# HEART, LUNG, AND CANCER PRESUMPTIONS IN VIRGINIA PRESENTATION

BY

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# JUSTIN R. MAIN

Curriculum Vitae

Justin Main is a partner with the firm of Siciliano, Ellis, Dyer & Boccarosse PLC in Fairfax, where he has been since 2011. He received his Bachelor of Science degree from James Madison University with a double major in economics and philosophy. He received his Juris Doctorate from George Mason University School of Law, graduating Magna Cum Laude.

His practice is now concentrated exclusively on the defense of Virginia workers' compensation claims. He has litigated hundreds of workers' compensation cases at the hearing and appellate levels in Virginia. He represents a wide array of industries and clients, including self-insured retail stores and corporations, local counties and municipalities, insurance carriers, and the Uninsured Employers' Fund. He is also a member of Virginia Self-Insured Association's Legislative Committee, where he provides feedback and comments on proposed legislation impacting Virginia Workers' Compensation.

Michael A. Kernbach
Law Office of Michael A. Kernbach

Virginia injury lawyer Michael A. Kernbach dedicates the wisdom and skill gained during his more than 25 years of experience to negotiating and litigating for his clients' rightful compensation. Michael started his extensive career as a federal prosecutor with a commitment to give a voice to individuals who could not speak for themselves. He has carried this mission of advocacy into his personal injury practice, representing people who have been hurt because of auto accidents, commercial trucking crashes, motorcycle wrecks, medical malpractice, workplace injuries and criminal negligence.

As a former Miami police officer, Michael often witnessed the devastating consequences of an injury on the health, families and careers of his dedicated colleagues. Having been both a police officer and a lawyer, Michael understands the importance of seeking the advice of a personal injury attorney after an injury. He continues to represent law enforcement, fire fighters and other first responders who have sustained serious injuries while serving their communities.

Michael has represented clients across the country and abroad, and he regularly consults with other lawyers throughout the United States. He accepts referrals from other lawyers seeking experienced Virginia injury attorneys for their clients.

## Education

University of Miami School of Law, J.D., 1981
University of Miami, B.A., cum laude, 1978

# Heart, Lung, and Cancer Presumptions in Virginia
# Section 65.2-402 of the Act

## The Heart/Lung/Cancer Presumption

I. "Heart/Lung/Cancer" Presumption History (Va. Code § 65.2-402)

A. The presumption grants a rebuttable presumption to public safety employees (primarily firefighters and police) for respiratory disease, heart disease, hypertension, and certain cancers.

B. Enacted in 1976 to solve the problem public safety officers had proving their heart and respiratory diseases were caused by their employment.

C. Expanded in 1994 to include certain types of cancers.

D. Average workers comp claim for public safety employees costs $13,000.
   a. Average Line of Duty Act claim costs 300k
   b. An awarded presumption claim triggers a LODA claim
   c. The newly proposed cancers cost 2-3 times more than current presumption cancers.
   d. 50-75 million added to the workers comp system if all the January 2020 presumption legislation passed

II. Respiratory Disease (Va. Code § 65.2-402(A))

A. Employees covered include volunteer and salaried firefighters

B. Examples of types of diseases covered:

1. Pulmonary sarcoidosis (Sar-coy-doe-sis) (groups of immune cells that form lumps in various organs. The causes are largely unknown, making it tough to rebut the presumption). Fairfax Cnty. Fire & Rescue Servs. v. Newman, 222 Va. 535, 539, 281 S.E.2d 897, 900 (1981).
2. Carcinoma of the lung
3. Emphysema Page v. City of Richmond, 218 Va. 844, 848, 241 S.E.2d 775, 777 (1978).

III. Heart Disease and Hypertension (Va. Code § 65.2-402(B)

A. Employees covered include salaried or volunteer firefighters and police officers, along with several other smaller categories of law enforcement.

B. What constitutes hypertension and heart disease?

1. Hypertension is relatively easy: it is "a persistently high pressure of the blood against the arterial walls, the diagnosis of which is based on at least three consecutive daily or weekly blood pressure readings." Marshall v. Commonwealth, 61 O.I.C. 288, 289, 105-12-95 (1982)

2. What is heart disease? Broad definition: Any deviation from or interruption of the normal structure or function of the heart that is manifested by a characteristic set of symptoms and signs and whose cause may be known or unknown.

C. Examples of conditions that have constituted "heart disease:"

1. Cardiac spasm or coronary artery spasm (a sudden tightening off the muscles within the arteries of your heart) Va. Dep't of State Police v. Haga, 18 Va. App. 162, 167 442 S.E.2d 424, 426 (1994).
2. Irregular heart rhythms Davis v. Albemarle (Cnty. of) Fire Dep't, VWC 216-78-89 (Apr. 5, 2006)
3. Tachycardia (fast heart beat) Weaver v. Fairfax Cnty. Police Dep't, VWC File No. 175-50-13 (May 31, 2000)

D. Examples of conditions that have not constituted "heart disease:"

1. Esophageal spasm. Arnold v. City of Richmond, VWC File No. 100-02-94 (1981);
2. Atrial fibrillation. Link v. Commonwealth, VWC File No. 155-19-20 (1992);
3. One brief incident of arrhythmia. Delaney v. City of Fairfax Fire & Rescue, No. 1588-93-4 (Va. Ct. App. May 31, 1994);
4. Tachycardia caused by a dysfunction of the nervous system. Bunting v. City of Suffolk Fire, VWC File No. 219-09-56 (Nov. 2, 2005);

IV. Cancer (Va. Code § 65.2-402(C))

A. Employees covered – primarily volunteer or salaried firefighters (there a few additional occupations covered)

- The claimant must have twelve (12) years of continuous service in a qualifying occupation before the employee is eligible for the presumption.
- Recent push to make this 5 years in recent legislative sessions.

B. 7 cancers currently covered under the presumption statute?
1. Leukemia
2. Pancreatic cancer
3. Prostate cancer
4. Rectal cancer
5. Throat cancer
6. Ovarian cancer
7. Breast cancer

C. Exposure to "toxic substance" required

1. Proof of contact with a toxic substance encountered in the line of duty. Austin v. City of Roanoke, JCN VA00001051196 (Apr. 25, 2018)

2. The definition of a "toxic substance" contains *two* elements:

i. It must be a known or suspected carcinogen as defined by the International Agency for Research on Cancer (IARC); and

ii. It must cause or be suspected to cause the cancer for which benefits are sought.

iii. "Suspected" requires that it probably be the cause of the cancer; a "contributing risk," "risk factor," "possible," or "may," etc. is not sufficient. Weissman v. Stafford Cnty., JCN VA00001171981 (Dec. 7, 2017); Whiting v. City of Charlottesville Fire & Rescue, No. 0141-15-4 (Va. Ct. App. Aug 11, 2015) (unpubl.)

iv. The requirement of the claimant "to show that the known or suspected carcinogen 'causes, or is suspected to cause' a particular cancer can be shown" through any form of competent evidence, including the opinions of treating or independent medical providers or IARC literature. Weissman; Beahm v. City of Norfolk, JCN VA00000199677 (Oct. 5, 2011)

V. Applicability of Presumption Statute

A. Presumption statute is not automatic, that is, it is not triggered simply by the filing of a claim.

B. There are two threshold requirements the employee must prove before the presumption applies:
    i. That they have a qualifying disease
    ii. That the qualifying disease resulted in death or disability

C. These two requirements apply to all three presumptions (respiratory, heart, and cancer). Cancer has the added requirements of toxic substance and 12 years continuous employment.

D. The presumption statute establishes a causal relationship between the disease and a claimant's employment. However, the statutes do not establish a presumption that the disability arose from the disease. Employee has to prove that that the disease itself caused the disability. Samartino v. Fairfax County, No. 1406-14-4 (Va. Ct. App. March 24, 2015)

    i. "'Disability from a disease' has been defined as the stage when the disease prevents the employee from performing his work efficiently." Id. (quoting Salyer v. Clinchfield Coal Corp., 191 Va. 331 (1950))

E. Pre-Employment Physical: The presumptions . . . shall only apply if persons entitled to invoke them have, if requested by the employer, undergone pre-employment physical examinations that found such persons free of respiratory diseases, hypertension, cancer or heart disease at the time of such examination.
    i. Exception: Where the examiner performing the pre-employment physical is not told of a preexisting heart condition, and the examiner's conclusion that the employee was free from heart disease was therefore based on erroneous information, the employee is not entitled to the presumption. Dizon v. City of Norfolk Sheriff Dep't, 75 O.I.C. 122 (1996)

F. Date of Communication

i. What is it: The date that the employee first learns he has a qualifying disease and that his disease may be work related. City of Alexandria v. Cronin, 20 Va. App. 503, 508-09, 458 S.E.2d 314, 317 (1995)

ii. Why is the date of communication important?

1. It determines the date that the employer is responsible for medical and lost wage benefits. An employer becomes responsible for medical and lost wages 15 days prior to the date of communication.

2. It determines the date that the statute of limitations begins to run, i.e., how long the employee has to file a claim with the Commission.
   a. The statute of limitations for occupational diseases begins to run on the date the diagnosis of a work-related disease was first communicated to the employee or his representative, or the date of the last injurious exposure in the employment, whichever is earlier.
   b. Generally, two years from date of communication or 5 years from date of last exposure.

iii. A 2015 decision from the Court of Appeals found that if a claimant brings an occupational disease claim and it is denied, they are not prohibited from bringing a second claim when the condition worsens, which triggers a new filing period. Samartino v. Fairfax County, No. 1406-14-4 (Va. Ct. App. March 24, 2015)

VI. Rebutting the presumption

A. Assuming the employee has proven they have a covered disease resulting in disability.
B. And that the pre-employment physical was clear.
C. And there is no statute of limitations defense.
D. What happens:
   i. Creates a rebuttable presumption that the employee's condition is an occupational disease causally related to his or her employment.
   ii. Rebutting the Presumption: To overcome the presumption, the employer must prove by a preponderance of credible evidence that:
      1. The disease was not caused by the employment; and

2. The disease resulted from specific non-work-related causes.

iii. Proving "risk factors" for the disease is not enough.

iv. For the first prong, the employer must prove that the employment was not likely a cause or significant contributing factor in disease. However, the employer does not have to rule out the "possibility" the employment played a role in the disease.

E. In practice, how do we meet this burden?

i. We look at length of employment

ii. We obtain a complete medical history and all medical records to assess for other possible causes.

iii. For heart disease claims, we are looking at family history, smoking history, weight, sleep apnea, high cholesterol, and other risk factors that are thought to be a contributing cause of heart disease.

iv. Once a full medical profile is obtained, the treating cardiologist can be questioned, records reviews set up, or IMEs.

## VII. Case Law Update

A. SEAN STEWART v. STATE POLICE, Jurisdiction Claim No. VA00001547504, December 05, 2019

B. FRANK LEFTWICH v. CITY OF ROANOKE, Jurisdiction Claim No. VA00001204016, October 2, 2019

C. ADRIAN K. MANNING v. CITY OF NEWPORT NEWS, Jurisdiction Claim No. VA00001492636, August 30, 2019

D. JIMMY WOODARD v. LEE COUNTY, Jurisdiction Claim No. VA00001464513, August 15, 2019

E. JOEY K. KAHIKINA v. CITY OF NEWPORT NEWS, Jurisdiction Claim No. VA00001359709, July 23, 2019

F. STEPHEN JOHNSON v. CITY OF HAMPTON, Jurisdiction Claim No. VA00001300094, June 25, 2019

G. JEREMY DORSEY v. LOUDOUN COUNTY, Jurisdiction Claim No. VA00001315771, April 24, 2019

H. JOAN COBB v. COUNTY OF HENRICO, Jurisdiction Claim No. VA00001084167, May 9, 2019

## VIII. 2019 JLARC Findings and Recommendations and Impact

A. Full report available here: http://jlarc.virginia.gov//landing-2019-workers-compensation.asp

B. Interesting finding: "Virginia is only state where employers are not obligated to compensate workers for work related cumulative trauma injuries."

C. Additional findings and recommendations:

i. All types of fires release toxic and carcinogenic substances (IARC)
ii. Primary routes of exposure are inhalation and skin absorption
iii. Fully avoiding exposure to carcinogens is not possible, even with protective gear
iv. Existing research provides support for Prostate, Throat, Brain (proposed in 2019), Leukemia, Rectal, and Testicular (proposed in 2019) cancers having an increased risk in firefighters.

1. There is no research on ovarian cancer to support an increased risk
2. The evidence on colon (proposed in 2019), pancreatic, and breast cancer is insufficient to determine risk.
3. Adding colon, brain, and testicular cancer is "expected to result in only about six new compensable claims per year, but five year total cost per compensable claim expected to be high."
4. "Requirements to establish cancer presumption for firefighters are unreasonably burdensome and appear counter to the purpose of the presumption."
5. Of 20 disputed firefighter-cancer cases heard by VWC between 2009 and 2018:
    a. 13 (65%) did not prove toxic exposure or a disability resulting from the cancer and denied benefits
    b. 4 (20%) denied benefits for other reasons
    c. 4 (20%) met all requirements and were awarded benefits
6. Virginia's 12 years of continuous service requirement for cancer presumption is highest of any state and lacks scientific basis.
7. Requirement that service be continuous , rather than cumulative, also does not align with research

8. Recommendation: remove toxic exposure requirement or simplify it, shorten 12 years of service, and eliminate "continuous" from the service requirement
9. For heart disease cases: consider adding a service requirement. 16 of 34 states have a service requirement.

D. Impact –January 2020 legislative session:

i. The most significant workers' compensation bills introduced in the latest Session involved attempts to expand the cancer presumption section of the law. Attempts to add colon, brain, and testicular cancer. Certain bills also proposed to reduce, from 12 years to five years, the minimum number of years of continuous service that firefighters and other specified employee types are required to have completed in order to qualify for the presumption. Further proposals to remove the current requirement that the claimant show there was contact with a toxic substance encountered in the line of duty.

ii. Results of legislation introduced…..

E. Alternate Systems in lieu of presumptions

2019 VA Wrk. Comp. LEXIS 688

Virginia's Workers' Compensation Commission

December 05, 2019; November 29, 2018

Jurisdiction Claim No. VA00001547504; Claim Administrator File No. 6807444

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 688 *

# SEAN STEWART

**v.**

# STATE POLICE; COMMONWEALTH OF VIRGINIA, Insurance Carrier; YORK RISK SERVICES GROUP, Claim Administrator

## Core Terms

claimant's, heart disease, disease, hypertension, disability, medical evidence, state police, occupational, coronary, artery

## Counsel

**[*1]** Stewart, Sean, Claimant, pro se; Katz, Adam, L., Esquire, For the Defendant

**Panel:** REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

**Opinion By:** NEWMAN

## Opinion

The claimant requests review of the Deputy Commissioner's August 9, 2019 Opinion finding that the defendant had rebutted the statutory presumption that his heart disease was caused by his employment. We AFFIRM.

**I. Material Proceedings**

The claimant, a lieutenant in the state police, filed numerous claims for benefits alleging that he suffered from the occupational diseases of hypertension and heart disease. He sought medical benefits and two closed periods of temporary total disability. [1] The defendant argued that the claims were barred by the statute of limitations, that the claimant's hypertension did not result in disability, and that it had rebutted the statutory presumption that the claimant's hypertension and heart disease were caused by his employment.

The Deputy Commissioner found the claimant had been diagnosed with hypertension "and was fully aware of the presumption statute and its requirements as of 2009, at the latest." (Op. 9.) As a result, that portion of the claim alleging hypertension as an occupational disease was barred by the statute of limitations.

The claimant was also diagnosed with coronary **[*2]** artery disease as of November 29, 2018, and his claims alleging heart disease were timely filed. The Deputy Commissioner found the claimant established that he suffered a period of disability resulting from coronary artery disease, and he was therefore entitled to the *Virginia Code § 65.2-402(B)* presumption that his heart disease was an occupational disease "suffered in the line of duty." However, the employer overcame the presumption and the claim was denied for the following reason:

> The third-party administrator wrote a January 17, 2019 check box and fill-in-the-blank letter to Dr. Chandra. His responses included an acknowledgment that the claimant has heart disease. In response to a question of the causes of the claimant's heart disease, Dr. Chandra noted "prior CABG, hypertension, hyperlipidemia, and obesity." Dr. Chandra opined that neither the claimant's heart disease, nor any of its noted causes were related to the claimant's employment with the State Police. Dr. Chandra also opined that some or all of the previously noted causes were related to his family history of coronary artery disease. Finally, Dr. Chandra could not exclude the claimant's work with the State Police as a cause of his heart disease. **[*3]**
>
> . . . .
>
> Dr. Chandra is the only treating physician to opine on the relationship of the claimant's heart disease and his employment. While Dr. Chandra could not eliminate the claimant's employment as a state trooper from the diagnostic equation, he stated clearly that the claimant's hypertension, hyperlipidemia, obesity, and family history [were] the causes of his heart disease.
>
> After careful review of the testimony and the medical evidence, we find that the defendant has rebutted the statutory presumption that the claimant's heart disease was caused by his work as a state trooper. Since the defendant sustained its burden of proof, the claimant's several applications seeking the benefit of the Section 402 presumption for hypertension or heart disease must be denied.

(Op. 10-11.) (Footnote omitted.)

The claimant filed a timely request for review by the full Commission and argues that the medical evidence demonstrates that his heart disease was caused by his work as a state trooper. [2]

**II. Findings of Fact and Rulings of Law**

*Virginia Code § 65.2-402(B)* provides, in pertinent part, that:

> Hypertension or heart disease causing the death of, or any health condition or impairment resulting in total or partial disability of . . . members of **[*4]** the State Police Officers' Retirement System . . . shall be presumed to

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[1] At the evidentiary hearing the claimant also indicated he wished to seek benefits for disfigurement/scarring. The Deputy Commission held that portion of the claim in abeyance and made no findings. (Tr. 10-11.)

[2] The claimant also submitted four pictures detailing scarring resulting from medical procedures, and alleges that the Deputy Commissioner stated that he would hold the record open to allow for their admission. The Deputy Commissioner held the claim for scarring/disfigurement in abeyance, which means it would not be decided presently but may be adjudicated at a later date if the underlying claim is deemed compensable. As the proffered photographs were not relevant to the issues being adjudicated, there was no need to hold the record open for their admittance, nor do they need to be considered on review.

be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary.

"In order to establish a prima facie case, the claimant need only prove his occupation and his disability from one of the diseases identified by statute." *Samartino v. Fairfax Cnty. Fire & Rescue, 64 Va. App. 499, 506 (2015)* (quoting *Town of Purcellville Police v. Bromser-Kloeden, 35 Va. App. 252, 259 (2001)*). A claimant will be entitled to the presumption if he is "found to be free from heart disease by a prior physical examination conducted under the direction and control of his employer." *Estate of Montgomery v. Portsmouth Police Dep't, 4 Va. App. 525, 528 (1987)*.

The claimant submitted to a pre-employment physical which revealed no evidence of heart disease. The defendant stipulated to his employment as a state trooper and agreed that *§ 65.2-402(B)* is applicable to his circumstances. The medical evidence demonstrated that the claimant was informed he had coronary artery disease in November of 2018, and that this disease resulted in a period of disability. The claimant is entitled to the presumption that his heart disease resulted from his employment as a police officer.

Our analysis does not end here, however. Once the claimant has established **[*5]** entitlement to the *§ 65.2-402(B)* presumption, the burden shifts to the defendant to bring forth "a preponderance of competent evidence to the contrary." *Bass v. City of Richmond, 258 Va. 103 (1999)*, provides the standard by which evidence is evaluated to determine if the presumption has been overcome. "[T]he employer must show, by a preponderance of the evidence, both that 1) the claimant's disease was not caused by his employment, and 2) there was a non-work-related cause of the disease." *Id. at 114*. However, the "employer is not required to *exclude* the possibility that job stress may have been a contributing factor in the development of a claimant's" disease. *Id. at 113* (citing *Augusta Cnty. Sheriff's Dep't v. Overbey, 254 Va. 522, 527 (1997)* (1st emphasis added; 2nd emphasis in original)).

We applied the *Bass* test in *Mays v. Amherst County Sheriff's Office*, VWC File No. 178-55-67 (Jan. 8, 2001). Although some medical evidence indicated that "work-related stress 'potentially' played a minor role in the development of the claimant's heart disease," we were "more persuaded by the greater weight of the medical evidence that the claimant's condition is related to hypocholesterolemia, hypertension, diabetes and his family history." (Op. 16.) We found this satisfied both prongs of the *Bass* standard and affirmed the Deputy Commissioner's denial of benefits.

The Court **[*6]** of Appeals of Virginia applied this standard in *Coble v. County of Henrico Fire*, No. 1943-10-2 (Va. Ct. App. Mar. 29, 2011), when it determined that the evidence established that the claimant's "'employment was probably not a cause of his heart disease,'" thus satisfying the first prong of the *Bass* test. It also found the defendant had presented sufficient evidence indicating the disease was caused by atherosclerosis, diabetes, obesity, and hyperlipidemia, which "satisfied the second prong: that there be a non-work-related cause of claimant's disease." *Id.* (citing *Bass, 258 Va. at 114*).

In the present case, the defendant relies upon a questionnaire response prepared by Dr. Harish Chandra, a nuclear cardiologist who has treated the claimant since 2012. Dr. Chandra opined that the claimant's heart disease was caused by prior CABG, hypertension, hyperlipidemia, and obesity. Dr. Chandra did not find that these causes were related to the claimant's employment with the State Police, but were instead related to his family history of coronary artery disease. The questionnaire responses address both prongs of the *Bass* test necessary for the employer to overcome the *§ 65.2-402(B)* presumption.

On review the claimant argues that Dr. Chandra did not have **[*7]** independent knowledge of his job duties, schedule, and associated stress and medical consequences. He urges us to consider an article he submitted with his August 4, 2019 discovery response detailing cardiovascular disease and associated risk factors in law

enforcement personnel. Although the article was not formally admitted as an exhibit, we have reviewed it. [3] However, we do not find it sufficient to overcome the medical opinion of Dr. Chandra, who treated the claimant personally on multiple occasions over the last seven years. Furthermore, although Dr. Chandra did not exclude the claimant's employment as "a cause" of his heart disease, the employer is not required to do so in order to rebut the presumption. We find the defendant has submitted prepondering evidence that overcomes the § 65.2-402(B) presumption. We find no error in the Deputy Commissioner's denial of the claim.

**III. Conclusion**

The Deputy Commissioner's August 9, 2019 Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia **[*8]** within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

End of Document

[3] The Deputy Commissioner noted that he was considering "[a]ll medical records in the Commission's computer file." (Op. 2.) In addition, the defendant's responsive statement on review did not contain an objection to the consideration of the article.

2019 VA Wrk. Comp. LEXIS 479

Virginia's Workers' Compensation Commission

October 02, 2019; May 23, 2016

Jurisdiction Claim No. VA00001204016; Claim Administrator File No. 0016W87529

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 479

# FRANK LEFTWICH

**v.**

# CITY OF ROANOKE; ROANOKE CITY OF, Insurance Carrier; PMA MANAGEMENT CORP, TPA, Claim Administrator

## Core Terms

claimant, disability, occupational disease, disease, partial disability, hypertension, period of disability, invoke, statutory presumption, occupation, derogate, diagnose

## Counsel

Townsend, George, L., Esquire, For the Claimant; Whitt, Jr., Ralph, L., Esquire, For the Defendant

**Panel:** REVIEW before Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport on August 5, 2019 at Richmond, Virginia.

**Opinion By:** NEWMAN

## Opinion

JUSTIN MAIN

The defendant requests review of the Deputy Commissioner's February 8, 2019 Opinion awarding benefits for hypertension as an occupational disease. The defendant excepts to that portion of the Opinion finding the claimant established the elements necessary to trigger the statutory presumption of Virginia Code § 65.2-402(B). [1]

**I. Material Proceedings**

The claimant, a police detective, filed claims alleging hypertension as an occupational disease with a communication date of August 1, 2018. He sought to rely on the Virginia Code § 65.2-402(B) presumption that his hypertension qualifies as an occupational disease entitling him to the Act's coverage. [2] Pertinent to the present claim, the defendant argued that the claimant did not establish the requisite elements for entitlement to the § 65.2-402(B) presumption.

The issue on review is whether the claimant experienced the necessary "total or partial disability" for application of the presumption under § 65.2-402. The Deputy noted that the period of disability suffered by the claimant--March 5, 2018 through March 28, 2018--occurred before the August 1, 2018 date of communication, that being the date of "the happening of an injury by accident" as defined in § 65.2-403. Consequently, the claimant was not entitled to the payment of indemnity benefits for that period. Nonetheless, the Deputy Commissioner found the claimant was still entitled to the rely on the presumption, finding no requirement that the period of disability required be one for which the claimant was entitled to compensation. (Op. 10.) The Deputy also determined that the defendant had not presented sufficient evidence to overcome the presumption. The claimant was awarded medical benefits beginning July 18, 2018, which was fifteen days before the date of communication, as provided by § 65.2-403(B).

The defendant filed a timely request for review, and the parties presented oral argument before the Commission. The defendant contends that disability necessary for application of the presumption under § 65.2-402 must be defined in conjunction with § 65.2-403(A), which designates the date of communication as the accident date. It argues the period of disability required to trigger the § 65.2-402 presumption cannot occur prior to the date of communication/injury by accident. Because the claimant's period of disability predates the communication date, the defendants contend the claimant failed to establish the requisite disability for application of the presumption. Lastly, it requests that the Commission address *Lambruscati v. City of Roanoke*, JCN VA00000598401 (May 15, 2013), when rendering our decision. [3]

**II. Findings of Fact and Rulings of Law**

The question before us is when "total or partial disability," as provided in § 65.2-402, must occur in order for a claimant to gain entitlement to the statutory presumption. Being a question of statutory interpretation, we begin our analysis with review of the controlling statutory language. Virginia Code § 65.2-402(B) provides, in pertinent part, that:

> Hypertension or heart disease causing the death of, or any health condition or impairment resulting in *total or partial disability* of . . . members of county, city or town police departments . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary.

(emphasis added)

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[1] The claimant also filed a request for review of the February 8, 2018 Opinion. However, at oral argument counsel for the claimant withdrew the review request.

[2] The claimant advanced two alternative theories for recovery in his claims, and the defendant raised additional defenses to those theories at the evidentiary hearing. In the interests of clarity, theories and defenses not pertinent to the present review have been omitted.

[3] *Lambruscati*, JCN VA0000598401, was adjudicated by the Deputy Commissioner but not appealed to the full Commission.

Neither § 65.2-402 nor the Act at large expressly defines total or partial disability. However, our task is aided by well settled rules. When constructing a statute, "every provision in or part of a statute must be given effect if possible." Travelers Prop. Cas. Co. of Am. v. Ely, 276 Va. 339, 345 (2008) (citations omitted). "[S]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogenous system, or a single and complete statutory arrangement." Moreno v. Moreno, 24 Va. App. 190, 198 (1997) (quoting Lillard v. Fairfax Cnty. Airport Auth., 208 Va. 8, 13 (1967)); see also Prophet v. Bullock Corp., 59 Va. App. 313, 318 (2011) ("Proper construction seeks to harmonize the provisions of a statute both internally and in relation to other statutes.").

In interpreting § 65.2-402, we consider its humanitarian objective. "Code § 65.2-402 'has long been recognized as a remedial statute, enacted by the legislature to overcome the difficulty that a [police officer] would otherwise have in proving causation.'" Medlin v. Cnty. of Henrico Police, 34 Va. App. 396, 406 (2001) (quoting City of Norfolk v. Lillard, 15 Va. App. 424, 430 (1992)). "[T]he purpose of the statutory presumption is to establish by law, in the absence of evidence, a causal connection between certain occupations and death or disability resulting from specified diseases. " Bass v. City of Richmond Police Dep't, 258 Va. 103, 112 (1999) (citing Page v. City of Richmond, 218 Va. 844, 847 (1978)). "In order to establish a prima facie case, the claimant need only prove his occupation and his disability from one of the diseases identified by statute." Samartino v. Fairfax Cnty. Fire & Rescue, 64 Va. App. 499, 506 (2015) (quoting Town of Purcellville Police v. Bromser-Kloeden, 35 Va. App. 252, 259 (2001)).

So informed, we address the question of whether we should find in § 65.2-402 a requirement that the requisite "total or partial disability" be limited to only such periods as after the date of communication of the disease. Advancing such an interpretation, the defendant cites Virginia Code § 65.2-403, which reads in pertinent part:

> A. When the employer and employee are subject to the provisions of this title, first communication of the diagnosis of an occupational disease to the employee . . . shall be treated as the happening of an injury by accident, and the employee . . . shall be entitled to compensation as provided by this title.

We first note that the Court of Appeals of Virginia, when interpreting the predecessor to § 65.2-403, made a fundamental distinction between claims alleging an injury by accident and those alleging an occupational disease. "The date of communication of the disease has been selected as the *date of the injury* for statute of limitations purposes because occupational diseases develop over time into compensable injuries and claimants cannot point to a single date as the date on which they were injured." Chesapeake & Potomac Tel. Co. v. Williams, 10 Va. App. 516, 519 (1990). When enacting §§ 65.1-49 and 65.1-52 (now §§ 65.2-403 and 65.2-406), "the legislature intended that the phrases 'injury by accident' and 'date of injury' be used to determine when a claimant's right to assert a claim begins and the time limit within which the application for benefits must be filed with the commission." *Id.*

The pertinent statute of limitations provides that "[t]he right to compensation under this chapter shall be forever barred unless a claim is filed with the Commission within . . . two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs." § 65.2-406(A)(6). Virginia Code § 65.2-403(A) therefore provides a baseline from which the statute of limitations in occupational disease cases will begin to run. By enacting § 65.2-403, the legislature created a legal fiction "designed to place occupational diseases within the general structural and definitional framework of the Workers' Compensation Act." Dan River, Inc. v. Adkins, 3 Va. App. 320, 327 (1986).

The Court in *Adkins* further held that "[a]bsent clear language to the contrary, this statute cannot be construed in derogation of another substantive right . . . ." *Id. at 328*. When the legislature enacted § 65.2-402 (formerly § 65.1-47.1), it created a substantive right for, inter alia, police officers employed in the Commonwealth. The presumption establishes "by law, in the absence of evidence, a causal connection between certain occupations and death or disability resulting from specified diseases. " Bass, 258 Va. at 112. Interpreting § 65.2-403 in the manner suggested by the defendant would go beyond placing claims for occupational diseases within the Commission's established procedural framework. It would serve to derogate the claimant's existing rights by requiring him to prove

an additional, temporal, element to rely upon the presumption, which is otherwise absent from § 65.2-402. We see no intent from the legislature in the plain language of the statute that they intended such a derogation.

We have also held that "the definitions of total disability and partial disability . . . are separate from and not influenced by limiting periods which govern compensability." *Link v. Commw. of Va./Dep't of State Police*, 71 O.W.C. 143, 145 (1992). "Disability from a disease has been defined as the stage when the disease prevents the employee from performing his work efficiently." *Samartino, 64 Va. App. at 507* (quoting *Salyer v. Clinchfield Coal Corp., 191 Va. 331, 338 (1950)*). Disability caused by disease may manifest either before or after its diagnosis is communicated to the claimant. Furthermore, in order to establish reliance on the presumption, a claimant need not demonstrate that he is entitled to indemnity benefits during the period claimed. "[I]t is not necessary for a claimant to prove compensable disability which extends for a period more than seven days in order to be eligible for the statutory presumption." *Link*, 71 O.W.C. at 145.

We find that although *§§ 65.2-403(A)* and 65.2-(406)(A)(6) limit the availability of indemnity benefits and the period in which the claimant may file a claim, they do not create an additional requirement that the claimant prove disability after the date of communication in order to rely upon the *§ 65.2-402* presumption. *Virginia Code § 65.2-402(B)* contains no such explicit requirement. Inferring such a requirement would derogate the rights extended to the claimant, while no intention of such derogation on the part of the legislature is apparent in the statute itself. "[T]he claimant need only prove his occupation and his disability from one of the diseases identified by statute" to invoke the presumption. *Samartino, 64 Va. App. at 506*. In the present matter, the claimant proved his occupation and a period of disability resulting from hypertension. The claimant is entitled to rely on the presumption, and in the absence of preponderating evidence refuting it, he remains entitled to medical benefits.

Counsel for the defendant also requested that the Commission address *Lambruscati v. City of Roanoke*, JCN VA00000598401 (May 15, 2013). The claimant in that case developed leukemia, resulting in two brief periods of hospitalization during April of 2011. The parties stipulated that his date of first communication was April 10, 2012. The Deputy Commissioner denied the claim, holding that "the claimant cannot avail himself of prior disability periods to satisfy the statute's requirement that he show his condition resulted in 'total or partial disability.'" *Id.* The case was not appealed to the full Commission and became final. For the reasons stated above, we do not agree with the Deputy's interpretation of the statute, and we are not bound by his holding. A claimant may rely upon a period of disability that pre-dates the date of communication when invoking the *Virginia Code § 65.2-402(B)* presumption.

**III. Conclusion**

The Deputy Commissioner's February 8, 2019 Opinion below is AFFIRMED.

An attorney's fee in the total amount of $ 1,250, including the $ 1,000 awarded by the Deputy Commissioner below, shall be awarded to Hammond Townsend, P.L.C., for legal services rendered to the claimant, the payment of which shall be the sole responsibility of the claimant.

Interest is payable on the award pursuant to *Virginia Code § 65.2-707*. This matter is hereby removed from the review docket.

**Concur By:** MARSHALL, COMMISSIONER, Concurring:

**Concur:**

I concur with and join the majority reasoning. I write separately to elucidate two indubitable considerations. First, occupational diseases are distinct because they may cause disability or a need for medical attention prior to the date they are communicated to an afflicted worker. Second, the disability required to prove entitlement to the presumption of *Virginia Code § 65.2-402* is not, in the statute, bounded by a temporal limitation.

Under *Virginia Code § **65.2-402**(B)*, proving total or partial disability is required element to establish the substantive right granted by the General Assembly - the entitlement to the presumption of work-related causation for hypertension. It is distinct from the temporal limitations imposed on obtaining the remedy of specified wage and medical benefits.

For occupational diseases, Virginia Code § 403(A) allows medical benefits to be awarded prior to the date of communication. This illustrates a unique characteristic of the onset of occupational diseases. "An injury by accident is defined as a sudden mechanical or structural change in the body occurring at a reasonably definite time." *Kohn v. Marquis, 288 Va. 142, 147 (2014)* (quoting *Lane Co. v. Saunders, 229 Va. 196, 199 (1985)* (internal quotation marks omitted)). For an injury by accident, the need for medical treatment and resulting disability necessarily occurs after the defining event. In the case of an occupational disease, both disability and the need for medical treatment may precede the communication of it. *See Samartino v. Fairfax Cty. Fire & Rescue, 64 Va. App. 499, 507 (2015)*.

In *Dan River, Inc. v. Adkins, 3 Va. App. 320, 327 (1986)*, the Court of Appeals of Virginia acknowledged that the Workers' Compensation Act's two-pronged time limitations, "contain an implicit recognition of the unique circumstances involved in making a claim for an occupational disease." The Court explained that designating the date of communication as the "injury by accident," avoided the need to require "parallel provisions," which would, "merely duplicate existing provisions of the Act pertaining to injury by accident." *Id. at 327*.

If the General Assembly had intended that total or partial disability necessary to qualify for the *Virginia Code § **65.2-402*** presumption had to occur after the date of communication, it would have said so. We cannot adopt the dissent's reasoning without inserting additional words not present into the statute.

Courts "assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." *Dep't of Med. Assistance Servs. v. Beverly Healthcare, 41 Va. App. 468, 493-94 (2003)*. "We may not add to a statute language which the legislature has chosen not to include." *Cty. of Amherst Bd. of Supervisors v. Brockman, 224 Va. 391, 397 (1982)*; *see Kiser v. Clinchfield Coal Co., 225 Va. 357, 360-61 (1983)* (refusing to judicially insert word "compensable" before "occupational disease" in statute).

The dissent argues, "*Virginia Code § **65.2-402**(B)* contains no qualifying language which allows a claimant to rely on disability occurring before the occupational disease claim existed." It is the absence of qualifying language requiring disability to occur after the date of communication which leads to the correct statutory interpretation. "[T]otal or partial disability," in *Virginia Code § **65.2-402**(B)* is not bounded by any retrospective or prospective temporal qualifying words. We cannot adopt the dissent's interpretation without adding "after the date of communication," following "total or partial disability," in *Virginia Code § **65.2-402**(B)*. We cannot do that.

"When the legislature has spoken plainly it is not the function of courts to change or amend its enactments under the guise of construing them. The province of construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation." *Winston v. City of Richmond, 196 Va. 403, 407-08 (1954)*.

**Dissent By:** RAPAPORT, COMMISSIONER, Dissenting:

**Dissent:**

I respectfully dissent from the majority's finding that the claimant's disability prior to his date of communication was sufficient to invoke the presumption pursuant to *Virginia Code § **65.2-402**(B)*. I would find the claimant did not prove he suffered hypertension resulting in disability as required by *Virginia Code § **65.2-402**(B)*.

"When the language of a statute is clear and unambiguous, we are bound by the plain meaning of that language." *Indus. Dev. Auth. v. Bd. of Supervisors, 263 Va. 349, 353 (2002)* (citing *Vaughn, Inc. v. Beck, 262 Va. 673, 677*

(2001)). The Commission must "'ascertain and give effect to the intention of the legislature . . . gathered from the words used, unless a literal construction would involve a manifest absurdity.'" Watkins v. Hall, 161 Va. 924, 930 (1934) (citations omitted). This dictates that we "examine the statute in its entirety, rather than by isolating particular words or phrases" to glean the statutory language of the individual provisions. Earley v. Landsidle, 257 Va. 365, 369 (1999).

"[W]hen analyzing a statute, we must assume that 'the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.'" City of Va. Beach v. ESG Enters., Inc., 243 Va. 149, 153 (1992) (citation omitted). No judicial body is "'authorized to amend or extend the Workers' Compensation Act's provisions beyond their obvious meaning.'" Ashby v. Ramar Coal Co., Inc., 47 Va. App. 8, 11-12 (2005) (quoting Peacock v. Browning Ferris, Inc., 38 Va. App. 241, 248-249 (2002)).

"'Proper construction seeks to harmonize the provisions of a statute both internally and in relation to other statutes.'" Prophet v. Bullock Corp., 59 Va. App. 313, 318 (2011) (quoting Hulcher v. Commonwealth, 39 Va. App. 601, 605 (2003)). When two statutes are in apparent conflict, they should be construed, if reasonably possible, "to allow both to stand and to give force and effect to each." Kirkpatrick v. Bd. of Supervisors, 146 Va. 113, 125 (1926) (citation omitted). "The doctrine that a special act should be construed as an exception to the general law is not to be invoked unless the two acts cannot be harmonized or reconciled in any other way." *Id.*

Pursuant to Virginia Code § 65.2-403(A), the "first communication of the diagnosis of an occupational disease" is treated as "the happening of an injury by accident . . . ." This language instructs that occupational disease claims begin on the date of communication.

Virginia Code § **65.2-402**(B) provides:

> Hypertension or heart disease causing the death of, or any health condition or impairment *resulting in* total or partial disability of . . . members of county, city or town police departments . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary.

(emphasis added). I would find the disability suffered by the claimant from March 5, 2018 through March 28, 2018 is not proof of a disability resulting from his hypertension as required by the statute, given that this disability occurred prior to the claimant's communication date of the disease.

I recognize when assessing a claimant's ability to file pursuant to the presumption, the Commission has held, "[W]hen an employee otherwise qualifies for the presumption, it is not necessary that he establish a communication of a diagnosis that he has a disease coming from his employment." *Revard v. Fairfax Cnty. Bd. of Supervisors*, 70 O.I.C. 154, 157 (1991). Nonetheless, here, the claimant's date of communication for his work-related hypertension was established as August 1, 2018; therefore, his occupational disease claim only began on August 1, 2018.

"All that is required to invoke the statutory presumption is proof of the disease and proof of a disability resulting from that disease." Samartino v. Fairfax Cnty. Fire & Rescue, 64 Va. App. 499, 508 (2015). Virginia Code § **65.2-402**(B) contains no qualifying language which allows a claimant to rely on disability occurring before the occupational disease claim existed. In the case *sub judice*, the claimant seeks to look back just over four months prior to his August 1, 2018 date of communication to establish disability. Under the reasoning of the majority, a claimant could look back years for the qualifying disability to invoke the presumption.

The claimant failed to prove that his hypertension, communicated on August 1, 2018, resulted in any disability. Accordingly, I would find the claimant is not entitled to the presumption pursuant to Virginia Code § **65.2-402**(B). I would remand this matter to the Deputy Commissioner for consideration of the claimant's claim without the presumption set forth in Virginia Code § **65.2-402**(B).

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

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2019 VA Wrk. Comp. LEXIS 415

Virginia's Workers' Compensation Commission

August 30, 2019; July 10, 2018

Jurisdiction Claim No. VA00001492636; Claim Administrator File No. 0024W24513

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 415

# ADRIAN K. MANNING

**v.**

# CITY OF NEWPORT NEWS; CITY OF NEWPORT NEWS, Insurance Carrier; PMA MANAGEMENT CORP, TPA, Claim Administrator

## Core Terms

cancer, claimant, asbestos, toxic substance, disease, rectal, carcinogen, preponderance of evidence, overcome a presumption, classification, occupational, exposure to asbestos, firefighter, exposure, expose, causal

## Counsel

Shall, Adam, B., Esquire, For the Claimant; Baine, Adonica, Esquire, For the Defendant

**Panel:** REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

**Opinion By:** NEWMAN

## Opinion

The defendant requests review of the Deputy Commissioner's March 15, 2019 Opinion finding the claimant has "an occupational disease, suffered in the line of duty," as contemplated by Virginia Code § 65.2-402(C). We AFFIRM. [1]

**I. Material Proceedings**

On July 30 and August 15, 2018, the claimant filed claims for benefits alleging he suffers from an occupational disease, rectal cancer, with a communication date of July 10, 2018. The claimant contends that he contracted this disease after being exposed to asbestos while working as a firefighter. The claim was defended on the grounds he did not establish entitlement to the Virginia Code § 65.2-402(C) presumption and that he did not suffer from either an occupational disease or compensable ordinary disease of life.

The Deputy Commissioner found the claimant was entitled to the presumption for the following reasons:

> Manning clearly proved the first two elements required in § 65.2-402(C), and it is found that he also proved a contact with a toxic substance as defined in this statutory provision. The testimony of Anthony Hamilton, a senior asbestos technician who had, in the course of performing inspections of buildings to be demolished, identified asbestos insulation at the structure where Manning underwent training on April 2, 2003, is found sufficient to establish that Manning was exposed to asbestos on that date. If contact with asbestos is sufficient to constitute contact with "a toxic substance," this one contact is sufficient to invoke the presumption because § 65.2-402(C) does not require more than one "contact" with "a toxic substance."
>
> It is found that Manning's submission of the list of cancers with sufficient or limited evidence of causal connections with certain carcinogens from the International Agency for Research on Cancer (IARC) establishes that asbestos is "a toxic substance" so that he could invoke the presumption. Even without this submission, which was confirmed by reference to the IARC's website, the language the General Assembly used in enacting § 65.2-402(C) is found to make this information an automatic part of the evidentiary record in any claim arising under that subsection.

(Op. 4.)

The Deputy Commissioner also found that the defendant had presented insufficient evidence to overcome the presumption, finding that "there is no medical opinion in the record that identifies a non-work-related cause of this condition." (Op. 6.)

The defendant filed a timely request for review by the full Commission. It argues the claimant has not proven entitlement to the § 65.2-402(C) presumption because he did not prove exposure to asbestos, that evidence purporting to prove a causal connection between exposure to asbestos and the development of rectal cancer was admitted without a proper foundation, and that the improperly admitted evidence is insufficient to prove causation. In the event the claimant proved entitlement to the presumption, it contends that the two-prong test detailed in Bass v. City of Richmond, 258 Va. 103 (1999), is not applicable to cases alleging work-related cancer under § 65.2-402(C), and that all that is necessary to overcome the presumption is a preponderance of evidence to the contrary. In the alternative, it argues it satisfied the two-prong test because the evidence presented is sufficient to prove a non-work related cause for the claimant's rectal cancer.

**II. Findings of Fact and Rulings of Law**

A. Entitlement to the Presumption

Virginia Code § 65.2-402(C) provides, in pertinent part, that:

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[1] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see* Barnes v. Wise Fashions, 16 Va. App. 108, 112, 428 S.E.2d 301, 303 (1993).

> [R]ectal . . . cancer causing the . . . impairment resulting in total or partial disability of, any volunteer or salaried firefighter . . . having completed 12 years of continuous service who has a contact with a toxic substance encountered in the line of duty shall be presumed to be a occupational disease, suffered in the line of duty, that is covered by this title, unless such presumption is overcome by a preponderance of competent evidence to the contrary.

The statute defines a "toxic substance" as "a known or suspected carcinogen, as defined by the International Agency for Research on Cancer, [] which causes, or is suspected to cause," . . . rectal . . . cancer. *Id.*

The claimant was employed as a firefighter for more than twelve years. He developed rectal cancer while employed that resulted in periods of total and partial disability. The defendant argues, however, that the claimant has not established exposure to asbestos in the course of his employment. We disagree. Tony Hamilton, a senior asbestos technician with the City of Newport News, testified that asbestos was present in a building where the claimant participated in training exercises. It was located on the outside of pipes leading to radiators. The asbestos was "friable," meaning it crumbled to a powder with hand pressure alone when dry and could become airborne when disturbed. (Tr. 8-9.) The claimant also described the activities he and the other recruits engaged in while training, which included demolition of walls and removing plaster and sheathing behind the radiators, as well as placing fire gear on a radiator itself during debriefing sessions. These activities exposed the claimant to asbestos in the air and on his clothing. While we acknowledge that at his deposition the claimant believed his exposure to asbestos occurred when he came into contact with piping on the walls, the training exercises he described during the deposition would also have exposed him to the friable asbestos on the radiator pipes.

The defendant next contends that the evidence submitted by the claimant purporting to demonstrate that asbestos is a "toxic substance" for the purposes of § 65.2-402(C) was admitted without a proper foundation and that the Deputy erred by taking judicial notice of the findings published on the International Association for Research on Cancer's ("IARC") website. If such evidence was found to be properly admitted, the defendant avers that it does not establish that asbestos is a "toxic substance" as defined by § 65.2-402(C).

The claimant submitted a copy of the "List of Classifications by cancer sites with sufficient or limited evidence in humans" published by the IARC ("IARC List of Classifications"). [2] At the evidentiary hearing, counsel for the claimant clarified that this was a copy of a chart published on the IARC's website. Virginia Code § 65.2-402(C) requires us to define a "toxic substance" as "one which is a known or suspected carcinogen, as defined by the IARC, and which causes, or is suspected to cause, leukemia or pancreatic, prostate, rectal, throat, ovarian, or breast cancer." It was the legislature that mandated that the IARC's findings be considered when determining if a claimant is entitled to the § 65.2-402(C) presumption. Accordingly, we do not find the Deputy Commissioner's admittance and consideration of the IARC List of Classifications was in error. He did not abuse his discretion by taking judicial notice of the IARC's findings. *See Foster v. Smithfield Packing Co., Inc.*, 79 O.W.C. 184, 187 (2000) ("The Commission may take judicial notice of matters . . . that may be easily ascertained by reference to reliable sources.").

We also find that the IARC list defines asbestos as a "toxic substance" which is suspected to cause rectal cancer. A substance will be considered "toxic" if a claimant demonstrates both that "he or she was exposed to carcinogen(s) *and that such carcinogens caused or are suspected of causing the particular type of cancer from which the claimant suffers.*" *Whiting v. City of Charlottesville Fire & Rescue*, No. 0141-15-4 (Va. Ct. App. Aug. 11, 2015) (emphasis in original). "[A] carcinogen is a suspected cause of a particular cancer if it is probably—or more likely than not--the cause of that cancer." *Id.* The burden of proof required to demonstrate that a substance is a suspected carcinogen is therefore that of a preponderance of the evidence.

The IARC List of Classifications is subdivided into cancers occurring in various parts of the body, and it describes two categories of carcinogens. (Cl.'s Ex. 5.) The first is "Carcinogenic agents with *sufficient evidence* in humans,"

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[2] *Available at* https://monographs.iarc.fr/wp-content/uploads/2019/07/Classifications_by_cancer_site.pdf

which are defined as evidencing proof of a causal relationship between exposure to the agent and human cancer, and for which "chance, bias, and confounding could be ruled out with reasonable confidence" IARC, *Preamble to the IARC Monographs* (amended January 2019), *available at* https://monographs.iarc.fr/preamble-to-the-iarc-monographs/preamble-to-the-iarc-monographs-13/. The second category is "Agents with*limited evidence* in humans," in which:

> A positive association has been observed between exposure to the agent and cancer for which a causal interpretation is considered by the Working Group to be credible, but chance, bias, or confounding could not be ruled out with reasonable confidence.

*Id.*

Based upon the definition provided by the IARC, we interpret "Agents with *limited evidence* in humans" as being toxic substances that are suspected of causing cancer in specific body parts by the IARC. The IARC working group considers a causal link between exposure to the substance and the development of cancer to be credible. The studies reviewed by the IARC, when considered in their totality, indicate *it is more likely than not* that the listed substances cause or are suspected to cause cancer, even if chance, bias, or cofounding cannot be ruled out. Asbestos is included as an "Agent[] with *limited evidence*" of causing rectal cancer. We find this sufficient to establish, by a preponderance of the evidence, that asbestos is suspected of causing rectal cancer.

We utilized similar reasoning, albeit with a different result, in *Whiting v. City of Charlottesville*, JCN VA02000014996 (Jan. 6, 2015), *aff'd*, No. 0141-15-4 (Va. Ct. App. Aug. 11, 2015). The claimant in *Whiting* alleged that his workplace exposure to diesel engine exhaust and biomass fuels caused him to develop prostate cancer. However, the IARC List of Classifications did not include those substances as carcinogenic agents with either sufficient or limited evidence of causing prostate cancer. We denied the claim because "[t]he IARC does not define the substances to which the claimant has proven exposure in the course of employment as toxic substances because they do not link exposure to the type of cancer the claimant developed." *Id.*

The defendant also argues that the IARC List of Classifications, standing alone, is not persuasive enough to establish entitlement to the presumption. The legislature, however, placed specific language in the statute identifying the IARC as the source to be relied upon when defining a "toxic substance." Absent from the statute is any language indicating the claimant is required to present additional evidence from any other source to prove that the carcinogen in question is known to cause, or suspected of causing, the cancer from which he suffers. *See Gilliam v. McGrady, 279 Va. 703, 709 (2010)* ("[T]he General Assembly clearly knew how to create a presumption and allocate the burden of proof."); *Fairfax Cnty. Fire & Rescue Servs. v. Newman, 222 Va. 535, 541 (1981)* ("The legislature was making a public policy judgement in its allocation of the burden of proof - - the ultimate risk of nonpersuasion - - in these cases.").

We find that the evidence in the record establishes, by a preponderance of the evidence, that exposure to asbestos is suspected to cause rectal cancer. The claimant has also proven exposure to asbestos in the course of his employment as a firefighter. He is therefore entitled to the *§ 65.2-402(C)* presumption.

B. Rebuttable Presumption

Having found that the claimant is entitled to the presumption, left for our consideration is whether the defendant's evidence rebutted that presumption. In *Bass v. City of Richmond Police Dep't, 258 Va. 103 (1999)*, the Supreme Court of Virginia held that "[t]o overcome the presumption the employer must show, by a preponderance of the evidence, both that 1) the claimant's disease was not caused by his employment, and 2) there was a non-work-related cause of the disease. Thus, if the employer does not prove by a preponderance of the evidence both parts of this two-part test, the employer has failed to overcome the statutory presumption." *Id. at 114* (citing *Newman, 222 Va. at 539*). "[E]vidence that merely rebuts generally the underlying premise of the statute . . . is not probative evidence for purposes of overcoming the presumption." *Medlin v. Cnty. of Henrico Police, 34 Va. App. 396, 407 (2001)*.

The defendant argues that the Deputy Commissioner improperly relied on *Bass* when evaluating the defendant's evidence. It contends that *Bass* applies to cases involving hypertension and heart disease, and although the two-part test has been extended to respiratory diseases, it should not be applied to the cancers listed under § 65.2-402(C).

We disagree with the defendant's argument. Entitlement to the presumption under § 65.2-402(C) requires a claimant to prove an additional element than that which is required for subsections A or B - specifically, that he was exposed to a toxic substance known or suspected to cause the subject cancer. However, the statute does not differentiate between what a defendant must prove in order to overcome the presumption. Subsections A, B, and C all provide that the presumption may be "overcome by a preponderance of competent evidence to the contrary." Va. Code § 65.2 402(A), § 65.2-402(B), § 65.2-402(C). The language used in each subsection is identical and there is nothing in the statute to indicate the legislature intended a different evidentiary burden for overcoming the presumption in cases arising under § 65.2-402(C) as opposed to subsections A or B.

The Court of Appeals of Virginia referred to the *Bass* standard in *Samartino v. Fairfax County Fire & Rescue, 64 Va. App. 499 (2015)*, which involved the application of § 65.2-402(C). Although the Court did not need to determine if the presumption had been overcome when deciding the case, the Court quoted *Bass* when noting that "[o]nce the claimant makes a prima facie case, in order to overcome the statutory presumption created by Code § 65.2-402 'the employer must show, by a preponderance of the evidence, both that 1) the claimant's disease was not caused by his employment, and 2) there was a non-work-related cause of the disease.'" *Id. at 506, n. 1* (quoting *Bass, 258 Va. at 114*).

Remaining to be decided is whether the defendant's evidence overcomes the presumption. The defendant relies upon the opinion of Dr. George J. Kannarkat, the claimant's treating physician. In an August 10, 2018 letter, Dr. Kannarkat stated that the claimant "did not have risk factors for rectal cancer such as age over 50, family history, smoking, history of bowel disease or polyps, or a lack of exercise," and that its cause was "possibly a result of his occupation as a firefighter." (Def.'s Ex. 1-2.) Dr. Kannarkat further clarified his opinion during a December 17, 2018 deposition, stating that "the usual risk factors for colon cancer were not present in his history," and although it was possible his occupation caused his rectal cancer, "[i]t's not a certain cause and effect," and the actual cause of the claimant's cancer was unknown. (Def.'s Ex. 1-3, p 7.)

After a review of the medical evidence, we do not find that Dr. Kannarkat's medical opinion sufficient to satisfy either part of the *Bass* test. He never ruled out the claimant's employment as a cause of the claimant's cancer, but acknowledged the "cancer is possibly a result of his occupation as a firefighter." (Def.'s Ex. 1-2.) Neither did Dr. Kannarkat identify a non-employment related cause. We find his opinions fall short of establishing the claimant's work was not the cause of his disease and that his cancer was caused by a non-work-related factor. Consequently, we find the defendant has failed to overcome the § 65.2-402(C) presumption.

**III. Conclusion**

The Deputy Commissioner's March 15, 2019 Opinion below is AFFIRMED.

An attorney's fee in the total amount of $ 2,600, including the $ 2,000 awarded by the Deputy Commissioner below, is awarded to Adam B. Shall, Esquire, for legal services rendered to the claimant, the payment of which shall be deducted from accrued compensation.

Interest is payable on the award pursuant to *Virginia Code § 65.2-707*.

This matter is hereby removed from the review docket.

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion.

You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

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2019 VA Wrk. Comp. LEXIS 474

Virginia's Workers' Compensation Commission

August 15, 2019; April 10, 2018

Jurisdiction Claim No. VA00001464513; Claim Administrator File No. WC052207710

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 474

# JIMMY WOODARD

v.

# LEE COUNTY; VIRGINIA ASSOCIATION OF COUNTIES GROUP S, Insurance Carrier; RISK MANAGEMENT PROGRAMS, INC., Claim Administrator

## Core Terms

claimant, hypertension, atrial fibrillation, disability, disease, heart disease, occupational disease, total disability, blood pressure, diagnose, sleep apnea, indemnity, diagnose, rebut

## Counsel

Collins, Mingkwan, Esquire, For the Claimant; Lucas, Richard, D., Esquire, For the Defendant

**Panel:** REVIEW on the record by Commissioner Marshall, Commissioner Newman and Commissioner Rapaport at Richmond, Virginia.

**Opinion By:** MARSHALL

## Opinion

The defendant requests review of a May 8, 2019 Opinion awarding lifetime medical benefits for hypertension and atrial fibrillation as occupational diseases pursuant to *Virginia Code § 65.2-402*. We AFFIRM as modified.

**I. Material Proceedings**

The claimant filed Requests for Hearing on May 16, 2018, October 17, 2018, and January 30, 2019. He alleged heart disease and hypertension as occupational diseases, and sought temporary total disability from April 10, 2018 through April 13, 2018.

The defendant asserted the following defenses to the heart disease claim: (1) a single episode of atrial fibrillation or arrhythmia does not constitute a disease; (2) the presumption does not apply; (3) the claimant was hospitalized for testing, which did not meet the definition of disability; and (4) the defendant has identified other causes of atrial fibrillation.

Regarding the hypertension claim, the defendant asserted: (1) the claim was barred by the statute of limitations; (2) the claimant had no disability related to hypertension; (3) in the absence of disability, the presumption did not apply to the hypertension claim; and (4) absent the presumption, the claimant's hypertension was a non-compensable ordinary disease of life.

The Deputy Commissioner issued a May 8, 2019 Opinion. He found that although the claimant was diagnosed with hypertension in 2002, the statute of limitations did not begin to run until May of 2018 when the claimant learned of the presumption. As such, the hypertension claim was timely. The Deputy Commissioner further found that the claimant suffered disability from the hypertension and atrial fibrillation because he required inpatient medical treatment at the hospital. From the medical evidence, the Deputy Commissioner found the claimant's atrial fibrillation was a form of "heart disease." He found the defendant failed to rebut the presumption. The evidence at most suggested that the claimant's sleep apnea was a non-work-related cause of his atrial fibrillation. The defendant failed to establish the claimant's heart disease was not caused by his employment. The claimant was awarded medical benefits for hypertension and atrial-fibrillation. An Award of temporary total disability for April 11 and 12, 2018 was entered for record purposes only in accordance with *Virginia Code § 65.2-509*.

The defendant timely filed a request for review.

**III. Findings of Fact and Rulings of Law**

The claimant had a history of hypertension since 2002. He suffered increased blood pressure and atrial fibrillation on April 10, 2018. He was hospitalized and underwent cardioversion to restore normal sinus rhythm. Upon discharge the following day he was instructed to take aspirin and to continue with an antihypertensive regimen. The claimant alleged both heart disease and hypertension as occupational diseases. We have reviewed the record in its entirety, and recite the facts only to the extent necessary to support our reasoning.

A. Heart Disease

1. Entitlement to the presumption

*Virginia Code § 65.2-402(B)* provides that "[h]ypertension or heart disease causing the death of members of county, city or town police departments . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary."

In order for the presumption to apply, a claimant must provide proof of the disease, and proof of a disability resulting from the disease. *Samartino v. Fairfax Cty. Fire & Rescue, 64 Va. App. 499, 508 (2015)*. The defendant challenges the evidence of both of these elements.

The defendant first argues the claimant's atrial fibrillation does not qualify as heart disease. However, its own expert, Dr. Michael Goldman, conducted a records review and opined that paroxysmal atrial fibrillation was a form of heart disease. He explained that atrial fibrillation was related to the presence of abnormal circuits within the atrium due to structural changes. When the claimant was hospitalized on April 10, 2018 he required intervention to restore normal sinus rhythm. The claimant's May 14, 2018 electrocardiogram showed sinus rhythm with first degree atrioventricular block and probable left atrial enlargement. This evidence is sufficient to establish the claimant

suffers from a deviation of the normal structure and functioning of the heart which constitutes heart disease. *See Beasley v. City of Chesapeake*, JCN VA00000889787 (Nov. 12, 2015).

We next address whether the claimant suffered disability from his heart disease. "Disability from a disease has been defined as the stage when the disease prevents the employee from performing his work efficiently." *Samartino, 64 Va. App. at 507* (quoting *Tomes v. James City Fire, 39 Va. App. 424, 431-32 (2002)*).

The defendant relies on the unpublished Court of Appeals' opinion of *Lipscomb v. City of Lynchburg*, No. 2157-13-3 (Va. Ct. App. May 27, 2014), for the proposition that the claimant must demonstrate entitlement to economic indemnity in order to prove disability. However, the Court subsequently clarified the holding of *Lipscomb* in its published opinion in *Samartino, 64 Va. App. 499 (2015)*. The Court held:

> Today we clarify our holding in *Lipscomb*. All that is required to invoke the statutory presumption is proof of the disease and proof of a disability resulting from that disease. A right to economic indemnity is only one factor that a fact finder may consider in determining if a person is disabled as a result of his illness--in other words, whether he has reached "'the stage when the disease prevents the employee from performing his work efficiently.'" *Tomes, 39 Va. App. at 431-32, 573 S.E.2d at 316* (quoting *Salyer, 191 Va. at 338, 61 S.E.2d at 20*). Proof of entitlement to economic indemnity may be used to support a finding that a claimant is disabled, however *its absence is not dispositive of a finding that a claimant is not disabled.*

*Samartino, 64 Va. App. at 508-09* (emphasis added).

The Commission applied *Samartino* in *Ezell v. James City Cty.*, JCN VA02000013694 (July 7, 2016). Ezell was hospitalized from May 6 to May 10, 2011, and underwent various surgical procedures. We found that during the time Ezell was hospitalized, he could not perform his work and was therefore disabled. Ezell did not also have to prove entitlement to economic indemnity in order to be entitled to the presumption of *Virginia Code § **65.2-402(B)***. *Ezell*, JCN VA02000013694 (citing *Cohn v. City of Va. Beach*, JCN VA00000796047 (June 15, 2016) (finding claimant entitled to the presumption where she was unable to work during her heart ablation procedure and follow-up)).

The facts of the present case are analogous to *Ezell*. The claimant presented to Jonesville Family Health Center on April 10, 2018 and was seen by Torry Taylor, FNP for a same-day appointment due to increased blood pressure. He reported he had been checking his blood pressure and it had been elevated. He also complained of chest tightness, lightheadedness, and a fast heart rate. His blood pressure was recorded as 160/100. He was given an IV of Lopressor. EMS was contacted, and he was transported to Holston Valley Medical Center. At the hospital, the claimant's admitting diagnoses were paroxysmal atrial fibrillation and hypertension. He was admitted at 12:23 p.m. on April 10, 2018. He was started on a Cardizem drip, and then transitioned to Diltiazem. Because the claimant had been in atrial fibrillation for almost 48 hours, a transesophageal echocardiogram and direct current cardioversion were completed to restore normal sinus rhythm. The claimant was started on Eliquis and instructed to continue his pre-admission antihypertensive regimen. A cardiology follow-up was scheduled. The claimant was discharged at 3:59 p.m. on April 11, 2018. [1]

Nurse Practitioner Taylor reviewed the claimant's hospital records and agreed the claimant's hospitalization was necessary to treat his essential hypertension and atrial fibrillation. She further agreed that the claimant was totally disabled during his hospitalization, noting that "he was unable to perform his job duties while hospitalized."

We agree the claimant's inpatient hospitalization rendered him disabled and unable to work. During the hospitalization, he received treatment for his atrial fibrillation. The claimant was admitted to the hospital and disabled due to his heart disease and is therefore entitled to the presumption.

2. Rebuttal of the Presumption

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[1] We note that he hospital records indicate elsewhere that the claimant was discharged on April 12, 2018 at 4:10 p.m. However, the claimant testified that he left the hospital on Wednesday, which is consistent with a discharge on April 11, 2018.

"After the claimant establishes that he is entitled to the presumption, the burden shifts to the employer to refute the presumption." Medlin v. Cty. of Henrico Police, 34 Va. App. 396, 405 (2001) (citations omitted). To rebut the presumption "the employer must show, by a preponderance of the evidence, *both* that (1) the claimant's disease was not caused by his employment, and (2) there was a non-work-related cause of the disease." Bass v. City of Richmond Police Dep't, 258 Va. 103, 114 (1999). "[I]f the employer does not prove by a preponderance of the evidence both parts of the two-part test, the employer has failed to overcome the statutory presumption." Id. at 114; *see also Cty. of Henrico v. Cobb*, No. 0929-18-2 (Va. Ct. App. Dec. 11, 2018).

The defendant relies primarily on Dr. Goldman's records review report. Dr. Goldman stated:

> There is no objective evidence or specific scientific support for relating his work history, or any specific occupational activities to the development of atrial fibrillation in this context. To prove a negative (i.e. that work activities were not the cause of atrial fibrillation) is logically impossible. It is possible however to apply reasonable medical scientific certainty and probability that essentially excludes work and work related activities as a cause of Mr. Woodard's atrial fibrillation. Extensive medical literature makes it highly probable if not a medical certainty that his atrial fibrillation is related to factors most prominently including obesity and untreated (until recently) sleep apnea.
>
> . . .
>
> I conclude with a high degree of medical certainty that Mr. Woodard's episode of atrial fibrillation (on 04/10/18) was related to pre-existing conditions including hypertension, obesity, and untreated sleep apnea. His occupational history and activities are unrelated to his episode of atrial fibrillation.

The defendant also points to the claimant's history of obesity, hypertension since 2002, high cholesterol since 2004, and family history of hypertension and cardiac disease. They further rely on the opinion of Dr. Michael Girish, who began evaluating and treatment the claimant in June of 2019. Following a sleep study, Dr. Girish diagnosed the claimant with obstructive sleep apnea. He opined, "[c]ertainly, sleep disordered breathing can cause or aggravate arrhythmias, especially atrial fibrillation."

This evidence was not sufficient to meet either prong of the *Bass* test. Only Dr. Goldman opined that the claimant's disease was not caused by his employment. However, this opinion followed his statement that it was impossible to prove that work activities were not a cause of the claimant's atrial fibrillation. He cited the lack of "scientific support," for a connection between heart disease and the claimant's work. Evidence that merely rebuts generally the underlying premise of the statute, which establishes a causal link between stress and heart disease, is not probative for purposes of overcoming the presumption. Medlin, 34 Va. App. at 407.

Furthermore, Dr. Goldman appeared to reach the conclusion that work was not a cause by merely identifying other probable causes. He did not otherwise explain why he did not believe the claimant's employment caused his condition. We also note that Dr. Goldman did not personally examine or treat the claimant. For these reasons, we are not persuaded that the claimant's heart disease was not caused by the employment.

Alternatively, the defendant failed to meet the second prong of the *Bass* test as well. "The showing of 'risk factors' alone does not rebut the statutory presumption and does not establish competent medical evidence of a non-work-related cause of the disabling disease."

City of Portsmouth Sheriff's Dep't v. Clark, 30 Va. App. 545, 554 (1999) (quoting City of Norfolk v. Lillard, 15 Va. App. 424, 429 (1992)). Evidence that the claimant had other risk factors that could cause atrial fibrillation, such as obesity, family history, and sleep apnea, is insufficient to meet the defendant's burden. Additionally, as discussed below, the claimant's hypertension is presumptively work-related. Thus, Dr. Goldman's opinion that the claimant's atrial fibrillation was related to his hypertension suggested that the claimant's heart disease was indeed connected to his employment.

Accordingly, the defendant failed to rebut the presumption that the claimant's atrial fibrillation was an occupational disease.

B. Hypertension

1. Statute of Limitations

*Virginia Code § 65.2-406* provides the limitation periods for occupational disease claims. For all diseases which are not listed specifically, including heart disease and hypertension, *Code § 65.2-406(A)(6)* sets the limitation period as "two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of last injurious exposure in employment, whichever first occurs."

A diagnosis of an occupational disease is not completely communicated to an employee until he receives information indicating the disease is "one 'arising out of and in the course of the employment.'" *Garrison v. Prince William Cty. Bd. of Supervisors, 220 Va. 913, 917 (1980)* (citing former Va. Code § 65.1-46 (now *Code § 65.2-400*)). Communication has two elements: (1) a communication of a diagnosis; and (2) a communication that the disease is work-related. A physician must diagnose the disease although an employee may receive communication that the disease is an occupational disease for which compensation may be awarded from someone other than a physician. *See City of Alexandria v. Cronin, 20 Va. App. 503, 508 (1995), aff'd, 252 Va. 1, 471 (1996)*. "Whether a diagnosis of an occupational disease was communicated and when the communication occurred are factual determinations to be made by the commission upon the evidence." *Owens v. York Fire & Rescue, 38 Va. App. 354, 359 (2002)* (citing *Uninsured Emp'r Fund v. Mounts, 24 Va. App. 550, 558 (1997)*).

We find the claimant did not receive a communication of a diagnosis of an occupational disease when he was diagnosed with hypertension is 2002. There is no evidence that from 2002 to 2018 the claimant was informed his hypertension was work-related. The claimant testified that on April 23, 2018, when he returned to work after his hospitalization, he spoke with a human resources representative, Sharon Lawson. Lawson told him about filing a workers' compensation claim under the hypertension presumption for law enforcement. That was the first time he learned that hypertension was an occupational disease for which compensation may be awarded. That conversation prompted him to file his claim.

The claimant's testimony on this issue was uncontradicted. Therefore, his May 16, 2018, October 17, 2018, and January 30, 2019 claims were timely.

2. Entitlement to the Presumption

The defendant argues that the claimant did not suffer any disability causally related to his hypertension. We disagree.

The claimant initially reported to his primary care provider, Nurse Practitioner Taylor, with reports of high blood pressure. He had been checking his blood pressure himself and noted it was elevated. During the office visit, his blood pressure 160/100. The claimant's blood pressure, in combination with his complaints of chest tightness and lightheadedness led to him being transported to the hospital. Upon admission to the hospital, the claimant was diagnosed with hypertension and atrial fibrillation. He underwent evaluation and treatment for both conditions during his inpatient stay. Nurse Practitioner Taylor agreed the claimant's hospitalization was medically necessary to treat his hypertension. As we previously concluded, his hospitalization rendered him disabled and unable to work. Thus, the evidence established disability in part related to his hypertension.

The claimant is entitled to the presumption that his hypertension is an occupational disease. The defendant failed to present evidence to overcome the presumption. Accordingly, we affirm the Deputy Commissioner's award of benefits for hypertension and heart disease, and award temporary total disability from April 10 through April 11, 2018. [2]

**III. Conclusion**

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[2] The Deputy Commissioner awarded temporary total disability for April 11 to April 12, 2018. The record supports that the claimant was hospitalized and unable to work from April 10 through April 11, 2018. We modify the award accordingly.

The Deputy Commissioner's May 8, 2019 Opinion is AFFIRMED as modified.

An award is hereby entered in favor of Jimmy Woodard, claimant, against Lee County, employer, and Virginia Association of Counties Group, insurer, for indemnity benefits at the rate of $ 833.76 per week, based upon a pre-injury average weekly wage of $ 1,250.64, from April 10, 2018 through April 11, 2018. No benefits are payable due to the waiting period set forth in *Va. Code § 65.2-509*, and the present award is for record purposes only.

Pursuant to *Va. Code § 65.2-603*, medical benefits are awarded for as long as necessary to treat the claimant's hypertension and atrial fibrillation.

An attorney's fee in the total amount of $ 1,500, is hereby awarded to Mingkwan Collins, Esquire for legal services performed on behalf of the claimant, said sum to be collected directly from the claimant.

This matter is removed from the review docket.

## APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

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2019 VA Wrk. Comp. LEXIS 274

Virginia's Workers' Compensation Commission

July 23, 2019; June 24, 2017

Jurisdiction Claim No. VA00001359709; Claim Administrator File No. 0020W83184

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 274 *

# JOEY K. KAHIKINA
v.
# CITY OF NEWPORT NEWS; NEWPORT NEWS CITY OF, Insurance Carrier; PMA MANAGEMENT CORP, TPA, Claim Administrator

## Core Terms

claimant, heart disease, cardiomyopathy, diagnose, occupational disease, hypertension, disease, disability, diagnose, coronary artery disease, file a claim, chest pain, diabetes, notice

## Counsel

Kernbach, Michael, A. Esquire, For the Claimant; Baine, Adonica, Esquire, For the Defendant

**Panel:** REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

**Opinion By:** NEWMAN

## Opinion

[*1]

The defendant requested review of the Deputy Commissioner's February 5, 2019 Opinion finding the claimant suffered from a compensable occupational disease with resultant disability and that his claims were not barred by the statute of limitations. We AFFIRM.

**I. Material Proceedings**

The claimant filed claims on August 8, 2017, and February 20, 2018, alleging occupational diseases of cardiomyopathy and heart disease, respectively, with a communication date of June 24, 2017. He sought an award of medical benefits and temporary total disability from June 24, 2017, to July 17, 2017. The defendant asserted that the claims were barred by the statute of limitations of *Virginia Code § 65.2-406*, the claimant did not suffer from a compensable occupational disease or ordinary disease of life, he failed to give proper notice of his injury, and he was not disabled as alleged.

The Deputy Commissioner held the claimant's claims were not barred by the statute of limitations, the claimant was entitled to the statutory presumption, the defendant did not overcome the presumption, and the claimant was disabled as alleged.

The defendant filed a timely request **[*2]** for review.

**II. Findings of Fact and Rulings of Law**

The claimant has worked as a police officer for the City of Newport News since September 1994. He underwent a pre-employment physical examination which failed to disclose evidence of heart disease or hypertension.

The claimant testified that he treated for heart problems in 2004 but he agreed he was not "formally diagnosed with any cardiac disease as a result of the 2004 treatment." (Tr. 7.) He had no further problems until October 2011 when he had an incident at work where his heart was skipping beats. He was transported to the hospital by ambulance. He "vaguely" recalled "filing city paperwork for Workers' Comp claim in October 2011." (Tr. 44.) After filing that paperwork, he saw Dr. Roxanne Dietzler, who sent him to Dr. William Gillen, cardiologist. The Commission's file indicates the matter was assigned a claim number (VA00000533043 DOI 10/29/11), based upon a Notification of Injury submitted by the employer. [1]

**[*3]**

In 2015, the claimant began having chest pain while at home. He went to the hospital where he underwent cardiac catheterization with one stent placement performed by Dr. Eric Jensen Chou who diagnosed heart disease. (Tr. 8-9.) The claimant was out of work for one and one half to two months and then returned to full duty. He testified that he completed some paperwork with the city for a claim in 2015, but he did not follow through with filing a workers' compensation claim because he had recovered and he "didn't bother to follow up with it." (Tr. 59.) The city's Assistant Director, now acting Director of Human Resources, Elaine Johnson, testified that the city has no documentation of a heart claim in 2015. The city did have documentation of heart claims in 2004 and 2011 as well as the 2017 claim. The Commission's records fail to indicate a claim was filed in 2015.

The claimant testified that on June 24, 2017, he experienced sharp chest pains after spending several hours responding to a custody dispute. He went to the hospital where he underwent another cardiac catheterization. Dr. Chou also prescribed medication. At that point, the claimant was diagnosed with coronary artery disease **[*4]** and cardiomyopathy. Based on conversations with a friend, the claimant learned of the "heart lung bill," and he filed a claim for workers' compensation. While undergoing treatment with Dr. Chou, the claimant testified that Dr. Chou mentioned "work, work-related stress, diabetes and hypertension" as risk factors. (Tr. 18.) The claimant filed a

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[1] In a February 29, 2012 letter filed with the Commission on March 2, 2012, the carrier denied benefits relating to the October 29, 2011 incident based upon "the Doctor [']s report indicat[ing] the following: 'I think his palpitations were ventricular or atrial ectopy due to the stimulants contained in Red bull'. As such, we must respectfully deny benefits under this incident."

claim pro se on August 8, 2017, alleging cardiomyopathy as an occupational disease with a communication date of June 24, 2017.

In his deposition, the claimant testified he first became aware of the heart lung presumption that applies to law enforcement officers in 2015. At the hearing, he explained that although he had heard of the presumption prior to his 2017 episode, it was not until 2017 that he conducted further research and learned he could file a claim. The claimant also agreed that in December 2009 and 2010, after his annual physicals, he signed acknowledgements of his receipt of the heart lung presumption statute.

The medical evidence reveals the claimant reported to Riverside Regional Medical Center (Riverside) on August 27, 2015, for chest pains. He was then referred to Dr. Chou for chest pain and abnormal stress echo. The claimant **[*5]** reported he had been having intermittent chest pain on and off for two to three weeks, progressively worsening. Dr. Chou noted a history of diabetes, hypertension, and dyslipidemia. Dr. Chou's impressions included:

1. Unstable angina with large area of ischemia by stress echo.

2. Resting LV dysfunction of unclear significance.

3. Hypertension.

4. Diabetes.

5. Dyslipidemia.

Dr. Chou recommended "cardiac catheterization plus/minus percutaneous coronary intervention." The claimant underwent the procedure and was discharged on August 28, 2015, with diagnoses of acute coronary syndrome/unstable angina, diabetes, and hypertriglyceridemia. Dr. Chou kept the claimant out of work.

On September 11, 2015, Kim W. Liebold, NP with Riverside under the direction of Dr. Chou, saw the claimant in follow up. Her impression included coronary artery disease with critical stenosis of the proximal LAD, successfully stented by Dr. Chou in August 2015. Dr. Chou released the claimant to light duty beginning September 24, 2015. The claimant eventually returned to full duty work. He followed up with Dr. Chou on December 13, 2016, with "a history of coronary artery disease as well as a cardiomyopathy. " His **[*6]** diagnoses included coronary artery disease status post drug-eluting stent in August 2015 and longstanding cardiomyopathy dating back to at least 2004.

We first address whether the claimant's August 8, 2017 and February 20, 2018 claims were timely under *Virginia Code § 65.2-406*. *Virginia Code § 65.2-406(A)(6)* provides, in part, that the right to file a claim for an occupational disease will be forever barred unless filed within "two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last injurious exposure in employment, whichever first occurs." "A person has not received 'a diagnosis of an occupational disease' until he receives a diagnosis that he suffers from 'an occupational disease' : one 'arising out of and in the course of the employment.'" *Garrison v. Prince William Cnty. Bd. of Supervisors, 220 Va. 913, 917 (1980).* Though the statute does not require that an employee receive from a physician a communication that the disease is work-related, it does require that the employee "learn that the condition **[*7]** is an occupational disease for which compensation may be awarded." *City of Alexandria v. Cronin, 20 Va. App. 503, 509 (1995), aff'd, 252 Va. 1 (1996).*

In *Cronin*, the claimant's physician diagnosed heart disease and hypertension and wrote a letter recommending he be medically retired because of his heart disease. Cronin thereafter opted to file for service-connected retirement benefits rather than workers' compensation. More than two years later, after Cronin's death, his estate sought workers' compensation benefits, arguing that his doctor did not actually tell him his heart disease was work-related. The city defended the claim on the grounds that the statute of limitations had expired. The Commission found that although Cronin thought his condition was work related, the estate was not barred by the limitations period because Cronin was not "medically advised that his condition was causally related to his work."

The Court of Appeals of Virginia reversed, explaining that Code § 406(A)(6) does not require proof of a physician's direct communication to the employee that the disease from which the employee suffers is work **[*8]** related to trigger the running of the limitations period. Specifically, the Court held:

> Code § 65.2-406 (A)[(6)] does not require that an employee receive from a physician a communication that his disease is work related; rather, the statute only requires that the employee, simultaneously with or sometime after the diagnosis of his condition, learn that the condition is an occupational disease for which compensation may be awarded.

Id. at 508-509. The Court concluded, "Cronin received a medical diagnosis of his heart condition and acted upon such diagnosis to receive service-connected disability benefits. This action proved that Cronin was informed for purposes of the statute." Id. at 510.

Similarly, in Owens v. York Fire & Rescue, 38 Va. App. 354 (2002). Owens had not been informed by a doctor that his hypertension was work-related. The Court found, however, that Owens had known for ten to fifteen years that hypertension is an occupational disease which is presumptively compensable under Code § 65.2-402(B) **[*9]** as he had lobbied for legislation to enact that presumption.

In this case, the weight of the evidence shows that as early as 2009, the claimant had knowledge of the Workers' Compensation Act and specifically the presumption applicable to police officers, as he acknowledged receipt of a copy of the legislation in 2009 and 2010. The record also shows that a file was created in 2011 based on an incident with heart palpations at work on October 29, 2011. [2] The claimant testified that he completed paperwork in 2015 for a heart disease claim but did not follow up on that claim. The medical evidence shows that on August 27, 2015, he was diagnosed with unstable angina with large area of ischemia by stress echo and hypertension, and on August 28, 2015, he was diagnosed with acute coronary syndrome/unstable angina, diabetes, and hypertriglyceridemia. Thus, the medical records from August 27 and 28, 2015, show diagnoses that would trigger the running of the statute of limitations, and given the claimant's awareness of the heart presumption at that time, he had two years from that date to file a claim for heart disease or hypertension. In other words, when the claimant was diagnosed with coronary **[*10]** artery disease on August 27, 2015, he was aware of the heart lung presumption, thus establishing the necessary conditions to trigger the running of the statute of limitations. Therefore, the claimant's August 8, 2017 claim listing body parts injured as "Heart/Cardiomyopathy" and alleging cardiomyopathy would be timely. [3]

We next consider the defendant's argument that cardiomyopathy is not heart disease, as Dr. Chou was equivocal in labeling it as such, and therefore, a claim for cardiomyopathy is not a claim for heart disease under the statute. [4] We disagree. Dr. Chou testified that the claimant had been diagnosed with nonischemic cardiomyopathy which "means not related to blocked arteries, or heart attacks, but that his heart was weak."(Dr. Chou Dep. 12.) When asked whether cardiomyopathy is a heart disease, the Dr. Chou testified **[*11]** that "heart disease is kind of a vague general descriptive term that you could say is any kind of problems with your heart. Same thing with cardiomyopathy. Cardiomyopathy is just saying that there's a problem with your heart." (Dr. Chou Dep. 13-14.) The claimant had been diagnosed with hypertensive cardiomyopathy, which is a problem with the heart related to high blood pressure. Based on Dr. Chou's testimony, we find the claimant's listing of cardiomyopathy as his heart condition is sufficient enough to put the parties on notice of a claim for heart disease. See Nelson Cnty. Sch. v. Woodson, 45 Va. App. 674, 681 (2005), quoting Johnson v. Paul Johnson Plastering, 37 Va. App. 716, 723

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[2] This claim was denied by the defendant, and no further action was taken by the claimant.

[3] Given this finding, the issue of whether the February 20, 2018 claim is timely is moot.

[4] The defendant further argues that if the August 8, 2017 claim is considered a timely claim, the claim is still barred as the defendant did not receive notice of the diagnosis of coronary artery disease in August 2015 as required by Virginia Code § 65.2-600. Because the employer was prejudiced by the two-year delay in reporting his 2015 heart disease, the claim is likewise barred. We do not find any prejudice on the part of the employer. The employer was aware of the claimant's diagnosis and his absence from work due to his heart condition in 2015.

*(2002), rev'd in part on other grounds*, 265 Va. 237 (2003) ("as long as the employee's application for benefits provides an employer with notice 'of the potential issues in a case,' the claim will satisfy 'minimal due process safeguards.'") Therefore, his August 8, 2017 claim was timely.

**[*12]**

We find the claimant as a police officer with a diagnosed heart condition is entitled to the presumption of *Virginia Code § 65.2-406*. We also find that the defendant did not successfully rebut the presumption. We rely on the Deputy Commissioner's analysis as follows:

> Kahikina proved that he suffers from a compensable occupational disease. As noted above, since Kahikina meets the standards for invoking the "heart-lung" presumption, the burden of proof shifted to the defendant to show both a non-work-related cause for the heart disease, and that work was not a cause of the claimant's heart disease. See *Page v. City of Richmond, 218 Va. 844, 847-48, 241 S.E.2d 775 (1978)*. The Commission and the Court of Appeals have recently reiterated that an employer must prove by a preponderance of the evidence both of these elements in order to rebut the presumption. See County of Henrico v. Cobb, No. 0929-18-2 (Va. Ct. App. Dec. 11, 2018) and Klatt v. City of Virginia Beach, JCN VA00001250891 (December 27, 2018). After reviewing the records, questionnaire responses, and deposition testimony of Dr. Chou **[*13]** and the February 25, 2018 questionnaire responses from Dr. Nagraj, it is found that the defendant failed to prove that work was not a cause of Kahikina's heart disease.

(Op. 7-8.)

We also agree that the claimant proved disability related to his heart disease. He was admitted to the hospital from June 24 to 26, 2017. Thereafter, he was kept out of work until seen by Dr. Chou. Dr. Chou evaluated the claimant on July 12, 2017, when he recommended a return to light duty. Thus, we agree with the Deputy Commissioner that the claimant proved disability from his heart disease.

**III. Conclusion**

The Deputy Commissioner's February 5, 2019 Opinion is AFFIRMED.

The Award is modified to reflect temporary total disability benefits from June 24, 2017, through July 12, 2017, inclusive, subject to the provisions of *Virginia Code § 65.2-509*. [5]

**[*14]**

An attorney's fee in the total amount of $ 1,000, including the $ 500 awarded by the Deputy Commissioner below, is awarded to Michael A. Kernbach, Esquire, for legal services rendered to the claimant, the payment of which shall be deducted from accrued compensation.

Interest is payable on the award pursuant to *Virginia Code § 65.2-707*.

This matter is hereby removed from the review docket.

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

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[5] Both parties agree to this modification of the award to reflect a beginning date of June 24, 2017, rather than June 23, 2017. (Cl.'s W.S. 3, Def.'s W.S. 12.)

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2019 VA Wrk. Comp. LEXIS 253

Virginia's Workers' Compensation Commission

June 25, 2019; March 22, 2016

Jurisdiction Claim No. VA00001300094; Claim Administrator File No. 0019W04622

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 253 *

# STEPHEN JOHNSON
v.
# CITY OF HAMPTON; HAMPTON CITY OF, Insurance Carrier; PMA MANAGEMENT CORP, TPA, Claim Administrator

**Disposition:** We REVERSE the Deputy Commissioner's March 7, 2019 Opinion.

This matter is removed from the review docket.

## Core Terms

claimant's, atrial fibrillation, occupational, heart disease, genetic, disease, stress, opine, risk factor, ablation, family history, tachycardia, non-work-related, preponderance, cardiologist, disability, episode, pathway

## Counsel

Michael A. Kernbach, Esquire, For the Claimant; Ralph L. Whitt, Jr., Esquire, For the Defendant

**Panel:** Marshall, Commissioner; Newman, Commissioner; Rapaport, Commissioner

**Opinion By:** MARSHALL

## Opinion

[*1]

JUSTIN MAIN

The defendant requests review of the March 7, 2019 Opinion awarding lifetime medical benefits and temporary total disability for atrial fibrillation and supraventricular tachycardia as occupational diseases. [1] We REVERSE.

**I. Material Proceedings**

A November 2, 2017 claim alleged the claimant was diagnosed with heart disease, including atrial fibrillation and supraventricular tachycardia, on March 22, 2016 and had been performing restricted work since April 6, 2017.

At the February 5, 2018 hearing, the claimant sought medical benefits and temporary total disability from April 6, 2017 and continuing. The parties stipulated the claimant was entitled to the presumption set forth in *Virginia Code § 65.2-402* **[*2]** , and that he received a communication of diagnosis of his disease on January 24, 2017 rather than on March 22, 2016.

The defendant disputed the claim on the basis that the claimant did not suffer from an occupational disease, his employment did not cause his disease, and he unjustifiably refused medical attention by not undergoing a second ablation recommended by Dr. Ryan Seutter.

Following two evidentiary hearings and submission of post-hearing position statements, the Deputy Commissioner issued a March 7, 2019 Opinion. He found the defendant failed to rebut the presumption of *Code § 65.2-402(B)*. He noted that although the defendant presented evidence from Drs. Seutter, Hess, and Soni, he was more persuaded by the opinions of Drs. Hoffmier and Schwartz. While there was evidence the claimant suffered from a genetic predisposition for heart disease, Dr. Schwartz opined there was no relationship between the claimant's atrial fibrillation and that suffered by his father. Dr. Hoffmier could not rule out stress as a cause of the claimant's heart problems. The Deputy Commissioner further found that the claimant did not unjustifiably refuse medical **[*3]** attention. Although Dr. Seutter recommended a second ablation, the claimant followed the different course of treatment recommended by Dr. Schwartz. An award was entered for lifetime medical benefits and temporary total disability beginning April 6, 2017 and continuing.

The defendant filed a timely request for review.

**II. Findings of Fact and Rulings of Law**

We have reviewed the record in its entirety, and recite the facts only to the extent necessary to support our reasoning.

*Virginia Code § 65.2-402(B)* provides that "heart disease causing the death of, or any health condition or impairment resulting in total or partial disability of (i) salaried or volunteer firefighters . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary."

The claimant, a 33-year old police officer, suffered from a several-year history of intermittent episodes of rapid heart palpitations. On August 4, 2015, the claimant presented to Dr. Thomas J. Hoffmier, cardiologist, with a complaint of general, rapid palpitations. **[*4]** The claimant elected to have a loop recorder implanted to monitor his heart rhythm. On March 22, 2016 the claimant reported a recent episode of rapid palpitation associated with orthostatic syncope. The loop recorder showed atrial fibrillation. Dr. Hoffmier referred the claimant to electrophysiologist Dr. Ryan Seutter for evaluation and treatment. On November 11, 2016, Dr. Seutter performed an atrial fibrillation ablation. Following the ablation, the claimant did not experience another episode of atrial fibrillation. However, the loop recorder showed episodes of supraventricular tachycardia (SVT), for which he was prescribed beta blockers.

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[1] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see Barnes v. Wise Fashions, 16 Va. App. 108, 112 (1993).*

The parties agreed the claimant's diagnoses of atrial fibrillation and supraventricular tachycardia constituted heart disease. Based upon the claimant's conditions and resulting disability, they further agreed the claimant was entitled to the heart disease presumption set forth in Virginia Code § **65.2-402**(B).

"After the claimant establishes that he is entitled to the presumption, the burden shifts to the employer to refute the presumption." *Medlin v. Cty. of Henrico Police, 34 Va. App. 396, 405 (2001)* **[*5]** (citations omitted). To rebut the presumption "the employer must show, by a preponderance of the evidence, *both* that (1) the claimant's disease was not caused by his employment, and (2) there was a non-work-related cause of the disease. " *Bass v. City of Richmond Police Dep't, 258 Va. 103, 114 (1999).* "[I]f the employer does not prove by a preponderance of the evidence both parts of the two-part test, the employer has failed to overcome the statutory presumption. " *Id. at 114; see also Cty. of Henrico v. Cobb*, No. 0929-18-2 (Va. Ct. App. Dec. 11, 2018).

We first consider whether the defendant established the claimant's disease was not caused by his employment. We are presented with conflicting medical evidence. "Medical evidence is not necessarily conclusive, but is subject to the commission's consideration and weighing." *Hungerford Mech. Corp. v. Hobson, 11 Va. App. 675, 677 (1991).* Where there are contrary expert medical opinions, "'the commission is free to adopt that opinion which is most consistent with reason and justice.'" *Va. Nat. Gas v. Tennessee, 50 Va. App. 270, 279 (2007)* **[*6]** (quoting *United Airlines, Inc. v. Sabol, 47 Va. App. 495, 501-02 (2006)).* The Commission may consider several factors when apportioning weight to conflicting medical evidence: (i) the expertise of each physician; (ii) the extent of involvement in the treatment of the claimant's condition; (iii) the reasoning applied by each physician and (iv) the criteria relied upon by each physician. *Jackson v. Haynes Furniture Co., Inc.*, 77 O.W.C. 92 (1988).

Having considered the competing medical opinions in light of these factors, we are most persuaded by Dr. Seutter's opinion. Dr. Seutter, an electrophysiologist, is responsible for the treatment of the claimant's arrhythmias, and is therefore in the best position to opine on their cause. He is also most familiar with the claimant's family history, as he treated the claimant's father. Dr. Seutter opined that it was unlikely that the atrial fibrillation was related to or caused by the claimant's job as a police officer. He explained the atrial fibrillation was likely genetic in origin, based on the claimant's family history and young age. He explained that the claimant's father had a left-sided atrial fibrillation, **[*7]** as did his son. Dr. Seutter opined that the recurrent SVT was likely caused by a dual pathway in the Atrioventricular (A-V) node, which is a congenital abnormality.

Dr. Seutter's opinion is corroborated by other physicians. Dr. Soni, cardiologist, agreed that the claimant's SVT and atrial fibrillation were not causally related to his occupation as a police officer. Dr. Hess, defense medical examiner, did not opine one way or another on the role of occupational stress in the claimant's condition, although he agreed with Dr. Seutter's opinion that the claimant's condition was genetic in origin.

Dr. Hoffmier, the claimant's treating cardiologist, opined that the exact causes of the claimant's paroxysmal atrial fibrillation and SVT were unknown. He believed occupational stress was a contributing risk factor in the development or acceleration of the claimant's conditions. He opined the claimant's condition was not genetic, and he did not believe the claimant had any known cardiac risk factors associated with paroxysmal atrial fibrillation and SVT due to AV nodal physiology.

Following the Court of Appeals' guidance in *City of Portsmouth Sheriff's Dep't v. Clark, 30 Va. App. 545 (1999),* **[*8]** we have held that "identifying work stress as a risk factor no more establishes work as a cause of heart disease than identifying a non-work-related risk factor establishes a non-work-related cause of the disease. " *Mays v. Amherst Cty. Sheriff's Office*, VWC File No. 178-55-67 (Jan. 8, 2001). Dr. Hoffmier opined it was impossible to discern the cause of the claimant's condition. Thus, he was unable to do anything more than identify what he believed to be the claimant's risk factors. He did not offer any explanation as to why he discounted the role of the claimant's known family history of atrial fibrillation. Accordingly, his opinion is insufficient to rebut the positive opinion on causation set forth by the claimant's other treating physician, Dr. Seutter.

Dr. Richard A. Schwartz, medical examiner for the claimant who later took over as the claimant's cardiologist, opined that occupational stress aggravated the claimant's arrhythmias, and more likely than not contributed to the development of his conditions. He believed the only risk factor in the claimant's case was the occupational

stress and demands of police work. He believed the high alert states and uncertainties involved [*9] in police work made occupational stress a risk factor. (Schwartz Dep. 20-21, Oct. 10, 2018.) Like Dr. Hoffmier, Dr. Schwartz identified occupational stress as a risk factor, but did not explain why he believed it was the cause of disease in the claimant's case. Furthermore, we are not persuaded that Dr. Schwartz had sufficient knowledge of the claimant's family history to determine whether occupational stress, rather than genetics, caused the claimant's conditions. Unlike Dr. Seutter, Dr. Schwartz was only aware of the claimant's family history to the extent it was discussed with him, and had not reviewed the father's records. (Schwartz Dep. 26, Oct. 10, 2013.)

Based on Dr. Seutter's well-reasoned and informed opinion, we find the defendant established the claimant's occupational stress was not a cause of his heart disease. As such, we consider whether the defendant also established a non-work-related cause of the claimant's heart disease.

Dr. Seutter opined the claimant's atrial fibrillation was genetic in origin, based upon his familiarity with the claimant's father's similar left-sided atrial fibrillation. In regards to the claimant's recurrent SVT, Dr. Seutter explained it was [*10] likely caused by the dual pathway in the claimant's A-V node, a congenital abnormality that did not manifest itself until after the atrial fibrillation ablation in November 2016.

Dr. Hess concluded the claimant suffered from genetic heart disease characterized by abnormal cells in an aberrant location responsible for his atrial fibrillation. He explained there was a cluster of arrhythmogenic cells located in the left atrium at the entrance of the pulmonary veins draining the lungs. He noted this was a common finding in young patients with atrial fibrillation. He explained proof of the cause and effect was demonstrated by the success of the ablation. The ablation destroyed the abnormal cells, and the claimant's loop recording device showed no post-ablation atrial fibrillation. Dr. Hess also believed the claimant's SVT episodes were genetic in origin. He explained a normal individual has one pathway through the A-V node. The claimant, however, has two pathways permitting the electrical impulse to reenter the A-V node and setting up a rapid, circular electrical activation that is rapidly conducted to the ventricle and is responsible for his bursts of tachycardia and accompanying symptoms. [*11] Dr. Hess explained that the emergence of the tachycardia after the ablation was to be expected.

In response, Dr. Schwartz asserted there was no specific gene that predisposed a person to suffer from atrial fibrillation. He testified "there are other ways of demonstrating genetics without being able to identify a gene," but maintained that he was not aware of atrial fibrillation being a genetic condition. Dr. Schwartz conceded that he would defer to Dr. Seutter in regards to whether the claimant's dual pathway was congenital or acquired.

We find Dr. Hess's and Dr. Seutter's opinions entitled to greater weight than Dr. Schwartz's opinion. Dr. Hess provided thorough reasoning explaining why he believed both of the claimant's arrhythmias were genetic in origin, with reference to the claimant's medical records and electrophysiology study results. Dr. Seutter's similar opinion was supported by his expertise in electrophysiology and first-hand knowledge of the claimant's family history. Dr. Schwartz's response was not as persuasive. His knowledge of the claimant's family history was limited, and he acknowledged that his role in treating the claimant was as a general cardiologist, while Dr. [*12] Seutter's role was to treat the claimant's underlying arrhythmias. Dr. Schwartz did not provide a response to Dr. Hess's detailed explanation for the claimant's condition. Based upon the opinions of Dr. Hess and Dr. Seutter, we find the defendant proved by a preponderance of the evidence a non-work-related cause of the claimant's heart disease.

The defendant successfully rebutted the statutory presumption by proving both elements of the two-pronged test by a preponderance of the evidence. Therefore, the claimant is not entitled to an award of benefits for his heart disease. As such, we do not address the defendant's other arguments on review.

**III. Conclusion**

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion.

You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

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2019 VA Wrk. Comp. LEXIS 170

Virginia's Workers' Compensation Commission

April 24, 2019; March 12, 2017

Jurisdiction Claim No. VA00001315771; Claim Administrator File No. 014997941 LOU 217194145 Q

*VA Workers' Compensation Decisions*

**Reporter**
2019 VA Wrk. Comp. LEXIS 170 *

# JEREMY DORSEY
**v.**
# LOUDOUN COUNTY, VIRGINIA LOUDOUN COUNTY OF, Insurance Carrier; HEALTHSMART CASUALTY CLAIMS SOLUTIONS, Claim Administrator

**Disposition:** We AFFIRM the Deputy Commissioner's January 17, 2019 Opinion.

This matter is removed from the review docket.

## Core Terms

claimant's, stress, occupational, heart disease, coronary artery disease, risk factor, disability, scientific, firefighter, disease, occupational disease, hypertension, causal, opine, family history, refute, rebut

## Counsel

Michael A. Kernbach, Esquire, For the Claimant; Justin R. Main, Esquire, For the Defendants

**Panel:** Marshall, Commissioner; Newman, Commissioner; Rapaport, Commissioner

**Opinion By:** MARSHALL

## Opinion

[*1]

JUSTIN MAIN

A January 17, 2019 Opinion awarded lifetime medical benefits and temporary total disability for heart disease as an occupational disease. The defendants request review. We AFFIRM.

**I. Material Proceedings**

On April 11, 2018, the claimant filed a Claim for Benefits alleging heart disease as an occupational disease with a date of communication of March 12, 2017. He sought lifetime medical benefits and temporary total disability from March 12, 2017 through July 4, 2017. [1]

The defendants asserted the claimant did not suffer a compensable occupational disease or ordinary disease of life, the medical evidence was sufficient to overcome the statutory presumption of Virginia Code § 65.2-402, and the claimant was not disabled to the extent alleged. Subject to their defenses, the defendants stipulated the claimant was totally **[*2]** disabled from March 12, 2017 through July 4, 2017.

Following an evidentiary hearing, the Deputy Commissioner issued a January 17, 2019 Opinion. He found the claimant entitled to the rebuttable presumption that his heart disease was a compensable occupational disease pursuant to Virginia Code § 65.2-402(B). He found the opinions of the defense experts, Dr. Stuart F. Seides and Dr. Jonathan D. Dubin, were insufficient to rebut the resumption. The Deputy Commissioner noted that the presence of other risk factors did not rebut the presumption. He also found both physicians' opinions were an attempt to refute the premise of the statutory presumption, and thus were not proper rebuttal evidence.

The Deputy Commissioner relied upon the opinions of the claimant's treating cardiologist, Dr. Jeffery Skiles, and primary care physician, Dr. William F. Bodenheimer. Both physicians acknowledged the claimant's other cardiac risk factors, but opined occupational stress contributed to the development or acceleration of the claimant's coronary artery disease. Neither could exclude the role of occupational stress as contributing to the claimant's heart disease. **[*3]** The claimant's expert, Dr. Richard Schwartz, also noted the claimant's risk factors included the occupational stress of firefighting. Weighing this evidence, the Deputy Commissioner found the defendants failed to show the claimant's occupational stress was not a cause of his heart disease. The claimant was awarded medical benefits and temporary total disability from March 12, 2017 through July 4, 2017

The defendants filed a timely request for review.

**II. Findings of Fact and Rulings of Law**

Virginia Code § 65.2-402 (B) provides that "heart disease causing the death of, or any health condition or impairment resulting in total or partial disability of (i) salaried or volunteer firefighters . . . shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary."

The claimant suffered a myocardial infarction on March 12, 2017. The following day he underwent left heart catheterization with two stents. He was diagnosed with coronary artery disease. The defendants do not request review of the Deputy Commissioner's **[*4]** finding that the claimant was entitled to the presumption under Virginia Code § 65.2-402(B).

"After the claimant establishes that he is entitled to the presumption, the burden shifts to the employer to refute the presumption." Medlin v. Cty. of Henrico Police, 34 Va. App. 396, 405, 542 S.E.2d 33, 37 (2001) (citations omitted). To rebut the presumption "the employer must show, by a preponderance of the evidence, both that (1) the claimant's disease was not caused by his employment, and (2) there was a non-work-related cause of the disease. " Bass v. City of Richmond Police Dep't, 258 Va. 103, 114, 515 S.E.2d 557, 562-63 (1999). "[I]f the employer does not prove by a preponderance of the evidence both parts of the two-part test, the employer has

[1] At the parties' request, the Commission agreed to retain jurisdiction over the claim for temporary partial disability from July 5, 2017 through March 21, 2018.

failed to overcome the statutory presumption. " *Id. at 114, 515 S.E.2d at 563;* see also Cty. Of Henrico v. Cobb, No. 0929-18-2 (Va. Ct. App. Dec. 11, 2018).

We first address whether the defendants proved the claimant's disease was not caused by his employment. **[*5]**

The claimant's treating cardiologist, Dr. Skiles, and primary care physician, Dr. Bodenheimer, completed medical questionnaires from claimant's counsel. They both agreed the exact cause of the claimant's coronary artery disease was unknown. They agreed the claimant had traditional risk factors for coronary artery disease, including cigarette smoking, family history, hypertension, and high cholesterol. They determined occupational stress as a firefighter was a contributing risk factor in the development or acceleration of the claimant's coronary artery disease. They could not exclude the claimant's occupational stress as a contributing risk factor.

Dr. Schwartz, a physician consulted by the claimant, opined the claimant's risk factors for coronary artery disease included the occupational stress of firefighting, history of cigarette smoking, and treated hypertension and hyperlipidemia. He noted to the extent there was a family history in first-degree relatives of premature heart disease, this could also be considered a risk factor. He implicated occupational stress in the claimant's coronary artery disease and stated this had been borne out by research. He noted risk factors are correlative **[*6]** and not causative, and that it was impossible to parse the contribution of any given risk factor in the claimant's situation. [2] But, he noted the risk factors, including occupational stress, were associated with coronary artery disease and myocardial infarction.

Dr. Seides, defense expert, reviewed the claimant's records and opined the claimant had a family history of early-onset coronary artery disease upon which was superimposed tobacco abuse, hypertension, hyperlipidemia, and obstructive sleep apnea. He stated these factors were a more than adequate causal explanation for the claimant's coronary **[*7]** artery disease. He further stated, "there is absolutely no plausible basis for implicating his employment in this case and any attempt to do so would be without any scientific foundation." In an addendum report, Dr. Seides further stated, "the notion of some type of chronic job-related 'stress' playing a significant role in the development of the underlying coronary atherosclerosis in this case is without any scientific foundation."

We find Dr. Seides' statements were an impermissible attempt to refute the presumption. The General Assembly, in enacting *Virginia Code § **65.2-402**(B)* decided there *is* a scientific foundation for implicating job-related stress in cases such as this one. The Act presumes the claimant's heart disease is an occupational disease suffered in the line of duty, subject to the defendants' ability to prove otherwise. Dr. Seides' report demonstrated his disagreement with the underlying premise of the statute. "Testimony which merely refutes the premise of such a legislatively enacted presumption does not constitute proper evidence in rebuttal." *Medlin, 34 Va. App. at 407, 542 S.E.2d at 38.* **[*8]** We cannot accept Dr. Seides' opinions as probative evidence for purposes of overcoming the presumption. [3]

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[2] We do not read Dr. Schwartz's opinion as an argument that the employer can never rebut the presumption. He did not state occupational stress is implicated in the development of heart disease in every case. While Dr. Schwartz was unable to break down the contribution of each risk factor in the claimant's case, he did not dismiss the notion that occupational stress may not be a contributing risk factor in some patients.

[3] InMedlin, the Court of Appeals rejected the Commission's reliance on Dr. Seides because he opined, "a person's occupation as a police officer ... cannot in any reasonable way be linked with the development of coronary artery disease. " He admitted his opinion that the claimant's work did not contribute to the disease was based on what he perceived to be a lack of affirmative proof of such a causal connection. *Medlin, 34 Va. App. at 404, 542 S.E.2d at 37.* The Court held:

> [w]here the General Assembly has concluded that there is a causal link between stress and heart disease, it is not for the commission or the courts to reconsider the issue, for to do so would defeat the intentions of the legislature. It thus follows that, it is impermissible for the [commission] to accept the opinion of a physician so disposed as the basis for disallowing a claim. Stated otherwise, the employer may not, in effect, 'repeal' the statute "by seeking out a doctor whose beliefs preclude its possible application.

*Id. at 407, 542 S.E.2d at 38* (citations omitted).

[*9]

Dr. Dubin's report was the only probative opinion on causation produced by the defendants. [4] Dr. Dubin reviewed the claimant's records and found he had multiple major cardiac risk factors including hypertension, tobacco abuse, and a family history of coronary artery disease. He noted these conditions are well-established causes of coronary artery disease and heart attacks, and are clearly unrelated to his work as a firefighter. Therefore, he concluded, the claimant's coronary artery disease was caused by other risk factors, and not his work as a firefighter. He opined the claimant would have developed coronary artery disease no matter what occupation he chose.

While we find Dr. Dubin's opinion probative, it alone is insufficient to prove the claimant's heart disease was not caused by work-related stress. Dr. Skiles, Dr. Bodenheimer, and Dr. Schwartz all examined the claimant. While [*10] they could not determine to what extent occupational stress caused the claimant's heart disease, they all agreed it was a contributing cause of the claimant's condition.

The present case is distinguishable from Howard v. City of Chesapeake, JCN VA00000630261 (May 21, 2018), in which the claimant's family physician, who treated his hypertension over the course of two years, denied that work-related stress contributed to his heart disease. In this case, Dr. Bodenheimer treated the claimant's hypertension, hyperlipidemia, and chronic airway obstruction since 2012. He was aware of the claimant's tobacco abuse and his family history of heart disease. Nevertheless, Dr. Bodenheimer determined occupational stress was a contributing cause of the claimant's heart disease.

Only Dr. Dubin opined the claimant's occupational stress did not cause the claimant's heart disease. However, medical evidence is not necessarily conclusive, and is subject to the Commission's consideration and weighing. *Hungerford Mech. Corp. v. Hobson, 11 Va. App. 675, 401 S.E.2d 213 (1991).* We note Dr. Dubin did not personally examine the claimant and merely conducted a review [*11] of medical records for the defendants. Weighing the opinion of Dr. Dubin against those of Drs. Skiles, Bodenheimer, and Schwartz, we find the defendants failed to establish by a preponderance of the evidence that the claimant's occupational stress was not a cause of his heart disease.

As the employer did not prove the first element of the two-pronged test, we do not address the second prong. The employer failed to rebut the statutory presumption of *Virginia Code § 65.2-402(B)*.

**III. Conclusion** JCN VA00001315771 8

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion.

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The Court of Appeals reversed the Commission's reliance on Dr. Seides' opinions for similar reasons in *Metro Washington Airports Authority v. Lusby, 41 Va. App. 300, 312-13, 585 S.E.2d 318, 324 (2003)* (rejecting opinion that "[a]ny attempt to make this [causal] association is contrary to our current scientific understanding as to the genesis of this process"); *Patton v. Loudoun County Board of Supervisors, 36 Va. App. 392, 396, 551 S.E.2d 6, 8 (2001)* (rejecting opinion that "relationship of occupation to the development of atherosclerosis is virtually nil"); *Bristol City Fire Department v. Maine, 35 Va. App. 109, 115-18, 542 S.E.2d 822, 825-6 (2001)* (rejecting opinion that "his employment as a firefighter had nothing whatsoever to do with the genesis of either his underlying coronary atherosclerosis or his myocardial infarction. Any attempt to associate his occupation and his disease is without scientific merit."); *City of Waynesboro Police v. Coffey, 35 Va. App. 264, 275, 544 S.E.2d 860, 865 (2001)* (rejecting opinion that causal relationship between work and heart disease was inconsistent with "our current scientific thinking"); Metro Washington Airports Authority v. Bispo, No. 0905-03-4 (Va. Ct. App. Aug. 19, 2003) (rejecting opinion that conclusion of causal relationship had, "no basis in scientific fact whatsoever"); and Goodwin v. Amherst County Sheriff's Office, No. 0810-01-4 (Va. Ct. App. January 29, 2002) (rejecting opinion that there was "no scientific merit in the theory that work as a law enforcement officer would contribute to the development of coronary artery disease" ).

[4] We disagree with the Deputy Commissioner's finding that Dr. Dubin's opinion was an impermissible attempt to refute the presumption.

You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

VA Workers' Compensation Decisions

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2018 VA Wrk. Comp. LEXIS 189

Virginia's Workers' Compensation Commission

May 09, 2018

Jurisdiction Claim No. VA00001084167

**Reporter**
2018 VA Wrk. Comp. LEXIS 189 *

# JOAN COBB v. COUNTY OF HENRICO VIRGINIA ASSOCIATION OF COUNTIES GROUP SELF-INSURANCE RISK POOL, Insurance Carrier RISK MANAGEMENT PROGRAMS, INC., Claim Administrator

## Core Terms

claimant, heart disease, disability, hypertension, diabetes, coronary artery disease, cardiac, heart attack, risk factor, sheriff's deputy, return to work, cholesterol, diagnose, stress, pre-employment, disease, total disability, non-work-related, preponderance, bypass, chest, smoke, pain, myocardial infarction, causal relationship

## Counsel

Joan Cobb, Claimant, pro se. Scott C. Ford, Esquire, For the Defendant.

**Panel:** REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

**Opinion By:** RAPAPORT

## Opinion

**[*1]**

Both parties request review of the Deputy Commissioner's January 26, 2018 Amended Opinion awarding medical benefits for the claimant's heart disease and temporary total disability benefits from August 11, 2015 through September 13, 2015. We AFFIRM.

JUSTIN MAIN

**I. Material Proceedings**

The claimant, a deputy sheriff, filed a claim on May 2, 2017 alleging a compensable occupational disease on June 17, 2015 in the nature of a stress-related heart attack/ coronary artery disease. She sought medical benefits and temporary total disability benefits beginning on June 17, 2015. The defendant raised numerous defenses against the claim, including that the claimant was not entitled to the heart disease/ hypertension presumption provided by *Virginia Code § 65.2-402*, particularly that the claimant could not establish disability due to heart disease/ hypertension and was not free of the cardiac condition during her pre-employment physical.

Deputy Commissioner Gibbs conducted an evidentiary hearing on September 18, 2017. The Deputy Commissioner found that the claimant was entitled to the presumption for a claim of "heart disease (heart attack)." [1] She held that the **[*2]** claimant proved grounds for the payment of wage loss benefits from August 11, 2015 through September 13, 2015. Both parties timely appealed. The claimant did not file a written statement.

**II. Findings of Fact and Rulings of Law**

A. Defendant's Request for Review

On appeal, the defendant argues that the claimant failed to prove entitlement to the presumption of *Virginia Code § 65.2-402(B)* because she failed to prove disability resulting from heart disease. The defendant maintains that little weight should be afforded to the **[*3]** "August 11, 2016 [sic] short term disability form as it is not consistent with the opinion at the time of the exam and is not contemporaneous with an actual exam." (Def.'s W.S. 10.)

Regarding this portion of the claim, and the voiced defense, the Deputy Commissioner found the following:

> We next find the evidence proves disability. In this regard, we need look no further than the records from the mid-June 2015 hospitalization. The claimant was admitted to Henrico Doctor's Hospital at 5:00 a.m. on June 17, 2015 according to the hospital's Admission Note, and not discharged until June 19, 2015. The June 19, 2015 Discharge Summary Letter authored by Charles W. Phillips, M.D., the cardiologist who treated the claimant while she was hospitalized and for a period thereafter, reflects a "Special Instruction[]" of "No work until 06/30." A hand-written Discharge progress note likewise states "resume work 6/30/15" with further notation of "no work for 6 weeks." We give more weight to this contemporaneous statement than to Dr. Phillips' deposition testimony as to his belief that he had not addressed the claimant's ability to work at the time. (Phillips Dep. Tr. at 7). From the hospital records, **[*4]** we find ample evidence of disability caused by heart disease to invoke the presumption. *Samartino v. Fairfax Co. Fire & Rescue, 64 Va. App. 499, 769 S.E.2d 692 (2015).*

(Op. 8-9.) We agree and find the defendant's argument on appeal unconvincing. On review, the defendant emphasizes the alleged inadequacy of the August 2015 short-term disability slip. However, the Deputy Commissioner clearly relied upon the claimant's incapacity while hospitalized in June 2015 and July 2015 to establish disability. We find this reliance proper and sufficient to prove the requisite causally related disability.

Next, the defendant argues that *Virginia Code § 65.2-402(D)* barred the application of the presumption. The defendant asserts that pre-employment screening showed hypertension and that multiple physicians concluded that "the claimant's long-standing and significant history of hypertension" was the direct cause of her heart disease. [2] (Def.'s W.S. 12.)

**[*5]**

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[1] *Virginia Code 65.2-402* instructs that "[h]ypertension or heart disease causing ... any health condition or impairment resulting in total or partial disability of ... (iv) sheriffs and deputy sheriffs ... shall be presumed to be occupational diseases, suffered in the line of duty, that are covered by this title unless such presumption is overcome by a preponderance of competent evidence to the contrary."

[2] The claimant testified to taking medication for diagnosed hypertension for more than 25 years.

Concerning this issue, the Deputy Commissioner held the following:

> Regarding the assertion that the claimant was not found free of hypertension and heart disease, we agree in part. The claimant was indeed found to have hypertension at her pre-employment physical. However, we do not have a claim for hypertension before us. We do not find in the pre-employment records that the claimant was found to have "heart disease. " Indeed, even Dr. Dubin, relied upon by the defendants, concluded the claimant "was first diagnosed with coronary artery disease in June 2015." In the pre-employment test, under clinical evaluation, the heart is described as normal. X-rays of the chest taken September 2, 2011 reflect a normal heart size with a description of the impression as "Normal." No further discussion of the heart is found. The next year, a September 7, 2012 x-ray report initially states "Cardiac and mediastinal structures are unchanged from September 2, 2011" but follows that statement with a semicolon and what appears to be an incomplete sentence that bleeds into the following sentence. This statement in its entirety reads: "cardiac and mediastinal structures are unchanged from September 2, **[*6]** 2011; atherosclerosis thoracic aorta There is no pneumothorax or pleural effusion." We have no explanation for why such atherosclerosis was not discussed on September 2, 2011 if seen then. The April 2, 2014 chest x-ray also noted calcification in the thoracic aorta and a heart size at the upper limits of normal. Given the lack of discussion of such in 2011, we cannot conclude she was not found free of heart disease. EKG tests were performed on September 2, 2011 and reflect normal sinus rhythm. The record does state "poor R wave progression" but we have no evidence explaining the significance of that finding, if any. Moreover, this is followed by a statement of "normal ECG." On October 30, 2013, Dr. Mills described the claimant as having a past surgical history of "coronary bypass saphenous vein graft." Dr. Edward Robinson is likewise seen to make that notation on August 25, 2014. Other records in our file, however, reflect she actually had a femoral to popliteal bypass surgery. See, e.g. June 17, 2015 Henrico Doctors' Hospital Admission Note. The June 17, 2015 Emergency Provider Report describes a "LLE bypass" which would appear to reflect left lower extremity bypass. Dr. Dubin **[*7]** described her as having a prior history of peripheral vascular disease and a left femoral artery bypass. We are not persuaded this constituted a finding of coronary artery disease or heart disease.

(Op. 9-10.). On review, we find no error.

Section ***65.2-402***(D) provides the following:

> The presumptions described in subsections A, B, and C shall **only** apply if persons entitled to invoke them have, if requested by the private employer, appointing authority or governing body employing them, undergone preemployment physical examinations that (i) were conducted prior to the making of any claims under this title that rely on such presumptions, (ii) were performed by physicians whose qualifications are as prescribed by the private employer, appointing authority or governing body employing such persons, (iii) included such appropriate laboratory and other diagnostic studies as the private employer, appointing authorities or governing bodies may have prescribed, and (iv) found such persons free of respiratory diseases, hypertension, cancer or heart disease at the time of such examinations.

Contrary to the defendant's argument, the Deputy Commissioner emphasized that the pre-screening **[*8]** did not show heart disease and such is the claim before the Commission. The Deputy Commissioner in fact agreed that the claimant had pre-existing hypertension. Again, however, the claim encompassed heart disease. We have thoroughly reviewed the claimant's 2011 and 2012 pre-employment physicals and diagnostic studies (including normal echocardiograms, i.e., Def.'s Ex. 1, Nos. 8 & 23). We similarly find no diagnosis of heart disease. Likewise, the claimant testified that she had not been diagnosed with any heart condition. [3] We acknowledge that the records clearly indicated potential risks for the development of cardiac problems in the future -- such as hypertension, diabetes and high cholesterol -- but such is not controlling for this consideration.

**[*9]**

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[3] The Deputy Commissioner found the claimant's testimony to be less than credible, pinpointing conflicting statements regarding her smoking of cigarettes and her describing her health condition as good. Regardless, this determination did not bar the claim based upon "the medical nature of the issue at hand and the operation of the presumption statute, leads us to find this credibility determination is not determinative of the outcome of this workers' compensation claim." (Op. 6-7.) (footnote omitted.)

Lastly, the defendant asserts that any applicability of the presumption was rebutted. The defendant maintains that a preponderance of the evidence showed that the claimant's heart disease/ hypertension was not caused by her employment through the opinions of Dr. Phillips, Dr. Mills, Dr. Dubin, and Dr. Slagel. The defendant argues that it was not required to show, by a preponderance of the evidence, that work was not a cause of the claimant's heart disease.

The Deputy Commissioner found that the defendant failed to refute the presumption and discussed her holding as follows:

> The evidence in this case more than preponderates to show a non-work-related cause for the claimant's heart disease. Dr. Mills, the claimant's primary care physician acknowledged the claimant had risk factors for her heart attack of high blood pressure, high cholesterol, diabetes, history of smoking, and positive family for heart disease. Likewise, as early as the time of the cardiac catheterization (June 17, 2015), Dr. Philips had noted the claimant had "multiple health risks including hypertension, hyperlipidemia, diabetes and cigarette smoking as well as known peripheral arterial disease. " However, identifying **[*10]** risk factors as possible causes of an employee's heart disease is insufficient to rebut the presumption, i.e., that the disease resulted from non-work-related causes. The employer must present a definitive medical opinion that the heart disease was most likely caused by these risk factors. *City of Norfolk v. Lillard, 15 Va. App. 424, 424 S.E.2d 243 (1992);* and *Virginia Dep't of State Police v. Talbert, 1 Va. App. 250, 337 S.E.2d 307 (1985).* See also *Portsmouth Sheriff's Department v. Clark, 30 Va. App. 545, 518 S.E.2d 342 (1999).* These are not the only opinion[s] in issue, however. Dr. Slagel, who performed the claimant's pre-employment physical, responded to a questionnaire and opined the claimant's "heart disease is causally related to the non-work related factors referenced above in Question No. 5 [i.e. family history, hypertension, elevated cholesterol, and diabetes] ." In addition to this opinion, we have the records review opinion of Dr. Dubin. He explained that the claimant's "coronary artery disease was caused by her multiple cardiac **[*11]** risk factors (hypertension, high cholesterol, diabetes, history of tobacco abuse in the past)". We rely on the opinions of Drs. Slagel and Dubin to conclude the employer has established by a preponderance of the evidence that there was a non-work-related cause for the claimant's heart disease.
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> To refute the presumption, however, the employer must also prove the work was not a cause of the claimant's heart disease. In this regard, the only affirmative statement on point is found in the opinion of Dr. Dubin. Dr. Dubin, after making the above-quoted statement regarding the claimant's coronary artery disease being caused by her multiple cardiac risk factors, goes on to briefly mention whether the work was not a cause of her coronary artery disease. The sentence, in its entirety, reads: "In my opinion, her coronary artery disease was caused by her multiple cardiac risk factors (hypertension, high cholesterol, diabetes, history of tobacco abuse in the past) and not caused by her work as a deputy sheriff. " After careful consideration, we find this statement as to the second prong of the test is insufficient to rebut the presumption. It is a mere conclusory opinion without explanation as to **[*12]** why the claimant's work was not a cause. Beyond reference to her job as a deputy sheriff/ sheriff's deputy/ Correctional Deputy Sheriff and the length of her tenure in that job, there is no discussion of her job. Moreover, while he states his intent to give an opinion as to whether her hypertension and heart disease were caused by her employment, there is no discussion of how he came to determine the work was not a cause. We have no information as to whether he reached this conclusion merely by identifying a non-work-related cause or if the work was found to be not the cause for separate reason or reasons. The Commission has previously opined that "a physician should provide an explanation for his conclusions."
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> . . . .
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> We certainly acknowledge that Dr. Dubin began his report by stating he had been asked to opine "whether her hypertension and heart disease were caused by her employment as a sheriff's deputy. " However, we have no analysis as to why the work was found to not be a cause, beyond juxtaposing the work against the "multiple cardiac risk factors" as the cause. As the Court of Appeals explained in [*Metropolitan Washington Airports Authority v.] Lusby, [41 Va. App. 300, 314, 585 S.E.2d 318, 324 (2003)],* **[*13]** proof of the first prong does not

satisfy the second prong. Under these circumstances, we conclude the presumption has not been refuted. Accordingly, we will award medical benefits for the claimant's heart disease and myocardial infarction.

Based on the claimant's testimony that she knew her condition related to her work when she received the packet of materials from her employer, we find the date of communication in this matter should be June 25, 2015, given description as to when this event occurred.

(Op. 11-14.) (footnotes omitted.)

At the hearing, the claimant testified that Dr. Mills advised that her condition was caused by her work. She explained: "Dr. Mills indicated that I was under stress . . . and I indicated to him that because of carrying a gun and working in the jail for over four years, the stress had built up and he said, 'Well, that's how I actually wind up having a heart attack. '" (Tr. 4.) The claimant said that Dr. Mills knew about her job as a deputy sheriff. She attributed her heart attack to her employment stress and discussed the "very stressful" situations posed by her employment. (Tr. 17-19.) The claimant denied suffering stress from other exterior sources. **[*14]**

The pertinent medical record reflects that Dr. John Mills, osteopath, oversaw the claimant's general health complaints. By at least April 21, 2014, he diagnosed the claimant as suffering asthma, hypertension, and uncontrolled Type II diabetes. These diagnoses, plus hyperlipidemia, were maintained after evaluation in March 2015.

The claimant's hospitalization records from June 2015 noted health risks of hypertension, hyperlipidemia, diabetes, cigarette smoking, and peripheral arterial disease. Dr. Charles Phillips, cardiologist, oversaw her cardiac catheterization. Dr. Phillips testified by deposition taken on October 7, 2016. He understood that the claimant worked as a deputy at a jail. He had "no knowledge of the details of her job." (Dep. 10.) Dr. Phillips understood that the claimant suffered pre-existing factors that may have caused or contributed to the need for cardiac catheterization such as diabetes, smoking, high blood pressure, hyperlipidemia, history of a previous stroke, and left leg bypass surgery.

Dr. Dale Slagel, internist, responded to the defendant's questionnaire on September 13, 2017. Dr. Slagel agreed that the claimant's heart disease was causally related to her **[*15]** non-work-related factors of "family history, hypertension, elevated cholesterol, and diabetes. "

Dr. Mills responded to the defendant's questionnaire in October 2016. He agreed that risk factors for the claimant's heart attack in June 2015 were "high blood pressure, high cholesterol, diabetes, history of smoking, and positive family history for heart disease. "

In September 2017, Dr. Jonathan Dubin, cardiologist, performed an independent record review of the claimant's condition. Dr. Dubin concluded the following:

> With regard to her history of coronary artery disease, Ms. Cobb has multiple cardiac risk factors that include hypertension, high cholesterol, diabetes, and history of tobacco abuse. These conditions are well established causes of coronary artery disease and heart attacks and are clearly unrelated to her work as a deputy sheriff. She was first diagnosed with coronary artery disease in June 2015. On June 17, 2015 she had new onset chest pain. She was diagnosed with atrial fibrillation and non-ST elevation myocardial infarction. She underwent angioplasty/stent placement of the right coronary and left circumflex arteries. She did well after this procedure. In my opinion, **[*16]** her coronary artery disease was caused by her multiple cardiac risk factors (hypertension, high cholesterol, diabetes, history of tobacco abuse in the past) and not caused by her work as a deputy sheriff.

(Def.'s Ex. 1, No. 40.)

As stated above, the Virginia Workers' Compensation Act provides for a presumption of compensability "unless such presumption is overcome by a preponderance of competent evidence to the contrary." We find no error in the lower application of this legal principle. We recognize that several physicians (Dr. Phillips, Dr. Mills, and Dr. Slagel) agreed that the claimant's numerous non-work-related risk factors causally related to her heart attack. This agreement is not the equivalent of opining that the claimant's employment was not a causative factor as well.

Finally, as discussed by the Deputy Commissioner, Dr. Dubin was the only physician to deny that the claimant's employment caused her coronary artery disease. However, we are simply not persuaded by this unexplained, summary assessment.

B. Claimant's Request for Review

Within the claimant's request for review, she asserts that wage loss benefits should commence effective June 17, 2015 (and we also presume **[*17]** that she disagreed with the denial of wage loss benefits beyond September 13, 2015). Regarding the claimant's award of wage loss benefits, the Deputy Commissioner discussed the following:

> The claimant was admitted to the hospital at 5:00 a.m. on June 17, 2015, according to the hospital Admission Note. She was discharged from the hospital on June 19, 2015. As outlined supra, she was disabled through June 29, 2015. However, on June 25, 2015, a nurse practitioner in Dr. Phillips' office completed a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) form prior to the end of that time. As to whether the employee was "unable to perform any of his/her job functions due to the condition", the provider responded by checking next to "No." Additionally, it was noted she was not incapacitated for a single continuous period of time due to her medical condition, including any time for treatment and recovery. On this basis, we find the claimant was disabled from June 17, 2015 to June 24, 2015. However, this was prior to the determined date of communication, which is treated as the happening of an injury by accident under the Act. Therefore, **[*18]** we cannot award benefits for this period. *Va. Code § 65.2-403(A)*.
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> The claimant testified that she only worked for a couple of days after her heart attack, believing these to be around July 1, 2015, stating she had to return to the hospital around July 2 or 3, 2015. The hospital visit for pleurisy was on July 6, 2015. We will, therefore conclude she worked July 1, 2015 to July 6, 2015. The claimant put on no evidence of her wages for this period and we decline to presume there was a wage loss. We have no evidence of a longer period worked and will accept this assertion. From review of the hospital records, we conclude this disability related to the claimed "heart disease (attack)".
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> An undated record from Dr. Mills found within Claimant's Exhibit 1 reflects "The above patient has had significant medical issues recently. It is anticipated she will be out of work from July 1 until at least another 4-6 weeks or possibly longer depending on the status of her medical problems." Claimant testified to having returned to work during this period, however. Inasmuch as this note is not dated, it is not clear whether this was a retroactive finding of disability. **[*19]** The note fails to state whether the disabling conditions included her heart disease. Additionally, it appears Dr. Mills may not have had a complete or accurate medical history given that he found her disabled during a period to which she testified to having worked. For these reasons, we do not accept this assessment of disability.
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> A July 6, 2015 record from Charles P. Shields, M.D. at Henrico Doctors' Hospital indicated the claimant was seen that day and excused from work through July 8, 2015. Other records for this date reflect treatment for pleurisy. The records do not relate this to the work or her heart condition. We acknowledge there are hand-written notes in the materials identified as being "from the carrier" filed by the defendants on May 31, 2016 that reflect the claimant had been seen after her hospital stay for pleurisy and told the pleurisy was due to surgery, presumably the cardiac catheterization. We do not have any other records from this date, however, and it is not clear whether these unsigned notes were from a doctor or other person qualified to render a medical opinion. We do not accept this as sufficient evidence to establish causally related disability. To the **[*20]** contrary, it appears this was merely documentation of a history given by the claimant and not a medical conclusion.
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> A note from a doctor at Commonwealth Primary Care, Inc. Commonwealth Extended Care Division addressed "To Whom It May Concern" provides that the claimant had been under the doctor's care "on 7/13/2015. Please excuse him/her from work/school related to illnes[sic]/injury for the following dates 7/13/15 to 7/20/2015." The nature of the illness/injury is not specified in this note. However, we have a July 13, 2015 office note from Dr. Campbell of Commonwealth Primary Care, Inc. Dr. Campbell noted the reasons for appointment as "1. Heart attack [J]une 17/stints[sic]/pl[eu]risy now 2. Note, started June 17." Assessments were chest pain and cough.

Relative to the former, he ordered tramadol and doxycycline hyclate, as well as an electrocardiogram. Having performed the latter, he noted she did not "seem to be experiencing any cardiac-like pain. The patient is having musculoskeletal chest wall pain, probably due to persistent cough. She is experiencing some cough and congestion so I'll start her on antibiotics in case she is developing bronchitis or a respiratory infection. **[*21]** Tramadol as needed for chest wall pain. " She was to follow-up with her primary care physician if not improving. We do not find this period of disability relates to her heart condition.

The claimant saw Dr. Mills on July 23, 2015. He noted she had tried to go back to work and found herself feeling more cold than in the past, "since the weight loss." She was noted to have lost 20 pounds. She had since gone back out of work, reporting to Dr. Mills that she was "unable to work in the computer center where the environment is kept cool." Dr. Mills noted she worked in the sheriff's department and carried a gun and, not uncommonly, had to break up a fight between inmates. She was not sure she wanted to continue in this work given her current medical issues. Dr. Mills identified five assessments, diabetes mellitus, type II, uncontrolled, coronary artery disease, hypertension, paroxysmal atrial fibrillation, and a history of myocardial infarction. In regard to treatment, for her assessment of uncontrolled diabetes, he indicated she would obtain FMLA paperwork and plan for four to six weeks. For the other assessments, he provided material regarding a healthy lifestyle. Thus, as of this time, **[*22]** it does not appear he was disabling her secondary to her heart condition. When he completed the form on August 11, 2015, however, Dr. Mills identified barriers to working as including her recent heart attack, among other issues. He noted "too much stress to carry a gun." He indicated an anticipated return to work date in four to six weeks. Current diagnoses were myocardial infarction and poorly controlled diabetes. He indicated she could not return to work with restrictions at that time. Under the two causes rule, we will find total disability beginning August 11, 2015.

An August 28, 2015 Certificate to Return to Work reflects the claimant and been under Dr. Mills' care from August 12, 2015 to September 4, 2015 and would be able to return to work on September 5, 2015. There would be no restrictions thereafter.

A September 4, 2015 Certificate to Return to Work note from Dr. Mills indicated the claimant had been under his care and would be able to return to work on September 14, 2015. He does not indicate what condition(s) caused this disability. His progress note for this visit, however, reflects she was seen in routine follow-up. He described a history of poorly controlled diabetes. **[*23]** Assessments included diabetes, hypertension, and coronary artery disease. Aside from inclusion of coronary artery disease within the assessments, there is no discussion of the condition within the visit note. We will accept this as an extension of the period of disability.

Dr. Phillips saw the claimant again on January 11, 2016. He noted problems to include cigarette abuse. He did not comment on disability, but noted she had "retired", having found her work as a deputy too stressful. We will not award disability for any periods not substantiated by the medical evidence.

The claimant returned to Dr. Mills on February 5, 2016 for lab follow-up and a gout flare-up. He stated in the progress note that she was continuing with cardiology regarding her heart disease. She was having significant pain related to an acute gout attack. He stated she needed a knee replacement. Dr. Mills stated the claimant was in the process of applying for work disability and would need paperwork completed. He stated intent to fill out the paperwork including copies of cardiology and orthopedic evaluations, as she was applying based on her diabetes, orthopedic problems, and heart disease.

A Virginia Retirement **[*24]** System Physician's Report completed by Dr. Mills on February 8, 2016 lists physical functional limitations preventing performing her "usual work duties" of an inability to walk flights of steps, a need to lift at least 70 pounds, and a need to avoid stress. Causative or contributory diagnoses included myocardial infarction, COPD, renal insufficiency, and poorly controlled diabetes. He found the claimant unable to work as of June 17, 2015, without addressing her actual return to work after that date. He stated she was permanently disabled from performing her usual work duties. Under the two causes rule, we find this sufficient to establish disability. However, we do not accept the retroactive nature of the statement for periods not proven by contemporaneous evidence. Moreover, given the focus of this report on her ability to perform her "usual work duties", we are not persuaded this reflects total disability. Under the law regarding a duty to market during periods of partial incapacity, we must conclude the claimant is not entitled to compensation beginning February 8, 2016. The claimant acknowledged she had not looked for work outside of

seeking to return to work for her pre-injury **[*25]** employer. Thus, we cannot award benefits for periods of partial incapacity.

A March 10, 2016 report from Dr. Mills reflects follow-up care. There is no discussion of disability.

(Op. 15-19.) (footnote omitted.) We find no error in the lower decision, and the claimant presented no arguments on appeal persuading us otherwise. We summarily adopt and incorporate by reference the Deputy Commissioner's explanation for the awarding of benefits from August 11, 2015 through September 13, 2015. [4]

**[*26]**

**III. Conclusion**

The Deputy Commissioner's January 26, 2018 Amended Opinion is AFFIRMED.

Interest is payable on the Award pursuant to *Virginia Code § 65.2-707*.

This matter is hereby removed from the Review docket.

**APPEAL**

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.

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End of Document

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[4] We note that we carefully reviewed the presented medical record, particularly claimant's Exhibit 1 which contained various documents regarding her employment capability. This evidence fully substantiated the finding that the claimant was released to return to work on September 5, 2015 and then no contemporaneous medical record disabled the claimant from employment based upon her compensable heart disease. At most, a physician advised in February 2016 that the claimant had modified work duties. However, the claimant testified to only seeking to return to work for the employer. Without marketing her residual work capacity, the claimant failed to prove entitlement to temporary total disability benefits while partially disabled.