VIRGINIA WORKERS' COMPENSATION
AMERICAN INN OF COURT

June 23, 2021

Recent Decisions of Interest

Presented by:[1] **Wesley G. Marshall, Commissioner**
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Virginia Workers' Compensation Commission[2]

Supreme Court of Virginia

Structural or mechanical change

- *Alexandria City Pub. Schs. v. Handel*, No. 190957 (Sup. Ct. Va. Oct. 15, 2020).

Reverse and remand by the Supreme Court. The Court held that the Court of Appeals of Virginia erred by ruling that "a claimant does not need to prove a structural or mechanical change in every body part affected by an obvious accident as long as there is at least one sudden mechanical or structural change and each injury is caused by the accident." The Court explained: "The 'structural or mechanical change' *is* the injury, when it 'produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.' *Snead* [*v. Harbaugh*, 241 Va. 524, 528 (1991)] (internal quotation marks omitted). Thus, without such a change in a body part, there is no injury to it." (Emphasis in original.)

Background:

The parties agreed that the claimant suffered a compensable injury by accident to her right hip, neck, back, right ankle, and right knee, but disputed claims for her right shoulder. The defendants maintained that there was no structural or mechanical change to the shoulder, and the pain complaints were not caused by the structural or mechanical changes elsewhere in her body. In *Alexandria City Public Schools v. Handel*, 70 Va. App. 349, 352 (2019), the Court of Appeals affirmed "the Commission because claimant must only prove her accident caused one sudden mechanical or structural change to her body to collect compensation for any injury caused by that accident. Proof of a 'sudden mechanical or structural change in the body' is required only to

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

[2] The information contained in this case summary was compiled and prepared by Staff Attorney Dana Dallas and edited by Executive Judicial Assistant Nancy Truman.

establish that a claimant suffered an 'injury by *accident.*'" (Emphasis in original.) The Court of Appeals elaborated:

> A single "sudden mechanical or structural change" anywhere in the body suffices to establish that a claimant has suffered an "injury by accident." Once an injury by accident is established, any injury causally connected to the accident—even if not connected to the sudden mechanical or structural change—is compensable. In other words, a claimant does not need to prove a structural or mechanical change in every body part affected by an obvious accident as long as there is at least one sudden mechanical or structural change and each injury is caused by the accident.
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> The requirement that a claimant prove she suffered a "*sudden* mechanical or structural change" exists only to establish that the injury is accidental and not the result of a gradual change over time. The Supreme Court and this Court have only applied the "sudden mechanical or structural change" requirement in three general circumstances. In each circumstance, the courts ultimately use it only to establish that the claimant's injuries are accidental. It is not used to establish that the injuries are "injuries" within the meaning of Workers' Compensation statute.
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> First, a claimant suffers an "injury by accident" when she suffers a "sudden mechanical or structural change" in the body, even if the claimant's injury is caused by the usual exertions of her job—even when there is no "accident" within the ordinary sense of that word.
>
> Second, a claimant has not suffered an "injury by accident" when the injury is gradually occurring. Suffering a "mechanical or structural change to the body" is insufficient. Rather it must be a "sudden mechanical or structural change."
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> Third, a claimant may prove a purely psychological injury to be an "injury by accident" without proving she suffered a "sudden mechanical or structural change" to her body. Rather, she can prove she suffered an "injury by accident" by demonstrating an "obvious *sudden* shock or fright" caused her purely psychological injury, such as post-traumatic stress disorder. The claimant may still prove the purely psychological injury is an injury by accident by showing a "sudden mechanical or structural change" to the body, but is only required to when she cannot prove her psychological injury was caused by an "obvious sudden shock or fright."

> These three uses of the test demonstrate that the purpose of proving the "sudden mechanical or structural change" is to establish the injuries are accidental.

Id. at 355-57. (Emphasis in original.)

On appeal, the Supreme Court upheld the defendant's argument that the Court of Appeals erred on the ground that the "sudden mechanical or structural change" also defined the "injury" part of the "injury by accident" to qualify for an award of compensation. The Supreme Court noted the introduction of the phrase "obvious sudden mechanical or structural change in the body" into case law in *Virginia Electric & Power Co. v. Quann*, 197 Va. 9, 12 (1955), and its conclusion that the phrase "'injury by accident'. . . did not require an extraordinary or abnormal activity by the employee, only that the injury was sustained suddenly and at a time that can be pinpointed with reasonable certainty. *Id*. at 12-14." The Supreme Court continued that in *Olsten of Richmond v. Leftwich*, 230 Va. 317, 319 (1985), it restated its definition of an injury in *Quann*, and that in *Snead*, "we said that "[a] condition causing disability or pain will not be considered an 'injury' for purposes of the [Workers' Compensation] Act unless accompanied by a 'sudden obvious mechanical or structural change' in the body." 241 Va. at 258 (quoting *Va. Elec. & Power Co. v. Cogbill*, 223 Va. 354, 356 (1982))."

Court of Appeals of Virginia

Arising out of

- *Reynolds v. Falletta Enters., Inc.*, No. 0796-20-3 (Va. Ct. App. Jan. 26, 2021).

The claimant, a plumber, alleged he injured his left knee on August 1, 2019, when he "[s]tepped out of the rear door of [a] work van" while working for the employer. He explained that he "g[o]t in the van through the back door," collected the necessary "stuff," and returned to "the back." He "set down [his] tray" but "still [had] stuff in [his] hand." He then "stepped out of the van" onto the customer's driveway. The claimant felt a "twinge" in his left knee but had no "immediate[]" pain and concluded that he was "all right." He agreed that "the way [he] stepped out [of the truck] on August 1" was "the way [he] normally step[ped] out of the truck" and was an activity in which he engaged repeatedly "throughout the work day." The Deputy Commissioner and the Commission found that there was no work-related risk or significant work-related exertion that caused the injury; hence, the injury did not arise out of the employment. The Court agreed:

> simply because unusual steps or particular job duties *can* constitute a risk of employment does not mean that all steps or all job duties do so *as a matter of law*. As this Court has previously noted, in evaluating whether a claim arose "out of" the employment, "to a certain extent each case must stand alone" because "[t]he facts in no two cases are identical." *Haley*[*v. Springs Global U.S., Inc.*, 54 Va. App. 603, 614 (2009] (quoting *Richmond Mem. Hosp. v. Crane*, 222 Va. 283, 286 (1981). . . .The injury unquestionably arose *in the course of* the claimant's employment, but the facts in the record surrounding how he exited the van and what work-related factors might have contributed to his injury are virtually nonexistent.

(Emphasis in original.) The Court noted that the Commission did not err in refusing to draw speculative inferences from the evidence to conclude that the injury arose out of the employment.

Assault

- *King v. DTH Contract Serv., Inc.*, No. 1401-19-4 (Va. Ct. App. June 30, 2020).

The claimant worked as an attendant at the Interstate 66 westbound rest area during a night shift. His duties were to keep the rest area clean, respond to inquiries from visitors, and complete maintenance tasks. When not performing these duties, he remained in a locked office. On July 13, 2016, the claimant was returning to the office when he was attacked and stabbed multiple times. The assailant committed suicide and was later identified as a former co-worker who had resigned in March 2015. In a June 19, 2018 Opinion, the Commission found that the claimant failed to prove the assault arose out of the employment. The claimant appealed. The Court of Appeals

remanded the case for consideration of whether the claimant established the arising out of test of compensability by proof that his employment increased his risk of being the victim of an assault. On remand, the Commission held that the evidence failed to preponderate that either the nature of the claimant's job or the location where he worked augmented the risk of assault. *King v. DTH Contract Serv., Inc.*, JCN VA00001225281 (Aug. 8, 2019). The Commission declined to conclude that the greater an employer's attention to safety, the greater the corresponding level of risk: "prudent safety precautions, standing alone, [do not] allow for the conclusion that the claimant's work environment exposed him to a greater risk of violent crime." (Op. 3.) The Commission did consider evidence relevant to the danger posed to him by the work environment. However, the Commission could not "conclude that the claimant's work at the Interstate 66 rest area exposed him to a greater risk of assault than that to which the general public was exposed." (Op. 6.) The "peculiar character" of the claimant's work did not create a risk of employment: the assailant did not steal anything from either the claimant or the workplace after the assault, and the claimant was not required to handle or carry money as part of his employment. (*Id.*) The Commission summarized the denial, "With disturbing clarity, we know how the claimant was injured. What we do not know is why. Proof of injury is insufficient unless it is causally related to a specific risk inherent to the claimant's work." (Op. 6-7). (Marshall concurred.)

The claimant appealed. The Court found no grounds to overturn: "the evidence did not establish that claimant's injury arose out of his employment as a rest area attendant because he was not exposed to a peculiar risk based on his employment or to a risk which the general public also was not exposed."

Average weekly wage

- *Johnston v. Echl Pers. Mgmt. of NJ*, No. 0327-20-4 (Va. Ct. App. Oct. 6. 2020).[3]

The claimant, a hockey player, argued that the Commission should have divided his salary by the number of weeks in the hockey season, rather than using a 52-week divisor, to calculate his average weekly wage. The Court affirmed the Commission's determination that the salary should be divided by 52 weeks as using the number of weeks he worked was not an accurate approximation of the amount he would be earning if he had not been injured:

> During the hockey season, which ran from October until April, Johnston testified that he earned $20,075.26. He did not seek or obtain other work during the off-season before his injury, as evidenced by his work history. Therefore, during a 52-week period, he would have expected to make $20,075.26 since his seasonal employment was his only anticipated income. . . . Since a calculation of average weekly wage that used the number of weeks Johnston worked would be unjust to

[3] On October 29, 2020, the claimant filed an appeal with the Supreme Court of Virginia.

> his employer, the Commission properly construed Code § 65.2-101(1)(b) and did not err in using a 52-week divisor.

The Court also held that the Commission properly did not include allowances in the average weekly wage calculation as the claimant provided no evidence to "address whether he received the per diem regardless of his actual expenses and that he was not required to account for his expense." The Court explained:

> Under Code § 65.2-101, "[w]henever allowances of any character made to an employee *in lieu of wages* are a specified part of the wage contract, they shall be deemed a part of his earnings." Code § 65.2-101(2) (emphasis added). In other words, allowances are included in the determination of average weekly wage "if the allowance meets two conditions: first, the allowance must be specifically provided for in the contract of employment, and, second, the allowance must be of such character as to indicate that it is paid 'in lieu of wages.'" *Bosworth* [*v. 7-Up Distrib. Co.*, 4 Va. App. 161, 163 (1987)]. To be considered "in lieu of wages," an allowance must constitute "an economic gain" to the employee rather than be a reimbursement for expenditures made pursuant to his employment. *Id.* at 163-64.
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> In this case, Johnston testified that he received housing, medical coverage, a gym membership, equipment, a forty-two dollar per diem, and coverage of his travel expenses. However, Johnston did not present any evidence on the issue of whether these allowances were provided in lieu of wages.

Compensable consequence

- *Masonite Corp. v. Dean*, No. 0516-20-2 (Va. Ct. App. Nov. 10. 2020).

The Court affirmed the Commission's finding that the claimant's back and neck injuries were compensable consequences of the compensable injury by accident occurring on December 21, 2017 in which the claimant injured her left shoulder, arm, and wrist. The claimant testified to developing back and neck pain in February 2018 while performing home exercises provided by her physical therapist. The claimant also acknowledged that immediately following the compensable accident, she had suffered discomfort in her back and neck. She stated that these symptoms were merely sore muscles as opposed to the qualitatively different pain that began in February 2018. On appeal, the defendants relied upon *Massie v. Firmstone*, 134 Va. 450 (1922), to argue that the claimant's own testimony established that the back and neck injuries transpired during the original accident. The Court disagreed:

> the record supports the Commission's finding that any discrepancies in the claimant's testimony did not result from bad faith and merely reflected her effort, as a layperson without medical training, to describe what she experienced during

> and after the 2017 accident and 2018 physical therapy exercises for her original injuries. The Commission, on the record before it, was not compelled to find that she injured her back and neck in the original accident simply because the claimant had sore muscles in those areas in the immediate aftermath of her fall. *See Va. Elec. & Power Co. v. Mabin*, 203 Va. 490, 494 (1962) (interpreting *Massie* to hold that a "damaging statement made in one part of [a litigant's] testimony must be considered in the light of an explanation of such statement made in a[nother] part" and that the fact finder generally "determine[s] whether it will accept such explanation" in light of "all the other evidence"). (Footnote omitted.)

- *Aqua Leisure Pools, Spas & Patios, Inc., v. Greene*, No. 0620-20-2 (Va. Ct. App. Nov. 4, 2020).

The claimant was attacked by a customer's dog in August 2017. The claimant said that he suffered dog bites to his left wrist, left ankle, and left thigh. At the hearing, the claimant also testified to falling off a brick wall, onto his hip, in the process of escaping the dog. In October 2017, the claimant developed groin pain. An Award was entered for the dog bites in November 2017. In July 2018, the claimant received additional medical treatment for his hip symptoms. Dr. Jacobson diagnosed avascular necrosis of the left femoral head. Dr. Jacobson opined that the avascular necrosis was caused by the hard impact injury after falling off the brick wall. The claimant underwent a hip replacement, and the claimant's incision site developed MRSA with the same antibiotic profile as the MRSA developed from the dog bite to his ankle. In May 2019, the claimant sought to amend his claim to include an injury to the left hip.

The defendants maintained that the claimant did not describe the fall off the brick wall in his September 2017 recorded statement. The Commission credited the claimant's testimony that he did not know that the fall caused his thigh injury until after a medical consultation and signing an award agreement. He also explained not knowing to provide such detail within his recorded statement. The Court held that the Commission did not err in resolving the potential inconsistencies, reviewing all the evidence, and finding compensability. Regarding the claimant's left hip injury and necrosis, the Court declined to override the Commission's reliance upon the opinion of the treating physician as to causation, as "[w]e grant great deference to the Commission's factual findings with respect to medical questions." The Court agreed that the claimant's MRSA infection that developed after surgery was either a compensable consequence of the dog bite or a compensable consequence of the surgery, which was treatment for the injury caused by the fall.

Injury by accident

- *Sibai v. Sterling Jewelers*, No. 0678-20-4 (Va. Ct. App. Dec. 29, 2020).[4]

The Court upheld the Commission's finding that the claimant failed to prove a compensable injury by accident to his left ear, nose, face, or neck and the denial of benefits for seizures as not causally related to his compensable occupational accident.

The claimant alleged that a panel of a display case struck the left side of his head, and that once at home, he suffered a seizure. He said that after the incident his co-workers told him that his nose and ear had been bleeding. The Court agreed that for the physical injuries, the claimant testified to suffering such, but there was no medical evidence of any injuries. For the seizures, the Court emphasized the medical record contained no diagnostic evidence or unequivocal medical opinion on causation, regardless of the claimant's testimony. The Court held that the denial of temporary total disability benefits was appropriate as well as the disability correlated to a fall that was alleged to be a compensable consequence of the seizures which were found not compensable.

- *Newman Knight Frank v. The Estate of Bruce A. Williams*, No. 0600-20-2 (Va. Ct. App. Nov. 4, 2020).

The Court held that the Commission did not err in finding that the decedent's death occurred while he was either working or resting before his next shift when he succumbed to carbon monoxide poisoning and either scenario is compensable. The Court noted that the injury occurred during his period of employment as the employer expected him to be available to work whenever necessary and reasonably where he was expected to be (he retreated to his vehicle prior to beginning his next shift). The injury arose out of the employment-caused exposure to risk:

> Decedent's work required him not only to work a full shift on December 20, but also to respond to two emergency maintenance problems. By the time decedent had finished his work with the malfunctioning fire alarm and left the office building, it was already 8:00 a.m. Decedent's next assigned shift started at 10:00 a.m., leaving him no time to return home. Assuming that he opted to continue working, it is not unreasonable nor unexpected that decedent chose to use his vehicle as a workspace. This is especially true given that the record makes no mention of decedent having an office or dedicated workspace within the building.

The Court found that moreover, if the claimant was just resting, the personal comfort doctrine would apply: "his employment afforded him no time to return home and no temporary lodgings. Therefore, his employment required him to find an alternative place to rest."

[4] On January 28, 2021, the claimant filed an appeal with the Supreme Court of Virginia.

- *Farrish of Fairfax v. Faszcza*, No. 2029-19-2 (Va. Ct. App. June 16, 2020).

The Court affirmed the Commission's findings that the claimant sustained a compensable injury by accident and awarding of benefits for a right foot injury, MRSA, chronic infections, and inflammatory bowel disease.

The claimant worked as a service manager in an auto dealership. During the mornings he interacted with customers seeking maintenance services, and afternoons he interacted with technicians in the service bays. The claimant testified that debris, such as clips, fasteners, and pieces of material, littered the floor. On the day of the accident, the claimant completed his shift, drove directly home, and when he removed his shoe, noticed blood spurting from a puncture wound on the bottom of his foot. Due to diabetic neuropathy, the claimant had no sensation in his feet and had not realized his foot had been punctured. After receiving care, the claimant found a spike sticking up in his shoe. He identified the spike as a plastic automotive fastener that he only encountered in the service bays.

The Court agreed that the claimant established a compensable injury by accident. The Court agreed that the claimant proved an identifiable incident and obvious sudden change:

> Just as the claimant in [*R&R Constr. Corp. v. Hill*, 25 Va. App. 376 (1997)] could not identify which heavy bucket he was moving when his discs herniated, this claimant could not identify the visit in which he stepped on a used fastener due to his neuropathy. As we observed in *Hill*, this inability to identify the moment the injury occurred does not preclude a finding that an identifiable incident occurred. We find that an identifiable incident occurred when claimant stepped on a used fastener in the service bays on August 30, 2016. Stepping on the used fastener caused it to penetrate claimant's shoe and the bottom of his foot, which resulted in a puncture wound to his foot. This caused an obvious and "sudden mechanical or structural change in [claimant's] body" because the puncture wound changed the anatomy of claimant's foot.

The Court agreed that the claimant proved an injury within a "reasonably definite time" despite that he could not feel the puncture and he visited the service bays several times on the day of injury:

> The injury report, which employer completed, stated that claimant's injury occurred at 4:00 p.m. on August 30, 2016. Claimant's testimony corroborates employer's report. Claimant testified that he was in employer's service bays that day at 4:00 p.m., and he testified that the only place he could have encountered used fasteners on the floor was in employer's service bays. The Commission found his testimony credible. Requiring claimant to provide the precise time the used fastener

> punctured his foot would fault him for having neuropathy and "yield a ridiculous and unjust result." *See Van Buren*[*v. Augusta Cnty.*, 66 Va. App. 441, 455-56].

Lastly, the Court agreed that the claimant proved a causal connection between the incident and the bodily change. The claimant testified to visiting the bays, and the fastener located in his shoe was consistent with the puncture wound.

Marketing

- *Loudoun Cnty. Pub Schs. v. Hernandez*, No. 0870-20-4 (Va. Ct. App. Jan. 12, 2021).

The Court affirmed the Commission's finding that the claimant adequately marketed her residual work capacity. The Court noted that although the claimant did not register with the Virginia Employment Commission and did not utilize the newspaper or internet, "there is no statutory requirement that she do so in order to be eligible for workers' compensation benefits." The Court dismissed the defendant's argument that the Commission failed to apply its own guidelines regarding marketing. The Court advised that the guidelines are simply guidelines and "not a set of mandatory requirements that are dispositive in any claim" and a mandatory application plainly violates the instructions of *National Linen Service v. McGuinn*, 8 Va. App. 267 (1989).

- *Johnston v. Echl Pers. Mgmt. of NJ*, No. 0327-20-4 (Va. Ct. App. Oct. 6. 2020).[5]

The Court upheld that the Commission's determination that the claimant, a hockey player, had residual work capacity and failed to market such. The Court explained that the claimant participated in intensive training for rehabilitation purposes to the exclusion of pursuing other employment despite having the residual work capacity. The Court cited *Hamilton v. Pro-Football, Inc*., 69 Va. App. 718, 731 (2019), where the Commission found the failure to market unreasonable in part because rehabilitation was not shown to be "so time consuming that it prevented [the football player] from simultaneously seeking and working in other employment."

Medical treatment

- *Cumberland Hosp. v. Ross*, No. 0682-20-4 (Va. Ct. App. Dec. 8, 2020).

The Court discussed the factors provided by *Warren Trucking Co. v. Chandler*, 221 Va. 1108 (1981), to prove the defendants to be responsible for payment of in-home care provided by a claimant's spouse. In this case, the defendants maintained that the spouse did not meet prong 3 as he did not administer "the type [of care] usually rendered only by trained attendants, and that his care extended beyond the scope of normal household duties." The Court agreed with the Commission's awarding, noting that the claimant's physicians opined that she needed 24-hour,

[5] On October 29, 2020, the claimant filed an appeal with the Supreme Court of Virginia.

7 days a week home health care and confirmed that the spouse performed care normally provided by nurses/trained medical attendants. The Court agreed with the Commission's finding that the spouse (a registered nurse) was particularly equipped to handle the requisite home health care needs. The Court noted that *Chandler* did not interpret "other necessary medical care" as synonymous with "skilled medical care" as argued by the defendants. The Court discussed that the care went beyond the scope of normal household duties:

> It is not typical or normal for one spouse to be responsible for administering attentive, round-the-clock-care to the other. Providing twenty-four-hour care, three hundred and sixty-five days a year to someone who cannot be left alone for her own safety, is starkly different from driving one's spouse to doctors' appointments or occasionally aiding their mobility. Normal "household duties" do not require a spouse to quit his job to provide unremitting safety monitoring.

Ordinary disease of life

- *Gen. Elec. v. King,* No. 0683-20-4 (Va. Ct. App. Oct. 27, 2020).

The Court affirmed the Commission's awarding of benefits for hearing loss. The claimant's job involved cleaning, sanding, and grinding propeller blades. The claimant wore protective equipment to bring the loud noise level to within the standard mandated by OSHA. The claimant's annual hearing test showed gradual hearing loss. The Commission found credible the treating physician's testimony that the medical evidence established that the claimant's employment was the primary source of his hearing and tinnitus. The physician also explained why he did not believe that other possible causes were the source of the hearing loss. The Court concluded that the Commission's factual findings constituted clear and convincing evidence that the hearing loss was caused by the claimant's employment. The Court noted that "the fact that King wore hearing protection that brought the noise below the level established as acceptable by OSHA does *not* mean the noise over years of employment was not the source of King's hearing loss." (Emphasis in original.)

Permanent total disability benefits

- *Roane v. Washington Metro. Area Transit Auth.,* No. 0450-20-4 (Va. Ct. App. Oct. 27, 2020).

The Court upheld the Commission's finding that the claimant failed to prove that she suffered the permanent loss of use of two body parts as required by Virginia Code 65.2-503(C)(1). The Commission had found that "there is insufficient explanation to justify reliance on the ratings by Dr. Yu and Dr. Delisser for the claimant's lower extremities" and that "Dr. Yu's first specific diagnosis of right leg radiculopathy appears in his March 5, 2019 questionnaire response. The diagnosis and 25% right leg rating are inconsistent with his examination notes from the same day,

in which he noted the claimant had no residual radicular symptoms." The Court found that the Commission did not err by considering the medical evidence and the witness testimony in totality, despite that the Deputy Commissioner had found the claimant to be credible about her condition.

Probable cause

- *Penske Trucking Co. v. Lawson*, No. 0449-20-3 (Va. Ct. App. Oct. 27, 2020).

The Court found that the Commission properly affirmed a staff attorney's rejection of an Employer's Application for Hearing. The Court agreed that a lack of probable cause could be found even though the presented medical evidence was the treating physician's opinions because such were contradictory and ambiguous.

Procedure

- *Irby v. Lifepoint Health*, No. 0662-20-3 (Va. Ct. App. Nov. 17, 2020).[6]

The Commission entered an award agreement only signed by the employee. The Court held that the Commission had the power to correct its mistake and vacate the award even though the 30-day review period of Virginia Code § 65.2-705(A) had lapsed: "Code § 65.2-705(A) addresses requests for review by the Commission of a deputy commissioner's award, not applications to vacate due to fraud or mistake. An ordinary application for review of an award by the Commission is quite different from a request to vacate due to mistake or fraud." The Court also upheld the Commission not imposing the award as a sanction or equitable remedy. The Court emphasized that "Code § 65.2-701(B) provides that employers or carriers who fail to file a memorandum of a completed agreement with the Commission '*may* be subject to a fine not to exceed $1,000 and to *any* other appropriate sanctions of the Commission.'" (Emphasis in original.) The Court agreed that without "a properly executed and approved agreement, Code § 65.2-702(A) clearly grants the Commission the authority to decide the merits" of the claimant's claim on the defendants' request for review as "*either party was permitted to make an application to the Commission for a hearing*." (Emphasis in original.)

Return to pre-injury employment

- *Va. Beach City Pub. Sch. v. Norman*, No. 1103-20-1 (Va. Ct App. Mar. 2, 2021).

The Court affirmed the Commission's finding that the defendant failed to prove that the claimant, a math teacher, was capable of returning to her pre-injury employment. The claimant's optometrist approved a return to work but clarified the restrictions on screen time: "Max [two] hours of screen work per half day with a b[r]eak every [thirty] minutes of screen time." The claimant testified to

[6] On December 17, 2020, the claimant filed an appeal with the Supreme Court of Virginia.

her actual job duties and denied her ability to adequately perform her job without using screened devices in excess of the restrictions. The Court found no error in the Commission affording more value to the claimant's testimony regarding the actual job duties over the statements of the work capacity evaluator and the principal.

Sick and personal leave

- *N. Va. Cmty. Coll. v. Easwarachandran*, No. 0213-20-2 (Va. Ct. App. July 21, 2020).

The parties entered a stipulated award that claimant suffered a compensable injury and was entitled to an award from employer in the amount of $645.36 per week from August 18, 2016 through October 14, 2016, while she was disabled. Claimant had used sick and personal leave to cover this gap in pay. The employer credited the leave back to the claimant in 2017, yet the leave could only be used during the 2016 calendar year and not carried to the next. The Court held that "Because employer was ordered to pay claimant temporary total disability for the agreed disability period, any leave charged to claimant during that time should have been reinstated to her." The Court emphasized that the employer received a benefit since it did not pay compensation, and then the reinstatement of the expired leave "was the functional equivalent of giving the claimant a check drawn on a closed account." The Court found that the employer failed to comply with the stipulated award and must pay the dollar value of the leave as "the leave used during the period of disability is now useless to claimant."

Statute of limitations

- *Lazo v. Wholesome Energy*, LLC, No. 0586-20-3 (Va. Ct. App, Dec. 15, 2020).[7]

The Court affirmed the Commission's finding that the claimant's right shoulder claims were barred by the statute of limitations under Code § 65.2-601.

The claimant had accident on April 10, 2015. He timely filed two claims in July 2015 and April 2016 regarding his right shoulder and other injured body parts. He signed an award agreement in October 2016 for benefits for second-degree burns to his right upper extremity, trunk, and thigh. In a November 2, 2016 award order, the Commission awarded wage loss benefits and lifetime medical benefits for those particular injuries. Determining "that the parties have resolved the matters in controversy," the Commission canceled a scheduled hearing and ordered that "the pending claims be removed from the hearing docket." On November 21, 2018 the claimant filed a claim seeking additional and continued medical treatment of the right shoulder.

[7] On January 29, 2021, the claimant filed an appeal with the Supreme Court of Virginia.

The Court emphasized that the Commission's order:

> removed the pending claims – all of them – from the docket. [The claimant] could have refiled his claim for his right shoulder injury (or any other injury) from the April 10, 2015 accident at any time before the two-year statute of limitations had run. . . . While he did not expressly abandon his opportunity to litigate his right shoulder claim in the award agreement, the agreement did not reserve that claim in any way for future adjudication so as to toll the statute of limitations. More importantly, [the claimant] failed to file any further claim to pursue compensation for an injury to his right shoulder until well after the statute of limitations for this injury had expired.

Statutory employer

- *Divino v. Uninsured Emp'r's Fund*, No. 1990-19-1 (Va. Ct. App. July 14, 2020).

See for extensive discussion of where a party may be liable as a statutory employer pursuant to Virginia Code § 65.2-301(A)-(C). The Court affirmed the Commission's denial of benefits for the claimant's injury sustained while installing flooring. The Commission found that: (1) the claimant's alleged employer did not have regularly in service three employees to be subject to the Act and (2) the owner and property manager of the building were not statutory employers under the subcontracted-fraction test of Va. Code §65.2-301(B). Notably, the Court discussed the finding that MMPA (the owner of the building) was not the claimant's statutory employer. The Court emphasized that MMPA's lease agreement gave MMPA, as the owner of the property and the owner of the improvements being made to it, the right to decide which contractors would perform the work on its building. Accordingly, the contractors were independent contractors, not subcontractors, as they completed the work for MMPA. The Court discussed Code §65.2-301(B):

> The statute clearly provides that "any person" can be a statutory employer and then simply refers to that person as "contractor" for identification purposes in subsection B of the statute. Moreover, the Virginia Supreme Court has applied the subcontracted-fraction test to situations that involve more than the relationship between a general contractor and a subcontractor that is often seen in construction contracts. (citation omitted). . . . Furthermore, this Court has determined that simply being an "owner" does not necessarily relieve a party from being a statutory employer under Code § 65.2-302(B) and the subcontracted-fraction test.

Temporary total disability

- *Securitas Sec. Serv. USA, Inc. v. Gersch*, No. 0379-20-3 (Va. Ct. App. Oct. 13, 2020).

The evidence showed that the treating physician had continued to excuse the claimant from work at her last appointment on June 11, 2019. The claimant credibly testified that she understood that she was unable to work up and until the evidentiary hearing on August 5, 2019. At the hearing, the claimant learned that in response to a questionnaire, the doctor released her to "light duty sedentary type work" as of July 24, 2019. The claimant testified that this release had not been previously communicated to her. The Court affirmed the Commission's finding that the claimant was reasonably unaware that she had residual work capacity and that she was entitled to ongoing temporary total disability benefits.

Virginia Code § 65.2-605

- *Va. Hand Ctr. v. Adams Lumber Co., Inc.*, No. 0463-20-2 (Va. Ct. App. Nov. 4. 2020).

A surgeon at Virginia Hand Center performed surgery on the employee's injured hand. The surgery involved multiple repairs to fractured bones, nerves, and tendons. The defendants paid some of the charges, and the medical provider sought the unpaid fees. The Commission found that "secondary/subsequent" procedures should not be paid in full, that is, one of the tendon repairs should be paid in full as primary procedure while the remaining procedures were subject to a 50% reduction based upon the methodology contained in the Medicare Claims Manual. The Court reversed and remanded the case. The Court concluded that the plain language of the version of Code § 65.2-605 applicable in this case did not provide for application of the Medicare Claims Manual or an automatic 50% payment reduction for multiple procedures. The Court elaborated:

> At the time of the appellant's surgery, the language of the applicable statute provided that charges for medical services generally could not exceed the prevailing community rate. Code § 65.2-605(B). The statute further provided, in pertinent part, that multiple surgical procedures should "be coded and billed with appropriate *CPT* codes and modifiers and paid according to the [*NCCI*] rules and the *CPT* codes as in effect at the time the health care was provided to the claimant." Code § 65.2-605(M) (emphasis added). The statute, *CPT*, and the *NCCI* do not specify how to bill multiple medical procedures. Clearly, *CPT* and the *NCCI* assign such medical procedures a certain modifier and suggest that they generally should be paid at a reduced rate due to the overlap of pre- and post-operative procedures, but they do not provide a reduction methodology to be applied universally. Nor do they reference the *Medicare Claims Manual*, which does provide for a 50% reduction for all but the primary procedure.

> Consistent with well-established legal principles, this Court will not add words to the statute. *See Berglund Chevrolet*[*v. Va. Dep't of Motor Vehicles*, 71 Va. App. 747, 753 (2020)]. The Commission's application of the multiple procedures payment methodology provided in the *Medicare Claims Manual* exceeded the bounds of the statutory language.

Virginia Code § 65.2-605.1(G)

- *Wardell Orthopaedics, P. C. v. Colonna's Shipyard, Inc.*, 72 Va. App. 296 (2020), *cert denied*, No. 2010008 (Va. Sup. Ct. Jan. 11, 2021).

The Court upheld the Commission's dismissal of the medical provider's claim (Wardell) for payment of medical services rendered to the employee. The Commission determined that it lacked jurisdiction to adjudicate the claim against the defendants and the Court agreed.

The claimant suffered a compensable occupational injury on January 29, 2010 and filed simultaneous claims to recover benefits under the Virginia Workers' Compensation Act (Act) and the Longshore and Harbor Workers' Compensation Act (LHWCA). In accordance with the parties' settlement, the defendants paid the claim pursuant to the LHWCA.

As of July 1, 2014, the Act included Code § 65.2-605.1. Therein, a health care provider had a one-year statute of limitation to "submit a claim to the Commission contesting the sufficiency of payment for health care services rendered to a claimant after July 1, 2014." Code § 65.2-605.1(F). The General Assembly added subsection G, effective July 1, 2019, which instructed:

> No health care provider shall submit, nor shall the Commission adjudicate, any claim to the Commission seeking additional payment for medical services rendered to a claimant before July 1, 2014, if the health care provider has previously accepted payment for the same medical services pursuant to the [LHWCA].

Code § 65.2-605.1(G). On March 31, 2015, Wardell sought reimbursement of partial payments for services rendered to the employee from February 2010 through June 2014. Wardell asserted that the payments were not accepted in full satisfaction and that Code § 65.2-605.1 should only be applied prospectively.

The Court held that "[t]he legislature's use of the phrase 'any claim' in describing the claims to which the new statute applies demonstrates the General Assembly's intent that the statute apply to all claims after July 1, 2019, including those filed before July 1, 2019, but not yet adjudicated." The Court noted that the statute did not contain language that applied it only prospectively, but rather manifested an intent to apply it retrospectively. "The enactment of Code § 65.2-605.1(G) imposed a time limitation for adjudicating a claim where no similar limitation had existed previously. The new statute affected only a provider's procedural right to seek additional payment

from the Commission, not its substantive right to be paid for services rendered to the injured employee."

See also Neurosurgical Specialists, Inc., v. Huntington Ingalls, Inc., No. 0076-20-1 (Va. Ct. App. July 14, 2020).

Willful misconduct/violation of a safety rule

- *Loudoun Composting, LLC v. Hernandez,* No. 0412-20-2 (Va. Ct. App. June 30, 2020).

The Court upheld the Commission's finding that the defendants failed to meet its burden of proving willful misconduct or violation of a safety rule. The claimant was injured while cleaning the inside of a trommel when the machine suddenly started operating/spinning. The claimant maintained that the key was in the off position before he entered the trommel. The defendants argued that the trommel's alarm "must have sounded" while the claimant was inside, that he "must have heard the alarm," and that he knew he needed to exit; thus, he willfully disobeyed Safety Rule 23. The Court agreed that the defendants failed to show that the claimant willfully breached the safety rule – the claimant presented the only evidence of what actually happened on the day of the accident.

Virginia Workers' Compensation Commission

Arising out of

- *Dawitt v. SP Plus Corp.*, JCN VA00001708797 (Mar. 17, 2021).[8]

The claimant stood up from sitting in a wheeled chair, greeted her supervisor, tried to return to a sitting position, and the chair was no longer there. She fell. The Deputy Commissioner held that the claimant's testimony established that she did not know how the accident happened, and hence, she failed to sustain her burden of proof. The Commission reversed and held that the evidence supported the finding that the chair moved, causing the claimant to fall and sustain an injury:

> There is no evidence that she moved to one side or the other when she stood up. Because the chair was not beneath her buttocks and her head hit it as she fell backwards, the *only* rational conclusion is that the wheeled chair on a solid surface moved when she stood up. It was not in the same location when she attempted to sit back down, and as a result she fell and was injured.
>
> The claimant could not explain in detail exactly why or how the chair moved. She was plainly uncertain on this point. But not knowing why the chair moved does not undermine the fact that it did move. The only rational conclusion is that the chair, a piece of the claimant's work equipment designed to move freely on the floor, *did in fact* move. To reach the conclusion that the accident did not arise out of the employment we would have to disregard the only rational analysis and resort to irrational speculation and conjecture. The chair moved. The claimant was the only force in motion that could have freed it from its state of static rest.

(Op. 6.) (Emphasis in original.)

(Rapaport dissented: The majority assumes facts not in evidence, and the theory of "the only rational conclusion" is based on speculation and surmise. (Op. 7.))

- *Hernandez v. NSR Solutions, Inc.*, JCN VA00001686764 (Dec. 21, 2020).[9]

The claimant slipped and fell while descending vinyl coated stairs. The Commission upheld that the injuries did not arise out of the employment as the claimant failed to prove that the vinyl was defective, unusual, or otherwise peculiar. Hence, the claimant's fall was not caused by a defect in the structure, a foreign substance on the stairs, or another condition of the claimant's employment. Relying upon set precedent regarding the actual risk test, the Commission did not accept the

[8] On April 1, 2021, the defendants filed an appeal with the Court of Appeals of Virginia.
[9] On January 14, 2021, the claimant filed an appeal with the Court of Appeals of Virginia.

claimant's argument that the fact of simply being on stairs at work exposed her to the hazards of height and stairs and put her at actual risk of injury.

(Marshall dissented: The claimant proved compensability as she slipped and fell due to a unique condition of the stairs – the vinyl tread which was slippery.)

- *Estate of Tony Davis v. City of Martinsville*, JCN VA00001384459 (Aug. 19, 2020).[10]

The Commission affirmed that the decedent's death arose out of his employment. The decedent was operating a tractor used for cutting grass and traveling on a road from one location to another when a tree fell on the tractor. The tractor proceeded down the road, demolished a brick column, and stopped after striking a utility pole. The estate maintained that the "street-risk doctrine" made the risk of the street, the falling tree, the risk of his employment. The defendants argued that the falling tree was an "act of God," a risk common to the neighborhood like a hurricane or lightning strike. The Commission held the following:

> This tragic confluence of events — work-related travel on a public road, the presence of a dead tree in close proximity to the road, and the timing of its fall so as to strike the decedent's vehicle — represent the collaboration between work and the forces of nature, to satisfy the arising out of precondition to compensability. The dead tree was a risk of employment, notwithstanding the fact that the general public was also exposed to the same risk. *See Lucas*[*v. Lucas*, 212 Va. 561, 563 (1972)].
>
> In conclusion, we find that the presence of the tree adjacent to the public road posed a risk to the decedent as a traveler on that road. Based upon the street-risk doctrine, that risk was a risk of the decedent's employment serving to satisfy the arising out of test of compensability. We further find that characterizing the falling of the dead tree as an act of God does not afford the defendants immunity from its lethal consequences.

- *Powers v. Moss Home Improvement*, JCN VA02000032852 (June 22, 2020).[11]

The Commission reversed the Deputy Commissioner and found that the claimant's fall from a ladder arose out of the employment. The claimant had ascended a ladder up to the roof. He carried a clipboard in his right hand, and he "attempted to transition from the ladder to the roof when he

[10] On September 11, 2020, the defendant filed an appeal with the Court of Appeals of Virginia. By Order entered November 10, 2020, the appeal was dismissed. By Order entered October 1, 2020, the Commission approved the parties' compromise settlement.

[11] On July 24, 2020, the defendants filed an appeal with the Court of Appeals of Virginia. By Order entered December 22, 2020, the appeal was dismissed. By Order entered February 3, 2021, the Commission approved the parties' compromise settlement.

fell." (Op. 3.) Citing *Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352 (2004), the Commission found a risk of the employment:

> That the claimant lost his balance while attempting to negotiate from ladder to rooftop is manifest. On this issue, the claimant testified that he was uncertain whether, when placing his right foot on the roof, it slipped on grit or moisture. Alternatively, he speculated he was distracted because of the presence of some large dogs, or he fell because he was hurrying to complete the job prior to the onset of anticipated rain. The question posed on review is this: Is his inability to precisely state what triggered his loss of balance fatal to his claim?
>
> . . . .
>
> Like *Beland*, the claimant described in detail his actions and locations immediately before his fall from the ladder. Added to the danger of the ladder cited in *Beland*, the claimant before us confronted the inherent risk from attempting to negotiate from ladder to rooftop. He described stepping off the ladder with his right foot, holding a clipboard in his right hand and holding the ladder with his left. As in *Beland*, the claimant detailed his actions leading up to his fall. So perilous was his activity that any miscalculation would result in his plummet to the ground.

(Op. 3-4.)

(Rapaport dissented: The claimant was unable to testify to, or present evidence of, the cause or mechanism of the fall. He did not know the cause and speculated to numerous, potential reasons. This fails to prove his legal burden of proof. *See Burney-Divens v. VADOC - Cmty. Corr. Admin.*, JCN VA00000656197 & VA00000667552 (Sept. 16, 2015), *aff'd*, No. 1588-15-2 (Va. Ct. App. May 3, 2016) ("[A] claimant may not offer two conflicting sets of facts as to the cause of the accident."). "Here, the claimant has provided no fewer than four potential causes, none of which are supported by the record. While the claimant offers multiple plausible theories for his fall, they are not the only possible explanations, and other non-work-related conditions could have equally caused the incident.")

Compensable consequence

- *Ali v. Knowledge Universe Educ., LLC*, JCN VA00001007686 (Jan. 22, 2021).

The Commission found that the claimant proved that her left knee injury was a compensable consequence of her initial right knee injury for which she subsequently underwent arthroplasty. The Commission found that since the defendants continued payment of disability benefits related to the right total knee replacement and paid for the right total knee replacement surgery, it demonstrated the parties' prior agreement to causation and a causal connection between the right

total knee replacement and the work accident. The Commission relied upon *Tyco v. Vanpelt*, 62 Va. App. 160 (2013), and *Boxley v. Onorato*, 218 Va. 931 (1978).

(Rapaport dissented: The claimant's left knee complaints are medically proved to be linked to the right knee injury. However, the parties' previous agreements do not prevent the defendants from currently challenging a causal relationship of the total right knee replacement. *Boxley* and *Vanpelt* considered statute of limitations issues and expanded the number of compensable body parts beyond those specifically stated in an award.)

In the course of

- *McLeod v. WGL Holdings, Inc.*, JCN VA00001601838 (July 13, 2020).

The Commission found that the claimant's motor vehicle accident did not occur in the course of his employment as he was performing a personal errand entirely distinct from his employment. The claimant had received his job assignments for the day and, with permission from a supervisor, attended the funeral of a co-worker's mother. He was driving the company van to the funeral when the accident occurred. The claimant planned to begin his work assignments after the funeral. The Commission emphasized: "[T]he claimant was not reasonably fulfilling any requirements of his employment at the time of his accident. The claimant was not engaged in a duty or task related to his employment. If the work had no part in creating the necessity for travel, his travel is personal, and he assumes the risk." (Op. 5.) The Commission noted that the case did not involve the personal comfort doctrine nor was the funeral a minor deviation.

Marketing

- *Nelson v. DBHDS W. State Hosp*., JCN VA00001541583 (Nov. 17, 2020).

The Commission reversed the finding that the claimant reasonably marketed her residual work capacity and emphasized that she retained the burden of proving that she made a reasonable effort to market her full remaining work capacity even during the COVID pandemic:

> the claimant failed to causally relate the economic impact of the pandemic with her ability to conduct a good faith job search. The claimant offered no testimony regarding the availability of jobs and whether such jobs were suitable to her restrictions. Rather, she again entrusts her evidentiary burden to the Commission's willingness to draw the necessary inferences. This we will not do. If the pandemic or the claimant's symptoms or her training, experience and education adversely impacted her ability to search for work, then it is incumbent upon her to tell us how.

(Op. 11.)

Medical treatment

- *Keel v. Boys & Girls Clubs of the VA Peninsula*, JCN VA00001560186 (Jan. 4, 2021).

The Commission reversed the Deputy Commissioner's granting of the defendants' motion seeking cancellation fees for two independent medical examinations (IME) that had to be rescheduled. The Commission emphasized that the agency, a creature of statute, could only act under the authority granted by the legislature and there was "no statutory basis for assessing fees against a claimant for failing to attend an IME." (Op. 14.) The Commission also reaffirmed that the defendants were responsible for payment of an MRI scan as a reasonable and necessary procedure albeit the study ultimately revealed that the claimant's neck complaints were in fact unrelated to the compensable injury.

Permanent partial disability benefits

- *Clements v. Augusta Health*, JCN VA00001283074 (Jan. 21, 2021).[12]

The Commission affirmed awarding of 25% permanent loss of use of the right lower extremity. Notably, the claimant was given a 50% impairment rating after hip replacement surgery, but the medical evidence demonstrated that the claimant had a pre-existing functional impairment. The treating physician acknowledged that the 50% rating should be apportioned between the pre-existing conditions and the occupational injury.

(Marshall dissented: The evidence failed to preponderate that the claimant had a pre-existing permanent functional loss of use prior to the work accident.)

- *Soupaphanh v. Arlington Cnty.*, JCN VA00001429599 (Sept. 18, 2020).

The Commission affirmed denial of permanent partial disability benefits. The claimant suffered compensable injuries to his left hand and back. He sought permanent partial disability benefits for 38% loss of use of right leg as rated by Dr. Bruno. The Commission noted a lack of explanation from Dr. Bruno, the contrary opinion of the authorized treating surgeon, and that the rating "creates in our mind doubt as to its accuracy." (Op. 8.) The Commission emphasized that the claimant had the burden of proving his claim and that the defendants were not required to introduce a contrary rating.

(Marshall dissented: The evidence was sufficient to establish the 38% impairment, and the treating physician did not expressly state or imply that the claimant had no impairment.)

[12] On February 9, 2021, the claimant file an appeal with the Court of Appeals of Virginia.

Post-traumatic stress disorder

- *Alford v. City of Roanoke*, JCN VA00001590386 (Oct. 6, 2020).

The Commission found that the claimant, a firefighter, failed to prove that his PTSD was a compensable occupational (or ordinary disease of life) as the evidence was insufficient to establish that he did not have substantial exposure to PTSD outside of his employment. The Commission noted that it may not be necessary for the claimant to produce an explicit statement that he did not have substantial exposure to the disease outside of the employment. However, here, the claimant had longstanding mental health issues and "there is little indication that the claimant's providers evaluated the claimant's past and non-work-related experiences. Nor were the providers asked whether they believed a non-work factor could have caused his condition." (Op. 12.)

Referral of claim to docket

- *Weaver v. Suffolk, City of*, JCN VA00001444326 (Mar. 12, 2021).

The claimant filed a "protective" claim for temporary total disability benefits, temporary partial disability benefits, and permanent partial disability benefits. (Op. 1.) The claimant did not request a hearing at this time. The employer filed a motion to refer the claim to the docket for adjudication, and the Commission issued a Notice of Referral of Application to Docket. The claimant objected. The Commission granted interlocutory review. The Commission instructed:

> it [is] appropriate to allow the claimant to file his permanent partial disability claim without, at present, being compelled to proceed to a hearing. However, the peculiar equities justifying anticipatory claims for permanent partial disability have no application when a claimant alleges an injury-related wage loss, either total or partial. Were it otherwise, the Commission could be relegated to a repository for claims advancing allegations unfounded in fact.

(Op. 4.)The Commission held that the employer had standing to seek a hearing as it would be duty-bound to pay accident-related wage loss, and either party may seek a hearing when a dispute exists over compensation entitlement pursuant to Virginia Code § 65.2-702. Accordingly, the referral of the wage loss benefits claim to the docket was appropriate; however, the referral of a claim for permanent partial disability was inappropriate.

Reinstatement of disability benefits

- *Davidson v. Kirby Kerns Contractor, Inc.*, JCN VA00001536155 (July 16, 2020).

The claimant sought reinstatement of temporary partial disability benefits beginning on January 13, 2020. The parties agreed that he had cured a previous refusal of medical treatment. At the hearing, the claimant stated that he sought temporary partial disability benefits at a rate of

$247.16.1. Notably, in a prior decision dated December 12, 2019, the Deputy Commissioner had found that "the claimant began working for Uber on October 16, earning an average weekly wage of $229.26" and entered a corresponding award for temporary partial disability benefits. (Op. 5, Fn. 1.) For the current claim, the Commission held that the claimant presented sufficient evidence of marketing by February 11, 2020 but "failed to demonstrate a rate of loss to sustain his burden of proving grounds for reinstatement of temporary partial disability benefits." (Op. 6.) The Commission explained that the claimant simply stated that he worked for Uber without presenting any wage records. Lacking this information, the claimant did not sustain his burden of proving his change in condition claim as he did not illustrate that the post-injury wages were less than his pre-injury average weekly wage.

Rule 1.4

- *Hodge v. Dreambuilder Logistics, LLC*, JCN VA00001781316 (Mar. 23, 2021).

The claimant sustained a compensable injury on October 3, 2020. On November 12, 2020, he was awarded wage loss benefits continuing from October 13, 2020. On January 22, 2021, the defendants filed an Employer's Application for Hearing seeking termination of the award. The defendants alleged that the claimant refused medical treatment offered on October 19, 2020. On the application, the defendants indicated that "[c]ompensation was paid through 01/21/2020 at the rate of $310.79 per week." (Op. 2.) Defense counsel certified the application with his signature on January 22, 2021.

The Commission rejected the application for failure to conform to the requirements of Rule 1.4 of the *Rules of the Virginia Workers' Compensation Commission* because "[c]ompensation has not been paid through the correct date." (Op. 2.) The defendants were directed to reinstate compensation benefits immediately, commencing January 21, 2020.

The defendants appealed and asserted that the application "clearly states that benefits were last paid on January 21, 2021. Pursuant to Rule 1.4 (C)(2), if the application alleges a refusal of medical attention or examination, then payment shall be made to the date of the refusal or 14 days before filing, whichever is later. Here, the compensation was issued through January 21, 2021 . . . ." (Op. 3).

The Commission reversed the rejection. The Commission emphasized that the claimant's accident date was October 3, 2020 and payment of compensation in January 2020 would not have occurred, nor would the Commission order a resumption of benefits on that date. The Commission elaborated:

> the technical rejection was correct based upon the filed document. However, we also recognize that payment of compensation in January 2020 cannot transpire. Based upon the uncontested representation of defense counsel that payments have

> been made through January 21, 2021, and the date of injury having been over eight months after the date referenced in the employer's application (i.e., January 21, 2020), we shall accept the defendants' assertion on review that compensation was in fact paid through January 21, 2021. This date comports with the allegations asserted, the current calendar year, and when compensation benefits would have been paid in this case.

(Op. 3.)

(Marshall dissented: The employer failed to properly assert the date of payment as required by Rule 1.4, and the Court of Appeals has approved the Commission's ruling that an employer's application was facially void when compensation was not paid in accordance with the Rules.)

Temporary total disability benefits

- *Challenger v. Randstad*, JCN VA00001382107 (Oct. 15, 2020).[13]

Virginia Code § 65.2-502(A) does not bar the partially disabled claimant, who is not eligible to legally work in the United States, from receiving temporary total disability benefits. The claimant was ineligible to work in the United States. However, he could work in his home country where he currently resided:

> Virginia Code § 65.2-502(A) provides, in part, that "the employer shall not be required to pay, or cause to be paid, compensation under this section to any injured employee not eligible for lawful employment; nor shall any such injured employee not eligible for lawful employment who is partially incapacitated be entitled during partial incapacity to receive temporary total benefits under § 65.2-500."
>
> The plain language of Virginia Code § 65.2-502(A) reflects partially disabled claimants who are not eligible for lawful employment are not entitled to ongoing temporary total disability benefits. It does not articulate that a claimant must be eligible to lawfully work in the United States.

[13] On November 10, 2020, the defendants filed an appeal with the Court of Appeals of Virginia. By Order entered February 1, 2021, the appeal was dismissed. By Order entered December 16, 2020, the Commission approved the parties' compromise settlement.

Virginia Code § 65.2-714

- *Hand v. Tidewater Termite & Repair, Inc.*, JCN VA0000096701 (Mar. 18, 2021).

Commission affirmed Deputy Commissioner's finding that the claimant lacked standing to file a claim seeking full payment of underpaid medical bills. Rapaport discussed that the claimant had no immediate, pecuniary, or substantial interest in the litigation, and that his rights would not be affected by the outcome of a decision regarding the remaining bill balances. Notably, the claimant had settled his claim and "surrendered his right to request any additional payment of medical bills already paid." (Op. 5.) Newman concurred, finding that there was no existing debt to the claimant, and this fact was fatal to the claimant's entitlement to the relief sought. Marshall found that the claimant had standing and, as a party to the settlement agreement, had a substantial legal right to enforce the agreement. However, he agreed that the claimant surrendered his right to bring a claim for additional payment through his settlement.

- *Bowe v. Honeywell Int'l, Inc.*, JCN 2145117 (Dec. 21, 2020).

The Commission held that the claimant's counsel was not entitled to an attorney's fee award pursuant to Virginia Code 65.2-714(B). Medical services were rendered on August 19, 2013, and paid by the carrier on October 5, 2015. The claimant's counsel sent emails in April, June, and July 2017, but they were sent to an incorrect address and not received by the medical provider. The Commission instructed:

> It was not until March 2020, more than four years after the bill was paid, that the medical provider received notice of a request for attorney's fees from claimant's counsel. Based upon the Commission's precedent, we find counsel failed to give reasonable notice to the health care provider of his claim for fees . . . .

(Op. 7.)

(Marshall dissented: There is no statutory requirement for counsel to file a motion for attorney's fee pursuant to Virginia Code § 65.2-714 within a specified time.)

- *Winkler v. Spartannash*, JCN VA00001219191 (Aug. 17, 2020).

Legal counsel for the claimant sought full payment of medical bills for services provided by Bon Secours. Counsel alleged that payment of $48,947.90 had been made and a balance remained of $25,485.50. The defendants filed a Motion to Dismiss. The defendants attached an affidavit signed by legal counsel for Bon Secours attesting that no additional payment was expected or sought for the services at issue. The defendants also averred that the claimant had settled his workers'

compensation claim and waived any entitlement to the payment of medical expenses by the defendants. The Deputy Commissioner dismissed the claim, and the Commission affirmed:

> The claimant's right to pursue the unpaid balance of medical expenses is established by statute. Virginia Code §65.2-714(A) allows the Commission to:
>
> > [R]etain jurisdiction for employees to pursue payment of charges for medical services notwithstanding that bills or parts of bills for health care services notwithstanding that bills or parts of bills for health care services may have been paid by a source other than an employer, workers' compensation carrier, guaranty fund, or uninsured employer's fund.
>
> We addressed the question of the claimant's right to prosecute a claim for the balance of medical charges due a provider in *Hansen v. TMA Trucking, Inc.*, JCN VA00001001203 (May 28, 2019). We recognized that there is good reason to afford claimants the right to pursue the payment of medical bills because "[A]n injured worker's access to treatment can too easily be relegated to the status of pawn when disputes arise between insurers, employers and the claimant's medical providers." *Id.* However, it is fundamental that the necessary precondition to the claimant's right to pursue payment of unpaid medical charges is the existence of such unpaid charges. When, such as here, the medical provider confirms its bills are paid in full, there is no debt nor corresponding cause of action for the claimant to pursue. We further find that the justification for allowing a claimant to pursue the balance of the medical bills as articulated in *Hansen* does not exist in this case. No risk exists that the claimant's access to medical treatment will be negatively impacted as he relinquished his right to medical treatment by settlement of his workers' compensation claim.

(Op. 3.)

(Marshall concurred: There is no justiciable controversy; disagreed with the conclusion that there was no debt.)