Virginia Workers' Compensation American Inn of Court
March 12-13, 2019

Case Law Update

Presented by: **R. Ferrell Newman, Commissioner**
James G. Muncie, Jr., Esquire
Jamie L. Karek, Esquire

Court of Appeals of Virginia

Causation

- Williams v. Lowe's Home Ctrs., LLC, No. 0120-18-2 (Va. Ct. App. Oct. 2, 2018).

The Court affirmed the Commission's determination that the evidence was insufficient to prove that the claimant's need for a vagus nerve stimulation operation was causally related to his compensable head injury. The claimant had pre-existing epilepsy and a temporal lobectomy. In March 2013 while working, a cart fell on his head at the site of his lobectomy. In February 2015, the claimant began suffering sudden crying spells. The claimant asserted that his crying spells began after the occupational incident and were causally related. The Court disagreed:

> Claimant experienced auras soon after he hit his head at work, but the crying spells began later. Claimant's doctors at VCU noted that the crying episodes were "susp[i]cious for seizure," but their examinations "thus far ha[d] not revealed an underlying objective abnormality associated with these spells and the[re]fore the exact etiology of these remain[ed] elusive." Similarly, claimant's doctors at the Cleveland Clinic determined that the crying spells were "highly suspicious of being epileptic in nature," but their relation to claimant's traumatic head injury was "not clear . . . at all."

(Op. 4-5.) The Court emphasized that the claimant had the burden to provide evidence to establish causation and "when medical issues are complex, as in this case, causation must be determined by a medical expert. See Strictly Stumps, Inc. v. Enoch, 33 Va. App. 792, 796, 537 S.E.2d 19, 21 (2000)." (Op. 5.)

Expert Witness Testimony

- Cnty. of Henrico v. Collawn, No. 0406-18-2 (Va. Ct. App. Oct. 16, 2018).

The claimant fell down steps in a school bus. A structural and forensic engineer testified as an expert on standards applicable to step design under the international building code which is the model for the Virginia Uniform Statewide Building Code. The Court held that the Commission

did not err in finding that the expert's testimony was admissible and could be relied upon. The Court explained:

> First, we note that neither the Virginia Rules of Evidence nor appellate decisions regarding those Rules are binding on the Commission regarding the admission of expert testimony. Pursuant to Rule 2.2 of the Rules of the Commission, the Commission "is not bound by statutory or common law rules of pleading or evidence nor by technical rules of practice." . . .
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> Accordingly, the Commission has tremendous latitude in determining whether to admit and eventually rely on expert testimony in an individual case. As we have observed regarding the expert qualification decision of another adjudicative body that similarly is not bound by the Virginia Rules of Evidence,
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> > the ultimate decision of what [expert qualification] standard should be applied belongs to the Board; it is free to adopt the traditional Virginia standard, the more stringent medical malpractice standard, or a lesser standard so long as the chosen standard is rational, is otherwise consistent with Virginia law, and provides determining principle[s] that can be applied consistently and that do not reduce the qualification decision to mere whim.
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> Va. Bd. of Med. v. Zackrison, 67 Va. App. 461, 480, 796 S.E.2d 866, 875 (2017) (internal quotation marks and citation omitted).

(Op. 13-14.)

Failure to Maintain Workers' Compensation Insurance Coverage

- Am. Transp. v. Mailloux, No. 0696-18-4 (Va. Ct. App. Oct. 9, 2018).

The Deputy Commissioner fined a penalty of $25,000 against the employer for failure to have workers' compensation insurance. The Commission affirmed. On appeal, the employer argued that the fine was burdensome, excessive, and violated public policy. The Court was not persuaded:

> The $25,000 fine imposed by the deputy commissioner and affirmed by the Commission was below the statutory maximum set by Code § 65.2-805. Employer asserts that he did not believe he was required to have workers' compensation insurance "due to the small size of his company." However, the Commission noted that "[t]he [d]eputy [c]ommissioner did not find credible the employer's testimony that he did not believe he was required to have coverage."

> Although "[t]he regulation of the amount of the fine to be imposed for an offense belongs to the legislature[,] . . . [t]he question as to the amount to be imposed within the limits of the statute is a judicial one." Western Union Tel. Co. v. Commonwealth, 204 Va. 421, 426-27, 132 S.E.2d 407, 411 (1963). The Commission has the discretion to determine the amount of the fine "according to the degree of default and the object designed to be accomplished." Id. at 426, 132 S.E.2d at 411. See also Dep't of Prof'l & Occupational Regulation v. Abateco Servs., 33 Va. App. 473, 483, 534 S.E.2d 352, 357 (2000) (rejecting claim that multiple civil penalties were unconstitutionally excessive where total was "well below the maximum amount authorized by the General Assembly"), aff'd upon reh'g en banc, 35 Va. App. 644, 547 S.E.2d 529 (2001). Considering that the amount of the fine was below the statutory maximum, under the facts of this case and the statutory objective of the civil penalty, we find that the Commission did not abuse its discretion by fining employer $25,000.

(Op. 3-4.)

Heart Presumption

- Cnty. of Henrico v. Cobb, No. 0929-18-2 (Va. Ct. App. Dec. 11, 2018).

The Court of Appeals affirmed the determinations that the claimant proved entitlement to the presumption of Virginia Code § 65.2-402(B) and that Virginia Code 65.2-402(D) did not bar the application of the presumption. The claimant was a deputy sheriff who began working for the employer when she was 59 years old. Her pre-employment physical diagnosed no heart disease, but reported a history of femoral bypass surgery, smoking, high blood pressure, a stroke, and Type II diabetes. The claimant suffered a heart attack at home in 2015.

The Court found that credible evidence supported the Commission's finding that the claimant's disability resulted from her heart disease, as opposed to other conditions. Next the Court disagreed with the defendant's argument that the claimant's pre-existing hypertension proved that she was not free of heart disease prior to her heart attack:

> Employer argues that because the statute lists both hypertension and heart disease, the General Assembly did not intend the presumption to apply to employees who suffered from either condition prior to their employment. Employer asserts that the Commission's finding that claimant suffered from pre-existing hypertension but not pre-existing heart disease is a "distinction without a difference."

> However, the Supreme Court repeatedly has found that a claimant is entitled to the presumption when the pre-employment physical "fails to make a positive finding of the disease which subsequently brings about the disability" of the employee. Berry v. County of Henrico, 219 Va. 259, 265 (1987). See also Commonwealth v. Barker, 275 Va. 529, 541, 659 S.E.2d 502 (2008); Garrison v. Prince William Cty. Bd. of Supervisors, 220 Va. 913, 919-20, 265 S.E.2d 687 (1980).
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> The Supreme Court has specifically considered whether the pre-existing condition of hypertension bars application of the presumption in Code § 65.2-402(B) for heart disease. Barker, 275 Va. at 541-45. In Barker, a deputy sheriff died from cardiac arrest while driving his police vehicle in the course of his employment. Id. at 534. The deputy sheriff underwent a pre-employment physical that noted "a diagnostic data etiologic reference to diabetes and hypertension," but "no finding of heart disease." Id. The employer argued that because Code § 65.2-402(D)(iv) lists medical conditions in the disjunctive, if any of them are present in the pre-employment physical, the presumption of Code § 65.2-402(B) does not apply. Id. at 541.
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> In rejecting the employer's argument, the Supreme Court followed the holdings of Berry and Garrison: a claimant is entitled to the presumption if the "pre-employment examination 'fails to make a positive finding of the disease which subsequently brings about the disability or death' of the employee." Id. at 542 (quoting Berry, 219 Va. at 264-65). The Supreme Court held that because "[t]he plain language of Code § 65.2-402(D) is in the disjunctive, not the conjunctive . . . the listed medical conditions are to be considered separately." Id. at 544.
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> Barker is directly applicable to this case. Here, claimant's history of pre-employment hypertension was uncontested. However, both the deputy commissioner and the Commission found no evidence that claimant suffered from heart disease prior to June 17, 2015.

(Op. 11-13.) Lastly, the Court agreed that the defendant failed to rebut the presumption, noting that "[a]lthough several doctors opined that claimant had risk factors for heart disease, this conclusion did not exclude the possibility that claimant's employment was also a causative factor." (Op. 15.)

Injury by Accident

- Daggett v. Old Dominion Univ., No. 0517-18-1 (Va. Ct. App. Sept. 25, 2018).

The claimant moved a series of fourteen boards. He grabbed each board by its sides, picked it up, rotated the board by lifting it "up and over," and placed it on the other side of the room. After recording the serial number on the back of the board, the claimant returned it to its original location. While performing the work, the claimant's arms were sore and his shoulders were "burning," especially his left shoulder. The claimant later expressed that he thought repetitive movement caused the injury. The Commission found that the claimant failed to prove a compensable injury by accident, relying upon Morris v. Morris, 238 Va. 578, 385 S.E.2d 858 (1989). On appeal, the claimant asserts that his claim should be compensable pursuant to the holdings of Riverside Regional Jail Authority v. Dugger, 68 Va. App. 32, 802 S.E.2d 184 (2017), and Van Buren v. Augusta County, 66 Va. App. 441, 787 S.E.2d 532 (2016). The Court of Appeals agreed with the Commission's denial and explained:

> The Commission found that on March 21, 2017, claimant engaged in repetitive movements, could not recall specifically when his symptoms began while he was moving the smart boards, and was unable to identify a particular movement or action that caused the onset of his symptoms. Those findings are supported by credible evidence in the record. . . . [T]hey are sufficient to support the Commission's ultimate finding: that claimant failed to prove his injuries resulted from an identifiable incident or sudden precipitating event and thus failed to prove he suffered a compensable injury by accident under the Act.
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> Further, claimant's reliance upon Van Buren and Dugger is misplaced. In Van Buren, this Court specifically noted that the firefighter claimant was not engaged in repetitive activity and distinguished Morris on that basis. Van Buren, 66 Va. App. at 452, 787 S.E.2d at 537. . . . Here, the Commission found that in contrast to the claimant in Van Buren, claimant was engaged in repetitive activity. That finding necessarily entailed the conclusion that while claimant's work activity in moving each smart board may have involved several discrete movements, those movements were repeated each time claimant undertook a particular piece of such work—i.e., each time he moved and then replaced one of the fourteen boards. Consequently, the Commission concluded that claimant's activities were sufficiently distinguishable from the widely varied and non-repetitive activities engaged in by the claimant in Van Buren. We agree that Van Buren is factually distinguishable from the instant case and does not support claimant's argument that he suffered a compensable injury by accident arising from non-repetitive activity.
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> Dugger is likewise distinguishable. In that case, this Court specifically concluded that, as in Van Buren, the claimant was not engaged in repetitive activity

> when she was injured during training in defensive tactics. Dugger, 68 Va. App. at 41-42, 802 S.E.2d at 189. The Court noted that "'simulated fights' . . . logically involved a variety of movements," and are "not inherently repetitive any more than would be the actions of a person defending himself in a [real] fight." Id. . . .
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> Contrary to claimant's argument, the Commission did not err in distinguishing Van Buren and Dugger from the instant case and determining that rather than those cases, Morris controls. In that consolidated case, the Supreme Court vacated awards of compensation to each of three claimants. Morris, 238 Va. at 589, 385 S.E.2d at 865. The Court held that none of the claimants had proved that his injury was caused by an identifiable incident or sudden precipitating event, resulting in an obvious sudden mechanical or structural change in the body. Id. . . . Although the Court did not directly characterize the nature of the activities engaged in by the claimants, its ruling makes clear that it concluded that they involved "repetitive trauma, continuing mental or physical stress, or other cumulative events" that produced "gradually incurred injuries," which were "not 'injuries by accident' within the meaning of [the Act]." Id. at 588, 589, 385 S.E.2d at 864, 865.

(Op. 7-11.)

- Cnty. of Henrico v. Collawn, No. 0406-18-2 (Va. Ct. App. Oct. 16, 2018).

The Court affirmed the Commission's awarding of benefits to a teacher who was exiting a school bus and "fell to the ground after losing her footing when she stepped down onto one of the bus steps." (Op. 2.) The Commission had "concluded that the bus steps were 'unusual in their configuration' and 'the unusual steepness of the bus steps was an actual risk of claimant's employment.'" (Op. 6.) The Court addressed the issue of falling on steps:

> Before turning to claimant's evidence regarding these stairs, it is worth emphasizing why falls on "normal" stairs are not compensable. Such stairs constitute a risk of the neighborhood not because they are stairs, but because they are an obstacle faced as often outside of the workplace as within it. Stairs of "normal" height, depth, and width are potential obstacles encountered by employees almost everywhere they go, whether at work, in the home, in public buildings, and in retail stores. Such stairs are found both inside and outdoors. It is because workers are equally exposed to the risks posed by the obstacles that are "normal building stairs," whether at work or not, that such falls on "normal" steps are not risks of the employment. This is true wherever such non-defective "normal" steps are encountered, even on a bus.

> Here, based on the evidence before it, the Commission found as fact that the steps on which claimant fell were "unusual," and therefore, not "normal building stairs."
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> . . . .
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> The fact that the steps might be "normal school bus steps" that meet certain guidelines does not make them a risk of the neighborhood. Every day Virginia employees encounter any number of things, from forklifts to safety equipment at nuclear power plants, that are standard for their particularized purpose and meet relevant safety guidelines. Despite meeting the relevant safety guidelines, the risks attendant to these things are not risks of the neighborhood because they are normally encountered in the workplace only and pose "a hazard to which the employee would [not] have been equally exposed apart from the employment." Fetterman, 230 Va. at 258, 336 S.E.2d at 893. The relevant question thus becomes, whether an employee faces the hazards posed by *school bus* steps as often outside of employment as while on the job.
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> The answer, of course, is no. Absent being a school system employee (and perhaps the occasional field trip), most adults do not encounter school bus steps at all let alone with the frequency necessary to render them a risk of the neighborhood.

(Op. 9-12.) (emphasis in original.)

- Norris v. ETEC Mech. Corp., No. 1054-18-2 (Va. Ct. App. Dec. 26, 2018).

The Court upheld the Commission's determination that the claimant's accident did not arise out of his employment. The claimant, an electrician, was driving home from work. He fell asleep behind the wheel approximately 200 yards from his home and sustained injuries. The claimant testified that "I get tired in the evenings, and sometimes moreso [sic] than others, . . . I've dozed off before." (Op. 2.) On the day of the accident, the claimant fixed leaks in air conditioning lines. He characterized the work week leading up to the accident as "a normal week" that "wasn't that bad, actually." (Op. 3.)

The Court agreed that the claimant failed to establish the requisite "critical link" or causal connection between the conditions of his work and falling asleep behind the wheel:

> While Norris's accident occurred because Norris fell asleep behind the wheel, the record reflects that Norris denied knowing what caused him to fall asleep. Norris testified that he dozed off because he was tired, but never related his drowsiness to his employment. Norris also characterized the work week leading up to the accident as "a normal week" that "wasn't that bad, actually." Based upon this

> testimony and other evidence in the record, Norris failed to sustain his statutory burden of providing the "critical link" between his employment and the resulting injuries. It follows that neither the Commission nor this Court can indulge in an inference that Norris's injuries arose out of his employment.

(Op. 8.) The Court rejected the claimant's "adoption of the Commission dissent that '[a]n employee should not be required to prove a work-related factor caused him to fall asleep while driving in the course of his employment.'" (Op. 8-9.) The Court emphasized that an injured employee retains the statutory burden of proving that his injury arose out of his employment, and here, the claimant failed as he "cannot show that the accident arose out of his employment because he failed to prove any nexus whatsoever between his employment and falling asleep behind the wheel beyond the fact that he was driving a company vehicle." (Op. 10.) The Court rejected any application of the street risk doctrine to the case, and noted "[t]he evidence in the record does not explain how any hazards of the street caused Norris's injuries, thereby eliminating the possibility of causes totally unrelated to the street risks of employment." (Op. 13.)

Medical Treatment

- Canada Dry Potomac Corp. v. Anderson, No. 0309-18-2 (Va. Ct. App. Oct. 9, 2018).

The Court upheld the Commission's determination that the employer was responsible for payment of medical treatment provided by Dr. Bonner. The Court emphasized that Dr. Bonner was the claimant's treating physician for many years and credible evidence from him showed that the provided physical therapy and massage treatment was reasonable, necessary, and causally related to the work injury. The Court was not persuaded by the defendants' argument that Dr. Bonner's viewpoint was "subjective and conclusory" and noted that the Commission was entitled to give greater weight to Dr. Bonner's opinion over the contrary presented opinions. (Op. 6.)

- DeVaughn v. Fairfax Cnty. Pub. Schs., No. 0539-18-4 (Va. Ct. App. Oct. 30, 2018).

The Commission found that the claimant unjustifiably refused medical treatment by not attending numerous functional capacity evaluations (FCE) and remanded the case to the Deputy Commissioner to consider her "cure defense." The Commission instructed the Deputy Commissioner "to determine if the claimant has subsequently cured her refusal." The Deputy Commissioner held that the claimant's verbal statement on December 7, 2016 was sufficient to cure, reasoning that he could identify "no reason to conclude that her testimony was offered other than in good faith." The Commission reversed and held that the cure was not in good faith as not accompanied by evidence of any affirmative acts or evidence of mitigating circumstances excusing her inactivity. On appeal to the Court of Appeals, the claimant argued that the Commission failed

to consider her participation in a FCE on December 15, 2016, and should have allowed her another opportunity to present evidence.

The Court found that the Commission did not direct that the record be re-opened and "we interpret 'subsequently' as referring to between June 14, 2016 and the December 7, 2016 hearing; the time frame between when the full Commission effectively terminated appellant's benefits and the evidentiary hearing." (Op. 5.) The Court found no error in the holding that she failed to cure:

> no evidence was introduced other than appellant's mere statement of her willingness to cooperate, thus precluding a finding of good faith. Appellant's evidence of her purported cure consisted *solely* of the verbal statement that she was "ready, willing, and able" to participate in a FCE. Appellant provided no evidence of any affirmative steps taken to demonstrate her efforts to cure nor did she identify any mitigating circumstances excusing her lack of effort. Appellant's three FCE appointments between February and May 2016 were each unsuccessful for various reasons, but all solely due to appellant's actions. By that time, appellee responded by filing the application for hearing on June 13, 2016. The evidence established that appellant took no known action whatsoever in the nearly seven-month period between May 2016 and December 2016, despite being directed to contact her nurse manager. Appellant had ample time before the hearing to make appropriate efforts to communicate with her nurse manager, meet with her physicians, attend a FCE, or indicate her desire to comply in other ways. Instead, appellant waited, apparently assuming that she would prevail on the issue of whether she had unjustifiably refused medical treatment.

(Op. 8-9.) Lastly, the Court found no error in not considering the December 15, 2016 FCE as the claimant requested closing of the record on December 13, 2016 and did not submit such medical record until June 2017.

Permanent Total Disability Benefits

- Kamco Bldg. Supply Corp. v. Heard, No. 0592-18-1 (Va. Ct. App. Sept. 25, 2018).

The Commission found that the claimant was permanently and totally disabled. The defendants argued that the claimant did not present credible evidence to conclude such entitlement. The Court upheld the award:

> the evidence overwhelmingly supports the Commission's factual finding that [the claimant] has a functional, permanent loss of use of both legs. Notably, the Commission explicitly stated that it had reviewed the entire record "including the previous Opinions and awards, depositions, hearing testimony, the surveillance

> video, the designated medical records, the position statements, the parties' Written Statements, and the October 10, 2017 Opinion" before finding that [the claimant] proved his permanent and total disability. It is clear that the Commission relied upon significantly more evidence in the record than employer claims. Moreover, the Commission analyzed the significance of Dr. Paschold's testimony and opinions in detail and assigned them great weight. Although employer points to contrary evidence in the record, we are bound to disregard such evidence on appeal as it was implicitly rejected by the Commission as the factfinder.

(Op. 13.)

- Paramont Coal Co. Va., LLC v. McCoy, 69 Va. App. 343, 819 S.E.2d 831 (2018).

The Court affirmed the Commission's finding that the claimant proved entitlement for permanent total disability benefits for pulmonary function loss pursuant to Virginia Code § 65.2-504(A)(4).

> To qualify as a permanent disability, the plain language of the statute requires that (1) the claimant has "sufficient pulmonary function loss as shown by approved medical tests and standards to render an employee totally unable to do manual labor in a dusty environment," (2) the claimant has been instructed to no longer work in a mine or dusty environment, and (3) he or she is in fact no longer doing so. Code § 65.2-504(A)(4). The Virginia Code does not define "approved medical tests and standards," nor has the Commission promulgated any regulations explaining or defining the terms or phrase.
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> . . . .
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> The words in the statute are plain and unambiguous. Pulmonary function loss "as shown by approved medical tests and standards" refers to the method by which a claimant must prove the pulmonary function loss to the satisfaction of the fact finder. Code § 65.2-504(A)(4). The statute requires evidence of approved medical tests and standards demonstrating the claimant's pulmonary function loss. The remainder of the relevant language, "to render an employee totally unable to do manual labor in a dusty environment," simply describes the degree of pulmonary function loss necessary to qualify as a permanent disability. Id.
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> The employer proposes that the statutory language requires that the approved medical tests be conducted according to some sort of independent approved standards. However, the plain language of the subsection does not require that a claimant prove his or her disability by approved medical tests "conducted according to" established standards. Code § 65.2-504(A)(4). The proposed

> construction of the subsection would require additional language in the statute that the legislature did not include. . . .
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> Alternatively, the employer proposes that the subsection requires an expert medical opinion that the claimant cannot work in a dusty environment due to pulmonary function loss "based on" approved medical tests. However, the plain language of the statute does not contain such a "based on" requirement. . . .
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> The statute does not require a duly qualified physician to use specific tests to diagnose a claimant's pulmonary function loss. It also does not exclude the possibility that a physician may make a diagnosis based on factors other than the specific "approved medical tests and standards" by which the claimant seeks to prove the extent of his or her pulmonary loss. No applicable statute mandates that an expert opinion that an employee is medically unfit to perform manual labor in a dusty environment is valid only if he or she gives that opinion after the administration of approved medical tests and standards demonstrating the requisite pulmonary function loss.

Id. at 352-355, 819 S.E.2d at 835-837. (footnotes omitted.) The Court found that the Commission did not err by accepting the claimant's approved medical tests and standards showing pulmonary loss rendering him unable to perform manual labor in a dusty environment, nor a weighing of the presented medical evidence.

Willful Misconduct

- Mailloux v. Am. Transp., No. 0636-18-4 (Va. Ct. App. Oct. 9, 2018)

The Court affirmed the Commission's determination that the claimant's claim was barred by his willful misconduct of violating a company policy and statutory requirement to wear a seatbelt. The claimant was a bus driver and when struck by another vehicle, he was ejected from the bus. On appeal, the claimant challenged only the proximate causation element of the employer's willful misconduct defense:

> The Commission concluded that "persuasive and preponderating evidence establishes that the claimant's injuries were directly the product of his failure to wear his seatbelt." Claimant argues the Commission could not reach that conclusion without medical evidence specifying which of his injuries were caused by his failure to wear a seatbelt. However, claimant fails to cite any statutory or case authority requiring an employer to establish proximate causation by medical evidence to prevail on a willful misconduct defense.

> Credible evidence in the record supports the Commission's finding. Claimant conceded that he was not wearing his seatbelt when the accident occurred. He further acknowledged that the purpose of a seatbelt is to secure a vehicle's occupant. After the initial rear impact, claimant was thrown into the passenger seat and subsequently ejected from the bus. He testified that he landed in a position pinned underneath the bus engine. Claimant admitted that he did not sustain any injury while in the driver's seat.
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> Based on these facts, the Commission could reasonably infer that all of claimant's injuries resulted from being thrown out of the driver's seat, a consequence of his failure to wear a seatbelt. Although the sequence of events started with the collision, credible evidence supports a finding that claimant's willful violation of his employer's rule and the statutory requirement to wear a seatbelt proximately caused his injuries.

(Op. 5-6.) (Marshall dissented in part in the underlying April 9, 2018 Commission Opinion.)

- Callahan v. Rappahannock Goodwill, No. 0661-18-4 (Va. Ct. App. Oct. 23, 2018).

Court upheld the Commission's determination that the claimant's willful misconduct barred his claim. The claimant drove a delivery truck. He was reversing a forklift from the back of the truck, and the truck began to roll away from the loading dock. The claimant suggested that the weight of the forklift caused the truck to bounce, which could have "knocked the gear off and caused [the truck] to roll." (Op. 2.) The claimant fell off the back of the truck while still astride the forklift. The claimant maintained that he never received safety training and stated that he was hired for his experience. He received and signed the employer's vehicle safety manual which stated "[d]rivers are responsible for the security of [trucks] assigned to them. The vehicle engine must be shut off, ignition keys removed, and vehicle doors locked whenever the vehicle is left unattended." (Op. 3.) A manager, Dotson, testified to informing the claimant about safety rules during the interview process, including securing trucks by removing the key from the ignition, engaging the brake, and chocking the wheels. The claimant had attended safety meetings about securing trucks by not idling and by locking truck doors.

On appeal, the claimant argued that the safety rules were not promulgated for the employees' benefit nor strictly enforced. The Court affirmed:

> The record supports the conclusion that reasonable safety rules regarding securing company trucks existed. These rules were communicated to appellant through several methods: Dotson informed him of the safety rules during the hiring process; appellant was given an employee manual containing the rules; appellant signed a document promising to read those safety rules; appellant was reminded of the safety

> rules at two safety meetings; and finally, the safety rules were reiterated during ride-alongs with at least one veteran employee.
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> The Commission also ruled that the safety rules were promulgated "in part for the benefit of the employee" even though Dotson testified that the safety rules were promulgated to protect company assets. A safety rule may have numerous benefits. It is of no significant moment that the safety rules regarding securing trucks may also have been promulgated for the employees' safety. Neither the statute nor case law suggests that safety rules must be promulgated "solely" for the benefit of employees.
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> . . . .
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> [The] safety rules were communicated to employees in a variety of ways. When Dotson was informed that violations of these safety rules had occurred, the informants did not reveal the violators' identity. Nevertheless, Dotson took action; she admonished all employees at the September safety meeting and reiterated the safety rules.

(Op. 12-16.)

Virginia Workers' Compensation Commission

After-Discovered Evidence

- Owusu v. Giant Landover, JCN VA00001397554 (Oct. 24, 2018).

The Commission awarded medical benefits and wage loss benefits. On appeal, the defendants – who did not show for the hearing – sought to introduce a wage chart to counter the claimant's evidence of her average weekly wage and recalculate the amount. The Commission did not accept the evidence on review:

> the proffered wage chart was prepared based upon information in existence prior to the Deputy Commissioner's hearing and could have been discovered and presented then through the exercise of due diligence. We do not find it satisfies the requirements for admission on review before the Commission. We note further that in her November 17, 2017 claim for benefits, the claimant requested that the employer provide a fifty-two week wage statement in addition to other pertinent documents. Despite this request, the employer did not produce these documents during discovery. The Deputy Commissioner therefore relied upon the claimant's testimony to determine her pre-injury average weekly wage. Although we have considered the employer's argument on review that the "claimant's testimony regarding her earnings was incorrect and not accurate," in the absence of contrary evidence, we have no means other than the claimant's testimony to make this determination.

(Op. 3-4.)

Attorney's Fee

- Pollard v. City of Richmond, JCN VA00001266933 (Nov. 8, 2018).

The Commission affirmed that it lacked jurisdiction to order the employer to reinstate leave balances or to provide a source of funds from which to deduct the attorney's fee awarded to his legal counsel:

> we have no authority to direct the employer to withhold the amount of the fee from the claimant's leave that was reinstated to him in lieu of compensation benefits. In these types of situations, where the claimant has used leave during his period of disability, the employer can [choose] to reinstate leave or to pay the temporary total disability benefits. The Commission has no jurisdiction to Order the employer to

> reinstate, or not reinstate, payment of leave benefits when wages are paid in lieu of compensation. Because the employer opted to reinstate leave balances in lieu of compensation, there is no compensation from which to deduct the attorney's fee. . . . [T]here is no accrued compensation from which to deduct the fee, and therefore no unpaid compensation against which to assess a penalty under Virginia Code § 65.2-524.

(Op. 5-6.)

Claim for Benefits

- Carper v. ABF Freight Sys., Inc., JCN VA00001132953 (Sept. 7, 2018).

The Commission granted the defendants' Employer's Application for Hearing alleging the claimant returned to light duty on September 5, 2017 and unjustifiably refused selective employment on October 13, 2017. Notably, on appeal, the claimant argued that because his award was suspended pending adjudication of the employer's application, the issue of additional work restrictions and a resumption of benefits was properly before the Commission. The Commission disagreed:

> the claimant did not "request" ongoing benefits at hearing on the ground of a new period of total disability. . . .
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> "Absent agreement of the parties, only claims set forth in the hearing notice may be heard and decided." Justus v. Rapoca Sales Co., 77 O.W.C. 223, 225 (1998). Deciding an issue not properly raised by the claimant in advance of the hearing is reversible error. Id.
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> The claimant did not articulate an effective defense to the employer's application and did not file an additional claim. On this record, and absent the agreement of the parties, the Deputy Commissioner did not err in only addressing the employer's application and the defenses asserted.

(Op. 5.)

De Facto Award

- James v. Wegmans Food Mkts., Inc., JCN VA00001272444 (Oct. 29, 2018).

The Commission agreed that a de facto award was applicable, contrary to the defendant's assertion that the parties had not reached an agreement to the pre-injury average weekly wage amount. The defendant paid temporary total disability benefits for six months based on a rate of $203.89 and the claimant had alleged an amount of $205. The Commission noted that this was an "insignificant difference in the initial average weekly wage calculation" and was not "a material dispute" to prevent the entry of a de facto award. (Op. 5.)

Employer's Application for Hearing

- Patterson v. UPS, JCN VA00001210029 (Dec. 11, 2018).

The Commission addressed Rule 1.4(C) of the Rules of the Virginia Workers' Compensation Commission which requires the defendants to pay compensation through the date of the filing of an Employer's Application for Hearing and whether the defendants may deduct an overpayment from awarded disability:

> At all times before the filing of the application, the claimant remained the beneficiary of the September 15, 2016 Award for the payment of temporary partial disability at the weekly rate of $555.47. Between July 23, 2016 and November 28, 2016, the claimant was paid disability at the temporary total rate, creating the overpayment at issue. After November 28, 2016, the defendants unilaterally suspended the payment of all indemnity benefits until they filed their May 31, 2017 Employer's Application for Hearing. With that filing, the defendants sent the claimant a check in the sum of $7,160.26, representing the unpaid temporary partial disability minus the overpayment.
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> Whether an employer may unilaterally deduct an overpayment of compensation from unpaid, awarded disability rests on the interpretation of Virginia Code § 65.2-520, which reads in relevant part:
>
> > Any payments made by the employer to the injured employee during the period of his disability . . . which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation, provided that, in the case of disability, such deductions shall be made by reducing the amount of the weekly payment in an amount not to exceed one-fourth of the amount of the

> weekly payment for as long as is necessary for the employer to recover his voluntary payment.
>
> The proper recovery of an overpayment is conditioned upon securing the approval of the Commission. The means by which an overpayment is recovered is a deduction from ongoing compensation at an amount not to exceed 25% of the weekly benefit until the overpayment is satisfied. Both elements must be satisfied in order for an overpayment to be lawfully recouped. The statute "creates no alternative or exception to the collection mechanism to redress circumstances that may result in a diminished recovery by an employer." Newport News Shipbuilding & Dry Dock Co. v. Holmes, 37 Va. App. 188, 193, 555 S.E.2d 419, 421-22 (2001). It does not contemplate the defendants unilaterally and without the Commission's blessing, deducting an overpayment from a lump sum of disability benefits owed to a claimant. Neither we, nor the defendants, are entitled to fashion a remedy contrary to that provided by statute. . . .
>
> When the Award for temporary total disability was vacated on the defendants' motion, the claimant's disability entitlement reverted back to temporary partial pursuant to the outstanding September 15, 2016 Award. The defendants failed to make the awarded payments from November 28, 2017 until May 31, 2018 at which time they paid accrued compensation after the deduction of the overpayment. We find that by doing so, the defendants failed to comply with the dictates of the statute. This was no mere technical error. By paying themselves in a lump sum from past due benefits, they recovered significantly more than allowed had they complied with the statutory mandate.
>
> We must conclude that the defendants improperly recovered their overpayment by deducting it from the claimant's disability entitlement. Consequently, they failed to pay compensation owed to the claimant through May 31, 2018, when they filed their Employer's Application for Hearing as required by Rule 1.4(C). As was the case in Cook, the application and any judgement resulting therefrom is *void ab initio*, because "the mode of procedure employed by the [Commission] was such as it might 'not lawfully adopt.'" Evans v. Smyth-Wythe Airport Comm'n, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998) (quoting Anthony v. Kasey, 83 Va. 338, 340, 5 S.E.176, 177 (1887)).

(Op. 6-8.) (footnotes omitted) (Marshall, concurring).

Injury by Accident

- Davis v. BWX Tech., JCN VA00001411100 (Nov. 6, 2018).

The Commission upheld that the claimant's injury arose out of his employment. The claimant, a tow motor operator, injured his knee when exiting his machine. The Commission explained:

> Here, the claimant's movement within the workspace was awkward and unique to his employment and was not a simple, routine activity. The claimant was injured when disembarking from a machine he operated to perform his work. The configuration of the machine required particular motions of stepping sideways, moving one leg off the machine, and twisting the body to navigate a narrow space. The method of disembarking was dictated by the confined area where the machine operator stood and worked.

(Op. 5.) (Rapaport, dissenting).

- Conner v. City of Danville, JCN VA00001172771 (Aug. 31, 2018) (appeal pending).

The Commission affirmed the lower decision that the claimant's injury did not arise out of the employment based upon an exposure to an Act of God. The claimant was a corporal in the investigations unit. She stood on an exterior front porch interviewing a homicide suspect and the weather suddenly became severe with increased wind and rain. All involved individuals wanted to move to an indoor location. The claimant stated that "the suspect took off, and went off the porch, and I took a left turn off of the porch onto the grassy area. It was hail and it was raining. I proceeded to try to get inside when I slipped . . . I almost fell . . . ." (Tr. 19.) She was trotting when she slipped. The Commission found that the evidence failed to establish that the claimant's employment duties exposed her to an increased risk of injury:

> The claimant temporarily suspended her interview and was injured as she hastened to reach shelter to avoid the rain and windy conditions, i.e., an Act of God. Contrary to the dissent's depiction, this was not a situation where an employee's employment required her to perform job duties in a hazardous weather situation. Instead, the evidence illustrated that the claimant had ceased and suspended the work-related tasks at the time of the injury. The claimant simply had no greater risk than anyone else who happened to be outside on that day.

(Op. 3.) The Commission denied that Virginia Code § 65.2-301.1 applied. The statute provides that when "weather constitutes a particular risk of a public safety officer's employment and where the public safety officer's injury arose out of and in the course of his employment . . . such injury shall be compensable under this title." The Commission explained that the claimant was not

exposed to a hurricane, tornado, lightning, flooding, or earthquakes. Instead, "[t]he claimant was interviewing a suspect, but the suspect was not under arrest nor in custody such that an officer needed to contain, control, or pursue the suspect. The evidence showed that the claimant trotted away from the interview for the purpose of removing herself from the rain." (Op. 4.)

(Marshall dissent: Virginia Code § 65.2-301.1 applies and an Act of God is inapplicable. "In the course of an active law enforcement investigation, the risk of severe weather is an actual risk of the employment. . . . The claimant was not injured directly by the storm. . . . Even if we view the claimant's accident as resulting from an act of God, her employment created a special risk and it arose out of the employment." (Op. 5-6.))

- Ignacio v. Alexandria City Pub. Sch., JCN VA00001175902 (Sept. 12, 2018).

The Commission upheld the determination that the claimant's injury did not arise out of the employment. The claimant was in the process of entering the employer's building. She fell as "I was walking in the grass and walked right into the parking garage. . . . there is a level where there was like a little lip, and then there's a huge opening, and there's a door in front of you . . . And I walked and stepped, and fell down into the parking garage." (Tr. 11, 13.) Other people (employees and non-employees) had similarly entered the garage as the claimant did. The Commission held that the claimant exceeded the sphere and scope of her employment:

> We decline to find that the claimant was reasonably expected to be walking under a brick archway and stepping over a brick "lip" which topped the wall of a lower than ground level garage in efforts to enter the office building. This was not a designated method of entry nor was the claimant performing a required aspect of her employment.
>
> As emphasized by the Deputy Commissioner, the "opening" described by the claimant was clearly not a doorway with a purpose of providing pedestrian access, and we do not afford credence to her testimony to such. For example, the claimant depicted herself casually walking through a "huge opening." Yet, the photographs illustrated that a person would have to crouch under and awkwardly maneuver through the brick archway. Next, the claimant refers to the "little lip" over which she simply needed to step. Again, we find this to be a gross understatement of the actual physical situation: a bricked area that rose higher than the exterior, grassy ground level and then dropped four feet to the interior, concrete garage floor. Lastly, we are hard-pressed to accept that the claimant could not visually ascertain and appreciate the depth of the garage floor – a space that she routinely observed prior to the accident date.

(Op. 6.) (Marshall dissent: The claimant fell on the employer's extended premises and her negligence is not a bar to the claim.)

- Henderson v. City of Va. Beach, JCN VA00000873556 & VA00001047755 (Sept. 21, 2018).

The Commission agreed that the claimant's knee injury did not arise out of the employment. The claimant walked into a cubicle, deposited files, and pivoted to leave. Her knee popped as she pivoted. The cubicle space was narrow and confined, and one needed to pivot to exit. The Commission emphasized that the "routine activity" was not "unique to her employment":

> The claimant did not engage in any significant exertion, her action of pivoting did not involve any awkward position, and there were no obstacles or barriers on the floor or in the workspace that caused her injury. . . . [T]here was no condition of the workplace or additional exertion necessitated by work . . . that caused her injury.

(Op. 7.) (The case also upheld the determination that the 2015 injury was not a compensable consequence of a 2013 accident.)

- Cannon v. Versability Res., Inc., JCN VA00001413146 (Oct. 4, 2018) (appeal pending).

The Commission affirmed that the claimant, a shuttle bus driver, failed to establish an injury by accident arising out of her employment. The claimant approached the main parking lot from between two buildings. She testified, "The last thing I remember is that instead of me going to the left to go out of the parking lot, I was going straight, and that's how I remember I saw a tree and I have no recollection of nothing else." (Tr. 12.) The claimant did not recall what happened or what caused her accident. She recalled speaking with the paramedics at the scene but "not clearly." (Tr. 13.) On appeal, the claimant maintained that "the accelerator was somehow pressed while she was operating the vehicle" which is a sufficient explanation of why the accident happened. (Op. 4.) The Commission was not persuaded:

> the claimant was unable to explain the circumstances surrounding her accident. It is therefore an unexplained accident. Her statements . . . about talking with the remaining passenger and the accelerator somehow being pushed do not provide sufficient explanation for, or details of, the accident to establish the cause of the accident. The medical records likewise indicate that the claimant did not know what happened and had no recollection of the event. . . . [T]he cause of the claimant's accident was unknown and the reason for the accelerator being pressed remains speculative.

(Op. 5.) (Marshall dissent: "The facts of this case are narrow and clear. There is only one reasonable interpretation of the evidence. The claimant was driving a bus. She inadvertently depressed the accelerator which caused the bus to strike a tree and overturn." (Op. 6.))

- Bandy v. Motor Vehicles, Dep't of, JCN VA00001370700 (Nov. 2, 2018) (appeal pending).

The Commission reversed the Deputy Commissioner's denial and held that the claimant proved an injury by accident, i.e., he suffered a particular injury to his wrist during the course of defensive tactics training as opposed to an injury arising from cumulative events. The Commission disputed that the case was governed by Daggett v. Old Dominion University, JCN VA00001318459 (Mar. 8, 2018), aff'd, No. 0517-18-1 (Va. Ct. App. Sept. 25, 2018), and elaborated:

> The claimant sustained a traumatic injury in the form of a left wrist comminuted distal radius fracture. It was not an injury of gradual growth or one that, by its nature, resulted from repetitive activity. The defensive tactics punching training undertaken on August 18, 2018 was one "piece of work." The claimant consistently attributed his injury to this drill. Dr. McDermott, the treating physician, stated a causal relationship between the left wrist fracture and the punching drill. To require the claimant to pinpoint the exact moment his wrist fractured during the exercise would yield an unjust result.

(Op. 7-8.)

- Sclafani v. City of Charlottesville, JCN VA00001340217 (Nov. 29, 2018) (appeal pending).

The Commission reversed the lower denial to find that the claimant did sustain a compensable injury by accident. The claimant, a police officer, was in training and was "taken down on the ground in handcuffs throughout the day." (Op. 2.) The swat team members would lift him up by the arms and put him on the ground. He denied feeling an intensive pain or something pop or crack at any time. When he left work, he noticed he could not straighten his arm on the steering wheel. Relying upon Bandy v. Department of Motor Vehicles, JCN VA00001370700 (Nov. 2, 2018), the Commission explained:

> the claimant was involved in activities where he was handcuffed and taken down by trainees in role playing drills. He did not notice any problems at lunch. Then after four more hours of training, during which he felt a tweak but no severe pain, he got into his car, and as he was driving, he could not straighten his arm on the steering wheel. . . . [T]he training session provided the necessary rigidity of temporal precision to constitute one event, and the claimant suffered a "discrete and specific" traumatic injury to his shoulder as a result.

(Op. 5.) (Rapaport dissent: The evidence failed to show that the claimant suffered a compensable injury traceable to any identifiable incident: "[T]the claimant participated in repeated physical exertions over his entire work day, and he was unable to provide with any specificity as to when

during this extended period of time – or during what activities – some action may have caused his injuries." (Op. 7-8.) Also, the medical evidence did not show a causal connection between the injuries alleged and the claimant's work.)

- Pozada-Portillo v. Golden Gate Serv., Inc., JCN VA02000029033 (Nov. 8, 2018).

The Commission reversed the determination that the claimant sustained a compensable injury by accident arising out of the employment. The claimant fell down an exterior set of stairs. She testified that she slipped on the metal strip on the step. The Commission found that the claimant failed to prove that the incident arose out of the employment:

> She did not establish that the metal strip was irregular, broken, sloped, unusually high or covered by a foreign substance. Rather, the metal strip was simply a part of each step. The claimant did not offer any explanation as to why or how her foot slipped on the metal strip. Without more, we cannot conclude the metal strip on these stairs was an actual risk of the employment. . . .
>
> The claimant presented no other risk of the employment, such as hurrying, distraction, or carrying items related to her work.

(Op. 5-6.)

- Jackson v. Hidenwood North Apartments, JCN VA02000029713 (Nov. 8, 2018).

The Commission affirmed that the claimant proved a compensable injury by accident. The claimant opened a door to a bathroom and was overcome by bleach fumes. The Commission explained compensability:

> The claimant reported the incident on December 14, 2017. In that report the claimant wrote that the "high level of bleach fumes caused breathing problems for me." The claimant suffered from chronic obstructive pulmonary disease. This incident exacerbated that condition. Thus, there was an identifiable incident at a definite time. This incident caused immediate change to the claimant's lungs.

(Op. 4.) (Rapaport dissent: Medical records do not support the conclusion that the exposure to bleach fumes changed the claimant's pre-existing lung condition.)

Medical Treatment

- Knight v. Coresix Precision Glass, Inc., JCN VA00001196578 (Nov. 29, 2018).

The Commission reversed the holding that the claimant sustained a traumatic brain injury, post-concussive syndrome, headaches, and neck pain during her compensable injury by accident. The Commission emphasized the normal objective testing, the claimant's unexplained refusal to take medications as recommended, and testing finding "a patient sabotaging the results through a lack of effort and inaccurate responses." (Op. 6.)

The Commission reversed the determination that Dr. Shawke Soueidan qualified as her treating physician. The Commission explained that the claimant had established a course of treatment with Dr. Nanavaty who treated the claimant for two months until he recommended that she return to work, and she sought a second opinion. Dr. Nanavaty "took an accurate history, performed physical exams, ordered diagnostic testing, prescribed medication and ordered a comprehensive psychological evaluation." (Op. 10.) The Commission elaborated:

> While there are no strict guidelines by which we can assess whether a particular doctor's care rises to the necessary level, there are factors to weigh into our deliberations. We should evaluate whether the physician in good faith accepted his role as a treating physician, whether treatment was provided appropriate to the injury alleged, and whether the physician employed such resources at his disposal in an effort to diagnose and treat the injury. To this list of considerations we can add the period of time during which a claimant remained under the physician's care.

(Id.) Lastly, the claimant failed to prove justification for changing from Dr. Nanavaty to Dr. Soueidan. Dr. Nanavaty did not indicate an unwillingness to treat the claimant, and there was a five-month significant delay to see Dr. Soueidan. The Commission noted that "[p]rompt and appropriate medical treatment for injuries assists both employers and employees. . . . A contrary interpretation would place injured workers in the untenable position of having to wait months to receive medical treatment." (Op. 12.) (citation omitted).

- Uhlmann v. Mattress Firm, JCN VA00001339057 (Sept. 28, 2018).

The claimant suffered compensable injuries to her right shoulder and neck. The defendants disputed the extent of her injuries at the hearing, particularly the alleged neck condition. Pertinently, the Commission upheld the determination that the claimant sought unauthorized medical treatment with Dr. Joel D. Fechter and that the defendants were not responsible for payment of such:

> the claimant began treatment with Dr. Jeffrey H. Berg, orthopedist, on July 10, 2017. He initially diagnosed the claimant with right shoulder impingement

> syndrome and right shoulder pain. He recommended rest of the right arm, medication, and physical therapy with dry needling. He advised the claimant to work sedentary duty and to follow-up in four weeks for "persistent symptoms." She continued to treat with Dr. Defoe at Concentra on July 12, 2017 and July 19, 2017. She returned to Dr. Berg on August 17, 2017 and described worsening pain. Dr. Berg diagnosed the claimant with cervicalgia and pain in the right shoulder. He again prescribed medication, physical therapy with dry needling, and sedentary duty. He also noted a plan for the claimant to be evaluated by Dr. Clop or Dr. Bhatia, physicians who appear to be in the same office. His work note reflects the claimant was to return "PRN." Instead of returning to Dr. Berg as needed, or following through with an evaluation with either Dr. Clop or Dr. Bhatia as recommended by Dr. Berg, the claimant chose to begin treating with Dr. Joel D. Fechter. Given this evidence, we do not find Dr. Berg discharged the claimant from his care or failed to provide adequate medical care. There is no evidence that the claimant was confronted with an emergency that required her to seek treatment with Dr. Fechter.

(Op. 4-5) (footnote omitted). (Marshall dissent: The evidence demonstrated that Dr. Berg no longer intended to treat the claimant, and since the defendants were disputing responsibility for the neck injury, they were failing to provide all of the medical treatment she needed.)

- James v. Wegmans Food Mkts., Inc., JCN VA00001272444 (Oct. 29, 2018).

The Commission agreed that the claimant unjustifiably refused medical treatment when she failed to undergo an endovascular procedure recommended by her treating physicians to cure her left hand problem. The Commission recognized the claimant's fear of undergoing the procedure, yet "the medical evidence preponderates to show that the procedure is necessary, not only for the claimant to obtain any improvement in her condition, but also to address Dr. Drooz's concerns related to progressive high output heart failure." (Op. 7.)

Permanent Partial Disability Benefits

- Richardson v. Loudoun Cnty., Va., JCN VA00000806147 (Amended, Sept. 11, 2018) (appeal pending).

The claimant injured his left hip and sought permanent partial disability benefits for a 74% loss of use of the left leg. The Deputy Commissioner awarded a 49% rating and both parties appealed. The Commission held that the claimant proved entitlement to the requested amount of 74% and awarded such. The Commission found the treating physician to be credible and reliable, noting that Dr. Avery treated the claimant before and after a total knee replacement. The treating physician also testified to his process for calculating the permanent partial disability rating, and

the failure to use a roentgenographic grading system under the AMA Guides to the Evaluation of Permanent Impairment did not invalidate his opinion. Dr. Avery also did not incorrectly account for pain, as the claimant's pain affected his left leg function. The Commission noted that Trevathan v. Loudoun Cnty. Sch. Bd., JCN 240-63-68 (Dec. 3, 2012), aff'd, No. 2266-12-4 (Va. Ct. App. July 16, 2013) was "an outlier case decided on its own peculiar facts. It did not categorically exclude hip replacements as a basis for establishing loss of use of a scheduled extremity under Virginia Code § 65.2-503." (Op. 10.)

The Commission discussed the holdings of Creative Dimensions Grp. Inc. v. Hill, 16 Va. App. 439, 430 S.E.2d 718 (1993), and Rowe v. Dycom Indus., Inc., VWC File No. 179-38-18 (Apr. 24, 2002):

> In Creative Dimensions, the Court of Appeals pointed out that the Workers' Compensation Act was silent on "whether the disability rating of a 'total loss of vision' is determined with or without regard to the benefit obtained by the implant." 16 Va. App. at 442, 430 S.E.2d at 720. The Court concluded there was no basis to determine permanent partial disability by including the effect of a man-made corrective device.
>
> In Rowe, the Commission applied the analysis in Creative Dimensions to a case involving a total knee replacement. The Workers' Compensation Act does not address explicitly whether loss of use of the leg is determined with or without regard to the benefit obtained from a surgical implant. In Rowe, we said, "we do not discern a meaningful distinction legally between an intraocular lens transplant and knee replacement." We used the impairment rating before the total knee replacement to determine the extent of the injured employee's loss of use. Applying Rowe to the facts of this case, we find no error in relying on Dr. Avery's estimate of pre-replacement permanent partial impairment.

(Op. 11.) Lastly, the Commission held that the Deputy Commissioner erred by deducting 25% from the rating by concluding that arthritic changes were limited to the hip and not related to any impairment of the ratable left leg, and stated, "[W]e cannot presume that any cartilage loss in the hip was not related to the work injury and jump to the conclusion that cartilage loss equals 25% loss of use of the leg. . . . [Also] if the damage was confined to the hip, as the Deputy Commissioner concluded, then there was no loss of use of the leg." (Op. 13.)

- Hicks v. Giant Landover, JCN VA01002424518 (Sept. 24, 2018) (appeal pending).

The Commission upheld the Deputy Commissioner's determination that the claimant proved a 7% permanent impairment to her right knee as a result of her 2009 work-related accident. The claimant had pre-existing right knee problems, including osteoarthritis. She underwent a total knee arthroplasty after the accident. Dr. Bruno rated the claimant to have a 50% impairment. Dr. Malek

rated the claimant to have a 37% impairment. He attributed 30% of the impairment to pre-existing osteoarthritis and 7% impairment to the arthroplasty. The Commission explained:

> Dr. Bruno's March 30, 2015 rating of 50% fails to consider the claimant's pre-existing knee condition, and he provides his rating based solely upon the claimant's condition after her surgery. Dr. Malek's September 17, 2015 opinion reflects that 30% of the claimant's 37% permanent impairment was the result of her pre-existing arthritis. A crucial issue in determining a claimant's eligibility for permanent partial disability benefits is "the extent of impairment related to the accidents at issue" as opposed to the extent of impairment attributable to a pre-existing condition. Suyo v. Fairfax Cnty. Pub. Schs., JCN VA00000341533, VA00000613172 (May 13, 2015). An impairment rating that fails to consider relevant pre-existing conditions is not credible evidence. Id. Given Dr. Bruno's failure to comment on the claimant's pre-existing condition and how it might impact his permanent partial impairment rating, and based upon the medical evidence before us, we must find the claimant did not meet her burden of proving she suffered more than 7% permanent impairment to her right leg as a result of the March 2, 2009 work accident.

(Op. 9-10.) (Marshall dissent: Dr. Bruno's assessment is proper, and regardless, Dr. Malek's deduction of 30% for preexisting osteoarthritis is inconsistent with case law. Evidence did not prove that the claimant suffered a 30% functional loss of use of her right leg from pre-existing osteoarthritis before the occupational accident.)

Personal Comfort Doctrine

- Wagler v. Univ. of Va. Health Sys., JCN VA00001349414 (Nov. 28, 2018).

The Commission upheld the finding that the claimant's injury by accident fell within the personal comfort doctrine and thus in the course of her employment. The claimant was employed as a nurse. Nurses are required to undergo CPR recertification every two years, and the employer provided free recertification for employees at its facility. The claimant was injured while participating in the recertification during her lunch break. The claimant was ceasing employment with the employer before her current certification expired. The Commission explained its holding as follows:

> We agree with the defendant that they derived little direct benefit from the claimant's CPR recertification. However, analyzing the benefit derived by the employer is not the key to determining if the personal comfort doctrine applies. The activity engaged in by the claimant at the time—obtaining recertification—was necessary for the claimant's convenience, as well as her employability. That it was also personal in nature is not a bar to recovery. The employer itself provided the

> recertification as a convenience to its employees. The class was held at the employer's facilities. The claimant cannot be said to have been some place she had no right to be when the injury occurred. Nor was she engaged in "a frolic of [her] own." Clearwater v. Mobil Oil Corp., VWC File No. 165-17-31 (Dec. 5, 1994), aff'd, No. 0233-95-4 (Va. Ct. App. Aug. 29, 1995).

(Op. 5.)

Selective Employment

- Mitchell v. Univ. of Va. Health Sys., JCN VA00001360407 (Dec. 17, 2018).

The Commission affirmed that the claimant's voluntary resignation constituted an unjustified refusal of selective employment. The Commission found that the employer offered to accommodate the claimant's work restrictions and to assist her in any way possible, but she resigned. The Commission discussed the following:

> A contrary decision would require an employer to make a specific job offer to a claimant who has made it abundantly clear that she has no intention of accepting any position that may be offered. When there is not ambiguity in words, then no exposition contrary to the expressed words needs to be made. The law does not require the doing of a useless act. . . . [T]he claimant made a pre-emptive refusal of employment with the employer when she was released to light duty. Despite the employer's sincere efforts to change the claimant's position regarding a return to work, she remained steadfast in her refusal.

(Op. 6.) The Commission further held that the claimant cured her refusal by obtaining a job earning a wage substantially similar to her pre-injury wage. However, she failed to continue marketing her residual work capacity as required by Virginia Code § 65.2-502 and was not entitled to temporary partial disability benefits. (Marshall dissent: The employer could not make a bona fide offer of selective employment to accommodate the claimant's restrictions because none were stated with any reasonable specificity.)

Termination of Award

- Collado v. Fairfax Cnty. Maint., JCN VA00000966406 (Sept. 18, 2018).

The Commission upheld the ordering of payment of compensation due under an outstanding award plus penalties pursuant to Virginia Code § 65.2-524. The claimant had an award entered on February 27, 2015 for the payment of temporary total disability beginning August 22, 2014. On

December 2, 2014, the claimant returned to work for the employer, earning his pre-injury wage, and the defendant suspended the payment of workers' compensation without filing an agreement or application to terminate disability benefits. The claimant filed claims beginning in October 2017 seeking payment of temporary total disability as provided by the award. The Deputy Commissioner found that for the period beginning December 2, 2014 through September 1, 2017, the employer wrongfully suspended the payment of benefits. Accrued compensation of $73,287.10 was ordered to be paid the claimant plus a 20% penalty ($14,657.42). An attorney's fee of $17,585 was awarded as well. The Commission agreed:

> The defendant in this case was free to seek modification or entry of a new award, but in doing so it was obligated to comply with [] both [the] Act and the Commission's Rules applicable to suspending payment under an existing Award. . . . Having ignored its obligation, the Commission is left with no basis to excuse the defendant's legal obligation to honor the award. As stated above, we are as equally bound as the parties by Commission Rule 1.4 and have no authority to excuse the defendant's failure to comply with an existing award.
>
> The defendant's contention that it was in compliance with the award, having paid the claimant wages in lieu of compensation, is similarly erroneous. Upon the claimant's return to work, he earned a wage. The payment of wages earned at light duty do not excuse the employer's obligation to comply with an outstanding award. See Diaz v. Wilderness Resort Ass'n, 56 Va. App. 104, 126, 691 S.E.2d 517, 528 (2010). . . .
>
> We reject the defendant's contention that the claimant's compensation was paid through "coded" injury/medical leave which continued until such leave was exhausted. It has long been recognized that salary paid as sick leave may be credited against the obligation to pay compensation if the sick leave is reinstated. See Augusta Cnty. Sch. Bd. v. Humphreys, 53 Va. App. 355, 362, 672 S.E.2d 117, 120 (2009). It may be that this self-insured employer paid leave that could have been credited against its obligation to pay compensation. However, we are unable to discern what periods the claimant was out of work due to his injury or what he was paid under the employer's leave policy. Furthermore, and most significantly, the defendant failed to establish that the leave was reinstated.
>
> . . . .
>
> If the defendant chose to ignore established principals applicable to existing awards, then they did so at their own peril.

(Op. 3-5.) (footnote omitted).

Third Party Settlement

- Pierson v. Essex Concrete Corp., JCN VA00001167005 (Dec. 11, 2018).

The Commission reversed the holding that the claimant's acceptance of a third-party payment from Nationwide Insurance without the knowledge and consent of the defendant barred her claim pursuant to Virginia Code § 65.2-309.

The claimant slipped in a parking lot owned by Essex Square, LLC. She stated that after the defendant denied her workers' compensation claim, Nationwide Insurance contacted her as the insurer of the parking lot owner. The claimant submitted her medical bills and received a $5,000 check dated March 1, 2016 from Nationwide Insurance. The claimant understood that this amount was a MedPay payment, and she denied settling her claim. Relying upon Overhead Door Co. of Norfolk v. Lewis, 22 Va. App. 240, 468 S.E.2d 700 (1996), the Commission explained that the employer failed to sustain its burden to establish that the claimant's acceptance of funds was a "settlement" of a right to recover damages against another party which prejudiced its right of recovery: "Nationwide Insurance, the insurance carrier for the parking lot owner, paid $5,000 for medical expenses to the claimant as a first-party insured. There simply was no persuasive evidence that this payment settled an outstanding matter between those parties." The Commission further held that the defendant was not entitled to a credit for the $5,000 payment:

> Section 65.2-309(D) allows the employer to recover its lien in the form of a credit against the "employee [who] receives the proceeds of the settlement or verdict." Again, there is no settlement or verdict in this case. Additionally, Section 65.2-313, which provides for a right to reduction of future entitlements, is predicated on a recovery transpiring through an effectuation of Code § 65.2-309 (or Code § 65.2-310), which we have found inapplicable.

(Op. 4.) The Commission entered an award for medical treatment.

Similar Employment

- Jackson v. The Grafton Sch., Inc., JCN VA00001298569 (Sept. 18, 2018).

The Commission upheld that the claimant's employment with the employer was substantially similar to that with James River Detention Center (JRDC) for purposes of calculating the pre-injury average weekly wage.

The claimant worked as a substitute/PRN staff member for the employer, a private school that enrolled juveniles on the spectrum of autism. The employer oversaw the school and group homes

for some students. The claimant's job description was to provide "planned, structured instruction and support to help clients build skills in the following domains: self-care, household, leisure/recreation, community participation (in most regions), communication, physical abilities, and social-emotional. . . . Key responsibilities included: (1) ensuring health, safety and wellness of clients, (2) implementing individual plans, (3) providing a supportive and solution-focused environment, and (4) managing household factors." (Op. 2.) Job duties for the employer included continuous supervision of the students in the classroom, cafeteria, gymnasium, community-based outings, and residential homes. The claimant also worked as a detention counselor at JRDC, a facility that detained juveniles who were awaiting trial for committing a crime. His job description was "supervis[ing] children placed in the detention home, does related work as required." (Op. 3.) The claimant's job duties at JRDC included supervising residents in the day room, gymnasium, cafeteria, social interaction area, showers, and community outings. The claimant said that both jobs required: (1) certifications in first aid and CPR, (2) hands-on training with the residents and clients, (3) certification to distribute medication, (4) a high school diploma, (5) a bachelor degree or equivalent experience, and (6) training requirements.

The Commission agreed that the general nature and primary missions of the two employments were substantially similar:

> Both jobs required and utilized notably similar skills and training to forward shared objectives. . . . The claimant's . . . primary mission for the employer exceeded instructing children in a typical educational arena. Instead, the claimant's primary mission for the employer and JRDC focused upon supervising, monitoring, and engaging with children who had unique attributes and environmental placements to ensure their safety and security.
>
> . . . .
>
> We recognize that the claimant had only worked as an instructional assistant at the school. However, his specific job duties included providing supervision at the group home once applicable and he did such post-injury. This portion of the job was not hypothetical or unrealized. Moreover, as discussed above, his actions at the school (and the missions of both employers) were substantially similar to those at JRDC without considering the group home aspect.

(Op. 4-5).

Virginia Code § 65.2-506

- Green v. Printpack, JCN VA02000007014 (Oct. 1, 2018).

The claimant injured her right shoulder in April 2011. She injured her left knee in July 2011. Both injuries rendered the claimant disabled for periods of time, yet the claimant was awarded temporary total disability benefits for the second accident as the first accident had later disability. The Commission discussed Virginia Code § 65.2-506:

> Before us is the question of treatment of a suspended award for the first accident when disability entitlement ends for the second. This is addressed in Virginia Code § 65.2-506 in two specific situations. If a claimant suffers a disabling accident while receiving compensation for permanent loss pursuant to § 65.2-503 for a previous accident, then the § 65.2-503 benefits are suspended during the period the claimant receives disability for the second accident. . . . The second circumstance addressed in Virginia Code § 65.2-506 is where the claimant was receiving partial incapacity when a succeeding accident occurs. In that scenario, "no compensation shall be payable on account of the first injury during the period he receives compensation for the second injury." . . . However, in the case of partial benefits, the statute is silent as to what becomes of the award for temporary partial once benefits for the second accident end.
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> As to the circumstance confronting us on review - the claimant's receipt of disability benefits under § 65.2-500 for a second accident prior to experiencing disability for the first - Virginia Code § 65.2-506 is clearly and unambiguously silent. . . .
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> We must deem the absence of statutory direction not as an oversight, but as an expression of legislative intent that we not apply relief provided in Virginia Code § 65.2-506 to cases not addressed therein, such as the circumstance before us involving Code § 65.2-500 benefits. Consequently, we look to the appellate courts for guidance as to how to treat the claimant's suspended disability award. In Hensley, 22 Va. App. at 546, 471 S.E.2d at 803, the Court of Appeals of Virginia addressed circumstances where the claimant was entitled to benefits for total incapacity pursuant to § 65.2-500 as a consequence of two injuries. Because the award at issue was neither for partial incapacity pursuant to § 65.2-502, nor permanent partial incapacity pursuant to § 65.2-503, the facts did not "fit precisely into the language of § 65.2-506." Id. at 554, 471 S.E.2d at 807. The Court explained, "Code § 65.2-506 expresses the legislative approach to multiple contributing injuries," mandating compensation be paid first on the most recent accident. Id. While honoring the statute's policy providing that compensation for multiple injuries be paid in reverse order, the Hensley Court declined to judicially

> expand the statute's application, refusing to automatically award disability for the first accident when disability for the second ended. Rather, the Court held that compensation for the first could be reinstated only "if justified." Id. at 553, 471 S.E.2d at 807.
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> What constitutes a sufficient justification to compel the reinstatement of disability for the first accident was a question addressed by the Supreme Court of Virginia in Eggleston. Citing Hensley with approval, the Court defined "if justified," stating that when the second injury resolves itself or the compensation limit is reached, "the claimant can continue to receive temporary total incapacity benefits based on the other component injury *only if the evidence still supports a finding that the claimant is totally incapacitated based on the other component injury*." Eggleston, 264 Va. at 21, 563 S.E.2d at 689-90 (emphasis added). . . .
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> The wisdom of predicating a reinstatement of disability upon proof of total incapacity recognizes that during the period the claimant was disabled for his second accident, circumstances impacting a claimant's entitlement to disability for the first may have changed. By the time the claimant's disability entitlement for the most recent accident ends, circumstances may have occurred that are incompatible with disability entitlement for the first injury. Regardless of the circumstance, we have no authority to automatically reinstate or "unsuspend" an award for total incapacity for her first injury independent of proof of entitlement to disability.
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> Before the claimant's disability award for her April 14, 2011 accident is reinstated, she must provide evidence of total incapacity. Id.

(Op. 5-8.) (footnotes omitted).