr. Brown’s deposition and an IME by a neurosurgeon. Subsequent to the hearing, on December 15, 2015, the defendants filed a motion requesting that the Deputy Commissioner leave the medical record open an additional 30 days to allow the defendants to obtain the neurosurgical IME and to order the claimant to postpone her surgery.

The Commission held that Rule 2.2(A) requires parties to be prepared to present evidence to support a claim at the time and place set for hearing. The decisions of whether to admit certain evidence and whether to hold the record open for the taking of further evidence are within the Deputy Commissioner’s sound discretion. Here, the Deputy Commissioner had reasonably provided the defendants with additional time to secure the IME on November 30, 2015, and the defendants failed to do so.

1. VA. CODE § 65.2-309 SUBROGATION RIGHTS

**Talley v. The City of Portsmouth, JCN VA00000748124 (June 8, 2016)**

The claimant settled his third party claim. The total amount of the third party settlement was $50,000, the total amount of the carrier’s lien was $48,480.45, the total amount carrier received from the lien was $16,404.90, the total amount of the third party settlement cost was $785.30 and the total amount of the third party settlement fees were $16,166.66.The Commission found defendants’ statutory subrogation right pursuant to Va. Code § 65.2-309 did not extend to settlement proceeds recovered by a claimant pursuant to his personal uninsured/underinsured motorist coverage. The defendants were not a third‑party beneficiary under a policy procured by the claimant at his own expense; thus, the claimant’s $25,000 recovery from his personal uninsured/underinsured motorist coverage did not factor into the calculation of the defendants’ lien and credit. The defendants’ lien only extended to the $25,000 recovered from PMA under the provisions of Va. Code § 65.2‑309.1, which granted defendants the right to claim a subrogation interest in recoveries from uninsured or underinsured motorist policies carried by or at the expense of the employer.

1. VA. CODE § 65.2-603(B) REFUSAL TO COOPERATE WITH VOCATIONAL REHABILITATION

**Alfaro v. Land-Ron, Inc., JCN VA02000005352 (June 7, 2016)**

The claimant failed to reasonably cooperate with vocational rehabilitation. For approximately one month, the claimant applied for only two jobs, one of them ten days late, cancelled one of three meetings with the vocational rehabilitation consultant and arrived late to another, and failed to apply for job leads located by the consultant. The claimant did not verify that he had registered with the Virginia Employment Commission (VEC) or applied for two jobs through its website. The consultant noted that the claimant focused on his pain and dissatisfaction with his treatment and often quoted his physician. At another meeting, the claimant appeared late, reported applying for only seven of the fourteen job leads provided, had not registered with the VEC, and stated that he only participated in vocational rehabilitation because it was required.

1. MARKETING

**Soria v. Young Mens Christian, JCN VA00000817128 (June 7, 2016)**

The claimant had an outstanding award of temporary partial disability benefits. The defendants filed an Employer’s Application for Hearing seeking to suspend the award based upon the claimant not working full time and not documenting efforts to market his residual work capacity. The Senior Claims Examiner properly rejected the application: “A claimant who is under an open award is not required to market residual work capacity . . . The claimant is working and has previously established reasonable marketing . . . [the employer’s] application did not set forth a basis for a change in condition.” (Op. 4-6.)

1. REFUSAL OF SELECTIVE EMPLOYMENT

**Jesse v. Our Lady of Mt. Carmel School, JCN VA00000446585 (May 31, 2016)**

The Commission found that there was no bona fide offer of employment of which the claimant unjustifiably refused: the offered selective employment was employment without payment of any wages.

1. INTERLOCUTORY REVIEWS
2. **Corbin v. Fairfax County Public Schools, JCN VA00000928014 (Sept. 1, 2016)**

Claimant objected to IME’s with a psychiatrist and neuropsychologist. The latter was a “segmented” IME schedule for different parts on different dates. The defendants accommodated the claimant’s unavailability when the appointments were first scheduled. The claimant requested review of denial of a Motion for Protective Order. The claimant contended the IME’s were overly burdensome and the neuropsychologist opinion would not be admissible under John v. Im, 263 Va. 315, 559 S.E.2d 694 (2002). The Commission declined to issue a preliminary ruling on the admissibility question and found the IME’s were reasonable. The Commission held, “[w]e generally disfavor examinations conducted in several segments, recognizing they could be used to circumvent the statutory provision for one medical examination per provider without our authorizations.” The Commission held the claimant did not establish substantial prejudice would result if we declined interlocutory review.

1. **Hough v. Food Lion, LLC, JCN VA000000922348 (June 28, 2016)**

The Commission affirmed the Sr. Claims Examiner’s rejection of the employer’s Application for Hearing. The Commission in a prior opinion noted the claimant remained under an open TPD award. The defendants filed an application on April 1, 2016 alleging the claimant was able to return to work at a time prior to the Commission’s prior opinion. The Commission held the defendants could not collaterally attack, on a retroactive basis, the prior open award noting the question presented was the claimant’s ability to return to pre-injury work at the time the employer filed its application for hearing.

1. **Conner v. The Martin-Brower Co., LLC, JCN VA00001149244 (Aug. 16, 2016)**

On defendants’ request for review, Commission reversed Senior Claims Examiner’s rejection of Employer’s Application for Hearing on grounds that failure to attend IME was due to claimant’s counsel’s error in notifying client. While noting it, “appreciated” the “candor,” of claimant’s counsel, the Commission noted the client generally is bound by the actions of his attorney. But, the silver lining … the Commission approved a suspension for 14 days, only the period between the refusal and the clear evidence of cure, rather than an open suspension.

1. VRS AND WORKERS’ COMPENSATION ACT OFFSETS

**Cooper v. Culpeper County, JCN VA00000844636 (June 9, 2016)**

The claimant requested review of a Deputy Commissioner’s opinion declining to hold a compromise settlement was a lump sum settlement in lieu or periodic payments for disability from a cause compensable under the Virginia Workers’ Compensation Act for purposes of applying Va. Code § 51.1-158. The Deputy Commissioner held the Commission did not have jurisdiction to decide the questions posed. The Commission majority affirmed, relying on City of Danville v. Tate, 289 Va. 1, 766 S.E.2d 900 (2015), stating the question posed was not, “directly or necessarily related to the right of a claimant to workers’ compensation for a work-related injury.” Commissioner Marshall concurred but noted Va. Code § 51.1-156(C), not cited by anyone, provided: If no compensation is finally awarded under the Virginia Workers’ Compensation Act, due to legal proceedings or otherwise resulting in settlement from the persons causing the disability, the Virginia Workers’ Compensation Commission shall determine whether the member’s disability is from a cause compensable under the Virginia Workers’ Compensation Act. He noted if the General Assembly had intended for the VWC to determine whether settlements were “in lieu of periodic payments,” under VRS, it would have so stated.

XXII. UNEXPLAINED ACCIDENT

 **Branch v. Morton G. Thalhimer, Inc., JCN VA00000928110 (Aug. 16, 2016)**

Claimant requested review of Deputy Commissioner’s opinion holding claimant did not prove a compensable injury by accident. A unanimous Commission reversed the Deputy. The Commission held the claimant’s accident falling off a ladder was not unexplained from medical records and the claimant’s testimony. Writing for the Commission, Commissioner Williams explained, “We fully agree that a fall from a ladder does not necessarily result from a risk of the employment. However, and most crucially in this particular case, the claimant testified that the ladder started to buckle and this movement began the series of the claimant stepping down a rung, the ladder moving forward, the claimant moving backward, and the claimant eventually falling. The buckling of the ladder – similar to any malfunctioning piece of equipment – created a workplace hazard which caused the fall.” Compare Nimmo v. Anderson Interior Contracting, JCN VA00001071207 (July 6, 2016) (Newman, dissenting, “Viewing the claimant's testimony through the lens of this iconic principle [Newton’s first law of motion] requires that we address a basic question: How does a non-defective A-frame ladder, resting securely on four legs on a level, clean, dry surface, spontaneously begin to skid, wobble, move sideways, and ultimately kick out from under this claimant so as to cause his fall? I would not conclude that the ladder became inexplicably animated in violation of a fundamental law of nature.”)

XXIII. ARISING OUT OF – HITTING HAND ON DESK TO CATCH FALLING PAPERS

 **Brothers v. City of Norfolk, JCN VA000001070435 (June 10, 2016)**

Claimant injured right thumb when she struck desk while reaching to catch falling papers. Employer alleged accident did not arise out of employment. Unanimous Commission acknowledged defendants’ argument that there was nothing unusual about the desk or its surroundings, but found claimant’s attempt to catch falling documents was an actual risk of the employment.

XXIV. COMPROMISE SETTLEMENT – MINOR BENEFICIARIES

**Estate of Curbean v. Foodservice Technologies, Inc. (Tech 24), JCN VA00000650441 (June 6, 2016)**

Unanimous Commission affirmed Deputy Commissioner’s rejection of proposed compromise settlement. Parties could not avoid requirement of Va. Code § 65.2-525(C) for appointment of guardian of property for minor’s distribution in excess of $15,000 by attempting to segregate classification of benefits into, “alleged accrued benefits,” and “alleged future benefits.”

XXV. ENFORCEMENT OF AWARDS, “FULL JUSTICE” AND EQUITABLE JURISDICTION

**See Smith-Adams v. Fairfax (County of) School Board, JCN 2226602 (Sept. 8, 2016)**

XXVI. COST OF DEPOSITION AND PPD OPINION

 **Beasley v. Virginia Natural Gas, Inc., JCN VA02000007191 (June 2, 2016)**

Claimant requested review of opinion finding he was not entitled to PPD and employer was not responsible for cost of treating doctor’s deposition. Claimant filed Rule 1.8(G) request to take treating physician’s deposition to elicit opinion on PPD. Defendants asserted they were not responsible for cost of obtaining PPD opinion. Doctor responded to request for PPD opinion by sending a statement of charges for it. Commission majority restated prior law that defendants are not responsible for PPD evaluation cost. They also held there was no evidence the doctor had an opinion on PPD, ergo defendants were not responsible for a deposition. Commissioner Marshall dissented restating prior dissents on PPD cost of evaluation issue and also stating Commission should not deny responsibility for a deposition on the basis that the claimant must first prove the doctor has an opinion in order to require the defendants to pay for that deposition to determine the physician’s opinion.

XXVII. WILLFUL MISCONDUCT

 **Johnson v. Alsop Trucking, Inc., JCN VA02000014170 (Sept. 1, 2016)**

Commission affirmed holding that claimant was not barred from receiving benefits due to willful misconduct. Claimant, after admonitions, allowed unlicensed driver to operate tractor to disengage it from trailer. Claimant’s foot was run over by tractor tires. Commission noted there was no evidence in case that the breach of the safety rule, permitting the unlicensed driver to operate the truck, caused the injury. Essentially, a distinction in the willful misconduct realm between but for and proximate causation.

**UPDATE ON DEVELOPMENTS AT THE COMMISSION**

1. **Continued Expansion of ADR:** In 2012, 213 mediation ADR events were held. In 2015, 1,417 ADR events (full and final, issue mediation, issue facilitation) were completed. This represents growth of over 500% in three years. At the 2016 IAIABC Meeting, Virginia was selected as one of two agencies to receive its first-ever Innovation Awards for expansion of ADR and development and implementation of its technology based ADR claims management tab.
2. **Improvements in Claims Resolution Timeline:** In 2012, the average time from claims filing to resolution was 297 days. As of June 2016, this had fallen to 209 days, representing a 31% decrease in claims resolution time.
3. **Review Docket Management**: As of February 1, 2017, the full Commission had
* 155 pending cases in active deliberation and drafting
* 93 additional review cases were filed but awaiting transcripts or written statements.
* 248 total cases pending on review.
1. **Review Docket Timeline**: As of January 2017, the Commission has implemented procedures for average review case timing. For the period of January 1, 2016 to December 31, 2016, the average time from the date a Request for Review was filed until the date an Opinion was issued was 141 days. A minimum of 45 days of that time period is required for obtaining transcripts and filing of Review Statements by the parties.
2. **Deputy Commissioner Judicial Code of Ethics**: Under the leadership of Chief Deputy Commissioner James Szablewicz, the Deputy Commissioner corps has been debating, deliberating, and drafting a proposed Judicial Code of Ethics for Deputy Commissioners. This is a work in progress.
3. **Commission Headquarters Consolidation and Relocation**: The Commission continues to consider options for a new headquarters building and consolidation of its Richmond-based operations.
4. **Enhanced Regional Offices**: We have upgraded security at our regional offices. The Lebanon office has relocated to superior office space in Bristol to allow for mediation space and room for two Deputy Commissioners. The Manassas office expansion is underway in the existing building. For 2017, we will be looking at increased and improved office space in Virginia Beach and possible enhancements in Roanoke.
5. **Virginia Employer Noncompliance Alerts Website**: The Commission is standing up a website for individuals to report cases of uninsured employers who do not have mandatory workers’ compensation coverage.
6. **Increased Employer Noncompliance Investigation and Enforcement**: The Commission has expanded its investigation unit, which now conducts background research and field investigations to locate non-compliant employers and to enforce penalties for failure to maintain mandatory workers’ compensation insurance.
7. **ARMICS and Audits:** The Commission undertook a broad and thorough program to investigate, develop, and implement a comprehensive Agency Risk Management and Internal Control Standards system. This insures the VWC has adequate financial and ethical controls to ensure appropriate levels of security and responsibility at all staff levels. In 2015, VWC underwent a Virginia APA audit which gave comprehensive approval for security in all financial and IS systems. VWC anticipates contracting with VITA for annual IS audits of sensitive information systems.
8. **Full Paperless Option**: As of April 2016, all system participants, including employers, insurers, third party administrators, attorneys, and **claimants** may register and use the Commission’s electronic filing system.
9. **Medical Fee Schedule**: The initial draft medical fee schedules have been posted and the Regulatory Advisory Group and stakeholders are preparing initial responses and feedback.

**2017 GENERAL ASSEMBLY UPDATE**

**HOUSE OF DELEGATES BILLS**

**HB 253:** **Local license tax and state contractor's license; certificate of workers' compensation compliance.**

Removes the requirement that contractors verify workers' compensation compliance before receiving a local license to do business and makes such requirement a condition of receiving a state contractor's license.

**HB 490: Workers' compensation; cost of living supplements.**

Provides that cost of living supplements shall be payable to claimants who are receiving disability benefits under the Virginia Workers' Compensation Act but are not receiving federal disability benefits.

**HB 1571: Workers' compensation; fees for medical services.**

Provides that the pecuniary liability of an employer for a medical service provided for the treatment of a traumatic injury or serious burn includes liability for any professional service rendered during the dates of service of the admission or transfer to a Level I or Level II trauma center or to a burn center, as applicable. The measure increases the initial charge outlier threshold, which under the stop-loss feature allows hospitals to receive payments or reimbursements that exceed the fee schedule amount for certain claims, from 150 percent of the maximum fee for the service set forth in the applicable fee schedule to 300 percent of such amount. The measure allows the Workers' Compensation Commission to adjust the charge outlier threshold percentage; under existing law, it is allowed only to decrease the percentage. The measure also (i) expands the definition of codes, as used in the provision directing the Commission to establish fee schedules for scheduled medical services, to include revenue codes, which are defined in the bill; (ii) clarifies the definition of "HCPCS codes"; (iii) directs the Commission to use the regulatory advisory panel on all matters involving or related to the fee schedule as deemed necessary by the Commission; (iv) adds a definition of "new type of technology;" and (v) extends the deadline by which the regulatory advisory panel is required to meet, review, and make recommendations to the Commission from July 1, 2017, to July 1, 2018. The bill contains an emergency clause.

**HB 1659: Workers' compensation; employer's lien; third party actions.**

Requires that the Workers' Compensation Commission and the injured employee approve of any arbitration, including any associated with the employer's lien. The measure also prohibits an employer from initiating a proceeding to recover its lien against any party other than an employee without prior notice to the Commission and the injured employee. In any such proceeding, the injured employee or the personal representative or dependents of the deceased employee shall be permitted to intervene as a matter of right.

**HB 1722: Workers' compensation; presumption of compensability for certain diseases.**

Adds colorectal cancer to, and removes rectal cancer from, the list of cancers that are presumed to be an occupational disease compensable under the Virginia Workers' Compensation Act if contracted by certain firefighters and certain other employees who have had contact with a toxic substance in the line of duty.

**HB 1803: Workers' compensation; disease presumptions; correctional officers.**

Adds correctional officers to the list of public safety employees who are entitled to a presumption that hypertension and heart disease and certain infectious diseases are occupational diseases compensable under the Virginia Workers' Compensation Act.

**HB 2155: Workers' compensation; modifications to employee's home and automobile.**

Increases from $42,000 to $50,000 the maximum aggregate cost of (i) bedside lifts, adjustable beds, and modifications and alterations to an injured employee's principal home and (ii) modifications to or equipment for an injured employee's automobile that the Workers' Compensation Commission may award on account of any one accident.

**HB 2318: Virginia Birth-Related Neurological Injury Compensation Program.**

Removes the condition for a child's eligibility for the Virginia Birth-Related Neurological Injury Compensation Program that a birth-related injury suffered in the course of resuscitation occur in the immediate postdelivery period.

**HB 2353: Workers' compensation; failure to make reports; deterring employee from filing claim; penalty.**

Provides that an employer is guilty of a Class 2 misdemeanor if he knowingly and intentionally fails to comply with the requirement that he report an employee's injury or death or dissuades or deters an employee from filing a claim for compensation under the Virginia Workers' Compensation Act.

**HB 2468: Commissioners and deputy commissioners of the Virginia Workers' Compensation Commission; carrying a concealed weapon; carrying a weapon in a courthouse.**

Permits commissioners and deputy commissioners of the Virginia Workers' Compensation Commission to carry a concealed weapon wherever they may travel in the Commonwealth and exempts such persons from the prohibition on carrying firearms in a courthouse.

**HJ 544: Study; JLARC to study the Virginia's workers' compensation system; report.**

Directs the Joint Legislative Audit and Review Commission (JLARC) to study Virginia's workers' compensation system. In its study, JLARC is directed to (i) examine whether claims are reviewed and processed in a timely and fair manner; (ii) assess whether the dispute resolution process is timely, effective, and fair and equitable toward all parties; (iii) compare the structure and administration of workers' compensation programs in other states with that of Virginia's; (iv) analyze the rate of growth in medical prices and examine any changes that occur in access to medical care in states that have adopted medical service fee schedules or treatment guidelines; (v) assess the effectiveness of House Bill 378 and Senate Bill 631 of the 2016 Session; and (vi) review any other issues and make recommendations as appropriate.

**SENATE BILLS**

**SB 904: Concealed handgun permit; Workers' Compensation commissioner or deputy commissioner exempt.**

Provides that a commissioner or deputy commissioner of the Workers' Compensation Commission may carry a concealed handgun throughout the Commonwealth without a permit.  The bill also provides an exception from the prohibition against carrying a weapon into courthouses in the Commonwealth for a commissioner or deputy commissioner of the Workers' Compensation Commission.

**SB 1119: Workers' compensation; presumption of compensability for certain diseases.**

Substitutes colorectal cancer, which is cancer that starts in the colon or rectum, for rectal cancer on the list of cancers that are presumed to be an occupational disease covered by the Virginia Workers' Compensation Act when certain employees develop the cancer after contact with a known or suspected carcinogen that causes, or is suspected to cause, the specific type of cancer.

**SB 1120: Workers' compensation; volunteer firemen and emergency medical services personnel.**

Provides that for the purposes of the Virginia Workers' Compensation Act volunteer firemen and emergency medical services personnel shall be deemed employees of the political subdivision or state institution of higher education in which the principal office of the volunteer fire company or volunteer emergency medical services agency is located. The measure repeals the existing provision that volunteer firemen and emergency medical services personnel shall be deemed the employees of the political subdivision or state institution of higher education if its governing body has adopted a resolution acknowledging those persons as employees. The measure also repeals the provision that volunteer firemen and emergency medical services personnel shall be deemed the employees of the volunteer fire company or volunteer emergency medical services agency if the company or agency elects to be included and maintains coverage as an employer under the Act.

**SB 1175: Workers' compensation; employer's lien; third party actions.**

Requires any arbitration held by the employer in the exercise of such right of subrogation shall be limited solely to arbitrating the amount and validity of the employer's lien and shall not affect the employee's rights in any way. Arbitration shall not be held unless (i) any contested expenses remaining have been submitted to the Virginia Workers' Compensation Commission (the Commission) for a determination of their validity and the Commission has made such determination of validity prior to the commencement of the arbitration; (ii) prior to the commencement of such arbitration the employer has provided the injured employee and his attorney, if any, with an itemization of the expenses associated with the lien that is the subject of the arbitration; (iii) upon receipt of the itemization of the lien, the employee shall have 21 days to provide a written objection to any expenses included in the lien to the employer, and if the employee does not do so any objections to the lien to be arbitrated shall be deemed waived; and (iv) the employer shall have 14 days after receipt of the written objection to notify the employee of any contested expenses that the employer does not agree to remove from the lien, and if the employer does not do so any itemized expense objected to by the employee shall be deemed withdrawn and not included in the arbitration.

**SB 1201: Workers' compensation; suitably equipped automobile.**

Authorizes the Workers' Compensation Commission to require an employer to provide funds for the purchase of a suitably equipped automobile for an incapacitated employee if it finds that it is medically necessary and that modifications to the employee's automobile are not technically feasible or will cost more than the funds available for a replacement automobile. The total of the costs of the automobile and of any bedside lifts, adjustable beds, and modification of the employee's principal home are limited to $42,000, which is the amount of the existing cap on expenses for modifications to the injured employee's automobile and home.

**SB 1466: Workers' compensation; infectious disease presumption; correctional officers.**

Provides that correctional officers are entitled to a presumption that hepatitis, meningococcal meningitis, tuberculosis, MRSA, or HIV causing the correctional officer's death or resulting in his total or partial disability is an occupational disease suffered in the line of duty and is compensable under the Virginia Workers' Compensation Act.

**SB 1472: Workers' compensation; accident reports; filing claims; civil penalty.**

Requires an employer's accident report filed with the Workers' Compensation Commission to include the signature of the injured employee or his personal representative. The measure provides that the employer's filing of the accident report constitutes the filing with the Commission by or on behalf of the employee of a claim for workers' compensation benefits with respect to any injury arising from the accident. The measure also provides that an employer that fails to comply with the requirement that it report an employee's injury or death, or dissuades or deters an employee from filing a claim for compensation, shall be assessed a civil penalty of not more than $500, which civil penalty is increased to not less than $500 and not more than $5,000 if the violation is willful.

**SB 1489: Workers' compensation; presumption that death or disease due to coal pneumoconiosis.**

Specifies that the standards prescribed by the Virginia Workers' Compensation Commission for determining whether the death or total disability of an employee was due to pneumoconiosis or any chronic occupational lung disease shall not be inconsistent with the standards prescribed by the federal Secretary of Health and Human Services under the 1969 Federal Coal Mine Health and Safety Act as amended by § 1556(a) of the federal Patient Protection and Affordable Care Act, in order to ensure that repeal of the Patient Protection and Affordable Care Act does not alter the standards required in the Commonwealth. The measure also incorporates presumptions regarding death or disability from pneumoconiosis that are codified at 30 U.S.C. § 921(c)(3) and (4).

1. In accordance with Canon 2B of the Canons of Judicial Conduct for the State of Virginia, any opinions in this presentation are those of the authors, they are personal, and they are not official opinions of the Virginia Workers’ Compensation Commission or any other court or governmental agency. The presenters will refrain from public or editorial comments regarding cases on appeal or within an applicable appeal period. [↑](#footnote-ref-1)
2. The Commission relied upon Carpet Palace v. Salehi, 26 Va. App. 357, 494 S.E.2d 870 (1998). [↑](#footnote-ref-2)