Virginia Workers' Compensation American Inn of Court
Annual Conference, March 14, 2018

RECENT DECISIONS OF INTEREST

By
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Commissioner
Virginia Workers' Compensation Commission

THE COURT OF APPEALS OF VIRGINIA

Arising Out of

- Nelson v. Town of Christiansburg, No. 0313-17-3 (Va. Ct. App. Oct. 3, 2017).

The claimant was a utility supervisor and marked the location of utility lines. The claimant knelt on the ground, with his buttocks on his heels, for a minute or two. He rose, twisted to the right to go to his truck, and something popped in his back. The Court upheld the Commission's denial of benefits upon the "factual finding that claimant merely rose from performing a normal work duty while in a squatting position and was not exposed to any work-related risk or hazard." The Court explained:

> [C]laimant candidly testified that there were no contributing environmental factors involved in his injury. Claimant, while kneeling, reached approximately two feet into the ground and unclipped a transmitter from a meter. While rising, he twisted to his right and felt a "pop" in his back. Claimant had several tools in his hands, and admitted that their weight was not an issue and that his attempt to control them as he rose only created "a little bit" of a problem for him. Claimant acknowledged that he was not in an awkward position at the time of his injury and that the relatively flat area surrounding the meter did not require him to exert any physical effort to kneel. As in [Southside Virginia Training Center v.]Ellis, [33 Va. App. 824, 537 S.E.2d 35 (2000)] there were no contributing environmental factors surrounding claimant's normal act of rising from a squatted position, and thus claimant's employment did not expose him to a hazard or risk that resulted in his injury.

[1] In accordance with Cannon 2B of the Cannons of Judicial Conduct for the Commonwealth of Virginia, any opinions in this presentation are those of the author, they are personal, and they are not official opinions of the Virginia Workers' Compensation Commission or any other court or governmental agency. The presenter will refrain from public or editorial comments regarding cases on appeal or within applicable appeal period.

Causation and the Two-Causes Rule

- Carrington v. Aquatic Co., No. 0628-17-2 (Jan. 23, 2018)

The Court affirmed the Commission's denial of wage loss benefits based upon the finding that the two-causes rule did not apply. The claimant suffered polycystic kidney disease prior to his hiring by the employer. In 2003, the claimant suffered a compensable injury to his left arm. He has permanent work restrictions regarding the left arm injury. The claimant worked light duty for the employer, using the right arm, through October 2, 2014. On this date, he became unable to work due to kidney failure, a complication of the underlying polycystic kidney disease. The Commission denied benefits upon the grounds that the kidney failure was a condition which arose after the occupational accident and was responsible for his disability. The Commission emphasized that, "[h]is ultimate hospitalization and corresponding unemployment was occasioned by an event, kidney failure, which did not exist when he was injured or when his light duty job was offered." On appeal, the claimant argued that he was entitled to benefits because of the two-causes rule. The Court disagreed:

> Although the two causes rule provides the general framework for analysis, the Supreme Court recognized an exception to the rule in American Furniture Co. v. Doane, 230 Va. 39, 334 S.E.2d 548 (1985). In that case, the Commission had "ruled that an employee was justified in refusing selective employment because of a physical impairment arising after and unrelated to the industrial accident for which compensation had been awarded." Id. at 41, 334 S.E.2d at 549. The Supreme Court reversed, and held that "[a]n employer . . . is absolved of liability for compensation if the employee refuses selective employment because of a physical condition unrelated to the original industrial accident and arising since the accident." Id. at 43, 334 S.E.2d at 550. A contrasting factual scenario was presented in James v. Capitol Steel Construction Co., 8 Va. App. 512, 382 S.E.2d 487 (1989). There, a panel of this Court observed that Doane did not "compel[] the conclusion that employment suitable to the employee's residual capacity does not require consideration of a condition which pre-existed the injury by accident and which was obvious to the employer when the employee was hired." Id. at 516, 382 S.E.2d at 489.
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> Here, the Commission found that, while Carrington did suffer from a condition that predated his employment with Aquatic Company, the ultimate reason Carrington was unable to work was a progression and worsening of that condition.
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> We agree with the Commission that an award of the requested benefits under these circumstances would risk "converting the Act into a form of health insurance or imposing liability for a condition unrelated to the employee's work."

- Francone v. Fairfax Cnty. Pub. Sch., No. 0357-17-4 (Dec. 19, 2017).

The Court held that the Commission did not err in determining causation and declining to apply the two-causes rule. The claimant had a lengthy history of left knee issues since 2008 and a total knee replacement was discussed by her physician, Dr. Peter Lavine, by 2012. The claimant sustained an occupational injury in August 2014 when she slipped and fell onto the left knee. Commission did not err in relying upon Dr. Lavine's opinion that the claimant "should have recovered from [the] minor accident within approximately two months" even though Dr. Lavine reviewed her medical records and did not examine the claimant after the occupational accident. The Court emphasized that the claimant's "need for a knee replacement long predated the August 2014 injury," and that the Commission could rely upon Dr. Lavine's conclusion because he treated the claimant "for an extensive period of time." The two-causes rule did not apply because the claimant failed to establish that the 2014 injury "damaged her knee to the extent that it accelerated her need for a total knee replacement. . . . in the months following the August 2014 injury, [she] continued receiving the same non-operative treatment as before." The claimant's need for a knee replacement arose from a single cause: her pre-existing knee problems.

Compensable Consequence

- Creative Energy Corp. of Richmond v. Howe, No. 0314-17-2 (Va. Ct. App. Oct. 3, 2017).

The Court affirmed the Commission's finding that the claimant proved that his bilateral lower extremity pain and conditions were compensable consequences of the initial 2010 left knee injury. The Court dismissed the defendants' argument that the treating physician could not state to a reasonable degree of medical probability when the saphenous nerve left leg injury occurred or what caused it. The Court emphasized that the medical opinion went to the weight of the evidence, not its probative sufficiency, noting:

> the mere fact that a physician cannot determine the cause of a claimant's pain does not prove a lack of medical causation. See Herbert Bros. v. Jenkins, 14 Va. App. 715, 718-19, 419 S.E.2d 283, 285 (1992) . . . As addressed by the Commission, "[w]hile Dr. Martin cannot say exactly when he believes the saphenous nerve was injured, it remains his opinion that it was injured, and that the resulting pain syndrome is directly related to the original left knee injury."

Similarly, the Court was not persuaded that the right leg problem was a non-compensable consequence of a compensable consequence. The Court reiterated that the claimant's "symptoms

developed from a pain generator in his left leg," and that Dr. Martin opined that the left saphenous nerve injury resulted in the right leg symptoms.

Employee Status

- Kirtley v. Joel Cooper, No. 0631-17-3 (Va. Ct. App. Oct. 31, 2017).

The Court affirmed the Commission's determination that the claimant, a construction worker, was an independent contractor and not an employee of the employer. The Court noted elements such as "claimant was a skilled framer who could read blueprints and perform the work necessary to accomplish the framing without supervision or instruction. . . . [he] worked independently. He was an experienced roofer, and he did not receive any specific direction regarding the shingling." The claimant planned the day's objectives, instructed his own employees, and determined his own schedule and work hours. The claimant's actions indicated that he considered himself an independent contractor, i.e., he submitted invoices for his and his employees' work and received an extra four dollars for each hour completed by one of his employees. Citing MacCoy v. Colony House Builders, Inc., 239 Va. 64, 68-69, 387 S.E.2d 760, 762 (1990), the Court stated that "Virginia law does not require that an independent contractor be free from all instruction or direction, as long as he has the power to control the means and methods of performance."

Employer Status

- Jeffreys v. The Uninsured Employer's Fund, Mount Lebanon Missionary, et al., Nos. 0660-17-3 & 0693-17-3 (Va. Ct. App. Oct. 3, 2017).

The Court affirmed the Commission's findings that the Historical Society and Church were not Jeffreys' direct employers nor statutory employers since neither were in the construction business, and that Jeffreys was an independent contractor. The Court noted the previous determinations that if agent Mosby was not Jeffreys' employer, then Mosby's principals, the Historical Society and Church, could not be his employers. Also, the Historical Society and the Church did not exercise control over Jeffreys' work activities. The Court found that the Church was not in the "trade, business, or occupation" that led to the claimant's injuries as the Church's trade was to administer to the spiritual needs of its members. The Court held that the complete reconstruction of the Harvey School was not a part of the Historical Society's trade as the "rebuilding project at issue was simply beyond its capabilities. The Historical Society was not a construction company or a commercial property developer. . . . It was a small, grassroots, nonprofit organization with limited resources." (Case also remanded for clarification in the order to expressly reverse the Deputy Commissioner's determination that the Church and the Historical Society were Jeffreys' employer and dismiss the claim.)

Extended Premises and Coming and Going Rule

- Washington v. Honeywell Int'l, Inc., No. 0467-17-2 (Va. Ct. App. Oct. 24, 2017).

The claimant departed work and was struck by a motor vehicle while crossing a two-way public street to reach the North Parking Lot. The North Parking Lot was exclusively used by employees, albeit employees were not issued decals or assigned spaces. The employer had other lots in which the claimant was permitted to park. The Court agreed with the Commission that the public street was not part of the employer's "extended premises":

> Honeywell did not have a "right of passage" across Industrial Street, nor was Industrial Street an essential means of ingress and egress for Honeywell's employees. Honeywell did not require its employees to park in the North Parking Lot, and it provided several other parking areas where employees could park. If claimant had parked in one of the other lots, she would not have needed to cross Industrial Street.

The Court declined to rely upon parking lot cases to support a contention that the public street was extended premises as the injury did not occur in the parking lot. The Court concluded that:

> Honeywell did not own or maintain the public street where claimant was injured. In addition, Honeywell did not exercise control over the street by requiring or directing its employees to cross the street to use the North Parking Lot. Therefore, Honeywell did not own, maintain, or control the situs of the injury, and it is not part of Honeywell's extended premises.

The Court did not apply the "coming and going" rule exception as the "claimant's route was not the sole and exclusive way of ingress and egress, and claimant's situation does not fit within the exception."

Medical Treatment

- Moffett Paving & Excavating v. Kelly, No. 0198-17-2 (Va. Ct. App. Oct. 24, 2017).

The Court affirmed the Commission's weighing of the evidence to find that the employer failed to prove that the claimant's ongoing disability was no longer related to his occupational injury. The Court discussed the employer's argument that Dr. Helm's medical opinion was entitled to no weight as he was unaware of the claimant's prior medical history:

> Clinchfield Coal [Co. v. Bowman, 229 Va. 249, 329 S.E.2d 15 (1985)] does not apply to this case. In this case, Dr. Helm did not base his medical opinions on "assumptions," but rather upon his examination of claimant, claimant's medical

> chart, Dr. Pollard's notes, and a cervical spine CT. Dr. Helm never revised or rejected his opinion that claimant's neck injury was more likely than not caused by the December 12, 2013 work accident. . . . Dr. Helm's opinion, despite not having the benefit of claimant's complete medical history, was not based upon mere assumptions and the Commission did not err in crediting it.

- Pacheco v. J.P. Masonry, Inc., No. 0315-17-4 (Va. Ct. App. Nov. 28, 2017).

The Court affirmed the Commission's holding that an Endolite Blade XT prosthetic device (a running blade) was not medically necessary. The Court emphasized that the presented evidence showed that the device was beneficial, yet failed to prove the medical necessity of it. The Court further commented that:

> [T]he purpose of workers' compensation is not to restore the injured employee completely to his pre-injury state, but to compensate him for injuries that "either actually or presumptively produce disability and thereby presumably affect earning power . . . ." 1-1 Larson's Workers' Compensation Law § 1.03 (2017). . . . Providing a running blade to enable claimant to participate in sporting activities falls "outside the range of benefits provided" in the workers' compensation statutes.

Post-Traumatic Stress Disorder

- Hess v. Virginia State Police, 68 Va. App. 190, 806 S.E.2d 413 (2017)

The Court affirmed the denial of compensability of a state trooper's post-traumatic stress disorder which developed after responding to a fatal accident scene in which "the violence of the wreck had mutilated the body beyond recognition." Preliminarily, the Court discussed the statutory phrase "arising out of and in the course of the employment" of Va. Code § 65.2-101 and clarified that "to be compensable, a psychological injury as with a physical injury, must arise out of the employment while the triggering event of a sudden shock or fright causing the injury must occur in the course of employment." The Court emphasized that the current case centered upon whether the claimant's injury was causally related to a "sudden shock or fright":

> The proper inquiry is whether Hess "encountered a situation that was an expected occurrence in the performance of his duties." Hercules, Inc. v. Gunther, 13 Va. App. 357, 363, 412 S.E.2d 185, 188 (1991) (discussing denial of benefits for a firefighter's PTSD in Chesterfield Cty. v. Dunn, 9 Va. App. 475, 389 S.E.2d 180 (1990)). If so, his PTSD is not a compensable injury by accident.
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> Whether a shock or fright occurred and if so, whether it was sudden or unexpected are clearly factual issues. Testimony before the Commission showed that traffic fatalities are an unfortunately frequent and expected occurrence in a trooper's daily duties and that troopers are prepared to encounter these scenes in their training. The Commission was entitled to consider the evidence that Hess was assigned to investigate an accident and that such accidents often involve fatalities, and to also consider Hess's training and experience in doing so as well as that of his fellow troopers and assign credibility and weight as it deemed proper. We cannot conclude as a matter of law that the Commission erred in finding that Hess's traumatic experience was not a sudden or unexpected shock or fright for a State Trooper who received fatal accident and crash scene reconstruction training and had a decade of professional experience doing so.

The Court declined the claimant's argument that the Commission should apply a subjective standard of the definition of "sudden shock or fright."

- City of Norfolk v. Munker, No. 1058-17-1 (Va. Ct. App. Jan. 9, 2018).

The Court reversed and remanded the Commission's findings regarding the compensability of the claimant's post-traumatic stress disorder as an occupational disease. The claimant worked as a fire inspector in February 2015. Prior to this position, the claimant worked for 17 years as a firefighter paramedic and responded to "a lot of bad calls." Also, the claimant participated in two post-Hurricane Katrina relief efforts during this time period. On February 3, 2015, the claimant was informed that he would be reassigned to his previous job as a firefighter paramedic. The claimant became nervous, stressed and emotional, and began seeking medical treatment for his psychological difficulties. Pertinently, the Court affirmed the holding that the claimant's post-traumatic stress disorder was a compensable occupational disease. However, the Court emphasized that "the question is whether claimant's trauma experienced post-Hurricane Katrina was 'exposure outside of the employment' under Code § 65.2-400(B). We find that the answer to this query is controlled by the definition of 'employment' under the statute provided by the Virginia Supreme Court in Pocahontas Fuel Co. v. Godbey, 192 Va. 845, 66 S.E.2d 859 (1951)." Accordingly, the Court remanded the case to "determine whether claimant's post-Katrina relief effort was the same 'work or process' of a firefighter paramedic" to see whether the claimant was engaged in "employment" as contemplated under Virginia Code § 65.2-400(A).

Va. Code 65.2-705(D)

- McCluster v. Baltazar, No. 0414-17-2 (Dec. 5, 2017).

The Court found that the Commission did not err when the Chairman appointed a Deputy Commissioner to sit with the full Commission to hear a review. Since one Commissioner was absent, the mechanism provided in Virginia Code § 65.2-705(D) was triggered. A majority of Commissioners existed and a quorum was achieved as required by Virginia Code § 65.2-201(E). Regarding the merits of the case, the Court affirmed the Commission's findings that the claimant's injury arose out of and in the course of his employment. The Court emphasized that the claimant was "engaged in activities incidental to his employment" when clearing the employer's property as directed by the employer, albeit the process also benefitted the claimant. "[T]he clearing was for the pair's mutual benefit" as the claimant was required to vacate the premises upon which he was living and the employer needed to close on the sale of the property to pay off company debts. The risk of injury from operating a forklift was peculiar to the claimant's employment and the causative danger was incidental to the character of the construction business.

Summarily Affirmed Cases (since September 2017)

Carlson Holdings, Inc., v. Tibebu, No. 1398-17-4 (Va. Ct. App., Dec. 12, 2017).

VIRGINIA WORKERS' COMPENSATION COMMISSION

Arising Out Of

- Pollard v. City of Richmond, JCN VA00001266933 (Dec. 6, 2017).

The Commission affirmed that the claimant's thigh injury, which occurred when he fled from a swarm of bees while in a confined area, arose out of the employment. The claimant delivered heavy equipment to a construction site. He was confronted with a swarm of bees and ran. The Commission noted that the claimant was allergic to bees, and that "his avenue of escape was obstructed by the excavator, truck and trailer" which were work-related environmental factors and that "[t]The 'sudden force from running' along a path limited and dictated by the conditions of the claimant's employment caused his injury." The Commission agreed that while the general public is exposed to bees, "they were not exposed to the same constellation of risks experienced by the claimant."

Compensable Consequence

- Brooks v. Cent. Tel. Co. of Va., Inc., JCN 2129196 (Dec. 27, 2017).

The Commission held that the defendants were responsible for the claimant's dental treatment as it was not a consequence of a compensable consequence. The Commission emphasized recent holdings and that the "the claimant was taking several pain medications for her compensable injury, which caused xerostomia. If we find the pain medical induced xerostomia required the requested dental treatment, then the claimant's dental condition would be a direct consequence of treatment for the pain that is a symptom of her compensable right ankle injury." The Commission then found that the medical record established that "the claimant's use of pain medications as a result of her accident . . . was one of the causes of her dental condition."

Conflict of Interest

- Carpio v. Haley Ford, JCN VA00000312505 (Sept. 14, 2017).

The claimant had three claims. In JCN VA00000312505, the employer was insured by VADA and represented by Scott Ford, Esquire. In JCNs VA00000620977 and VA00000645598, the employer was insured by Merchants and represented by Esther King, Esquire. The Deputy Commissioner dismissed JCNs VA00000620977 and VA00000645598 and awarded medical benefits in JCN VA00000312505. After the issuance of the lower decision and prior to the filing of VADA's request for review, King joined Ford's firm. The claimant filed a motion to require the withdrawal of Ford and his firm as counsel for the employer and VADA. The Commission granted the motion on the finding that Ford and his firm were disqualified from representing the employer and VADA:

> Virginia Rule of Professional Conduct 1.10(a) states: "While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9 and 2.10(e)." Reading Rule 1.9 in light of Rule 1.10, we discern no means by which we are afforded the latitude to allow Ford's continued representation. The interests of King's former client, Merchants, are directly opposed to those of Ford's client, VADA.
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> Ford agrees that with King's employment at his firm, King could not assume the representation of VADA. We agree since she "participated in the same or substantially related matter," representing Merchants in the same litigation before the Deputy Commissioner. Accordingly, under Rule 1.10, all of the attorneys in the firm, including Ford, are prohibited from doing what King cannot do, represent VADA.
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> We [disagree] that only a portion of Mr. Ford's request for review need be stricken, that part which attempts to saddle liability on the employer at a time when the employer was covered by Merchants. Rule 1.7 addresses a concurrent conflict of interest noting that such conflict exists if the representation of a client is limited by the lawyer's responsibilities to another or former client. Thus, Mr. Ford's firm cannot avoid the conflict by refusing to take positions which necessarily put the respective clients at odds since that necessarily limits the positions to be taken on VADA's behalf on appeal.

(footnotes omitted.)

Dismissal with Prejudice

- Demeke v. DC Water & Sewer Auth., JCN VA02000028399 (Oct. 19, 2017).

The Commission reversed the scheduling of an evidentiary hearing based upon the employer's application for a hearing to address its rights and liabilities under the Virginia Workers' Compensation Act (Act). The claimant filed two claims in January 2017. In June 2017, the claimant requested that the Commission dismiss his claims with prejudice. The Commission granted the motion and no party appealed the dismissal Order. Thus, the claimant is forever barred from prosecuting a claim under the Act for the alleged occupational accident and the employer's application is moot.

Doctrine of Imposition

- Lee v. HCA Patient Account Serv. Ctr., JCN 2408830 (Sept. 25, 2017).

The claimant suffered dental injuries in June 2008. The employer paid for dental care (crowns) and filed a report of injury with the Commission in November 2008. The Commission made a transposition error and mistakenly directed an informational booklet and claim form to an incorrect address for the claimant. The claimant filed a claim in January 2016 when she needed replacement crowns. The Commission found that the claimant "was denied this opportunity to educate herself and take the action necessary to preserve her rights," and that "we have the equitable power through the doctrine of imposition to find the statute of limitations did not bar" the 2016 claim.

Injury by Accident

- Farmer v. Macy's, JCN VA00001088061 (Sept. 14, 2017).

The Commission affirmed that the claimant sustained a compensable injury by accident. The claimant was stuck in an elevator that moved up and down until rescued by firefighters. The claimant testified to the elevator jerking and that her "body was being shaken from side to side and twisted and I just stood in the corner." The Commission explained that "the claimant established that she stood in an elevator that traveled up and down, jerked and erratically moved for over 30 minutes. She said that she felt neck and back pain shortly thereafter. Medical [personnel] found an abnormal examination and diagnosed lumbar and cervical strains."

Lifetime Benefits for Coal Workers' Pneumoconiosis

- Vanover v. Paramont Coal Co. Va., LLC, JCN VA02000020919 (Sept. 15, 2017).

The Commission held that to qualify for lifetime benefits under Va. Code § 65.2-504(A)(4), a claimant must prove one of the following factors:

> (1) he suffers from coal workers' pneumoconiosis medically determined to be A, B, or C under the I.L.O. classifications, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working, *or* (2) he suffers from coal workers' pneumoconiosis involving progressive massive fibrosis, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working, *or* (3) there is sufficient pulmonary function loss as shown by approved medical tests and standards to render him unable to perform manual labor in a dusty environment, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working.

Medical Treatment

- White v. City of Chesapeake VA, JCN VA00001225591 (Dec. 27, 2017).

The Commission upheld that the claimant's conduct rose to the level of an unjustifiable refusal of medical treatment as her "actions forced Dr. Fox, a physician who was providing her with reasonable, necessary, and appropriate treatment, to withdraw from her care." The medical record indicated that the claimant was "very combative," argumentative with the physician, and questioned his credentials. The claimant's seeking of treatment with another physician – "medical treatment which has been denied by the Commission as unreasonable and unnecessary" – was insufficient to prove a cure of the unjustified refusal.

Va. Code § 65.2-714(B)

- Rush v. Pennell's Logging, JCN VA02000016690 (Aug. 24, 2017).

The Commission affirmed (with modification to a 25% of the net recovery) the amount of an attorney's fee to be paid by the medical provider. The Commission considered the language of Virginia Code § 65.2-714(B) requiring that counsel be awarded an attorney's fee when his efforts "inured to the benefit of" the medical provider:

> Clearly, the medical provider has benefited from counsel's efforts. But for his efforts in securing the award of workers' compensation benefits, CJW would have been resigned to a minimal fraction of its bill as paid by Medicaid. The $119,804.97 received from the workers' compensation carrier in excess of the Medicaid payment manifestly benefited the provider and was properly subject to an attorney's fee.
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> Left to our consideration is whether the sum previously paid by Medicaid is subject to counsel's requested fee. Applying the clear and unambiguous language of the statute, we deem it is not. Counsel's entitlement to a fee out of the $19,869.15 paid the provider before medical benefits were awarded is conditioned upon his having benefited the provider in some way. As to this $19,869.15, we can divine no such benefit. Rather, allowing a fee on that sum would work directly to the provider's disadvantage by reducing the payment received by the provider, which payment was entirely independent of counsel's efforts or the outcome of the workers' compensation case.