INN OF COURT – CASE LAW UPDATE[1]
May 17, 2023
Commissioner Robert A. Rapaport
Deputy Commissioner Lynne M. Ferris
Deputy Commissioner Jimese P. Sherrill[2]

COURT OF APPEALS

Claimant - Standing

- ***Bockelman v. Millers Landscaping Sprinkler,*** No. 1170-21-1 (Va. Ct. App. June 28, 2022) – Reversed and remanded (JCN VA00000577719)

The Court of Appeals (COA) held that the full Commission (FC) erred in finding that the claimant had no right to pursue payment for expenses incurred in the course of his treatment with a third-party medical provider. The Deputy Commissioner (DC) and FC found that the claimant did not have the right to seek payment of the medical expenses that were paid by a third party because his claim accrued prior to the 2012 amendment to Code § 65.2-714(A) going into effect.

The COA held the fact that the 2012 amendment was not yet in effect does not control the outcome or preclude the FC from adjudicating the claim when "'the [C]ommission had before it a dispute among a medical care provider, an employee, and an employer concerning whether the employer was responsible for payment of [claimant's] medical expenses.'" (quoting *Northrop Grumman Shipbuilding, Inc. v. Wardell Orthopaedics, P.C.*, 67 Va. App. 420, 428 (2017).

The COA found that there was no agreement that the payments represented "full satisfaction" and this health care provider "elected" to write off the unpaid amounts. The COA found that the settlement agreement language of "all reasonable, necessary and authorized medical expenses" related to the accident "incurred up to and including the date of entry of the Order in this matter" allowed the claimant to pursue the unpaid portion. The claimant received medical care from the health care provider and the health care provider did not receive payment in full for its billing for that care, which was related to the claimant's accident and was incurred prior to the entry of the settlement order. "Accordingly, the settlement agreement controls, and [defendants] are bound by their agreement to pay related medical expenses incurred in the treatment of Bockelman's injury." (slip op. at 7.)

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[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 periods.

[2] The information contained in these written materials was compiled with the assistance of Deputy Commissioners Deborah Blevins, Christen Burkholder, Dana Plunkett, Randy Roach, Linda Slough, Lee Wilder, Ed Wise, and Joshua Wulf, and Staff Attorney Dana Dallas, and was edited by Judicial Assistant Cathy Earnest and Executive Judicial Assistant Nancy Truman.

The COA added that, while the health care provider was not named in the dispute before the Commission, nevertheless, the claimant had a right to pursue enforcement of the settlement agreement. The unpaid amounts the health care provider wrote off were medical expenses incurred in treating the claimant's injury and within the terms of the settlement (prior to entry of the Order). Accordingly, Bockelman, as a party to the settlement agreement, had both the right and ability to pursue enforcement of the terms of that agreement.

Employee; Willful Misconduct

- ***Modern Renovations, LLC v. Sagastume Espino***, No. 0466-22-4 (Va. Ct. App. Oct. 25, 2022) – Affirmed (JCN VA02000034633)

The FC affirmed the award and DC's findings that the claimant was an employee of Gerardo Reyes, that Reyes was a subcontractor to Alpha y Omega Services, LLC, and that Alpha y Omega was a subcontractor to Modern Renovations. The claimant was injured due to a fall from a ladder. The DC found that although the claimant was an experienced roofer with some of his own tools, he was an employee of Reyes and not an independent contractor. Reyes provided transportation to the job site, told the claimant when and where to work, and supervised the claimant's work. Reyes retained the right to control the methods and means of the claimant's work. The FC also affirmed a $10,000 fine against the statutory employer, Modern Renovations, LLC and the award of a limited period of temporary total disability (TTD).

The COA affirmed, finding that Reyes drove the claimant to the job site, told him what to do and where to do it, and provided him with most of the necessary materials and equipment. Reyes also hired the claimant and paid his wages. Accepting these factual findings, the COA found no error in the FC's conclusion that the claimant was an employee and not an independent contractor. Modern Renovations argued the claimant's prior experience as a roofer, and the fact that he brought his own harness and air gun to the job, required a different result under the COA's unpublished decision in *Kirtley v. Cooper*, No. 0631-17-3 (Va. Ct. App. Oct. 31, 2017). The COA distinguished *Kirtley*, noting that in that case the claimant brought his own employees and equipment to the job, submitted a bi-weekly invoice, set his own schedule, and sometimes left to work other jobs, which they determined demonstrated that Kirtley had the power of control, as opposed to this case where the evidence supported the finding that the claimant did not have the power of control.

The COA held that the FC did not err by refusing to consider a willful misconduct defense because the defendant did not raise the defense before the DC. The COA noted that the FC held that it would not consider an argument raised for the first time on review and that "our Court defers to the Commission in interpreting its own rules." (slip op. at 6.) The COA was not persuaded by the defendant's assertion that under Rule 3.1, the FC could address an error on review if necessary for a just determination. The COA advised as follows:

> Rule 3.1 is permissive, and not mandatory. Even if it were mandatory, we have no trouble concluding that it would not require the Commission to consider a late-raised willful misconduct defense where the employer (1) bears the burden of proof, (2) failed to give the required notice under Rule 1.10, and (3) never petitioned the Commission to reopen the record to present additional evidence under Rule 3.3.

(slip op. at 7-8.)

Independent Contractor

- ***Dunn v. Cityscape LLC*****,** No. 0358-22-3 (Feb. 7, 2023) – Affirmed

The claimant operated his own unincorporated business, specializing in cabinet, door, and tile installation, woodworking, and trim. He had a tax identification number, a business license, business cards, an email address, and a presence on Facebook and Angie's List. At the time of the accident, the business had workers' compensation insurance, but the claimant testified it covered the business' employees and not himself. Cityscape is a general contractor specializing in historical restoration. Cityscape hired the claimant to work at one of its jobs, and his job duties included hardware and cabinet installation. The claimant was also responsible for completing the "punch list" when the installation work was complete. At the time of the injury, the claimant was working between forty and sixty hours per week on the job and was paid weekly by check. Cityscape provided all the materials, and the claimant used his own tools. The DC held that the claimant was an independent contractor. The FC affirmed, finding that Cityscape did not retain "the right to exercise sufficient control over the means and methods by which [Dunn] performed his work to make him an employee." (Op. 5.)

The COA affirmed, acknowledging that there is no "hard and fast rule" for determining whether a person is an employee or an independent contractor. The COA discussed the four criteria generally considered, most significantly, the right of control. The COA stated it examines the nature of the work on a case-by-case basis to determine whether the employer possessed the requisite degree of control for the claimant to qualify as an employee. The COA disagreed with the claimant's assertion that Cityscape retained sufficient control over the means and methods of his work to render him their employee. The COA acknowledged that Cityscape supervisors checked claimant's work to ensure it met their standards but noted that the claimant did not require instruction regarding how to complete his job duties. The COA also discussed that the claimant supplied his own tools, held himself out to the public as a business owner performing the same work independently as the work he did for Cityscape, and was not restricted from working other jobs outside the Cityscape job. Thus, the COA found that the FC properly weighed the totality of the evidence and correctly found that the evidence was sufficient to support a finding that Cityscape did not retain the right to control the method and means of the work the claimant performed.

Injury by Accident

- ***Jenkins v. C & T Trucking Co., Inc.***, No. 0381-22-1 (Va. Ct. App. Feb. 14, 2023) – Affirmed (JCN VA00001650765) (On appeal to SCV, No. 230194)

The claimant appealed the decision of the FC denying his claim for a traumatic brain injury, left hip injury and low back injury. The claimant also asserted that the FC erred by admitting the opinion of a psychologist regarding the causation of the claimed brain injury. The claimant was injured on May 20, 2019, when he rear-ended a vehicle while driving a tractor trailer at 60 mph. A police officer testified that he spoke with the claimant at the scene, and he "appeared with it, cognitive, clearly speaking to me about what happened." The ambulance records indicated that the claimant complained of left flank and abdominal pain and that he reported remaining awake throughout the incident with no loss of consciousness. At the hospital, the claimant was noted to be "awake, alert, and oriented." He did not report any head or neck complaints and denied a loss of consciousness or altered level of consciousness. X-rays revealed a fractured left ninth rib.

On June 14, the claimant began treating with an orthopedic specialist, Dr. Snyder, for his left rib pain. In August, the claimant reported pain into the left hip area for the first time. On February 17, 2020, Dr. Snyder opined that he did not believe the left hip injury was causally related to the work accident. At an appointment at the VA on February 24, 2020, the claimant reported, for the first time, suffering a concussion and loss of consciousness in the work accident. The claimant reported the same history to several subsequent physicians, who opined that the claimant suffered a traumatic brain injury as a result of the accident. An orthopedic IME in January 2021 concluded there was no evidence to indicate a left hip injury related to the work accident. Dr. Spector also performed a neuropsychological evaluation, and the claimant thereafter retained Dr. Frederick, a psychologist, to review Dr. Spector's report and provide a rebuttal. The claimant's wife and daughter also testified to observed deficits since the accident.

The DC found that the claimant had failed to prove that the claimed head, back, and left hip injuries were causally related to the work accident. The DC reasoned that none of the medical records proximate to the accident referenced any complaints or diagnoses relative to the back, left hip, or head. The DC acknowledged that several medical providers later in the claim attributed claimant's various complaints to the work accident, but the DC found those opinions were "based on incomplete and inaccurate history." The FC unanimously affirmed and agreed with the DC's reasoning.

The COA affirmed the decision of the FC. Initially, the COA held that the FC did not err in admitting the neuropsychologist's (Dr. Spector's) report, stating that the FC has "wide latitude in determining whether to admit an expert's opinion in an individual case" and is "not bound by statutory or common law rules of pleading or evidence nor by technical rules of practice." (slip op. at 12.) The COA also agreed with the FC's decision that the claimant failed to prove causation of his alleged brain injury, left hip injury, and low back injury, finding that the FC properly weighed

the "objective medical evidence and properly considered the questionable history offered by Jenkins to his medical providers." (slip op. at 16.)

- ***Strom v. Transdev Servs., Inc.***, No. 0095-22-4 (Va. Ct. App. Jan. 24, 2023) – Affirmed (JCN VA00001790362)

Although the pro se claimant acknowledged pre-existing neck and back problems, he argued that "[t]here is supporting medical evidence" demonstrating he sustained neck, back, and shoulder injuries which he asserts were aggravated by his work motor vehicle accident. The COA affirmed the FC in a per curium opinion, finding that the pro se claimant did not prove he sustained a compensable injury by accident. The COA pointed out that none of the medical providers noted the claimant's prior injuries in his records, and some of them noted that he denied prior neck issues or any significant medical history. The COA also found the record supports the FC's finding that he misrepresented to his health care providers that he immediately experienced symptoms after the accident. The COA upheld the FC opinion, which was based on the conflicts between the pre-accident and post-accident medical records and between the claimant's testimony and the medical records, finding that the medical opinions linking the accident to the claimant's injuries were not credible because they were based on faulty information.

Injury by Accident – Lapse in Time in Report of Symptoms; Inference on Disability

- ***Abacus Remodeling & Constr. v. Fogel***, No. 0010-22-1 (Va. Ct. App. Sept. 13, 2022) – Affirmed in part, reversed in part, and remanded (JCN VA02000031767); FC Order Nov. 17, 2022 provided an award in accordance with COA remand)

In this case, the claimant fell from a ladder in December 2018. He initially received medical treatment for broken ribs. He complained of left-sided pain, but injuries to his neck, left shoulder, or left arm were not documented until June 5, 2019. The FC determined that the claimant suffered injuries to his neck, left shoulder, and left arm in the work accident, and entered an award for ongoing temporary total disability benefits.

On appeal, the defendants argued that the FC erred by "inferring" injuries to the claimant's neck, left shoulder, and left arm based on its finding that he fell and suffered injuries to other body parts. The defendants also argued that the FC erred in finding ongoing disability beyond May 2, 2020. In his dissent, Commissioner Rapaport found the evidence sufficient to establish total disability only through one month after the April 2, 2020 work note. He stated: "'There is no presumption in the law that once a disability has been established, a claimant will be assumed to remain disabled for an indefinite period of time.'" *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997) (citation omitted). '[A] party seeking compensation bears the burden of proving his disability and the periods of that disability.' *Id*. at 679." (slip op. at 15.)

Regarding proof of an injury, the COA stated:

> Under the Act, pain or disability alone is not an injury without "a sudden obvious mechanical or structural change in the body." *Snead v. Harbaugh*, 241 Va. 524, 527 (1991). "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.'" *Alexandria City Pub. Sch. v. Handel*, 299 Va. 191, 197 (2020) (quoting *Snead*, 241 Va. at 528). Therefore, "when a claimant alleges injury to multiple body parts, he must prove mechanical or structural change in every body part injured for each to constitute a compensable injury. *Id*. ("[W]ithout such a change in a body part, there is no injury to it.").

(slip op. at 9-10.)

Affirming the FC on this issue, the COA held that a lapse in time between a work accident and a claimant's complaint about an injury does not per se negate affirmative evidence of a mechanical or structural change to the affected body part caused by the work accident. *See Seven-Up Bottling Co. v. Moseley*, 230 Va. 245, 250 (1985) (holding that an obvious sudden mechanical or structural change occurred when the claimant's disc rupture was only diagnosed weeks after the accident); *see also Akisi v. Hartwood Found., Inc*., VWC No. 175-75-32, slip op. at 4 (Va. Workers' Comp. Comm'n July 18, 1996) (holding that the lapse of time between an accident and the onset of pain, as well as the absence of an injury in an initial medical report, are not necessarily fatal to a claim). While the defendants argued that the six-month lapse in time between the work accident and the claimant's symptoms was too long to support a compensable injury, the COA stated that "case law sets no such time limit within which claimants must recognize or report injuries. Instead, the claimant must simply prove that the mechanical or structural changes, whenever recognized, are causally related to the work accident." (slip op. at 12.) The COA also affirmed the FC's finding that the injuries were causally related.

With regard to the issue of ongoing disability, the COA determined that the FC could not infer the claimant's ongoing disability from the medical records as a whole. The COA discussed that a recent medical report is not required, but is only one factor to be considered, together with other credible evidence, including the claimant's testimony, in determining whether a claimant proved disability and the periods of that disability. *See Smith v. Dominion Tech. Sol.*, No. 0475-14-3, slip op. at 6-7 (Va. Ct. App. Jan. 27, 2015). In this case, the claimant was not awaiting surgery and the medical evidence did not reflect an open-ended no work duty status as his doctor stated that the claimant would be re-assessed at his next appointment.

Panel of Physicians – No "Good Faith" Exception to Requirement

- ***Jalloh v. S. W. Rodgers*,** No. 0920-22-4 (Va. Ct. App. Apr. 4, 2023) – Reversed and Remanded (JCN VA02000036280)

The claimant sustained compensable injuries by accident on June 10, 2021. On June 14, 2021, the company safety officer spoke with the claimant by telephone to try to get him to seek medical attention, at which time the claimant informed him that he planned to see "his own doctor." The safety officer went to the claimant's home with a panel. The claimant was not at home at the time but spoke to the safety officer by phone and demanded that he leave. The safety officer offered to meet him to provide him with a panel, but the claimant declined and the safety officer left without leaving a copy of the panel. It is undisputed that the claimant never received a panel. At the hearing, the employer denied responsibility for the claimant's treatment on the grounds that it was unauthorized because he went to his own doctor. The DC determined that the employer failed to provide the claimant with a panel. In a split decision, the FC reversed the decision of the DC, holding that "the employer made a good faith effort to present the claimant with a [physicians] panel, which the claimant effectively refused by engaging in a course of conduct designed to frustrate the employer's effort to provide a panel." (Op. 3.) The claimant appealed, arguing that the FC improperly applied a good faith exception to the statutory obligation to offer him a panel in accordance with Code § 65.2-603. The FC determined that because the employer made a "good faith effort" to provide a panel to the claimant, it met the requirement of Code § 65.2-603(A). The question on appeal was whether a good faith effort is sufficient to fulfill the statutory obligation to provide a panel of physicians to an injured employee.

Finding that the Workers' Compensation Act is construed liberally for the benefit of employees and that courts are bound by the plain meaning of a statute unless it would lead to an absurd result, the COA determined that "[t]he express and clear wording of the statute does not permit an employer to make only a good faith effort to provide a panel of physicians to the employee." (slip op. at 6.) "Consequently, the omission of a good faith provision from Code § 65.2-603 controls the outcome of this case." (slip op. at 7.) The COA made a point of stating there was no evidence to suggest that the employer intended to circumvent its obligation to provide a panel of physicians to the claimant and that the Court did not want their finding to encourage claimants to engage in obstructionist behavior or to be rewarded for doing so. The Court also indicated that it was "not unsympathetic to the position taken here by a majority of the Commission." *Id. at* n.6. However, they held that they would not "'judicially create a good faith exception . . . to the statute when the legislature has clearly expressed itself' by not doing so. *Weston v. B.J. Church Constr. Co*., 9 Va. App. 283, 287 (1989).'" (slip. op. at 7.)

PPD Previously Awarded, Proper Statute of Limitations – § 501 vs. § 708

- ***Prince William Cty. Pub. Schs. v. Brooks***, No. 0248-22-4 (Va. Ct. App. Oct. 11, 2022) – Affirmed (JCN VA00001332681)

The COA affirmed the FC's holdings that a claimant proved a timely claim, a compensable change in condition, the causation of her requested medical attention, and her claimed dates of disability, including the extent of her TTD beginning June 4, 2021 through June 9, 2021.

The claimant suffered a compensable injury by accident on May 9, 2017 that was the subject of a lifetime medical award for injuries to her neck, upper back, and lower back on August 16, 2018, and a September 10, 2019 award of compensation for a 4% permanent partial disability (PPD) rating to her right leg as a result of the accident. The last date of payment pursuant to the award occurred on June 10, 2019. The claimant also suffered a vehicular accident unrelated to her work as a school bus driver in September 2017.

The COA determined that the FC correctly weighed the available medical evidence and made reasonable inferences from it regarding whether a change in condition had occurred that produced the extent of disability that was caused by the claimant's industrial accident, agreeing with the FC that a reference to a viral infection in one of the disability slips the FC had cited to support its decision did not remove the claimant's claim from the scope of her compensable disability from her May 9, 2017 accident. The COA determined that the FC properly weighed the medical evidence, including whether the September 2017 accident had severed the causal connection between the claimant's May 9, 2017 accident and her disability. The COA rejected the defendant's argument that the one-year statute of limitations in § 65.2-501, after the last payment of compensation for permanent impairment, should have controlled the result, observing that this limitation applies only when a claimant fails to prove a change in condition.

Reimbursement of Transportation Costs – Uber

- ***Medical Mgmt. Int'l & Travelers Indem. Co. of Am. v. Jeffry,*** 75 Va. App 679 (Nov. 1, 2022) – Affirmed on different grounds (JCN VA00000865091)

The FC reversed the DC's Opinion that denied the claimant's claim for reimbursement of payments made to Uber for transportation to her medical appointments. The defendants argued that the claimant never requested transportation from the carrier, and it was not given an opportunity to make its own arrangements for transportation. The DC denied the claim noting that the defendants were not provided with notice of a need for transportation. The FC reversed, noting that while the purpose of providing notice to the defendants is to allow them an opportunity to mitigate the cost of transportation, in this instance, evidence was lacking to show that had the insurer been provided with notice, it would have been able to employ a less costly alternative.

The dissent, by Commissioner Rapaport, noted that the claimant decided to use Uber for nine months without notifying the defendants of the need for transportation. He also argued that the majority opinion abandoned prior precedent requiring the claimant to notify the defendants of the need for transportation and creates a new requirement for defendants to establish that they would have obtained less costly transportation had they received notice.

The COA addressed the employer's desire to establish a "black-letter-law requirement" that claimants must provide notice of their need for transportation to a medical appointment as a condition precedent to their receiving reimbursement of travel expenses. The COA unequivocally held there was nothing in the Act to support an advance-notice or pre-authorization requirement and stated that to imply such a requirement would be inconsistent with the "remedial" purpose of the Act, which must be "liberally construed in favor of the injured employee." *E.I. du Pont de Nemours & Co. v. Eggleston*, 264 Va. 13, 17 (2002). The COA stated:

> Because the employer's statutory duty to provide compensation under Code § 65.2-603(A) is "mandatory," the claimant "is automatically entitled to receive medical benefits once the fact of a compensable injury has been established." *Vital Link, Inc. v. Hope*, 69 Va. App. 43, 56 (2018) (quoting *Nelson Cty. Schs. v. Woodson*, 45 Va. App. 674, 678 (2005)). Thus, "[a]n employer is responsible for the medically necessary treatment regardless of claimant's 'failure to specifically request an award of medical benefits in [his] application to the [C]ommission.'" *Id*. at 58 (alteration in original) (quoting *Woodson*, 45 Va. App. at 678).

Jeffry at 688-89.

However, the COA pointed out that the employer can choose the means by which to meet its obligation to provide the claimant transportation to medical appointment by contracting with a third-party vendor.

Release to Full Duty v. Release to Pre-Injury Work

- ***Revels v. Costco Wholesale***, No. 0002-22-2 (Va. Ct. App. Aug. 30, 2022) – Affirmed (JCN VA00001537074)

The DC granted the Employer's Application to terminate TTD benefits, finding that the defendants met their burden of proving the claimant was capable of pre-injury work, based on the treating physician's note that the claimant was released to work "'without restrictions.'" The DC "also denied the claimant's request for a change in treating physician[] given the lack of medical evidence that [the doctor's] care was inadequate, that a specialist was needed, or that [the doctor] refused to treat the claimant." (Op. 3.) The FC agreed.

Helpful citations from FC opinion:

> In an application alleging that the claimant was able to return to pre-injury work, "[t]he threshold test of compensability is whether the employee is 'able fully to perform the duties of his preinjury employment.'" *Celanese Fibers Co. v. Johnson*, 229 Va. 117, 120 (1985) (quoting *Sky Chefs, Inc. v. Rogers*, 222 Va. 800, 805 (1981)). "That burden is met by uncontradicted evidence which establishes that no restrictions have been placed on the claimant's ability to return to work." *Fingles Co. v. Tatterson*, 22 Va. App. 638, 642 (1996) (citation omitted).
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> "[W]here uncontradicted medical evidence does not suggest any physical limitation on a claimant, the employer need not also show that the physician was familiar with the physical requirements of the job and the type of physical limitations which would prohibit its performance." *Fingles Co*., 22 Va. App. at 642 (citation omitted).
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> The claimant has the burden of proving that specific circumstances warrant a change in treating physician[]. *Apple Constr. Corp. v. Sexton*, 44 Va. App. 458, 461 (2004). A change may be justified in circumstances such as: (1) inadequate treatment is being rendered; (2) specialized treatment is needed and is not being provided; (3) there is a lack of progress without any adequate explanation; or (4) conventional modalities of treatment are not being used. *Id.* (citing *Allen & Rocks, Inc. v. Briggs*, 28 Va. App. 662, 675 (1998) (quoting *Powers v. J.B. Constr. Co*., 68 O.I.C. 208, 211 (1989))).

(Op. 3, 5-6.)

The defendants hired private investigators who obtained video evidence of the claimant driving and walking without difficulty. She was able to walk one mile and get her grandchildren into a car. After an examination with her treating physician, which showed a mildly ataxic gait, he discontinued her work restrictions, and she became angry and rushed out of the exam room without difficulty. Although she testified regarding her continuing symptoms and pre-injury job requirements, the FC gave "great weight to the uncontradicted medical opinion of her long-standing treating neurologist regarding her ability to work." (Op. 5.) The COA stated: "It was within the Commission's purview to weigh and consider the evidence; we do not reweigh the evidence before the Commission." *Jeffreys v. Uninsured Emp'r's Fund*, 297 Va. 82, 87 (2019) (quoting *Caskey v. Dan River Mills, Inc.*, 225 Va. 405, 411 (1983)). The COA further found that the claimant failed to prove her treating physician abandoned her or provided medically inappropriate or inadequate care.

Res Judicata

- ***Cty. of Henrico v. O'Neil***, 75 Va. App. 312 (Aug. 2, 2022) – Affirmed (JCN VA00001314915)

The claimant, a sheriff's deputy, was injured on March 24, 2017, when she was punched in the throat during a training exercise. In April 2017, she filed a claim for injuries to her neck, collarbone, and left upper extremity. Thereafter, the parties entered into an agreement that provided TTD benefits due to a "[s]ternoclavicular joint strain." The agreement was approved by the Commission, and an evidentiary hearing was never scheduled.

In February 2018, the claimant filed three more claims for injuries related to the same incident. The first two were withdrawn. The third claim sought benefits for injuries to her brachial plexus, neck, collarbone, left upper extremity, left ear, and mouth as original injuries, and a brain injury as a compensable consequence. At hearing, the claim for a brain injury was withdrawn. The DC denied the claims based on res judicata. The claimant appealed, and the FC reversed, finding that res judicata did not apply to the claimant's claims.

The COA agreed, stating that when res judicata conflicts with other public policy considerations, "we must balance application of the doctrine against those other considerations." *O'Neil* at 322-23. "Recognizing the need to balance the finality in litigation against the established public policy considerations that undergird the purpose of the Workers' Compensation Act, this Court has limited the application of res judicata as a bar to claimant's relief to two scenarios: 1) in a final judgment after a party has pursued and submitted a claim at an evidentiary hearing or 2) when a claim is considered waived or abandoned." *O'Neil* at 323-24 (quoting *Advance Auto & Indem. Ins. Co. v. Craft*, 63 Va. App. 502, 517 (2014)).

The COA found that where a claimant files a claim but enters into an award agreement before an evidentiary hearing is scheduled, res judicata does not preclude the claimant from filing additional claims. They gave four reasons. First, as in *Craft*, they found the claimant had not presented all her claims to the Commission for adjudication. Second, the claimant neither waived nor abandoned her claims for additional injuries. Third, the COA distinguished *Levy v. Wegman's Food Markets, Inc*., 68 Va. App. 575 (2018), stating "[t]hat the award agreement was silent on some injuries is not analogous to the Commission's explicit finding that Levy's claims were unsupported by the evidence." *O'Neil* at 329. Fourth, the COA was "persuaded that the same public policy considerations recognized in *Craft* apply equally here, so that a claim not otherwise waived or abandoned may not be barred by res judicata before an evidentiary hearing." *Id.*

See also Gonzalez v. Compass Grp., JCN VA00001651620 (Dec. 7, 2022), for a good discussion of this case by the FC.

Wage Loss

- ***Va. Alcoholic Beverage Control Auth./Commonwealth of Va. v Blot,*** No. 1395-21-2 (Va. Ct. App. Sept. 6, 2022) – Reversed (JCN VA00001723587)

The claimant sustained an injury to his right knee on December 15, 2019. On March 30, 2020, his cardiologist took him out of work due to concerns surrounding the COVID-19 pandemic. The claimant admitted that his decision to stop working was not related to his knee injury. On February 11, 2021, after he received the COVID-19 vaccine, the claimant asked his doctor for a note permitting him to return to work on "light duty," and he received a note, which did not detail his restrictions. While the claimant was out of work, the employer made changes to its system, and the claimant testified that on his return to work, he worked fewer hours than he did pre-injury because of scheduling issues and the need to be retrained, not because of his knee injury. His attempts at marketing after his light duty release were unsuccessful.

The DC found that the claimant sustained a compensable injury by accident, but denied his claim for TTD beginning March 30, 2020 through February 10, 2021 on the grounds that he stopped working due to the COVID-19 pandemic and not his compensable injury. The DC also denied the request for TPD beginning February 11, 2021 on the grounds that the reduction in hours was not related to the compensable injury.

The FC affirmed the finding of a compensable injury by accident but reversed the determination with regard to TPD, finding that the claimant adequately marketed his residual work capacity. (The defendant did not request review of the award for TTD.) The COA reversed, finding "unequivocal testimony affirmatively establishes that his wage loss was not caused by his partial incapacity but by his decision to stop working during the pandemic and attempt to reclaim his same job nearly a year later after he had been replaced and his employer had updated its system" and concluding that there was no evidence causally relating the claimant's wage loss to the work accident. (slip op. at 7.)

In the COA dissent, it was pointed out that while not specifically noted by the majority in its opinion, the claimant advised an insurance claims representative that he was partially absent from work because of his injury, and as his absence was due, in part, to his work-related injury, his wage loss was causally related to the work accident.

COMMISSION REVIEWS

Arising out of Employment; Reasonable Inferences

- ***Agyemang v. The Gardens at Warwick Forest***, JCN VA00001874767 (Jan. 10, 2023) – Reversed (Final)

The claimant jammed her left hand while putting lightweight plastic coffee cups on top of a refrigerator. The DC awarded the claim. The FC reversed, finding that the claimant did not prove that the accident arose out of her employment. The opinion provides a good discussion of the proof required to show actual risk versus positional risk. The FC found that "[t]here was no testimony that any condition of the claimant's work caused or contributed to the injury beyond the existence of a refrigerator in the office space." (Op. 5.)

Commissioner Marshall dissented, arguing that "[w]hile describing an action as 'awkward,' may be probative in identifying a work-related risk, it is not necessary. Otherwise, we would substitute form over substance . . . ." (Op. 7.)

- ***Cason v. VDOT Culpeper Dist. Wide***, JCN VA00001820369 (Aug. 1, 2022) – Reversed and remanded (Final)

The claimant sustained injuries in an accident while driving his employer's vehicle. He contended the accident occurred because he fell asleep due to fatigue caused by working long hours the prior week. The DC held he failed to prove that he fell asleep for a reason that was causally related to his employment. The FC stated that the appeal "turns on a narrow question: whether the claimant established by the greater weight of the evidence that he fell asleep while driving due to employment-related fatigue." (Op. 2.)

The claimant worked for VDOT as a machine operator. In addition to his regular shift, 7:00 a.m. to 3:30 p.m., Monday through Friday, the claimant remained on call on a twenty-four-hour basis. In the days prior to his accident, the claimant was called in to work extended hours. He was seen in the emergency room on February 2, complaining he had slept a total of six hours since January 30. He was discharged with medication which he took that evening and slept from midnight through the next day. On February 3, he took off and slept through the day. He worked his normal shift on February 4, but felt groggy at work. After his shift, he went to his PCP reporting anxiety, insomnia, and fatigue due to sleep pattern disturbance. He was prescribed Ambien, which he took that evening and slept through the night. He reported for work the next morning at his usual time, and his accident occurred that morning.

The FC found that the greater weight of the evidence supported their finding that the claimant fell asleep while driving, noting that they are "authorized to draw reasonable inferences from the facts

presented." (Op. 5.) While the FC acknowledged that the claimant had slept over the few days immediately prior to the accident, "we nonetheless find the sequela of his extended struggles with sleeplessness were not entirely abated thereby." (Op. 6.) This finding, however, only proved that the accident occurred in the course of the employment. To prove the arising out of prong, the claimant "must causally relate his sleep-induced drowsiness to his employment." (Op. 7) (citing *Norris v. ETEC Mech. Corp*., 69 Va. App. 591, 599 (2018)). To meet his burden of proof, the FC stated that the level of evidence needed was not one of exclusivity. Rather, they found *Henrico County School Board v. Etter*, 36 Va. App. 437 (2001) instructive, wherein the COA relied upon the treating physician's statement that the "accident probably contributed to the minutest degree . . . ." *Id*. at 442. Thus, the FC found the evidence as a whole established persuasively that the claimant was fatigued due at least in part to the long hours and irregularity of his work schedule.

- ***Guevara v. Signal Fin. Fed. Credit Union***, JCN VA00001742322 (Mar. 6, 2023) – Affirmed (Final)

The claimant slipped and fell in the employer's breakroom. She alleged that the floor was slippery. The claimant and two co-workers, who were present in the breakroom at the time of the fall, all testified that they observed the area immediately after the fall and saw no foreign substance, liquid, or defect in the flooring that would have contributed to the fall. The DC concluded that the claimant failed to meet her burden of proving that her injury arose out of a risk of her employment.

The claimant asserted on appeal that, even though she did not know the substance that caused her to slip, the slippery floor caused her fall, and she fell while walking on a ceramic floor with items in both hands. The FC affirmed and adopted the DC's summary of the video evidence. The FC noted that it is "authorized to draw reasonable inferences from the evidence. . . . However, inference[s] must be supported by the evidentiary record, and we cannot base an award on conjecture or speculation." (Op. 6) (citations omitted.) From the record, the FC found there was insufficient evidence in the record to infer the claimant's injuries arose from her employment. "Although it is unnecessary to exactly identify the substance in which one slipped, the evidence must still preponderate to show the existence of a substance on the floor." *Id.* (citation omitted.) The FC also discussed several cases where the allegation of a slippery floor alone was insufficient to meet a claimant's burden of proof without evidence of the presence of a substance on the floor.

- ***Gutierrez v. Perdue Farms, Inc.***, JCN VA00001818856 (Jan. 4, 2023) – Affirmed (On Appeal to COA, No. 0176-23-2)

The claimant alleged a compensable injury by accident when he slipped and fell on January 20, 2021. The DC found that the claimant failed to prove that his fall arose out of a risk peculiar to his employment. The DC explained that the claimant did not know why he fell, and none of the witnesses could testify as to the mechanism of the fall. Only after viewing video was the claimant able to describe what might have occurred. The claimant requested review, arguing that there was

ample evidence upon which to reasonably infer, without speculation, that he slipped and fell because of a wet substance at the site. The FC disagreed. Upon the evidence presented, the FC stated:

> Whether the claimant slipped, or not, it is simply too speculative to conclude that the claimant's fall resulted from a work-related hazard. We decline to presume (or infer) that some material upon the ground was the causative factor. Rather, the record as a whole failed to substantiate, by a preponderance of the evidence, that any substance existed, and even if so, led to the claimant's fall.

(Op. 5.)

- ***Kegley v. Hot-Rock Haulers***, JCN VA02000037886 (Jan. 25, 2023) – Reversed/ Remanded (On February 23, 2023, the FC affirmed the DC's February 7, 2023 letter overruling the claimant's objection to an additional evidentiary hearing and denied interlocutory review.)

The claimant, a truck driver, sustained multiple injuries from an assault that occurred on March 22, 2022. The claimant's tractor-trailer hit another vehicle and the occupants of that vehicle pursued the truck, stopped it, and assaulted the claimant, who said he could not see the other vehicle because it was in his blind spot. The DC accepted the claimant's testimony about the events as credible but found that he failed to prove "the attack was directed against him as an employee or because of the employment." (Op. 3.) The FC reversed and remanded, holding that the claimant had proven that assault arose out of employment. The FC found that the assailants were angry because their vehicle had been hit or cut off by a truck driven by the claimant, the claimant did not know his assailants, and there was no evidence that the incident arose from anything other than the claimant's operation of his vehicle through a construction zone and while avoiding a parked cement truck. The FC held that "[a]ll of these work-related circumstances were 'risks peculiar to the claimant's employment as a truck driver,' and 'impersonal circumstances directly attributable to the duties of his employment.'" (Op. 7.)

- ***O'Brien v. N. Va. Cmty. Coll.***, JCN VA00001876256 (Mar. 3, 2023) – Affirmed (On Appeal to COA, No. 0537-23-4)

The claimant was injured while walking down a hallway when she encountered a co-worker. As she turned to address her co-worker, she fell. The claimant asserted three factors as the cause of her fall: her right foot getting stuck to the floor as she turned; the distraction precipitated by turning to address her colleague; and the work materials held in her left hand. The DC denied the claim, and the FC affirmed.

Regarding the assertion that her foot got stuck to the floor, the DC reviewed video of the fall and stated, "[w]e find that it was the claimant's left foot becoming dislodged from her open back shoe

while in the process of turning . . . that caused her to lose her balance and fall." (Op. 4.) The DC further found no evidence of a foreign substance, an uneven or broken surface, or other condition of the hallway that would have caused her left shoe to become "stuck." On appeal, the FC declined to infer that a substance on the floor caused the claimant's shoe to stick. "[W]e find any inference in this case would require us to indulge in impermissible speculation. We have viewed the video numerous times, have considered the evidence in its entirety and yet remain uncertain as to the cause of the claimant's fall." (Op. 5.)

Discussing the alleged distraction, the FC stated:

> The consistent theme in distraction cases is that compensability rests, not merely on an injury attributable to a work-related distraction, but upon the distraction exposing the claimant to an increased risk of injury from some potential hazard in the work environment. By such means, the distraction provides the critical causative link between work and injury necessary for the accident to arise out of the employment.

(Op. 7.) (footnote omitted) The FC found no work environment that contributed to the claimant's fall. "The claimant was walking down a flat, non-defective, unobstructed hallway when she turned to address her co-worker and fell for no reason we can divine from this evidence." *Id.*

The FC also found no evidence "which would allow us to indulge in the inference that the work items held under the claimant's left arm were causally connected to her fall." (Op. 9.) Nor did the FC find any evidence that the work items contributed to the seriousness of the fall or resulting injuries.

Commissioner Marshall dissented. He disagreed with the majority's "adding an unnecessary second requirement for a workplace distraction to cause an injury 'arising out' of the employment." (Op. 14.) "There is no precedential or rational basis to graft an additional requirement onto the arising out of test. Case law does not establish or imply that an injured worker must prove both: (1) a distraction, and (2) a 'potential hazard' of the workplace that causes an accident." (Op. 15.) Commissioner Marshall discussed cases where the distraction alone constituted the risk necessary to satisfy the arising out of test and would have found the distraction caused by the co-worker sufficient to establish that the claimant's resulting fall arose out of her employment.

- ***Santi v. Loudoun Cty. Pub. Schs***, JCN VA00001703395 (Mar. 1, 2023) – Reversed and remanded (Request for review of remand opinion filed Apr. 19, 2023)

The claimant testified she was walking to the restroom when she turned into the hallway where the adult restrooms were located and felt the floor was slippery. She stated it felt like wax. Her right foot slipped, she fell forward, and she was not able to regain control of herself. She collided

with the window at the end of the hall, which the DC estimated was approximately twenty feet from where she said she slipped. The DC found that the claimant failed to meet her burden of proving the injury arose out of her employment. The DC stated there was no convincing evidence that any substance, defect, or other condition of the floor had a causal role in the fall, and declined to infer that a workplace condition caused the accident. The FC reversed the DC and found that the claimant proved that her injury arose out of the employment. Recognizing that the claimant does not have to identify the precise substance that caused her to slip and fall, the majority concluded that a condition of the employment caused the slip and fall and that her accident arose out of her employment.

> Immediately after the accident, the claimant told paramedics she slipped. She told hospital staff she slipped on a slick spot on the floor. The next day, her recorded statement indicated the floor "felt like wax" and she slipped and could not regain her balance. Her hearing testimony was consistent with this account.
>
> Based on the greater weight of the evidence, we infer the claimant slipped on an unknown substance on the floor of the hallway.

(Op. 6.)

Commissioner Newman wrote a concurring opinion. He stated that the evidence "presents us with an unassailable view of the events which rendered the claimant so severely injured." (Op. 7.) Agreeing with the outcome, he wrote separately to address his disagreement with the dissent and his "more tempered dispute with the majority." *Id.* Commissioner Newman stated that the slickness of the hallway caused the claimant's right foot to slip from under her resulting in a consequential loss of balance. "The claimant's forward momentum, fueled by unsuccessful efforts to regain her equilibrium, carried her the length of the hallway until she collided with great violence into a window at its end." (Op. 8.) Commissioner Newman noted that the claimant consistently conveyed that she slipped due to a slick floor. Interestingly, however, he found the evidence sufficient to infer that she slipped on water on the floor.

> In this short hallway, there were multiple sources from where the water could have come including two fountains . . . two bathrooms and a janitor's closet. The claimant had observed water on the floor previously. If that is deemed insufficient to employ an inference, then we may add to this impressive evidentiary mix the fact that the employer drew such an inference, abating the danger by placing a rug in the hallway.

(Op. 10.) Interestingly, it was noted in a footnote that the rug was installed in the hallway "some two years after the claimant fell." *Id.* Commissioner Newman also disagreed with the dissent that the description of the accident constitutes a violation of space/time.

Commissioner Rapaport dissented, stating the DC properly found there was no convincing evidence of a substance, defect, or condition of the floor that caused the fall. He noted the claimant's evidence is that she slipped and somehow traveled over fifteen feet before striking the window. "There is simply no explanation, plausible or otherwise, to explain the accident as the claimant alleges occurred." (Op. 14.) Commissioner Rapaport further discussed his disagreement with the inferences made by the majority.

> [A]n inference must be supported by the evidence. As finders of fact, we are entitled to our own opinions, but we are not entitled to our own facts. No matter how severe the injury or how great our desire to find a claim compensable, we are not at liberty to assume a causative event without supporting evidence.

(Op. 15.) Case law establishes that a claimant may be unable to identify the precise cause of her fall and the accident remains compensable. "Yet, here, the majority is creating causation from pure speculation and surmise." *Id.*

Attorney's Fees

- ***Boller v. Hapax Inc; Hapax Snow & Ice Mgmt.***, VA00001844122 (Dec. 20, 2022) – Affirmed (Final)

Claimant's counsel requested review of the DC's finding that he was not entitled to an award of attorney's fees pursuant to Virginia Code § 65.2-714(B). The claimant alleged a compensable injury by accident, and the defendants denied the claim. Thereafter, the parties settled the case by Petition and Order (P&O). Claimant's counsel sought fees against the medical provider, who asserted that he failed to meet the statutory requirements to receive an attorney's fee.

Virginia Code § 65.2-714(B) provides the following:

> If a contested claim is held to be compensable under this title and, after a hearing on the claim on its merits or after abandonment of a defense by the employer or insurance carrier, benefits for medical services are awarded and inure to the benefit of a third-party insurance carrier or health care provider, the Commission shall award to the employee's attorney a reasonable fee . . . .

The FC noted that the settlement reflects that the defendants raised viable defenses, including that the claimant did not sustain a compensable injury by accident, the alleged accident was unexplained, and the defendants did not abandon their defenses, as required by "the plain language requirements of the statute to award an attorney's fee." (Op. 4.) Moreover, the FC noted that no benefits for medical services were awarded and inured to the benefit of the health care provider through the efforts of claimant's counsel, and denied the claim for the requested fees.

Average Weekly Wage

- ***Martinez v. Better Views Tree & Landscaping***, JCN VA02000036515 (Nov. 1, 2022) – Affirmed in part, reversed in part, modified (Final)

The claimant requested review of the DC Opinion denying his claim for TTD because he failed to prove his average weekly wage (AWW). The DC found a compensable injury with resultant disability and that he adequately marketed. However, the DC found the claimant was not entitled to an award of wage loss because he failed to provide sufficient evidence to calculate his AWW. The FC affirmed in part, reversed in part, and modified the award, finding credible evidence from the employer as to the number of days worked per week and uncontradicted testimony from the claimant regarding his rate of pay. The parties agreed that the claimant worked for the employer weekly and earned a wage so the employer should not be shielded from paying disability benefits. Benefits were awarded based on the lowest rate of pay of $250 per day.

- ***Tickle v. Mary Washington Healthcare***, JCN VA00001675868 (Nov. 1, 2022) – Affirmed as modified (Final)

The DC found the claimant suffered a 37% loss of use to her right leg and entered an award based on a pre-injury average weekly wage of $1,789.10, which included a $4,700 relocation bonus. The FC reversed the DC's determination of the average weekly wage and held that the relocation bonus paid to the claimant should not be included in her gross earnings when calculating her pre-injury average weekly wage. The FC concluded:

> [T]he claimant testified that the cost of her relocation to Fredericksburg was significant. She did not present evidence that the relocation bonus was more than sufficient to reimburse the expenses she incurred. To the contrary, she stated that she probably spent more than the bonus while moving. We are not persuaded the reimbursement bonus constituted an economic gain or provided her extra compensation for services rendered to the employer. It was not an allowance made in lieu of wages, and should not have been included when calculating the average weekly wage.

(Op. 4.)

Change in Treating Physician on Employer's Application

- ***Moss v. Safeway***, JCN 1035985 (Jan. 23, 2023) – Affirmed (Final)

The FC affirmed the DC who sustained an Employer's Application and ordered a change in treating physicians. The claimant had undergone ten back surgeries, was treated for years in pain management, and took more opioids than prescribed without any decrease in pain. The defendant

had multiple peer review opinions and deposed the treating physician. The FC found that the claimant's treating physician provided treatment that was "unreasonable, inappropriate, inadequate, and dangerous" and that defendants presented an appropriate treatment plan for alternative care. (Op. 9.)

Claim for Permanent Total Disability Not Premature

- ***Corbin v. Fairfax Cty. Pub. Schs.***, JCN VA00000928014 (July 5, 2022) – Affirmed (Final)

The DC found the claim for permanent total disability (PTD) was not premature, noting that the claimant's entitlement to TTD would expire in less than two years and that significant additional litigation was anticipated after the Opinion was issued. The DC also found the claimant's evidence was more persuasive than the employer's and held "that the claimant has carried her burden of proving permanent and total disability resulting from the May 20, 2014, injury by accident." (Op. 13.) The DC further ruled that "it appears the Employer's Application seeking a change in treating physician is motivated more by a desire to remove Dr. Cintron from the case than by any desire to provide the claimant with more appropriate treatment," and the employer's request for a change in treating physician was denied. (Op. 14.)

The FC affirmed, holding that two years left on the TTD award does not render the claim premature. The claimant met her burden of proving PTD. Defense evidence did not show medical treatment was ineffective or that a different modality would improve the claimant's condition.

Claimant's Request for a Specific Provider not Per Se Accommodation

- ***Catlett v. Riverside Reg'l Med. Ctr.***, JCN VA00001678833 (July 20, 2022) – Affirmed (Final)

The claimant, who lives in Poquoson, suffered a compensable accident resulting in concussion/ post-concussion syndrome, neck, left arm contusion, lower back pain, tinnitus, and visual disturbance secondary to post-concussion syndrome. The treating neurologist referred the claimant to Dr. O'Shanick in Richmond. The defendants objected and were willing to offer a local neurologist panel.

The DC found the defendants responsible for the referral, noting the treating neurologist diagnosed a traumatic brain injury, and gave greater weight to the treating physician than the IME physician, who disputed a connection between the accident and the claimant's visual disturbances, contrary to the award. The defendants appealed and also argued that the referral was an accommodation to the claimant.

The FC agreed with the DC's analysis. The defendants argued the evidence showed the claimant researched professionals who treat traumatic brain injuries and the referral note states: "Patient Requested Specific Provider." However, the FC noted:

> "[T]he fact that a referral is based upon a claimant's request neither validates nor invalidates a referral. Rather, the Commission will look to the entire record to see if the referral is for medically necessary treatment." *Squires v. Shaw Jewelers*, VWC File No. 167-13-51 (Aug. 28, 1996), *aff'd*, No. 2320-96-2 (Va. Ct. App. Mar. 18, 1997). Given the evidence in this case, we find Dr. O'Shanick's referral was not merely an accommodation but was medically necessary treatment causally related to the claimant's work injuries.

(Op. 5.)

Compensable Consequence

- ***Halisky v. Fairfax Cty. Gov't***, JCN VA00001563137 (Aug. 15, 2022) – Affirmed (On Appeal to COA, No. 1388-22-4)

The claimant sustained a compensable injury by accident to his left shoulder in 2019. He fell on a fishing boat in 2020 and alleged a change in condition. The FC agreed with compensability, finding that the physician related the claimant's condition after the fall to the occupational accident, and this opinion was uncontradicted. The FC advised that a "claimant is entitled to continuing compensation in spite of an intervening non-compensable accident, if the intervening accident exacerbates the original injury." (Op. 5.) (citations omitted). The FC noted that the claimant's arthritis was asymptomatic, and he had recovered to return to full duty, albeit having symptoms and permanent impairment. However, "[a]fter the November 17, 2020 incident, aggravation of his arthritis prevented him from performing his job. The work accident made the claimant's left shoulder susceptible to the aggravation he suffered in November 2020, a compensable consequence of his original injury." (Op. 10.)

In his dissent, Commissioner Rapaport asserted that the claimant failed to prove that any injury suffered in 2020 naturally flowed from a progression, deterioration, or aggravation of the injury sustained in the original work accident.

Conduct by Counsel

- ***Penn v. Cornerstone Bldg. Brands***, JCN VA02000037627 (Jan. 12, 2023) – Request for Interlocutory Review Denied

The FC denied interlocutory review where the DC struck defenses for failure to comply with a discovery order. The FC quoted the DC in denying the Request for Reconsideration, "[y]our

continuing conduct has exhibited unprofessionalism and disrespect for the legal process, opposing counsel, and the Commission."

Constitutionality of COVID-19 Presumption - § 65.2-402.1; Subpoena

- ***Martin v. Fluvanna Cty.*,** VA00001842749 (Oct. 4, 2022) – Affirmed in part, reversed in part, remanded (Remand opinion issued Nov. 22, 2022, finding that the claimant is entitled to the presumption and that the presumption was not rebutted; that opinion was not appealed)

Presumption Issue – The claimant filed claims alleging an injury by accident on November 9, 2020, or an occupational disease of COVID-19. At the hearing, the claimant alleged COVID-19, pursuant to the presumption statute, and alternatively, the occupational disease of COVID-19. The DC dismissed the claimant's claim for an injury by accident. The defendant defended the claim, in part, on the grounds that the presumption set forth at Code § 65.2-402.1(B) is unconstitutionally retroactive and unconstitutional because it is vague, ambiguous, and otherwise fails to provide fair notice. Claimant's counsel asserted the Commission lacked authority to declare any statute unconstitutional.

The DC held the Commission has the authority to rule on the constitutionality of a statute and did not find the statute to be vague, ambiguous, or failing to provide fair notice. Nonetheless, the DC determined that Code § 65.2-402.1(B) affected a substantive right of the parties and substantive amendments were not retroactive. The DC therefore concluded the Commission did not have authority to apply the presumption.

The FC also found it has the authority to rule on the constitutionality of the applicable statute. The FC further stated:

> After the emergence of COVID-19, the legislature enacted this presumption statute and clearly intended it to apply retroactively. We find the amendments within Virginia Code § 65.2-402.1 affect remedy rather than a substantive right. Occupational diseases and ordinary diseases of life such as COVID-19 were already covered under the Act, pursuant to Virginia Code §§ 65.2-400 and -401. The amendments to Virginia Code § 65.2-402.1 merely expanded a remedy that was already established. Moreover, the unprecedented occurrence of the COVID-19 pandemic justified the retroactive application of this presumption for certain occupations.
>
> . . . .
>
> The amendments within Virginia Code § 65.2-402.1 affect remedy rather than a substantive right. The legislature clearly intended for the presumption to

> apply retroactively, and the defendant was provided fair notice of the amendments prior to their effective date. Therefore, we find the presumption in Virginia Code § 65.2-402.1(B) is not unconstitutionally retroactive.

(Op. 12-13.)

The FC found it significant that the defendant could have requested that the Commission adjudicate the claim, which was filed on May 4, 2021, before July 1, 2021, when the amendment to the statute became effective, but chose not to do so.

Subpoena issue - On July 21, 2021, the defendant filed a Motion to Compel the claimant to produce information and/or documentation relating to his financial institutions, bank accounts, and/or credit accounts to further investigate his activities in the days preceding his alleged COVID-19 exposure. The defendant asserted that obtaining the claimant's bank and credit card statements during the weeks before his COVID-19 exposure provided evidence of his whereabouts and potential outside sources of infection, which was critical to the investigation and defense of the claim. The claimant contended the information sought was not relevant to his claim. The DC denied the request on the grounds that it was "overly broad and unduly intrusive." The FC held that "[g]iven the evidence as a whole, including the other methods of discovery available to the defendant to determine the relevant information, we find the Deputy Commissioner's decisions to deny the defendant's motions were not plainly wrong or unduly prejudicial." (Op. 8-9.)

- ***Aguiniga v. Falls Church, City of,*** VA02000034899 (Nov. 1, 2022) – Affirmed as modified (On Appeal to COA, No. 1826-22-2)

The defendant requested review of the DC Amended Opinion finding the claimant suffered a compensable occupational disease under the statutory presumption found in Code § 65.2-402 (COVID-19). The DC found the statute was constitutional, the claimant qualified for the statutory presumption, awarded medical benefits, but did not specify a date on which benefits would begin. The FC affirmed as modified.

The claimant is a police officer who felt he contracted COVID-19 on June 8, 2020 while responding to a trespass call at an apartment complex. The claimant continued to work full time until he tested positive for COVID-19 on June 19, 2020. The defendant argued retroactive application of the COVID-19 presumption violates due process. The FC affirmed the finding that the statute is not unconstitutional. The defendant also argued the claimant did not prove all of the statutory requirements for application of the COVID-19 presumption as he failed to prove an incubation period consistent with COVID-19. The FC found the presumption is triggered through the claimant's testimony that he worked June 8, 2020 and continued to work thereafter, all dates within the fourteen-day incubation period. The date of communication was found to be June 26, 2020, with medical benefits beginning fifteen days prior.

- ***Robinson v. State Police***, JCN VA00001828687 (Jan. 3, 2023) – Affirmed in part, reversed in part, and remanded – Stayed pending outcome of *Aguiniga v. Falls Church, City of*, VA02000034899 (Nov. 1, 2022)

The claimant sought benefits in connection with his diagnosis of COVID-19 pursuant to the presumption in Virginia Code § 65.2-402.1, or alternatively as an ordinary disease of life. The claim was defended in part on the grounds that the claimant did not sustain an occupational disease or compensable ordinary disease of life, and that there was insufficient evidence to trigger the COVID-19 presumption. The DC denied the claim, holding that the presumption did not apply because it affected a substantive right of the parties, and substantive amendments are not retroactive. The DC further found the claimant failed to meet his burden of proof for an ordinary disease of life as he failed to exclude potential outside causes of his COVID-19.

Regarding the constitutionality of the amendments to Virginia Code § 65.2-402.1, the FC reversed. The FC disagreed with the DC that the Commission does not have statutory authority to apply the presumption. Citing its recent decision in *Martin v. Fluvanna County*, JCN VA00001842749 (Oct. 4, 2022) (discussed above), the FC determined that the presumption is not unconstitutionally retroactive. The claim was remanded to consider application of the presumption.

The FC affirmed the DC's finding that the claimant failed to establish his COVID-19 arose out of and in the course of his employment and did not result from causes outside of the employment. The claimant returned to work from a two-week vacation on January 4, 2021 and participated in meetings at various locations. The claimant testified he met in an enclosed space, without masks, with two individuals he understood were sick. On January 5, 2021, he worked in his private office, but spoke with two other individuals periodically during the day. That evening, he met with another officer after picking up a personal item at Lowe's. The claimant experienced a tickle in his throat on January 6, 2021, and worked from home until he became ill with cold-like symptoms on January 9, 2021. He was diagnosed with COVID-19 on January 13, 2021. The claimant presented medical evidence that it was more likely than not that his COVID-19 diagnosis was related to his work-place exposure to the virus. The doctor testified that he was aware that several of the claimant's coworkers had been diagnosed with COVID-19, and that after working with them, the claimant was diagnosed with COVID-19. However, given the doctor's lack of awareness or consideration of the claimant's activities outside of work, including his vacation, both the DC and the FC found the claimant failed to prove all required elements for a compensable ordinary disease of life.

COVID-19 Presumption - § 65.2-402.1

- ***Barker v. VADOC – Marion Corr. Treatment Ctr.***, JCN VA00001878125 (Aug. 10, 2022) – Affirmed (Final)

The claimant alleged he suffered injuries to his heart and lungs from COVID-19 contracted in the workplace. The first issue presented was whether the claimant was a correctional officer entitled to rely on the presumption. The claimant worked as an electronics technician in the employer's maintenance department. Virginia Code § 53.1-1 defines correctional officer as "a duly sworn employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any state correctional facility." The crux of the dispute centered on whether the claimant's normal duties related to maintaining immediate control, supervision, and custody of prisoners. The claimant performed work throughout the prison and had direct contact with the prison population. However, he did not carry a weapon nor did he perform the same duties as a "security officer." The FC looked to established rules of statutory construction to interpret the definition of a correctional officer and did "not interpret the definition as being restricted to prison guards or constrained to only those in security positions." (Op. 5.) Yet, the question remained whether this claimant's normal duties related to maintaining immediate control, supervision, and custody of prisoners. The FC was persuaded that the claimant's job satisfied these criteria, noting that he regularly supervised up to six inmates who assisted him with maintenance performed both inside and outside of the prison gates.

The defendant also argued that the claimant failed to establish he received a confirmed diagnosis of COVID-19, as required for triggering the statute. The FC found the defendant's argument refuted by the hearing testimony and medical evidence. The claimant tested positive for COVID-19 when taking presumptive tests at both the prison and Walgreens. He subsequently reported to the emergency room with symptoms consistent with the disease, and required a course of hospitalization. His diagnosis of COVID-19 was confirmed by multiple licensed physicians. The claimant also testified that three people he came into contact with at work a week before his positive test were diagnosed with COVID-19. Thus, the FC found that the evidence established that the claimant suffered a period of disability after a positive COVID-19 diagnosis, and he was entitled to rely on the presumption that COVID-19 is an occupational disease.

- ***Ogunleye v. Nursing-RN, LPN, Etc.***, JCN VA00001745031 (Oct. 17, 2022) – Affirmed (Final)

The FC affirmed the DC's findings that a claimant seeking benefits for a COVID-19 infection under Code § 65.2-402.1(B)(1) had met her burden of proof that the presumption applied and that the defendants had failed to rebut the presumption. The claimant, an LPN at a nursing rehabilitation facility, demonstrated direct treatment of patients who suffered from COVID-19. The defendants countered that they had rebutted the presumption because no physician related the claimant's COVID-19 infection to her employment, and COVID-19 was widespread. The FC disagreed,

finding their evidence did not meet the required burden of persuasion to rebut the presumption. The FC further found that because of the presumption in Code § 65.2-402.1(B)(1), the claimant did not have the burden of proving the elements set forth in § 65.2-400.

Rebuttal of a successfully invoked presumption is governed by the same principles that guide decisions in heart-lung presumption cases, such as *Bass v. City of Richmond Police Department*, 258 Va. 103, 114 (1999). Thus, an employer/insurer must prove both that work did not cause the disease the statute covers and that there exists a non-work-related cause. Rejecting the defendants' argument that the widespread nature of COVID-19 rebutted the presumption by showing a non-work-related cause, the FC cited longstanding precedent that evidence that merely rebuts generally the underlying premise of a statute is not probative evidence for purposes of overcoming the presumption. *See Medlin v. Cty. of Henrico Police*, 34 Va. App. 396, 405 (2001).

- ***Lauber v. Poquoson, City of***, JCN VA00001886513 (Oct. 18, 2022) – Reversed (Final)

The FC reversed the DC's determination that the claimant had suffered a compensable occupational disease under the presumption in Code § 65.2-402.1(B)(2).1. While agreeing that the claimant had proven the applicability of the presumption regarding his contraction of COVID-19, the FC held that the defendant had rebutted this presumption by demonstrating that no other employee with whom he had worked had suffered from or had experienced exposure to COVID-19 during the weeks surrounding the claimant's infection, thus establishing that there was not a work-related cause of his disease. The FC further held that the claimant's testimony that he had traveled to Las Vegas to visit his family around the time of his infection, during which time his mother and one of his sons suffered from COVID-19, demonstrated a non-work-related cause of his disease.

- ***Reader v. Prince William Cty.***, JCN VA00001896452 (Dec. 1, 2022) – Affirmed (Final)

The claimant was a lieutenant with the Department of Fire and Rescue. He made a claim for benefits related to COVID-19 as an injury by accident, occupational disease, or ordinary disease of life. The DC found the claimant did not suffer a compensable injury by accident that occurred at a reasonably definite time or an obvious sudden mechanical or structural change to the body. The FC determined that the claimant's exposure to people in a class for a period of six hours and forty-five minutes presented multiple potential causative events for exposure to COVID-19 and that the claimant failed to prove an identifiable incident that resulted in a change to the body. The DC further found that the claimant did not qualify for the presumption of Virginia Code § 65.2-402.1 because he never received a positive COVID-19 test and did not require medical treatment. The claim was then analyzed as an ordinary disease of life, and the DC determined that the claimant failed to prove his claim by clear and convincing evidence. The claimant emphasized that he did not contract COVID-19 until after the swift water class rescue when he could not wear PPE. The FC held that while the claimant's infection with COVID-19 possibly

resulted from his work instructing the water rescue course, it could have emanated from other causes, and, thus, did not meet the burden of proving his claim by clear and convincing evidence.

- ***Smith v. Scott Cty.***, VA00001859006, Feb. 9, 2023 – Affirmed (Final)

A Deputy Sheriff sought benefits for COVID-19 under Code § 65.2-402.1(B)(2). The employer argued that the presumption was unconstitutional, that the claimant was not entitled to the presumption, and that the claimant was unable to meet his burden of proof by clear and convincing evidence for a compensable ordinary disease of life. The claimant and extended family members went to Pigeon Forge, Tennessee tourist/resort area for a weekend. The claimant worked the following Monday and responded to a call for a suicidal person. The next day, the claimant began having symptoms and was subsequently diagnosed with COVID-19 and hospitalized. Later, the claimant was told that people in the home of the suicidal person had COVID-19. The DC found that three of the four necessary elements for the presumption were met, but the claimant failed to prove an incubation period consistent with COVID-19; thus, the presumption did not apply. The claimant also did not meet the burden of proof for a compensable ordinary disease of life. The constitutionality argument was not reached. The claimant requested review.

The FC affirmed, citing *Aguiniga v. Falls Church*, JCN VA02000034988 (Nov. 1, 2022). The presumption statute does not require proof of exposure. Instead, it requires proof the claimant was at work or working during the incubation period for COVID-19. Per the Centers for Disease Control, the incubation period is two to fourteen days. The claimant was at work on March 29. He did not work from March 26 through March 28, and his symptoms began on March 30. There was no evidence that he worked other days in March. Therefore, the FC held that the evidence failed to establish the presumption applied to claim. The FC also found that the claimant failed to sustain his burden of proof for a compensable ordinary disease of life, as there was no clear and convincing evidence that his COVID-19 arose out of and in the course of his employment and did not result from causes outside the employment.

- ***Wilson v. State Police***, JCN VA00001896670 (Jan. 18. 2023) – Affirmed (Final)

The parties stipulated that the claimant met the definition of "law-enforcement officer" pursuant to Virginia Code § 65.2-402.1. The defendant defended the claim on the grounds the claimant did not suffer an occupational disease or compensable ordinary disease of life, and the claimant was unable to prove entitlement to the presumption pursuant to Virginia Code § 65.2-402.1. The FC affirmed the DC who found the claimant did not prove the need for medical treatment for COVID-19 to qualify for the presumption. In his concurrence, Commissioner Marshall indicated that to the extent the majority opinion suggests that "diagnostic testing" is not "medical treatment," he disagreed and pointed out that the Commission has repeatedly held that reasonable and necessary diagnostic procedures are "necessary medical attention." (Op. 7-8.) He would

limit the holding that diagnostic testing for COVID-19 is not medical treatment only under the specific language of § 65.2-402.1(B)(2) and (F)(3).

Disability – Prospective Work Release

- ***Carcheri v. M & A Transp. Serv., LLC***, JCN VA02000035709 (Feb. 21, 2023) – Affirmed in part, reversed in part, and modified (Final)

The FC modified the DC's award of ongoing temporary total disability benefits to extend the timeframe to October 16, 2020, but agreed with no continuing disability thereafter. The medical evidence was that "[d]uring Dr. Patel's October 9, 2020 evaluation, Dr. Patel advised the claimant not to work for '1 more week due to fresh wound on the left knee.' He further opined, 'After 1 week, he may return to work but keep elastic sleeve on the left lower leg.'" (Op. 3.) The FC emphasized that the claimant was not under an open award and had the burden of proving the extent of his disability. The FC did not find that the claimant failed to meet his burden of proof based on the prospective release to work. Rather, the FC stated the "claimant simply failed to provide sufficient evidence to meet his burden of proving total disability after October 16, 2020." (Op. 4.)

Commissioner Marshall dissented in part and stated his opinion that the claimant proved total disability through October 26, 2020. He stated that the absence of any work restrictions at the October 27, 2020 office visit supports the conclusion that evidence of continuing disability was lacking. However, he disagreed with the majority that the prospective work release was insufficient to prove continuing disability until the next medical evaluation on October 27, 2020. The Commission routinely discredits prospective releases, and they should not be preponderating evidence regardless of the party carrying the burden of proof.

Discovery – Employer's Evidence Excluded for Discovery Misconduct

- ***Buruca v. Decked Out Landscapes, LLC***, JCN VA02000037708 (Feb. 7, 2023) (Interlocutory review denied)

The DC granted the claimant's motion to exclude the employer's testimony at hearing due to discovery violations and non-compliance with an order compelling response to discovery and continuing the hearing. The UEF requested reconsideration and objected to the Fund being barred from presenting defenses including testimony from the recalcitrant employer. The DC denied the motion for reconsideration. The UEF requested interlocutory review, arguing that the exclusion of the employer's testimony and evidence at trial is prejudicial to the Fund's defenses of the case and that the exclusion of the employer's testimony and evidence at the evidentiary hearing is an abuse of discretion and an extraordinary and unnecessary sanction which unfairly impacts the Fund. The FC denied the request for interlocutory review, holding: "[W]e do not find sufficient grounds to grant the Fund's request for review" of the DC's Order.

Employer's Application

- ***Compton v. Yokohama Tire Mfg. VA***, VA00001911795 (June 28, 2022) – Affirmed (Final)

The FC affirmed the rejection of the Employer's Application for Hearing. This was a technical rejection of the application where the Employer's Application did not state the last day compensation was paid. The employer had to file again and pay through the date of that filing. Good for case law on elements of Employer's Applications.

Extended Premises

- ***Aponick v. Inova Loudoun Hosp.***, JCN VA00001849848 (July 18, 2022) – Affirmed (Final)

The claimant's injury on extended premises while leaving work was found compensable. The claimant worked as a phlebotomist for the employer's central lab. At the end of her shift, she exited the building and walked on the adjoining sidewalk toward the designated employee parking lot. A patient in a vehicle stopped and asked her about the location of an outdoor COVID-19 testing facility. To respond, she left the sidewalk and stepped onto an elevated grassy strip or berm that ran between the sidewalk and the parking area. After responding, the claimant turned back toward the sidewalk placing her left foot on its edge, rolled her left ankle, and fell.

The DC found that, although the claimant had finished her shift and exited the building before the accident occurred, "the sidewalk and adjacent grassy area were part of the extended premises of the employer." (Op. 5.) The DC also noted that the claimant "clearly attributed her fall to the height differential between the sidewalk and the grassy area," and that the height differential constituted a risk of the claimant's employment. (Op. 6.) The claim was found compensable.

The FC affirmed, holding it was not a mere act of turning that caused the injury, but turning on uneven ground of sufficient slope to cause the claimant's ankle to roll, and she had been distracted by a customer, which also constituted a risk of employment.

- ***Sullivan v. United Cont'l Holdings, Inc.*****,** VA00001867427 (June 2, 2022) – Reversed and remanded (Remand opinion issued June 13, 2022; Defendant filed Request for Review; FC opinion issued Dec. 29, 2022 (On Appeal to COA, No. 0164-23-4)

The claimant was directed to park in a particular parking lot. She fell while on her way to work, as she was traversing through the public walkway leading to the terminal building where she worked. The walkway led to the ticketing level of the terminal, where the claimant would have clocked in to begin her work. Although it was not the sole means of ingress and egress connecting the parking garage to the terminal, it was an essential means of ingress and egress. The FC reversed

the DC and found that the injury did arise out of employment. While the property was not owned or maintained by the claimant's employer, it was on the premises of another employer that was in such proximity and relation to the space leased by the employer as to be in practical effect the employer's premises.

Commissioner Newman concurred, citing *Prince v. Pan American World Airways*, 6 Va. App. 268 (1988). The outcome in *Prince* was not dictated by how remotely the claimant fell from her ultimate destination but rather by the character of the passageway on which she fell. What qualified the walkway as, "in practical effect a part of the employer's premises," was its status as a "common avenue of passage over the grounds and an essential means of ingress and egress . . . " with the employer enjoying "something equivalent to an easement." (Op. 13.)

Commissioner Rapaport dissented, stating that the claimant's fall was not sufficiently close to the terminal building to constitute the extended premises of the employer. He declined to characterize the walkway as "immediately surrounding" the terminal, and pointed out that the majority's opinion expands the meaning of "immediately surrounding" and essentially created an exception, because the claimant worked in an airport rather than an office building. He stated: "I do not find any authority for such an exception. The claimant was approximately 270 feet away from the terminal building, nearly a football field away, when she fell in the walkway immediately after she exited the garage. I would find this area, which was not owned, controlled or maintained by the employer, too remote from the terminal to be in practical effect a part of the employer's premises." (Op. 15.)

Fall from Ladder

- ***Vasquez Organista v. JJ Drywall, Inc***., JCN VA02000036330 (July 25, 2022) – Reversed and vacated (Final)

The claimant fell as he was descending a ladder, injuring his right knee stating:

> I arrived to the job site, and I was about to install an aluminum prime. And when I was coming down the ladder, it's a six feet ladder, I... I fell and when I was falling, the weight of my body was on my knee, and this is how I fell.

He did not provide any additional information regarding how or why he fell as he was descending the ladder. The DC found the injury arose out of his employment.

The FC reversed, stating the cause of the fall was unexplained.

> We recognize the claimant was descending a six-foot ladder when he fell and injured his right knee, and ladders constitute an increased risk of the employment. Nonetheless, there is not sufficient evidence in the record that allows

> us to draw reasonable inferences as to how the fall occurred. The critical link between the claimant's fall and employment has not been demonstrated. For instance, the claimant did not describe an awkward position or a misstep as he descended the ladder. He did not testify about items in his hands or a defect in the ladder.
>
> The claimant's fall from the ladder is unexplained, and we are left to speculate as to the cause of his fall. We cannot base an award on conjecture or speculation. *See Central State Hosp. v. Wiggers*, 230 Va. 157, 159 (1985).

(Op. 5.) The FC pointed out in a footnote that the claimant's claim for benefits said he "slipped and fell injuring his right knee." (Op. 5, n.5.) However, the claim description was not introduced into evidence and, more significantly, the claimant did not mention this description during his testimony as the cause of his fall.

Commissioner Marshall dissented and noted that ladders are inherently dangerous, requiring the employee to descend backwards. Thus, "[t[he only reasonable inference from the evidence is that the claimant mis-stepped while descending the ladder." (Op. 6.)

- ***Valencia v. Sanchez Carpentry, LLC***, JCN VA02000036458 (Sept. 9, 2022) – Affirmed (Final)

The claimant requested review of the DC's finding that he failed to prove his injury arose out of his employment. The DC found that the claimant fell from a ladder, but the fall was not compensable as there was no indication that the ladder was defective or had anything to do with the fall. The claimant testified in his deposition that he did not "know what happened" to cause his fall, and the DC concluded that the claimant had an unexplained accident that was not compensable. (Op. 5.)

The FC determined that there was "insufficient information in the record below to allow us to draw reasonable inferences as to how the fall occurred." (Op 6). The claimant did not testify that the ladder was defective or unsteady, nor did he testify that he was working in an awkward position or leaning while on the ladder. Instead, he testified that he was standing straight with his feet planted, with a nail in one hand and a hammer in the other and gave no indication that this affected his ability to balance or caused him any difficulty. The FC held that the claimant's fall from the ladder is unexplained and not compensable.

- ***Sorto v. Metro Mech. Contractors***, JCN VA02000034233 (Oct. 12, 2022) – Affirmed in part, reversed in part (Final)

The FC affirmed the DC's decision regarding the occurrence of an injury by accident, but reversed the finding that claimant had only proven entitlement to compensation for TTD beginning May 30,

2019 to June 3, 2019 and from October 1, 2019 to February 16, 2020, concluding that he was also disabled for the denied period of June 4, 2019 through September 30, 2019. The FC found credible the claimant's testimony that before falling from the sixth step of a ladder and losing his memory, he was holding an air duct in one hand while trying to reach a wire in order to cut it with his other hand, the ladder shifted under him causing him to lose his balance.

On cross-examination, the claimant agreed that he did not know what had caused him to come off the ladder although he believed it traceable to his loss of balance and that he had told several of his medical providers that he did not know the cause of his fall. While considering this evidence, the FC determined that it should not casually disregard the DC's determination regarding the credibility of the claimant's remaining testimony.

On this point, Commissioner Marshall wrote a concurring Opinion, noting that because the FC had accepted the credibility of the claimant's testimony, it had not reached the alternative finding of the DC that the claimant suffered a compensable accident because of a risk of his employment that reasonably explained his fall and injuries. Commissioner Marshall supported this alternative finding with colorful language:

> The defendants contend the claimant did not establish that before his accident he was, "in a dangerous position to cause his fall." (Defs.' W.S. 22.) Rather, they maintain he was "comfortably situated," while standing on the sixth step of an eight-foot step ladder and reaching to cut duct work supports. (Defs.' W.S. 23.) These suggestions, which exceed the limits of both imagination and vocabulary, are factually and legally untenable and unpersuasive. "Ladders, in and of themselves, are dangerous, and accidents involving ladders cannot be properly evaluated without taking into consideration the increased risk" that they present. *Basement Waterproofing and Drainage v. Beland*, 43 Va. App. 352 (2004) (Citing *VFP, Inc. v. Shepherd*, 39 Va. App. 289, 293 (2003)). The defendants' argument that, "standing on a stepladder is not a unique hazard," belies reason and reality and conflicts with the conclusions of our appellate courts. (Defs.' W.S. 30.)

(Op. 8.)

In the Course of Employment

- ***Beckett v. Shenandoah Fleet Maint. & Mgmt.***, JCN VA02000037654 (Feb. 21, 2023) – Reversed and remanded

The DC denied the claim, holding that the accident occurred when the claimant was preparing to begin work and before he had entered the course of his employment. The FC reversed and found that the claimant's injury by accident occurred during the course of his employment.

The claimant worked on an "on-call" basis and was provided a company truck which was housed at his residence for efficient responding. The truck required new airbags. While scraping ice from the truck's windshield on the morning of the service appointment, the claimant slipped on black ice and fell. The FC held that the claimant's workday began when he began preparing the company vehicle for operation and brought him within the course of his employment.

> [T]he employer assigned the claimant a work vehicle and instructed him to park it at his residence so he could drive directly to assignments. On the morning of the accident, he was scheduled to take the vehicle to the dealership for an airbag replacement, as required by the employer. The safe operation of the vehicle required the claimant to scrape ice from its windows. The claimant unlocked the vehicle, retrieved an ice scraper issued by the employer, and was in the process of clearing ice from the windows when he slipped and fell.

(Op. 5.)

The FC found that the claimant's workday began when he began preparing the company vehicle for operation, and he was in the course of his employment when he sustained his injuries.

Commissioner Rapaport dissented and stated he would find that the claimant was not engaged in an activity growing out of and reasonably incidental to his employment at the time he suffered his fall. The claimant was injured when he was in the process of preparing to operate a vehicle so he could leave his residential home, "as any other employee is required to do." (Op. 7.) The claimant had not started any work duties, and he was not performing a required inspection as a part of this job. The mere act of scraping frost from the truck in order to operate it was a routine activity in preparation to commence work for the employer.

Injury by Accident

- ***Davis v. Wal-Mart Assoc., Inc.***, JCN VA02000037952 (Feb. 27, 2023) – Affirmed (On Appeal to COA, No. 0503-23-3)

The FC affirmed the DC's determination that the claimant failed to prove that the work accident caused a structural or mechanical change to his body or a compensable exacerbation of a pre-existing condition. The FC emphasized that an evaluating physician did not diagnose a specific type of back injury, that imaging studies showed normal, post-operative changes, and that the physician who treated the pre-existing back condition "opined that MRIs taken before and after the accident were similar and he could not determine whether the claimant suffered a structural change to the back." (Op. 7.) The FC noted that it considers "questionnaires prepared by an attorney and reviewed and returned by a physician" and that "[t]hey may constitute credible

evidence that carries the burden of proof." *Id.* The FC also confirmed that parties may argue alternative theories of recovery or defenses.

Commissioner Marshall dissented, stating that he would find the claimant proved a new injury to his back. While kneeling to place a twelve-pack of sodas on a low shelf, the claimant experienced acute low back pain that required treatment in the emergency room. Shortly thereafter, the claimant was diagnosed with lumbar radiculopathy and given discharge instructions for a lumbar sprain. This evidence established a material aggravation of his pre-existing condition, and the FC has recognized that a lumbar sprain qualifies as a mechanical change. Commissioner Marshall also discussed that the defense of an injury being an "expected result" of violating medically imposed restrictions must be narrowly construed. (Op. 12.)

- ***Tucker v. City of Richmond***, JCN VA00001736599 (July 11, 2022) – Reversed (On Appeal to COA, No. 1207-22-2)

The FC held that the claimant proved compensable back and spine injuries. It was undisputed that the claimant had pre-existing back problems and treated with Dr. Crane. The FC explained the claimant testified that he struck his back on a rail in his truck and felt pain in his back down his left leg. When the claimant visited Dr. Crane, he complained of symptoms which were never reported in records pre-dating the accident. Additionally, the physician prescribed stronger medication and diagnosed acute chronic low back and bilateral leg pain. Dr. Crane oversaw the claimant's surgery, and he concluded that the accident accelerated and aggravated the underlying condition.

In his dissent, Commissioner Rapaport asserted the claimant failed to prove a sudden mechanical or structural change. The claimant suffered pre-existing back pain for eighteen years. The MRI results showed no physical or structural changes. Dr. Crane opined that the occupational accident caused no physical or structural changes to the pre-existing low back condition.

Marketing

- ***Romeo v. US Foods***, JCN VA00001860891 (Oct. 3, 2022) – Affirmed (Final)

The FC affirmed the DC's finding that the claimant failed to prove a reasonable marketing effort by securing employment with a former employer before his release to selective employment where he was working approximately twenty hours more per week than for his employer at the time of his industrial accident. The claimant submitted some minimal evidence of other marketing efforts after securing this work. Citing *Ford Motor Company v. Favinger*, 275 Va. 83 (2008), the FC noted that the claimant had made insufficient efforts to seek employment so as to reduce the employer's responsibility for compensation for temporary partial disability.

In his dissent, Commissioner Marshall observed that the claimant was working one-third more hours than his pre-injury capacity (a total of sixty hours), leaving little time for marketing efforts. Commissioner Marshall borrowed a term from Japanese culture, karoshi, meaning "overwork death," and added:

> Applying the legal standard of reasonableness to marketing residual work capacity cannot inherently and doctrinally require an effort to find more work for more hours. To do so becomes, at some point, inherently unreasonable. This is just such a case. The majority's reasoning leads to the natural conclusion that someone working three jobs must still look for a fourth; someone working four jobs must still look for a fifth; and so on. On this record, the majority adopts too stringent an interpretation of reasonableness.

(Op. 12.)

Medical Provider Application Denied – No Proof Medical Treatment Related

- ***Tate v. Chubb Corp. (The)***, JCN 2236564 (Oct. 25, 2022) – Affirmed (Final)

The medical provider sought payment for allegedly unpaid medical services provided to the injured worker. The FC affirmed the DC's denial, finding that the medical provider failed to meet its burden of proving the employer's responsibility for the claimed charges.

The medical provider argued that the bills were prima facie evidence that the charges were for reasonable, necessary, and causally related treatment. The FC disagreed and clarified that the medical provider misconstrued the burden-shifting framework sanctioned in *Ceres Marine Terminals v. Armstrong*, 59 Va. App. 694, 703 (2012). The Commission instructed:

> In [*Armstrong*], the Court of Appeals of Virginia held that "it was reasonable for the commission to consider the medical bill as *prima facie* evidence that the charges were consistent with the requirements of the Act and to place the burden of proving that the medical fee was excessive on the employer."
>
> . . . .
>
> Whether the treatment rendered was reasonable, necessary, and causally related to the compensable work injury is a separate issue from whether the *charges* for such treatment are reasonable and necessary. It has long been held that "the claimant has the burden to prove that the medical attention, for which payment is claimed . . . was causally related to the industrial accident." *Watkins v. Halco Eng'g*, 225 Va. 97, 101 (1983) (citing *Ins. Mgmt. Corp.* v. *Daniels*, 222 Va. 434, 438-39 (1981)). "So long as a causal relationship between the industrial accident

> and the . . . [treatment rendered] is shown, the employer is financially responsible for the medical attention which the attending physician deems necessary, subject to review by the Commission." F*redericksburg Orthopaedic Assocs. v. Fredericksburg Mach. & Steel, LLC*, 62 Va. App. 83, 88 (2013) (quoting *Lynchburg Foundry Co. v. Goad*, 15 Va. App. 710, 714 (1993)). Thus, the burden of proving medical treatment is causally related to an accident is a threshold burden that must be met by the party making the claim, in this case, the medical provider, *prior* to determining the extent of the employer's pecuniary liability for such treatment under Virginia Code § 65.2-605.

(Op. 4-5.)

Medical Treatment

- ***Kaur v. Haimanot Gobena*****,** JCN VA00001614950 (Nov. 4, 2022) – Affirmed (Final)

The claimant suffered compensable injuries to her back, right hip, and right ankle on April 13, 2019. The claimant sought payment of medical bills related to dental treatment required for her right hip replacement surgery. The DC held the record did not sufficiently establish the necessary link between the work accident and the hip surgery, which required dental clearance, and also determined the claimant was barred from recovering payment for the bills associated with the dental treatment as the treatment was unauthorized.

The FC affirmed, finding that the claimant failed to prove that the hip surgery was causally related to the occupational accident, and hence, the defendants are not responsible for the dental treatment. The Commission noted that the surgeon involved made no mention of a work-related injury and that the treating physician's questionnaire response was not persuasive given the remaining medical evidence. "Dr. Weidner clearly did not believe the claimant's hip arthritis was causally related to the work accident at the time of his multiple assessments of the claimant immediately following her work accident. . . . Dr. Weidner completed the 2022 questionnaire response over two and one-half years after his treatment of the claimant, and he simply responded in the affirmative without any additional explanation regarding the basis for his responses." (Op. 5.)

Commissioner Marshall dissented, stating that the claimant's testimony and Dr. Weidner's revised opinion were sufficient to establish a causal relationship between the accident and the hip surgery.

Penalty for Failure to Pay COLA

- ***Vanderveer v. Shardan Inc.***, JCN 1396256 (Nov. 30, 2022) – Affirmed as modified (Final)

The defendants requested review of the DC Opinion awarding COLA totaling $145,543.84 and holding the defendants responsible for payment of $29,108.77 in attorney's fees. The FC affirmed as modified. The claimant was awarded PTD benefits beginning January 1998. The claimant sought payment of overdue compensation benefits, a penalty, and payment of COLA. The claimant started receiving social security retirement benefits on March 1, 2003. The defendants did not participate in an on-the-record hearing and an attorney was retained after issuance of the Opinion. The defendants argued COLA should only begin in 2003 when social security retirement began. However, the FC found that adjusting the claimant's compensation rate by each annual COLA adjustment since the claimant's accident date, as set forth in *Downey v. Guido*, VWC File No. 123-17-97 (Feb. 14, 1997), and *Mason v. Associated General Contractors of America, Inc.,* 61 O.I.C. 289 (1982), achieves the legislative purpose of the Act. Accordingly, the DC did not err in finding the claimant was due a lump sum of $145,543.84 in COLA, and that the current PTD rate with compounded COLA is $360.41. The FC modified the attorney's fee to be paid by the defendants to $21,831.58.

Permanent Partial Disability

- ***Mehrabani v. BJ's Wholesale Club, Inc***., VA00001643089 (Dec. 20, 2022) – Affirmed (On Appeal to COA, No. 0084-23-4)

The claimant sustained compensable injuries to her right hand (4th and 5th metacarpal bone fractures) and right arm on August 11, 2019. In 2019 and 2021, the claimant filed claims for permanent partial disability benefits alleging she suffered an 85% loss of use of the right upper extremity. The defendant agreed to a 7% permanent partial impairment rating but disputed a loss of use greater than that amount. The evidence primarily consisted of competing IME opinions and the claimant's testimony. The DC awarded 7% loss of use, finding the opinion of Dr. Khan more persuasive and the opinion of Dr. Meyer unsupported.

On review, the claimant asserted that the DC failed to consider her testimony in a meaningful way and overlooked the humanitarian purposes of the Act. The FC disagreed, stating that the claimant's testimony was "assiduously viewed and assessed along with the medical evidence . . . ." (Op. 2-3.) The FC also noted that while the underlying humanitarian purposes of the Act remain paramount in every case, each injured worker has the burden of proving entitlement to benefits sought. The FC further affirmed the DC's award of 7%, stating it was "the amount most convincingly established as appropriate and substantiated by the evidence." (Op. 3.) The FC also found no error in affording more probative value to the opinion of Dr. Khan and discarding the opinion of Dr. Meyer. The FC noted that Dr. Meyer improperly considered all fingers in his assessment and

failed to consider the combined values chart. Additionally, as Dr. Khan persuasively concluded that "a complete amputation across the metacarpophalangeal joints of the hand would result in 90% upper extremity impairment, suggesting that the 85% rating is inappropriate." (Op. 6.)

Permanent Total Disability - Gainful Employment

- ***Jones v. Athens Builders Corp***, JCN VA00000709100 (Dec. 1, 2022) – Affirmed (Final)

The claimant suffered a compensable injury by accident on October 18, 2012. Injuries awarded included right sphenoid fracture, right temporal skull fracture, right lateral orbital wall fracture, right zygoma fracture, left scapula fracture, and traumatic brain injury (TBI). On May 5, 2021, the claimant filed a claim seeking PTD pursuant to Virginia Code § 65.2-503(C), due to his TBI. The DC held that the claimant proved he suffered from a compensable injury to his brain that was so severe he was rendered permanently unemployable in gainful employment. The claimant's treating physician for his TBI indicated that the "potential exists for at least part-time selective competitive employment using supported employment services" including a vocational rehabilitation professional-assisted placement with shadowing support that would be weaned over time. (Op. 5.) The DC held that the "supportive work environment" described by his treating physicians did not qualify as gainful employment.

A claimant will be entitled to benefits if he suffers "an irreversible brain injury which renders the employee permanently unemployable and so affects the non-vocational quality of his life by eliminating his ability to engage in a range of usual cognitive processes . . . ." *Barnett v. D.L. Bromwell, Inc*., 6 Va. App. 30, 36 (1988). (Op. 3.) The "gainful employment" standard has been defined as "employment that is beneficial to both the worker performing the job, as well as the employer providing the opportunity" and that "results in profits and benefits both for the worker and the employer." *Great N. Nekoosa Corp. v. Wood*, 37 Va. App. 54, 59 (2001). (Op. 6.) The FC agreed with the DC and determined that the part-time supported employment, which was generally discussed by the claimant's treating physician for his TBI since 2017 and by the vocational case manager, who testified at hearing, was speculative and insufficiently indicative of the claimant's actual ability to perform gainful employment.

PTSD for Law Enforcement Officers and Firefighters – Code § 65.2-107

- ***Bean v. City of Chesapeake, Virginia,*** VA00001886662, (June 10, 2022) – Affirmed (Final)

An officer with a gunshot wound to his hand also claimed PTSD. The FC affirmed the DC and found that Code § 65.2-107 limits the award of benefits (here medical benefits for PTSD) to fifty-two weeks effective July 1, 2020. The claimant argued that he should not be limited to fifty-two weeks, arguing that the legislature intended to provide additional avenue for recovery,

not take away lifetime medicals. The FC did not agree, citing that the language of the code section is clear and unambiguous.

- ***Dawson v. Pittsylvania Cty.***, VA00001839612 (Nov. 1, 2022) – Affirmed (Final)

The claimant seeks review of the DC Opinion which denied his claim for PTSD. The employer seeks review of the finding the claimant suffered a qualifying event as described by Code § 65.2-107. The claimant is a Sheriff's Deputy who contends he developed PTSD after being called to the residence of a fellow officer who committed suicide. The claimant did not observe the body or view pictures of the crime scene. The DC found the incident constituted a "qualifying event" occurring in the line of duty per Code § 65.2-107, but concluded the event was not a substantial factor and primary cause of the claimant's PTSD, so the claim was denied. The FC affirmed.

The claimant's PTSD pre-existed the work event (first diagnosed in 2018) due to a 1995 suicide of a fellow military policeman. The claimant was able to work until the 2021 work incident. The claimant argued the 2021 incident aggravated his condition and caused the PTSD to become disabling. The FC found no provision in Code § 65.2-107(B) which allows them to construe proof of causation satisfied by the aggravation of PTSD. The claimant cites Section 65.2-107(A) which defines a qualifying event as "an incident or exposure occurring . . . on or after July 1, 2020," thus excluding the 1995 suicide from being such an event. (Op. 7.) The FC disagreed and stated the statute does not afford them the liberty to ignore causative events occurring prior to July 1, 2020 and referred to Code § 65.2-107(B)(4). The FC also found the claimant was in the line of duty when he experienced the qualifying event, regardless of the acts he engaged in after his arrival at the residence.

PTSD not Compensable as an Ordinary Disease of Life

- ***Combs v. VADOC – Red Onion State Prison***, JCN VA02000037536 (Aug. 9, 2022) Affirmed (Final)

The claimant worked as a correctional officer at Red Onion State Prison. In 2016, he was assaulted while removing an inmate from a cell. The inmate attempted to stab him, striking him in his protective vest several times. The assault caused a knee injury which required surgery and resulted in five months of disability. On returning to work, the claimant suffered increased anxiety, nightmares, and "almost daily" panic attacks. In 2019, another staff member was assaulted and stabbed, and the claimant responded to the emergency call. He testified that this "brought back a lot of bad stuff," causing his condition to regress. The claimant then came under the care of a Physician's Assistant, who took him out of work due to anxiety and depression. The claimant testified that the cumulative result of multiple events was that he was unable to work as a correctional officer beginning in April 2019. Though he was referred to a psychiatrist, no records from a psychiatrist were filed or made part of the hearing record.

The FC agreed with the DC that the claim should be analyzed as an ordinary disease of life, noting that the evidence identified sources of stress outside of the employment that contributed to the claimant's condition, including family relationships, difficulty with communication, and financial difficulties. The FC noted that the record was devoid of evidence from a medical doctor. "Although reports from counselors and licensed mental health professionals without a PhD are admissible, they become competent evidence only to such extent that such opinions have been expressly ratified and incorporated into the medical reports of a licensed physician as their own opinions. *Rother v. Prince William Cty. Sch. Bd.*, VWC File No. 230-67-74 (Dec. 15, 2008)." (Op. 8.)

The FC found that the claimant's evidence failed to meet the heightened burden of clear and convincing evidence, as the documents diagnosing PTSD were not prepared by either a psychiatrist or psychologist with a PhD. The FC was not persuaded that the claimed PTSD was characteristic of the employment and caused by conditions peculiar to such employment. The FC was unpersuaded that the claimed PTSD was caused by repeated exposure to traumatic stressors as required for it to be considered a compensable ordinary disease of life and agreed with the DC's finding that the claimant failed to prove his condition resulted from "cumulative exposure to multiple traumatic events as opposed to a [sequela] of his discrete injury by accident in 2016." (Op. 34.)

Request for Review of Entry of an Award Agreement

- ***Taylor v. Hurst Harvey Oil, Inc***., JCN VA00002013924 (Dec. 1, 2022) – Vacated (Final)

The pro se claimant and a claims administrator representative submitted an Award Agreement to the Commission. On September 23, 2022, an Order providing for an award of medical and TTD benefits was entered. On October 24, 2022, president of the employer's company disputed entry of the Order. The Commission accepted the president's letter as a timely Request for Review. In the majority Opinion, the FC found that the situation was similar to an employer who had a conflict of interest with the insurance carrier. *See Gutschmidt v. Peter L. Passero & Brian A. Feen*, JCN VA00001265239 (Mar. 14, 2019). The FC held as the employer was not a party to the Award Agreement and filed a timely Request for Review, grounds exist to vacate the Award Order, and the case was referred to the docket for hearing.

In his dissent, Commissioner Marshall disagreed, citing to his dissent in *Gutschmidt* and asserted that the Request for Review should be dismissed. Commissioner Marshall stated:

> Under the Virginia Workers' Compensation Act, the employer and insurer are treated as a single entity. *See* Virginia Code § 65.2-101 (defining employer and providing that "[i]f the employer is insured, it includes his insurer so far as applicable.") Furthermore, the insurer and the employer are bound together by contract. Accordingly, "[s]tipulations made by an employer's insurer are binding

> on that employer, and the employer does not have an independent ability to litigate issues agreed to by its insurer." *Kumar v. Tri Tech Labs*., VWC File No. 231-67-96 (Mar. 7, 2007).

(Op. 3.)

Commissioner Marshall indicated that, in his opinion, there was no apparent conflict of interest between the employer and the insurer in this case or that the employer was not a party to the agreement. He further stated that the employer should be bound by its insurer's promise to pay medical benefits and TTD, and to hold otherwise frustrates the purposes of the Act.

Res Judicata

- ***Godbey v. Am. Healthcare, LLC*,** JCN VA00001495234 (Nov. 3 2022) – Reversed (Appealed to COA, No. 1862-22-3; settled, Order entered Apr. 14, 2023)

The DC terminated the award based on a second Employer's Application for Hearing (EAH). The claimant argued that consideration of the issues raised in the EAH are barred by res judicata and that the defendants failed to prove their allegations by preponderating evidence. Agreeing with the claimant on both issues, the FC reversed.

The first EAH, which contained a questionnaire by Dr. Brasfield, was filed and rejected. The second EAH also relied upon Dr. Brasfield's questionnaire that was relied on in the first application. However, the EAH was supplemented with an additional record from Dr. Duncan deferring to Dr. Brasfield's opinion. The FC found this was nothing more than an attempt to revisit the issues raised in the first EAH and to persuade the Commission that Dr. Brasfield's opinion, which was previously rejected, merits greater evidentiary weight than that of Dr. Duncan. Res judicata bars the second application.

If the second application was not barred, the FC would have, nonetheless, concluded the defendants failed to prove by preponderating evidence the claimant was able to return to regular work as the medical evidence on which they relied was not contemporaneous to the filing of the application. TTD reinstated.

- ***Gonzalez v. Compass Grp.***, JCN VA00001651620 (Dec. 7, 2022) - Affirmed (Final)

On September 17, 2019, the claimant was injured at work. In a February 6, 2020 claim, she sought a medical award for injuries to her face, mouth, both eyes, and teeth. Later, the parties signed and filed with the Commission an Award Agreement, listing "left side facial injuries" under the section titled "Body Parts/Injuries Accepted" and the agreement was memorialized in an April 28, 2020 Order. The defendants challenged the claimant's efforts to later add specific teeth alleged to have been injured in the accident. The DC granted the requested medical award.

The FC affirmed. There is a nice discussion of res judicata and the distinction between issue preclusion and claim preclusion, as well as *Brock v. Voith Siemens Hydro Power Generation*, 59 Va. App. 39, 45 (2011).

The FC explained:

> As to any agreement, the Act requires the Commission's approval. Va. Code [§] 65.2-701; *see Tesfaye v. CPS-Washington DC*, JCN VA00000313190 (Apr. 3, 2014) ("[T]he Commission is required to determine whether the agreement is in the best interests of the employee."). However, nowhere does the Act mandate that all pending issues be subsumed in that agreement. Neither does it contain an express provision dictating that an agreement on a portion of a claim [affects] a bar to prosecution of unresolved claims. Consequently, it is possible, indeed it is common, that some portion of the claim will be resolved amicably while remaining disputed issues will proceed to a hearing.

(Op. 5.)

The FC noted that in this case there had been no hearing, and the claimant had not been afforded an opportunity to assert all claims. It was further explained that the parties simply employed the Commission's agreement form to facilitate the entry of an Award on those matters which were not disputed and, thus, the procedural elements of *Brock* critical to triggering the res judicata bar were absent in this case. The FC also held that by agreeing to a limited award, the claimant did not waive her right to assert a claim for her damaged teeth. Without "clear, precise, and unequivocal" evidence of intent to surrender a known claim, signing a stipulated order or agreement does not waive a right not explicitly in the agreement.

This case contains an excellent discussion of the application of *County of Henrico v. O'Neil*, 75 Va. App. 312 (Va. Ct. App. Aug. 2, 2022). The FC stressed the importance of allowing a claimant to agree to undisputed parts of a claim without forfeiting the right to litigate disputed issues. "[W]e cannot interpret that agreement as a forfeiture of claims unaddressed and yet to be litigated. To rule otherwise would impose upon injured workers the very harm addressed by the *O'Neil* Court, compelling them to agree to less than that to which they are entitled, or to languish without needed disability and medical treatment for the months and years necessary for all disputed issues to work their way through a multi-level judicial system." (Op. 9.)

Settlement of a UEF Claim when Uninsured Employer Could not be Reached

- ***The Estate of Remines v. Tolley Electric Co***., JCN VA02000035095 (July 20, 2022) – Affirmed (Final)

The pro se uninsured employer objected to a P&O between the claimant and the Uninsured Employer's Fund (UEF), which the Commission approved; request for review was ruled untimely.

The claimant and the UEF reached a settlement prior to hearing. The documents submitted to the Commission stated that the parties had unsuccessfully tried to reach the uninsured employer at the last known address. The Commission approved the P&O and sent a copy to all parties, including the employer, on January 10, 2022.

On February 4, 2022, the Commission issued a collection notice to the employer, ordering the employer to compensate the UEF. On May 12, 2022, the employer requested review.

The FC affirmed the January 10, 2022 approval of the P&O, noting the Request for Review was filed four months after it was approved, and that the pro se employer did not allege fraud, mistake, or any other basis upon which the Commission should reconsider the order.

Severely Marked Disfigurement

- ***Eary v. Costco Wholesale***, JCN VA00001226339 (Feb. 1, 2023) – Vacated and remanded (Remand opinion issued Feb. 16, 2023)

The DC denied the claimant's claim for severely marked disfigurement to the back under the provisions of Virginia Code § 65.2-503(B)(16). The DC concluded that the claimant presented evidence of severely marked disfigurement, yet "the prior award for permanent loss of use of the left leg already compensated him under that section for his compensable back injury, which resulted in not only scarring and a hump back but also functional loss of the leg." (Op. 2.) On appeal, the FC found that the claimant's disfigurement to his back was distinct and separate from the loss of use of his leg due to the back injury, and that such body parts were not the same anatomical area. The FC emphasized the COA's interpretation of Section 65.2-503(B)(16) in *Pruden v. Plasser American Corp.*, 45 Va. App. 566, 578 (2005), to vacate and remand the case:

> [U]nder the plain language of Code § 65.2-503(B)(16), the prohibition against a dual award for permanent loss of use, or anatomical loss, of a scheduled body part also applies where the award for disfigurement has previously been awarded for the same anatomical area. *A claimant, however, may obtain an award for permanent loss of use, or anatomical use, of a scheduled body part where it is not part of the same anatomical area subject to the disfigurement claim, and vice-versa.* In other words, where an injured worker sustains disfigurement to a different anatomical

> area other than that for which the permanent loss of use had been awarded, the employee is entitled to compensation for both the functional disability and the disfigurement. However, if compensation is awarded for disfigurement of the same anatomical area where the disfiguring scarring itself contributes to the permanent functional impairment or loss of use, the disfigurement is part of the functional disability, and the latter award must be reduced by the former.

(Op. 3.) (emphasis added.)

The FC also relied on *Ball v. Haynesville Correctional Center*, VWC File No. 178-64-08 (Mar. 17, 2008), in support of its decision.

Statute of Limitations

- ***Foust v. Lawrence Bros., Inc***., VA00000463553, (June 30, 2022) – Affirmed; Affirmed on appeal, *Foust v. Lawrence Bros., Inc*., No. 1146-21-3 (Va. Ct. App. Dec. 13, 2022) (Unpublished)

The claimant appealed the DC's finding that claims for direct injuries to the left carotid artery and lumbar spine were barred by the statute of limitations. The FC affirmed, finding that the claimant did not assert the additional claims within two years after the accident.

The DC also found the claim for an injury to the carotid artery as a compensable consequence barred by res judicata. The FC affirmed stating in part that the doctrine of compensable consequences does not apply to a consequence of a compensable consequence. The FC recognized that the previously litigated claim was for treatment of a stroke, yet the theory advanced in support of that claim was that the burns damaged his lymphatic system, leading to left carotid artery stenosis, leading to the stroke. "While the claimant did not specifically file a claim seeking coverage for his left carotid artery stenosis at the time, the relationship between the claimant's compensable injuries and his left carotid artery condition was 'essentially connected' to his stroke claim. *Brock,* 59 Va. App. at 46." (Op. 8.) Moreover, the FC found the present claim sought to relitigate issues which were already decided by the DC, and that the medical evidence relied upon by the claimant was the same as previously considered.

The COA unanimously affirmed the earlier decisions of the FC, holding that the appeals were without merit.

- ***Walker v. VADOC – Greenville Corr. Ctr.***, JCN VA00001618267 (July 25, 2022) - Affirmed (On Appeal to COA, No. 1265-22-2)

The statute of limitations barred the claimant's TTD claim after a medical award was entered; the tolling provision of Virginia Code § 65.2-708 does not apply unless there has been a previous

award of compensation. The claimant was injured on June 24, 2019. A medical only award was entered by the Commission on August 8, 2019. The claimant filed a July 6, 2021 claim (amended at the hearing), seeking TTD from July 23, 2021 through October 4, 2021.

The parties agreed the claimant was placed on light duty restrictions as a result of her work injury from June 24, 2019 through August 1, 2019, from October 17, 2020 through December 17, 2020, and from May 26, 2021 through July 22, 2021. During this time, the employer provided the claimant with work within her restrictions, and she experienced no wage loss. The DC found the claim was barred by Virginia Code § 65.2-601 and that the tolling provision of § 65.2-708(C) did not apply.

After the DC denied a motion to reconsider, the claimant appealed, arguing that the tolling provision gave her twenty-four months from the last day she was paid wages in July 2021 to file a claim for indemnity benefits. The FC disagreed and affirmed the DC's ruling, noting Virginia Code § 65.2-708 provides, in part:

> A. Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Commission may review any award of compensation and on such review may make an award ending, diminishing or increasing the compensation previously awarded . . . . No such review shall be made after 24 months from the last day for which compensation was paid, pursuant to an award under this title . . .
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> . . . .
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> C. All wages paid, for a period not exceeding 24 consecutive months, to an employee (i) who is physically unable to return to his pre-injury work due to a compensable injury and (ii) who is provided work within his capacity at a wage equal to or greater than his pre-injury wage, shall be considered compensation paid pursuant to an award for compensation but shall not result in a reduction of the maximum number of weeks of compensation benefits as described in §§ 65.2-500 and 65.2-518.

The FC noted both sections must be read together, holding:

> [T]he statute does not state that wages paid under subsection C "are an award of compensation," or "create an award of compensation." Rather, the statute states that such wages "shall be considered compensation paid pursuant to an award for compensation." "Compensation paid pursuant to an award for compensation" is not the same as an "award of compensation."

> Code § 65.2-708(A) provides the Commission may review "any award of compensation." If there is no "award of compensation," Code § 65.2-708(A) is inapplicable, and its period of limitation cannot be tolled by Code § 65.2-708(C). Hernandez[*v. Hyatt Dulles*], JCN VA00001102221[(Apr. 17, 2019)]. In other words, "A claimant cannot invoke subsection C of Code § 65.2-708 unless there has been a previous award of compensation[.]" [*Northampton Cty. v.*]*Somers*, No. 0542-15-4[(Va. Ct. App. Oct. 20, 2015)].

(Op. 6.)

- ***Harris v. State Police***, JCN VA00001028775 (Aug. 30, 2022) – Reversed in part, affirmed in part (Final)

Also discussed: doctrine of imposition; de facto award; 90-day Rule

On June 2, 2015, the Commission entered an award for the payment of medical benefits for the claimant's head and cervical injuries, and periods of indemnity benefits through April 14, 2015. On May 19, 2021, the claimant sought to modify the award to include wage loss benefits paid for individual days that she received medical treatment ranging from April 21, 2015 through December 15, 2017. The claimant maintained that a de facto award was appropriate as the employer had agreed to compensability of the claim and only denied benefits for the dates requested based on the grounds that the statute of limitations had expired. The defendant agreed to the payment of indemnity benefits for five dates ranging from April 21, 2015 through March 23, 2017, but contended the statute of limitations and the ninety-day rule barred the claim for indemnity benefits for dates from June 27, 2017 through December 15, 2017. The DC found there was no de facto award and therefore the claim was barred by the statute of limitations in Code § 65.2-708(A). An award was entered for the stipulated dates of disability.

On review, the claimant argued that a de facto award was appropriate for the disputed payments. She maintained that she relied to her detriment on a process established by the employer for the submission of her missed time from work for workers' compensation reimbursement. The FC agreed, finding that the defendant's actions worked an imposition on the claimant, and that a de facto award for the indemnity benefits sought was appropriate. The FC stated that the record demonstrated the unfairness of the defendant's actions, which were plainly inconsistent "with an endeavor to comply with the Act." (Op. 4.) *Miller v. Potomac Hosp. Found*., 50 Va. App. 674 (2007) (quoting *Odom v. Red Lobster #235*, 20 Va. App. 228, 234 (1995)). The FC noted that agreement forms were never submitted to the Commission and stated that the "de facto award doctrine was created to address a situation such as this, where an employer's voluntary payments without entry of an award misled the claimant and prejudiced her rights under the Act. *See Nat'l Linen Serv. v. McGuinn*, 5 Va. App. 265 (1987)." (Op. 7.)

The FC also declined to apply the ninety-day rule, stating again that the defendants' actions misled the claimant to her detriment, "giving her no reason to believe she needed to file a claim to preserve her entitlement to benefits for the dates she was disabled. Under these particular circumstances, it would be unjust to apply the 90-day rule to the claimant's claim." (Op. 9-10.)

Willful Misconduct

- ***Harley v. Prince William Cty.,*** JCN VA00001861877 (Sept. 7, 2022) – Reversed and remanded (Remand opinion issued Oct. 12, 2022) (Final)

The FC reversed the DC's finding that the claimant's claim was barred by her alleged willful misconduct.

The claimant worked in food services and had a pre-existing restriction of no lifting over ten pounds due to a previous back injury. The defendant asserted that "the claimant intentionally failed to follow employer safety rules/requirements of which she was aware regarding her not lifting greater than ten pounds at the time of her alleged accident, and that the aforementioned failure was the proximate cause of the claimant's alleged accident and injuries." (Op. 1-2.)

The claimant was moving a box of apples from a refrigerator shelf to a lower cart. The box weighed at least fifty pounds. As she pulled the box, her right knee popped, and she felt pain. She explained she was trying to slide the box of apples to the cart. When asked if she was "actually lifting" the box of apples when she hurt her knee, the claimant responded that she was "pulling it over on the cart and that's when it . . . twisted my knee and it popped." (Op. 5.) She was sure she was lifting more than ten pounds when the incident occurred.

The Commission held that based on the scope of the claimant's job duties, the rule was not a reasonable one that the claimant was able to obey and the evidence showed that the employer was aware that her duties required her to exceed the ten pounds.

> Given that there was previously an on-site manager who assisted the claimant, we are not persuaded that the employer was unaware the claimant's job duties required her to exceed the ten-pound lifting limit. . . . [M]oving the box of apples without violating the rule would have required the claimant to get at least one, if not multiple, people to assist her. Beginning in September 2020, there was only one other worker in the kitchen, who had job duties of her own to perform and was not always available to help the claimant. There was no longer a manager or other employee on site to assist the claimant. Even if Maria had helped the claimant lift the box in question, the claimant would likely still have been violating her weight lifting restriction given the approximate weight of the box. Thus, compliance with the rule would have rendered the claimant incapable of performing her assigned job

> duties. Such a rule is not reasonable, and the claimant had a valid reason for her inability to obey the rule.
>
> Even if we found the rule was a reasonable one with which the claimant was able to comply, we would not find the elements of a successful defense under Code § 65.2-306(A)(5) established in this case. The employer has not met its burden of proving that breach of the rule caused the claimant's injury. . . . The record establishes the claimant injured her knee *while* lifting a box of apples that weighed greater than ten pounds. However, the evidence does not preponderate to establish that the claimant's injury was *caused* by exceeding her lifting limitation.
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> . . . .
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> The claimant's physician had placed her under lifting restrictions due to a back injury, presumably to prevent re-injury to her back. Had the claimant injured her back while violating those restrictions, we could infer that lifting the weight of the box caused her injury. However, there is no medical opinion or other evidence in the record from which we can reasonably infer that lifting in excess of ten pounds caused the claimant's knee injury. The evidence establishes a temporal relationship between the lifting of the box and the onset of the claimant's knee injury, but does not establish causation.

(Op. 7-8.)

Commissioner Rapaport dissented and would have found the claim barred by the claimant's willful misconduct. He did not agree with the majority that the safety rule was not reasonable due to the claimant's inability to obey the rule and perform her job duties. He further stated that there was no evidence to support the majority's theories in this case. "Inferences must be supported by the evidentiary record, and we cannot base an award upon conjecture or speculation." *See Cent. State Hosp. v. Wiggers*, 230 Va. 157, 159 (1985). (Op. 9-10.) Commissioner Rapaport stated that in the absence of specific evidence, he would decline to speculate on how a claimant can or cannot perform her job.

2023 GENERAL ASSEMBLY LEGISLATIVE UPDATE

HB 1408/SB 906 Workers' compensation; presumption of compensability for certain cancers.

Introduced by: Emily M. Brewer (House) Richard L. Saslaw (Senate)

SUMMARY AS PASSED HOUSE: (all summaries)

Workers' compensation; presumption of compensability for certain cancers. Expands the workers' compensation presumption of compensability for certain cancers causing the death or disability of certain employees who have completed five years of service in their position to include bladder and thyroid cancer. The presumption for these cancers does not apply for any individual diagnosed with such a condition before July 1, 2023. This bill is identical to SB 906.

HB 1410/SB 1038 Workers' compensation; presumption for arson and hazardous materials investigators.

Introduced by: Daniel W. Marshall, III (House) Jeremy S. McPike (Senate)

SUMMARY AS PASSED HOUSE: (all summaries)

Workers' compensation; Department of State Police; State Police Officers' Retirement System; presumption for arson, bomb, and hazardous materials investigators. Expands the workers' compensation presumption of compensability for certain cancers causing the death or disability of certain employees who have completed five years of service in their position to include (i) arson investigators or bomb investigators employed by the Department of State Police and (ii) members of the State Police Officers' Retirement System who collect, analyze, or handle hazardous materials, infectious biological substances and radiological agents, fentanyl, or methamphetamine. This bill is identical to SB 1038.

HB 1684/SB 1354 Worker misclassification; debarment procedures.

Introduced by: Robert D. Orrock, Sr. (House) David W. Marsden (Senate)

SUMMARY AS INTRODUCED:

Worker misclassification; debarment procedures. Revises the procedure under which a contractor may be debarred from public contracts for misclassification of workers. The bill requires the

Department of Taxation to notify an employer of a determination that the employer failed to properly classify an individual and allows the employer to apply for judicial or administrative review. Upon a subsequent violation, and once the opportunity for appeals has been exhausted, the Department is required to provide notice to all public bodies that they shall not award a contract to firms associated with the offending employer for specified periods. Under current law, notice to all public bodies is required after the first violation determined by the Department, and debarment is required without reference to the timing of appeals. This bill is identical to SB 1354.

HB 1756 **Attorney-issued subpoenas; release of witness.**

Introduced by: Jeffrey L. Campbell (House)

SUMMARY AS PASSED: (all summaries)

Attorney-issued subpoenas; release of witness. Provides that, in a civil case only, a person to whom an attorney-issued subpoena is directed may be released from compliance with such subpoena by the attorney who issued the subpoena or a person acting on such attorney's behalf. As introduced, this bill is a recommendation of the Boyd-Graves Conference.

Word of caution to attorneys who see a witness has been subpoenaed, because they may be released by the other side prior to hearing.

HB 1775/SB 904 **Workers' compensation; anxiety disorder or depressive disorder incurred by law-enforcement officers.**

Introduced by: Israel D. O'Quinn (House) Bill DeSteph (Senate)

SUMMARY AS PASSED: (all summaries)

Workers' compensation; post-traumatic stress disorder, anxiety disorder, or depressive disorder; law-enforcement officers and firefighters. Provides that an anxiety disorder or depressive disorder, as both are defined in the bill, incurred by a law-enforcement officer or firefighter is compensable under the Virginia Workers' Compensation Act on the same basis as post-traumatic stress disorder, except in the case of responding to crime scenes for investigation. The bill provides that a mental health professional must diagnose the covered individual as suffering from anxiety disorder or depressive disorder as a result of a qualifying event, defined in the bill as an incident or exposure occurring in the line of duty on or after July 1, 2023, and includes other conditions for compensability. This bill is identical to SB 904.

HB 2418 **Workers' compensation; group self-insurance associations.**

Introduced by: William C. Wampler III (House)

SUMMARY AS PASSED HOUSE: (all summaries)

Workers' compensation; group self-insurance associations. Provides that, subject to approval of the State Corporation Commission, two or more workers' compensation group self-insurance associations may merge if the resulting group self-insurance association assumes in full all obligations of the merged group self-insurance associations.

SB 814/HB 2424 **Interpreters for persons who are deaf or hard of hearing; court may appoint certified interpreter.**

Introduced by: Scott A. Surovell (Senate) Holly M. Seibold (House)

SUMMARY AS PASSED SENATE: (all summaries)

Interpreters for persons who are deaf or hard of hearing. Provides that if the Department for the Deaf and Hard-of-Hearing cannot procure a qualified interpreter to assist a party or witness in a civil proceeding who is speech-impaired or who is deaf or hard of hearing, then the court may appoint a readily available interpreter with full certification from the Registry of Interpreters for the Deaf, Inc., or an equivalent national certification. This bill is identical to HB 2424.

NOTE: It has been Commission policy to provide interpreters, on request, to assist a party or witness in a civil proceeding who is speech-impaired or who is deaf or hard of hearing.