



**ANNUAL CASE LAW UPDATE  
PRESENTATION**

**ON JUNE 9, 2022 AT 8:30 – 9:30 AM**

**BY**

**LYNNE M. FERRIS  
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VIRGINIA WORKERS' COMPENSATION COMMISSION**

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**LYNNE M. FERRIS, DEPUTY COMMISSIONER  
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Lynne M. Ferris is a Deputy Commissioner for the Virginia Workers' Compensation Commission. She earned a Bachelor of Arts degree from the State University of New York at Geneseo in 1988 and a Juris Doctorate from Union University at Albany Law School in 1991. Ms. Ferris is admitted to the Virginia, New York , and Connecticut Bars. She is a former clerk for the Department of Labor Office of Administrative Law Judges in Newport News, Virginia, and was engaged in the private practice of law in Norfolk, Virginia. She began work for the Commission as a staff attorney in 1999 and a Deputy Commissioner in 2004. She has been certified by the Virginia Supreme Court as a general mediator since 2001 and she is a mediator and mediator mentor for the Commission's Alternative Dispute Resolution Department. Ms. Ferris was inducted into the 2020 Class of Fellows of the College of Workers' Compensation Lawyers in 2022.

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Jimese Pendergraft Sherrill is a Deputy Commissioner (Manassas Regional Office) and certified mediator/mentor with the Virginia Workers' Compensation Commission. Before joining the Commission in 2008, she began her career representing claimants, but ultimately specialized in workers' compensation defense. She also served as an Assistant City Attorney for the City of Portsmouth, Virginia, where she handled personal injury, employment and workers' compensation matters. Ms. Sherrill earned a Bachelor of Arts degree from Shippensburg University in 1984 and a Juris Doctorate from the T. C. Williams School of Law, University of Richmond, in 1987. She is a Board member of Kids' Chance of Virginia, a member of the Virginia Workers' Compensation American Inn of Court, and a Fellow of the College of Workers' Compensation Lawyers (CWCL).

**INN OF COURT – CASE LAW UPDATE**  
**JUNE 9, 2022**  
***Deputy Commissioners Lynne Ferris and Jimese Sherrill*<sup>1</sup>**

**SUPREME COURT:**

**Injury by Accident**

***City of Charlottesville v. Sclafani*, 300 Va. 212 (2021)**

On May 9, 2017, the claimant, a law enforcement officer, played the role of a suspect who needed to be restrained. The training activity ran from 8:00 a.m. through 4:30/5:00 p.m. He was repeatedly handcuffed, thrown to the ground, and picked up off the ground while in handcuffs. He testified to having mild discomfort throughout the day, but no “pop” or sudden acute pain. He informed his doctors no immediate onset of significant pain occurred. When he left the training, he could not straighten his left arm, and later, he could not raise it. The Commission held that “the eight-hour training session . . . provided the necessary rigidity of temporal precision to constitute one event, and the claimant suffered a ‘discrete and specific’ traumatic injury to his shoulder as a result.”

The Court of Appeals reversed the Commission’s finding that the claimant’s injury met the burden of establishing temporal precision and remanded for further fact finding. *City of Charlottesville v. Sclafani*, 70 Va. App. 613 (2019). The Court discussed that similar to *Department of Motor Vehicles v. Bandy*, No. 1878-18-2 (Va. Ct. App. Apr. 30, 2019), “the dispositive issue on appeal . . . was not whether the claimant’s injury arose from ‘repetitive trauma,’ but whether his injury was caused by an event ‘bounded with rigid temporal precision.’” The Court found, “the Commission assumed but failed to find that [the claimant’s] testimony established an identifiable incident with sufficient temporal precision.” The Court remanded the case for a factual finding as to whether the claimant’s injury occurred during the four hours of training after lunch.

On remand, the Commission found the claimant’s non-cumulative injury occurred during the last four hours of training. *Sclafani v. City of Charlottesville*, JCN VA00001340217 (Oct. 15, 2019). The Court of Appeals affirmed. *City of Charlottesville v. Sclafani*, No. 1815-19-2 (Va. Ct. App. May 5, 2020). The defendants appealed.

The Supreme Court of Virginia held the Commission properly awarded benefits. The evidence proved a compensable injury by accident as the claimant testified to a specific incident during the final scenario (i.e., “he was ‘picked up a little weird’ and he ‘felt some discomfort.’” When he was subsequently asked if that was the incident that caused his injury, Sclafani unequivocally answered: “Oh, yeah. There’s no doubt.”). However, the Supreme Court: (1) reversed the portion of the Court of Appeals decision applying the law of the case doctrine (the defendant’s

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<sup>1</sup> The written materials were prepared with the assistance of the following Deputy Commissioners: Susan Cummins, Angela Gibbs, Linda Gillen, Robert Himmel, Brooke Anne Hunter, Terry Jenkins, and William Kennard, and Staff Attorneys: Dana Dallas, Diane Dusseau, and Emily Loughren.



“acceptance of the Court of Appeals’ decision to remand the matter did not bar it from subsequently appealing an unfavorable ruling by the Commission”), and (2) discussed that the Court of Appeals’ reasoning for affirming the Commission was incorrect regarding the requirements of proving an injury by accident as contemplated by the Virginia Workers’ Compensation Act:

This Court has long recognized that the Act requires a claimant to prove, by a preponderance of the evidence, (1) an “injury by accident” or occupational disease, (2) arising out of, and (3) in the course of, the employment.” *Morris v. Morris*, 238 Va. 578, 584 (1989) (internal citation omitted). Here, whether Sclafani’s injury arose out of and occurred in the course of his employment is not at issue; the sole issue before the Court is whether there was sufficient evidence to prove that he suffered an “injury by accident” within the meaning of the Act.

To demonstrate an injury by accident “a claimant must prove that the cause of his injury was an identifiable incident or sudden precipitating event and that it resulted in an obvious sudden mechanical or structural change in the body.” *Morris*, 238 Va. at 589 (emphases in original). Our jurisprudence establishes that the requisite causative event must be more than a simple reference to a “work activity;” it must be a specific occurrence that can be temporally fixed with reasonable accuracy. *Id.* Merely establishing that a claimant was engaged in work activity during the discrete time period in which the injury occurred is insufficient. *Id.* at 588.

In *Morris*, the Court specifically discussed the Court of Appeals’ adoption of the “three hour test,” which is somewhat similar to the approach it took in this case. Under the three hour test, “any work-related injury resulting from stress which lasts three hours or less is deemed an ‘injury by accident’; injuries resulting from stress extending over a longer period fail to meet the test.” *Id.* In rejecting this test, the Court noted that it did not require the claimant to identify the specific causative event that resulted in the injury. Rather, the three hour test only required that a claimant establish they were engaged in “‘work activity’ within a ‘reasonably discrete time frame.’” *Id.* The Court’s explicit rejection of this test made it clear the proper focus was not on the specific time frame in which the accident occurred, but on the specific causative event that precipitated the accident because “[s]uch events are inevitably ‘bounded with rigid temporal precision.’” *Id.* at 588-89.

The present case exemplifies the reason we rejected the three hour test in *Morris*. Here, the evidence establishes that the afternoon training involved multiple different scenarios where Sclafani “would be put on the ground and cuffed” or he would “just get on the ground and be cuffed and be picked up and moved away.” In other words, the afternoon training session involved multiple potential causative events occurring throughout the four-hour post-lunch period. Clearly, a claim asserting that an injury occurred during a time period where multiple potential causative events occur is not sufficiently temporally precise to establish a compensable injury.

*Id.* at 221-22.

The Supreme Court noted the determination that the claimant sufficiently identified a specific incident causing his injury renders moot an argument regarding an injury caused by repetitive trauma: “When the definition of cumulative injury is considered in conjunction with the reasoning for requiring the identification of the specific incident, it is clear that an injury caused by an identifiable incident is mutually exclusive of an injury caused by repetitive trauma.” *Id.* at 224.

## **COURT OF APPEALS:**

### **Permanent Partial Disability – Pre-existing Impairment**

*Clements v. Augusta Health*, Rec. No. 0109-21-3 (Va. Ct. App. Aug. 3, 2021) (Unpublished) - Affirmed

The Commission did not err in holding that the claimant’s work-related accident caused a 25% impairment of her right lower extremity and a pre-existing condition caused an additional 25%. The COA held that the record supported the Commission’s factual finding of a pre-existing functional impairment, i.e., the claimant’s pre-existing “degenerative disease of the right hip caused symptomatic limitations and affected her overall ability to functionally use her hip. That pre-existing condition compromised her ability to functionally work without resting, bending, entering and exiting vehicles, and decreased her range of motion.” The COA reiterated that to determine a permanent functional loss, one considers “the treating physician’s opinion, whether claimant was placed under permanent work restrictions, whether claimant was ever diagnosed with a permanent impairment, whether claimant was ever given a permanent impairment rating, whether there were symptomatic limitations, or whether the pre-existing disease affected claimant’s overall ability to use that body part.” The COA noted that a Deputy Commissioner’s conclusion in 2019 that the claimant lived an “active lifestyle” did not discount the possibility that she also suffered pre-existing functional loss as opined by the treating physician in 2020. The Commission did not err by not averaging the two 50% ratings assigned by the treating physician because they did not conflict. The doctor did not change the original 50%, he simply apportioned 25% to the pre-existing condition at a later date.

### **Permanent Total Disability – Pneumoconiosis**

*Dickenson- Russell Coal Company, LLC v. Kiser*, Rec. No. 0328-21-3 (Va. Ct. App. Aug. 31, 2021) (Unpublished) - Affirmed

COA affirmed the Commission’s finding of permanent and total disability under Va. Code § 65.2-504(A)(4) in this case involving pneumoconiosis. The Court revisits the subject of the “approved medical tests and standards” that the statute allows to be considered in order to establish the employee is “totally unable to do manual labor in a dusty environment,” as those



terms are used in the statute. The Court found that credible evidence supported the weight given to the doctors' opinions.

### **Arising Out of the Employment**

*Amaya-Hernandez v. NSR Solutions*, Rec. No. 0044-21-4 (July 13, 2021) (Unpublished)  
– Affirmed

The claimant alleged an injury by accident occurring when she fell on stairs with a vinyl covering. She testified that “there was some[thing] slippery” on the lower part of the stairs and that “the plastic caused me to slip and fall.”

The DC denied the claim after determining that the claimant had failed to carry her burden of proving that her accident arose out of her employment. The claimant requested review by the FC. A majority of the Commission affirmed the Deputy Commissioner's decision. The FC rejected the claimant's argument that the Deputy Commissioner had erred because the vinyl covering on the stairs was an unusual hazard that had caused claimant's injury. It noted that “beyond contending she slipped on the vinyl surface,” which claimant had described as like the surface used at a gym, the claimant “did not explain what about the covering increased her risk of suffering the fall, instead stating that she ‘just fell.’ She did not produce persuasive evidence that the vinyl covering was more slippery than other surfaces used to cover stairs.”

The claimant appealed to the Court of Appeals. The Court affirmed the Commission's decision. They noted that the claimant did not offer any explanation as to how the vinyl stair covering increased her risk of falling on the stairs, and did not present any other evidence that the vinyl covering of the stairs made them more slippery or hazardous than stairs with other surfaces. They concluded the record did not support the claimant's argument that the vinyl surface of the stairs exposed her to any unique hazard peculiar to her worksite.

*Magic City Ford Lincoln Isuzu Trucks v. Kerr*, Rec. No. 0173-21-2 (Va. Ct. App. Aug. 31, 2021) (Unpublished) - Affirmed

Commission's finding of an injury that arose out of the employment was affirmed where the injury was suffered when the claimant tripped and fell on a threshold under a bay door with a 1-2” rise over the course of 11”. Other factors involved: Claimant noticed light was on inside building and he was charged with ensuring they were off before closing the shop. He had no key to the building, so he stepped under the closing door (which took 16 seconds to fully close), crouching and stepping sideways. The Court noted that the claimant had to move quickly and that this movement was not ordinary, but unusual and awkward. Regarding the slope, the Court found that it was substantial enough to contribute to the fall and disagreed with the employer's arguments to the contrary.

### **Injury by Accident**

*Quest for Excellence Learning v. Newsome*, Rec. No. 0255-21-4 (Va. Ct. App. July 20, 2021) (Unpublished) – Affirmed

The claimant testified that she parked in Harris Teeter’s parking lot and walked from her car toward the school in which she worked. After she entered the defendants’ property, she walked down a grassy slope and slipped on wet grass, falling back on her left leg. She testified that she felt pain in her knee when she fell. The claimant testified that she could have taken a different route from the Harris Teeter parking lot, along a street adjoining the school, but did not do so because it was a busy, one-way street and did not have a sidewalk. She also testified that she always walked down this slope from the Harris Teeter parking lot, other employees took the same route, and she was never reprimanded or cautioned by defendants against taking that route. There was no foot path or paver stones along the route and she walked “cautiously” because the hill was sloped.

The DC and the FC found that the claimant sustained an injury by accident arising out of and in the course of her employment. The defendants appealed.

On appeal to the Court of Appeals, the defendants argued that the record did not contain sufficient evidence to find that the claimant sustained an injury by accident to her knee. The Court disagreed, finding that there was ample evidence in the record to prove that she injured her knee at the time of her accident.

The defendants also asserted that the injury did not arise out of and in the scope of the claimant’s employment. They maintained it is unreasonable to expect them to anticipate or expect that its employees would traverse the dangerous, non-established, and undesignated route that the claimant was on when she fell. They asserted that the claimant was not required to take the route she did and that she was not a place where it would have reasonably expected her to be. The employer argue that it was “unreasonable” for it to have anticipated or expected that its employees would “traverse” the “dangerous, non-established” and undesignated route that Newsom was on when she fell. Employer also asserted that Newsom was not “required to take the route she did,” and the wet drainage ditch was not a place where it would have reasonably expected her to be. However, the evidence showed that the defendants did not communicate to the claimant that she was not supposed to take the route she took when she fell. The Court noted that the Commission found that even if the claimant carelessly chose to walk along the path which precipitated her fall, a claimant’s negligence does not bar recovery under the Workers’ Compensation Act, explaining that “[n]egligence is not a factor in our analysis.” *Virginia Tree Harvesters v. Shelton*, 62 Va. App. 524, 536 (2013); see *Uninsured Employer’s Fund v. Keppel*, 1 Va. App. 162, 165 (1985) (“Negligence, regardless how gross, does not bar a recovery for workers’ compensation benefits.”). Thus, the claimant’s injury while walking from the parking lot to the defendants’ property from the parking lot to defendants’ property on a route used by other employees and where defendants never told her not to use this route, fell within the scope of her employment.

### **Procedural Misstep**



***County of Chesterfield v. Overton***, No. 0512-21-2 (Va. Ct. App. Nov. 16, 2021) (Unpublished) – Affirmed

The defendants moved to end claimant's wage replacement benefits. Prosecuting successive applications, they alleged that claimant was terminated for cause. In support of the applications, defendants said in their cover letter that the termination was based on "poor job performance", and other supporting materials stated the termination was related to "performance deficiencies". However, at the hearing, the defendants alleged and produced, for the first time, evidence of possible "fraud," casting it as the "major" factor leading to claimant's termination—not poor job performance. Thus, the defendants' evidence supported an unpled fraud allegation, while undermining the condition change they advanced.

Given the procedural posture, the Commission denied the defendants' applications, finding that the evidence did not support that the termination was based on poor job performance. The FC stated that the allegation of fraud and "the issue of the claimant's termination for fraud was not raised in the application" and therefore the FC could adjudicate an issue that is not before it. The COA affirmed the Commission's decision, rejecting defendants' argument that its claim of fraud was "encapsulated" in the "for just cause" grounds listed in the application. Instead, the COA stated that the issue was a purely procedural one, whether the defendants properly identified fraud as a basis for claimant's termination in the successive applications, which they did not.

Defendants must identify the "grounds for relief" underscoring an asserted change in condition. As the COA noted, this represents neither a "draconian" requirement nor a call for "painstaking specificity." Perhaps listing a "just cause termination" could satisfy the governing rule. But, here, the defendants' misdirection (perhaps unintended) doomed their argument. The COA emphasized the marked difference between the assertions made in the defendants' successive applications and "the evidence at trial."

### **Change in Treating Physician**

***Drose v. J.E. Richards Electrical Company***, Rec. No. 0591-21-4 (Va. Ct. App. Dec. 21, 2021) (Unpublished) – Affirmed

The COA held that Commission correctly determined that the claimant failed to establish a valid reason to allow for a change in physicians to a specific doctor, where the defendants properly provided the claimant with panels from which the claimant chose a treating neurosurgeon and treating pain management physician; there was no referral to the desired doctor; and the claimant did not seek emergency treatment from the desired doctor. Evidence showed that authorized physicians were appropriate specialists and that appropriate treatment had been provided. Distance and travel difficulty were not considered because the claimant did not argue that distance justified a change in physicians and because of a lack of evidence. Prior treatment with the desired doctor also did not justify a change in treating physician.

COA also could not say the Commission, as fact finder, erred in finding that the claimant failed to prove total disability. FC found work note from claimant's desired doctor to be unpersuasive.

The doctor's opinion was "naked"—meaning "unaccompanied by an office visit note or examination findings"—and "retroactive." Other doctors had refused the claimant's requests for out-of-work notes. COA affirmed FC's denial of the TTD claim.

## **Willful Misconduct - Safety Rule**

***Klockner Pentaplast of America v. Miller***, Rec. No. 1348-20-2 (Va. Ct. App. July 27, 2021) (Unpublished) – Affirmed

The Court of Appeals upheld the Commission's determination that the employer failed to prove that the claimant's injury resulted from violation of a known safety rule. The claimant, a fork-lift driver, was moving pallets around improperly placed metal crates. She suffered hand injuries in the process. The employer had a safety rule of requiring the driver to keep a clear path while operating the fork truck. The claimant testified that she, in fact, had a clear path and had moved around the metal crates successfully prior to the injury. The Deputy Commissioner and the Commission afforded weight to the claimant's testimony that she believed that she had a clear path. The Court affirmed: "The Commission, on the record before it, was free to interpret the claimant's testimony as asserting that she believed she had a clear path immediately prior to the accident."

The Court also denied the claimant's request for sanctions under Code § 8.01-271.1. The claimant argued that the defendants did not act in good faith in pursuing the appeal by relying upon a single phrase of testimony to assert that she intentionally failed to follow the clear path safety rule. The Court declined: "Although we conclude that the Commission's decision is not erroneous, the record, viewed under a standard of objective reasonableness, does not establish the complete absence of a factual basis for challenging the sufficiency of the evidence on this ground. To the contrary, the employer's argument falls within the scope of the zealous representation of one's client."

***Truteam v. DeQuintanilla***, Rec. No. 0719-1-4 (Va. Ct. App. Feb. 2, 2022) (Unpublished) – Affirmed

Claimant fell through an attic floor while installing insulation. COA affirmed the FC and DC's finding that there was no bona fide enforcement of the employer's safety rule requiring workers to wear a safety harness when working at heights above 6 feet. COA also affirmed the DC's decision to not exclude claimant's medical evidence that was not filed in compliance with Rule 4.2. Defendants failed to object to the medical evidence until near the end of the evidentiary hearing and declined the DC's offer of a post-hearing remedy.

## **Marketing**

***Yarbrough, Jr. v. Firewater Transport, LLC***, Rec. No. 0822-21-3 (Va. Ct. App. Mar. 8, 2022) (Unpublished) – Affirmed

The claimant was employed as a delivery tanker truck driver for Firewater. After suffering compensable injuries to his neck, trapezius, right knee and spine, the claimant was released to light duty. His restrictions included limited lifting and no driving. The claimant applied for numerous jobs during the disputed period (from November 22, 2019 through March 4, 2020 and from April 16, 2020 through November 10, 2020), mostly through Indeed. The DC denied the



claim for temporary total disability benefits for the disputed period, relying solely on the fact that the claimant's application output averaged roughly two applications per week. The FC unanimously affirmed, focusing on both the quantity of claimant's applications and the quality of his overall efforts. Regarding the quality of the claimant's efforts, the FC noted that the numerous applications for truck driving jobs did not demonstrate a good faith effort to find suitable light duty employment.

The claimant appealed, asserting two arguments: (1) that he submitted over ninety job applications during the disputed period, and (2) that he used online technology to conduct his job search when in-person efforts were difficult during the COVID-19 pandemic. The COA found that claimant's arguments failed because credible evidence supported the FC conclusion that he did not make reasonable efforts to market his residual work capacity. The COA stated, "[t]he vast majority of the applications claimant submitted were for driving jobs that fell outside the medical restrictions Dr. Stephenson imposed on him. There were several months during the disputed period where claimant failed to apply to any jobs at all. And as the Commission pointed out, claimant never registered with the Virginia Employment Commission to aid his job search—a factor that, although not dispositive in itself, was one the Commission was entitled to rely on in combination with all the circumstances of the case." *See Herbert Bros., Inc. v. Jenkins*, 14 Va. App. 715, 717-18 (1992).

### **Identifiable Incident**

*Johnson v. General Dynamics Corp.*, Rec. No. 0645-21-3 (Va. Ct. App. Mar. 8, 2022)  
(Unpublished) – Affirmed

The claimant's husband suffered from sudden cardiac arrest while he was exposed to radar waves at work and later died. The COA held the claimant failed to establish that her husband suffered an identifiable compensable injury. The COA also held that the claimant could not recover under a negligent first-aid theory because the claim is either a compensable consequence claim that fails when the initial claim is denied or a separate claim that is time-barred.

The main issue was whether the claimant suffered a compensable injury by an identifiable incident or sudden precipitating event. The claimant argued that the FC erred in focusing on the three-week radar exposure as the possible identifiable incident, instead of the specific radar exposure that allegedly triggered the cardiac arrest. The claimant alternatively argued that the three-week exposure was an identifiable incident. The COA noted that both of the claimant's experts provided credible evidence to support a conclusion that the cumulative, three-week exposure was the possible identifiable incident. "While the facts establish Johnson's sudden cardiac arrest occurred at a reasonably definite time and resulted in an obvious mechanical or structural change in Johnson's body, the evidence fails to establish the three-week exposure was an identifiable incident that caused Johnson's cardiac arrest. To be an identifiable incident, the causative event must be 'temporally fixed with reasonable accuracy.'" *City of Charlottesville v. Sclafani*, 300 a. 212, 221 (2021). Citing *Morris v. Morris*, 238 Va. 578 (1989), the COA stated, "the Court made clear that the still-good 'Aistrop rule' requires a claimant show not only a period of work activity but an injury by accident as a result of 'some particular piece of work done or condition



encountered on a definite occasion.” *Morris*, 238 Va. at 586 (emphasis added) (quoting *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293 (1943)). Additionally, the claimant must prove “that the cause of his injury was an identifiable incident or sudden precipitating event.” *Id.* at 589. Therefore, “injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time, are not ‘injuries by accident.’” *Id.*

Additionally, the COA stated, “[r]ecent Virginia caselaw emphasizes the close connection between the elements of identifiable incident and causation in the ‘injury by accident’ analysis. See *Sclafani*, 300 Va. at 221. In *City of Charlottesville v. Sclafani*, the Supreme Court explained that by rejecting the ‘three hour test,’ the Court ‘made it clear the proper focus was not on the specific time frame in which the accident occurred, but on the specific causative event that precipitated the accident because ‘such events are inevitably “bounded with rigid temporal precision.”’” *Id.* at 221-22 (quoting *Morris*, 238 Va. at 588-89). Through this explanation, the Court emphasized how the identifiable incident and causation elements are closely linked in the injury by accident analysis.

Ultimately, the COA held that the alleged identifiable incident involved a series of exposures over three weeks, culminating in Johnson’s cardiac arrest. Under Virginia caselaw, a claimant cannot recover for an injury caused by cumulative events.

## COMMISSION REVIEWS:

### Penalty

*Vanrensselaer v. Mentor Management, Inc.*, JCN VA00001520710 (July 2, 2021)  
—Affirmed

The claimant sought a 20% penalty against the defendants as provided by Virginia Code § 65.2-524 based upon untimely payment of settlement proceeds. The Commission approved the compromise settlement on December 2, 2020. Claimant’s counsel asserted he did not receive the claimant’s settlement proceeds until January 19, 2021, when USPS delivered the proceeds to claimant’s counsel’s law firm. The Deputy Commissioner found a penalty was appropriate. She found the payment was not made as promptly as practicable and that there was no good cause outside the control of the employer for the delay. She noted the settlement payment was not addressed to the claimant’s address on file, but instead sent to claimant’s counsel. The record did not reflect why the defendants mailed the check to claimant’s counsel or why it took so long to reach claimant’s counsel’s office. The Deputy Commissioner rejected the defendants’ argument that the delay was caused by the pandemic or problems with the postal service.

The defendants requested review. They argued that they mailed the check to claimant’s counsel on December 9, 2020, and thus complied with the duty to promptly mail the checks. They asserted there was good cause outside of their control for the delayed payment: the mishandling of the payment by USPS, of which they had no knowledge. The defendants’ evidence included postal service tracking that showed the shipping label was created in California on December 9, 2020. The Commission noted that the creation of the shipping label did not prove the item was in fact mailed at that point. Most significantly, the Commission found that the defendants did not comply with Rule 9.2 because they did not mail the claimant’s settlement payment to her

residential address. The Commission recognized that parties may on occasion agree for a check to be mailed to legal counsel, but that this is not an exception to Rule 9.2. The defendants had the responsibility of making prompt payment to the claimant or facing the statutory repercussion.

***Morris v. Rosewood Village Associates***, JCN VA00001776117 (Sept. 3, 2021) – Affirmed

Commission affirms assessment of a \$500 penalty for failure to timely respond to a 30-Day-Order that required the Employer/Insurer to respond to an attached Order Response Form. The defendant failed to respond to the Order and failed to pay the fine, prompting the CDC to write about these failures and cautioning that, absent response, a Show Cause Order would issue. After considering the seven assignments of error raised, the Commission noted that the recently enacted Va. Code § 65.2-601.2 required a response from the employer/insurer after a claim is filed and a 30-Day-Order was issued and that such response must tell the employee whether the claim will be accepted, denied, or cannot be decided without more information. The reason for a denial had to be set forth and, any information needed for decision needed to be provided. The statute made the response a required report per § 65.2-902, which section provides for a civil penalty of not more than \$500 for failing to file a required report, or between \$500 and \$5,000 for any willful failure. The Commission explained: “Virginia Code § 65.2-601.2 makes the insurer’s response to a claimant a required report to the Commission, pursuant to Virginia Code § 65.2-902. We no longer need to rely on contempt power or the general power to enforce our orders. When a response to a 30-Day-Order does not reach the Commission on time, Virginia Code § 65.2-601.2 authorizes us to fine the insurer.”

#### **Discovery – Interlocutory Review Denied**

***Stone v. Skyline Automotive***, JCN VA00000262486 (July 2, 2021)

On November 15, 2019, the defendants filed an Employer’s Application for Hearing seeking termination of the claimant’s temporary total disability benefits based upon the allegation that the claimant unjustifiably refused to cooperate with vocational rehabilitation. Following multiple continuances, the hearing was postponed until May 24, 2021. The vocational counselor was unable to attend the proceeding and her supervisor testified. The defendants understood that the vocational counselor was on leave had a tentative return to work date of June 7, 2021. As the hearing progressed, the Deputy Commissioner decided to continue the proceeding as both parties were placed in “an impossible situation” in the absence of the vocational counselor.

On May 25, 2021, the defendants propounded discovery requests upon the claimant. In response, the claimant filed a Motion seeking a protective order from responding to the recent discovery issued by the defendants. The claimant contended the employer’s application had been pending for over eighteen months, and discovery requests after the May 24 hearing were untimely, oppressive, and burdensome to the claimant. The defendants opposed the Motion for a protective order. They maintained that their discovery properly addressed facts regarding the alleged refusal.



The Deputy Commissioner granted the claimant's Motion for a protective order. She noted that the sole purpose of the May 24, 2021 continuance was to allow both the defendants to present testimony by deposition of the vocational counselor, and the opportunity for the claimant to cross examine. The Deputy Commissioner found the claimant had shown good cause to not respond to the late issued discovery in this case.

The defendants timely requested interlocutory review. They asserted that the Act or the Rules of the Commission did not prohibit further discovery following issuance of a continuance. The Commission denied interlocutory review, finding the defendants had not established good cause for interlocutory review or that substantial prejudice might result if interlocutory review was declined.

### **Compensable Consequence**

*Neff v. Warwick Trading Co. LLC*, JCN VA02000030707 (July 8, 2021) – Affirmed

The claimant sustained a compensable injury by accident on July 7, 2018, suffering injuries to her right shoulder, back and right knee. The claimant filed a claim seeking medical benefits for a left knee injury as a compensable consequence. She claimed that she injured the left knee “as a result of a fall when her right knee buckled.” During testimony, she indicated that her right knee would inexplicably buckle after her accident. The Deputy Commissioner determined that the left knee injury was a compensable consequence of the accident.

On Review, the Commission considered the Virginia Supreme Court's recent opinion in *Merck & Co., Inc. v. Vincent*, 299 Va. 705 (May 27, 2021). In fact, the Commission re-opened the record to allow the parties to file position statements regarding this decision. The Commission concluded that the claimant is entitled to benefits for the left knee. The Commission held:

We read *Vincent* to clarify that an original occupational injury and a resulting consequential injury are separate and distinct in both reality and in the law. We do not find that it alters the outcome in this case. Vincent sustained a compensable injury by accident in February 2009 and hurt his neck, left arm, and left hand. He later suffered a left knee injury that was found to be a compensable consequence of the original injury and was awarded benefits. In September 2017, Vincent sought compensation under Virginia Code § 65.2-503(C)(1) which provides for permanent total disability benefits for the “[l]oss of both hands, both arms, both feet, both legs, both eyes, or any two thereof in the same accident.” The defendants argued, and the Supreme Court agreed, that the original injuries and the knee injury did not occur “in the same accident” as statutorily required to permit an award of permanent total disability. The Supreme Court emphasized that two accidents are not one accident and that the compensable consequence “doctrine allows a new injury that is causally connected to an earlier, compensable injury to be ‘treated as if it occurred in the course of and arising out of the employee's employment.’” (Op. 7 (citing *Leonard*, 218 Va. at 214) (emphasis in original)). The Supreme Court also reflected upon the holding of

*Amoco Foam Products Co. v. Johnson*, 257 Va. 29 (1999), which similarly repeated “that the compensable consequence doctrine applies only to an injury with a direct causal connection to an original, compensable injury.” (Op. 10.) Hence, based upon our determination that the current claimant proved a causal connection to the original injury, she has proven grounds for the payment of medical treatment of the left knee injury as a compensable consequence.

## **Cost of Living Adjustments (COLA)**

***Connell v. Courtyard Marriott***, JCN 1538929 (July 23, 2021) – Affirmed

The defendants filed an employer’s application for hearing seeking to amend the claimant’s compensation rate to 80% of average weekly wage. The Deputy Commissioner denied the application. He found the plain language of Virginia Code § 65.2-709 predicated the 80% limitation on the combined disability benefit entitlement of a claimant or his dependents under this title and the Federal Old-Age Survivors and Disability Act. He concluded social security retirement benefits and COLA supplements were not part of the combined disability benefit entitlement referenced in Code § 65.2-709. The claimant therefore remained entitled to COLA supplements.

The defendants requested review. The Commission affirmed. The Commission discussed the plain meaning of Code § 65.2-709 and emphasized that the agency “has declined to characterize social security benefits based on age as a ‘disability benefit entitlement’ in calculating 80% of the average monthly earnings of the claimant for determining COLA supplements.” The defendants relied upon two recent cases from Deputy Commissioners and the Commission held those determinations as “not persuasive authority. Both were opinions by Deputy Commissioners involving unrepresented claimants. Neither was the subject of full Commission review.”

## **Medical Management**

***Quintero v. Hitt Contracting Inc.***, JCN VA00001552907 (Aug. 6, 2021) – Affirmed

The defendants filed an Employer’s Application for Hearing seeking termination/suspension of the outstanding wage loss award. It alleged the claimant refused medical treatment offered by Dr. Kucia as noted in an April 21, 2021 medical report. They also asserted a refusal to attend an FCE on May 18, 2021 as ordered by Dr. Kucia.

In response, the claimant argued the application should be rejected. The claimant asserted Dr. Kucia ordered physical therapy and pain management, for which the claimant requested authorization. The nurse case manager did not respond to the request. The nurse case manager then asked that an FCE be performed at the adjuster’s request. The claimant stated Dr. Kucia acquiesced to the FCE request by the nurse case manager, but that the FCE was not the doctor’s recommendation.



A staff attorney rejected the employer's application. She noted the insurer requested the FCE and Dr. Kucia responded. She stated medical management of a claim was to be directed by the treating physician, not an employer representative.

The defendants requested review of the rejection of the application. They asserted that under Virginia Code § 65.2-607, they are permitted to request an FCE and the claimant was required to attend it.

On review, the Commission found that the FCE was ordered to accommodate the adjuster's wishes, and was mere "acquiescence" rather than a valid referral. The Commission found that the FCE was not an independent medical examination, and thus the claimant was not required to attend the appointment pursuant to Code § 65.2-607. The Commission therefore upheld the staff attorney's refusal to refer the employer's application to the docket on the basis of improper medical management.

### **Res Judicata**

*Reinhardt v. Walden Hatton*, JCN VA00001465677 (Sept. 8, 2021) – Vacated/Remanded

The FC vacated the DC's finding that the claim was barred by res judicata and remanded the matter to the DC for further consideration. The claimant alleged injury to his back on January 17, 2018 and filed claims seeking various benefits from his employer, identified as Waldon Hatton. In a Petition for Approval of a Compromise settlement, Hatton denied liability, asserting the claimant was not his employee. Nonetheless, it agreed to a settlement in the amount of \$100,000. This was approved on December 27, 2018 and the insurer paid the claimant on January 3, 2019.

On February 1, 2019, the claimant filed a new claim for the same date of accident, but identifying a different employer. Because the new claim aligned with the prior date and injury, the two claims were consolidated, with Hatton and its insurer listed as "Interested Parties." The new employer, Forest Hills Manor, argued the new claim was barred by res judicata. The claimant testified that he believed that Mohammad Aslam, the owner of Forest Hills Manor, was his employer at the time of his injury. Notwithstanding, the first claim was filed solely against Hatton. The DC sustained the res judicata defense.

The Commission disagreed, and observed that for the doctrine of res judicata to apply, Forest Hills Manor and Hatton had to be identical or in privity and that "[a]bsent such evidence, then the 'identity of the parties necessary for application of res judicata' is not present." (citing *Carnahan v. Catherine's*, JCN VA00000798338 (May 31, 2016)). The case was remanded to the DC to make a finding as to the issue of privity and, absent such, to address the remaining claims and defenses.

## **PTSD - Injury by Accident - Call to a Family Member's Suicide**

*Oliver v. Suffolk, City of*, JCNs VA00001581720, VA00001578357 (Sept. 8, 2021) – Affirmed

The claimant, a firefighter and EMT with 20 years' experience, claimed psychological and/or psychiatric injuries by accident due to two sudden shocks or frights arising out of and in the course of his employment on April 13, 2018 and March 15, 2019 and PTSD as an occupational disease. The claimant drove a fire truck to an attempted suicide on April 13, 2018. He thought the address might be his father-in-law's home. While traveling to the scene, he learned the person was dead and the call was canceled because other rescuers were present. When he arrived, he learned his father-in-law had taken his life with a gun. He did not perform any work at the scene and did not go near the body. The Battalion Chief drove him to his wife's workplace, and he then accompanied his wife to her father's home. At that time, the claimant saw his father-in-law's body in the truck and placed in a body bag. On March 15, 2019, the claimant responded to a man's suicide in circumstances similar to his father-in-law's death.

The Deputy Commissioner found the claimant failed to prove compensable injuries by accident arising out of his employment. He found the claimant's psychological distress arose not from his employment but from the personal natures of the exposures on April 13, 2018 and March 15, 2019. He held the claimant's PTSD was an ordinary disease of life. In the alternative, he found the claimant failed to prove a compensable occupational disease. The claimant requested review of the finding he did not prove he suffered a compensable injury by accident on either April 13, 2018 or March 15, 2019.

The Commission held the claimant's psychological distress did not arise out of his employment. The claimant argued he remained in the course of his employment when he returned to his relative's home, because he remained on call. His return to the scene of his father-in-law's suicide was personal, and even it was in the scope of his employment, it did not lead to a psychological injury arising out of his employment. Based on *Hess v. Virginia State Police*, 68 Va. App. 190, 198 (2017), the Commission found the proper inquiry for considering an injury by accident claim was whether the claimant "encountered a situation that was an expected occurrence in the performance of his duties." The Commission stressed that each case must be judged on its facts. It recognized the claimant's devastating experience on learning of his relative's death but held the evidence did not establish it was shocking, unexpected or frightening as a consequence of his employment. It also found learning of his father-in-law's death during the course of his employment did not render the event arising out of his employment. The later suicide of a stranger did not amount to a sudden shock or fright arising out of the employment. The Commission found the testimony and medical evidence did not establish the requisite causal connection between the claimant's PTSD and either suicide.

## **PTSD as an Occupational Disease**

*Sine v. State Police*, JCN VA00001746329 (Nov. 23, 2021) – Affirmed



The claimant, a state police officer, began to have panic attacks after exposures at work to violence at the Unite the Right rally in Charlottesville in August 2017 and the 2018 memorial to the woman killed at the Unite the Right rally. He continued to work, did not take any time off and did not receive medical treatment. He had trouble sleeping and felt on edge while preparing for an expected gun rights rally during December 2019. On January 9, 2020, he had chest pains at the office. His sergeant sent him to a hospital where cardiac causes were ruled out. The doctors found he was having panic attacks. The claimant saw his family doctor, who excused him from work for two weeks. He did not attend the gun rights rally. He returned to work after the two weeks. He began counseling with a psychologist, Christopher DeCanio, Ph.D., on January 28, 2020, at his wife's urging.

In late May 2020 until June 5, 2020, the claimant and other troopers were on call to react to civil disturbances all week. Some days he performed his usual administrative duties. On other days, he was deployed to Fredericksburg and to Winchester where he encountered multiple stressors (unruly crowds, the need to wear gas masks and riot gear, and riding a bus to a protest). At the end of the week, he told his supervisor he could not work. Dr. DeCanio excused him from work.

The claimant filed an August 3, 2020 claim alleging post-traumatic stress disorder as an occupational disease or ordinary disease of life. At the hearing, he stated he was not proceeding for an injury by accident. The claimant's PTSD was diagnosed by his psychologist and by a psychiatrist who evaluated him for a fitness for duty. The defendants argued the claimant sustained injuries by accident which were not compensable and failed to prove his PTSD was a disease.

Relying on *Fairfax Cty. Fire & Rescue Dep't v. Mottram*, 263 Va. 365 (2002), the Commission found the claimant's PTSD was properly classified as an occupational disease. He did not suffer a specific injury. In *Petersburg Fire & Rescue v. Wells*, No. 0328-04-2 (Va. Ct. App. Oct. 4, 2004), the Court of Appeals relied on *Mottram* to hold an ailment diagnosed as PTSD may qualify as an occupational disease under the Act. The Court noted the Commission in *Mottram* found that PTSD, in its standard medical definition, qualified as a disease under the Act. The Court ruled "if a claimant proves the ailment did not occur as a result of a specific injury, the Commission may, without further proof, infer that it is a disease under the Act, absent evidence to the contrary." *Id.*

#### **PTSD - Award Pursuant to Va. Code § 65.2-107 C.**

*Ruszas v. City of Virginia Beach*, JCN VA00001767897 (Jan. 7, 2022)

On December 6, 2021, the Commission issued a Notification of Terminated Award Order, which terminated Claimant's TTD award effective 9/13/21, but left medical benefits open for as long as necessary. The Award was entered for PTSD pursuant to Va. Code § 65.2-107(C). The claim administrator argues the medical award should have also terminated 52-weeks from the date of diagnosis pursuant to the statute. The Notification of Termination was VACATED and the matter was referred to the docket. On 1/21/22, the parties entered into a Stipulated Order, agreeing that the PTSD medical award is for a 52-week period beginning 9/15/20.

\*Firefighters/Police appear to have lesser benefits in this specific scenario than does a claimant who is not a first responder.

### **Arising Out of the Employment**

***Mata v. Campbell Cty. Sch. Bd.***, JCN VA00001794197 (Aug. 9, 2021) – Affirmed

The claimant, a custodian, alleged a compensable injury by accident that occurred when she was sweeping under a desk. At hearing, the claimant agreed that she was not moving her body “awkwardly” when the injury occurred. The Deputy Commissioner nevertheless found the claimant suffered an injury arising out of the employment, explaining:

[The claimant] described movements that would qualify as awkward. She was bent at the waist, bent at the knees, swiveling her upper body and pushing a dust mop into a small, two-inch tall space. It was while she was in that position that she felt a pop in her back. We closely observed the claimant at the hearing, found her to be credible, and accepted her testimony as to her position when she felt the pop in her back. . .

The defendants requested review. The Commission affirmed the Deputy Commissioner’s finding, noting that the claimant credibly testified as to the configuration and motions her body underwent to sweep underneath the desk. Based upon the claimant’s testimony, the Commission declined to categorize the claimant’s actions as simple bending or turning. The Commission found that the claimant’s acknowledgement that her movements were not “awkward” was not fatal to her claim, explaining that “While the movements required for the claimant to perform her job may be routine to her, it does not mean that such movements cannot be deemed award given her very specific testimony in this case.”

***Kirkpatrick v. Northampton Co.***, JCN VA00001778552 (Sept. 22, 2021) – Affirmed

The Commission affirmed the DC’s finding that the claimant failed to prove her injury arose out of her employment. The claimant, a paramedic, suffered an injury after taking one step after having exited the side of an ambulance when her foot rolled outwards, twisting her ankle. The Commission acknowledged the possibility that a risk of the employment caused the fall, but was not persuaded that either or both risks identified was more likely than not the precipitating cause.

***Schweitzer v. Auto Chlor Systems of Northern***, JCN VA00001752385 (Sept. 22, 2021) – Reversed

The Commission, by majority Opinion, reversed the DC’s finding that the injury did not arise out of the employment.

Summarizing the facts, the Commission explained the claimant had returned to his work van and stepped onto the highest ledge to retrieve three gallons of Pot and Pan cleanser. He pulled the



cleanser off an internal rack and, while holding one gallon of it, lowered himself to the ground, feeling immediate pain in his leg when he hit the ground. He did not step onto the bumper. As to whether there was anything different about this activity than how he normally entered or exited, he stated he “may have stretched” his leg a little more than usual; it seemed more strenuous than usual because it caused immediate pain. The van was 24” from the ground, with the bumper below 16” above the ground. The Commission found the distance an “exceptional height” and caused him to stretch his leg outward resulting in an awkward position. They found “without speculation that the claimant’s injury resulted from the height of the step and the width of the bumper. As he stepped from the cargo area of the van all the way to the ground, the claimant was required to stretch his left leg to an usual degree.”

Dissenting, Commissioner Rapaport did not find evidence to support the description of an exceptional height as the claimant had merely described the height without producing evidence it was unusual. He described the inference that the van bumper caused him to step out further in an awkward fashion as “impermissible.” Because he found the evidence failed to establish a defect or unusual configuration and the claimant did not attribute the injury to holding the cleaner or describe the manner of exiting the van as awkward, he found insufficient evidence to meet the claimant’s burden of proving an injury that arose out of the employment.

***Varma v. Northern VA Community College***, JCN VA00001797774 (Oct. 28, 2021) – Reversed

FC reversed the DC’s finding that injuries did not arise out of her employment. FC found that Claimant’s work required her to traverse a gravel covered area to reach her car and that she rolled her ankles and fell due to the loose gravel, which was an actual risk of her employment and the proximate cause of her fall and injuries. DC had noted “this is a challenging case” and had denied on the basis that the claimant’s hearing testimony was different than her recorded statement, and cause of the claimant’s fall was her unsteadiness in her platform shoes on the gravel walkway.” The FC noted that the claimant was wearing four-inch platform heels at the time, but nonetheless found that she attributed the fall to the gravel. The FC stated:

We recognize that “[s]imple acts of walking, bending, or turning, without any other contributing environmental factors, are not risks of employment.” *Southside Va. Training Ctr. v. Ellis*, 33 Va. App. 824, 829 (2000). However, the claimant was not simply walking without any contributing environmental factors when she fell. The claimant’s work required her to traverse this gravel covered area to reach her car. The evidence preponderates to show the claimant rolled her ankles and fell due to the loose gravel surface of the walkway. Under the specific facts of this case, the loose gravel on the employer’s premises was an actual risk of the claimant’s employment and the proximate cause of her fall and injuries. Although we do not hold every employee’s fall on gravel arising out of a risk of the employment, here, based on the evidence before us, the claimant met her burden of proof that her injuries arose out of her employment. See *Schilling v. Carrington Graham, Inc.*, JCN VA00000683665 (Aug. 5, 2013.)

***Henry v. Virginia Alcoholic Beverage Control Auth.***, JCN VA00001796291 (Nov. 8, 2021) – Reversed

The claimant maintained a kneeling or squatting position for one hour as he stocked shelves, with two thirty second interruptions to serve customers at the cash register. He then took four or five steps to the back room with an empty box, set it down, and turned to return to the sales floor. He felt a little left knee pain. His left knee buckled and twisted and he fell, injuring his right arm and left knee. The Deputy Commissioner found he sustained an accident arising out of his employment.

The majority reversed, finding that at the time the claimant's knee gave out, he was simply walking from the back room to the sales floor. The majority cited *Morris v. Morris*, 238 Va. 578, 589 (1989) and quoted *City of Charlottesville v. Sclafani*, 301 Va. 212, 222 (2021), "Clearly, a claim asserting that an injury occurred during a time period where multiple potential causative events occur is not sufficiently temporally precise to establish a compensable injury." The majority found, "The record fails to establish the claimant's injuries occurred as a result of a specific incident during his multiple work activities as required to prove an injury by accident pursuant to the Virginia Workers' Compensation Act."

The dissent argued neither the time nor the distance from the end of the stocking activities until the onset of symptoms were significant enough to represent a departure or separation from the preceding physical exertion. It noted the claimant attributed his injury to overuse of his knee in an awkward and uncomfortable position for an hour. Applying the analysis of *Richard E. Brown, Inc. v. Caporaletti*, 12 Va. App. 242 (1991) and *First Fed. Savings & Loan v. Gryder*, 9 Va. App. 60, 65 (1989)), to this case, the dissent argued the claimant's need to work in a "very awkward," position for an hour was a "hazard," to which he would not have been equally exposed apart from his employment. Contortions of the body to perform a job task are a hazard of the work place. *Id.* at 65. It makes no sense to conclude that an onset of symptoms which occurs immediately when arising after significant exertion arises out of the employment, but experiencing the same symptoms after a "few steps," does not. The dissent further asserted the need to view the incident which caused the claimant's sudden bodily change in the aggregate, not its component parts. See *Cassada v. Wiseman Enters.*, JCN VA00000364748 (Feb. 24, 2012); *Shifflett v. Fleet Maint. Serv., Inc.*, VWC File No. 186-96-01 (Sept. 9, 1998).

***Jacobs v. Wilson Workforce and Rehabilitation Center***, JCN VA00001779976 (Dec. 3, 2021) – Affirmed

Disputed issue was whether knee injury arose out of risk of employment. FC agreed with DC that it did not. After briefly kneeling to complete a routine task, the electrician claimant stood up, at a normal pace, and then felt a pop and pain in his knee. He had not been working in a cramped area or in an awkward position. He held only a screwdriver and fairly light pliers in his hands. FC held the evidence failed to establish any condition of the workplace or environmental factors contributed to the injury, or that the claimant's movement was unusual. Therefore, his injury did not arise from a risk of employment.

***Harris v. Bon Air Juvenile Correctional Center***, JCN VA00001733393 (Dec. 20, 2021) – Affirmed



Claimant suffered an injury when his hand got caught in a heavy steel security door at the correctional facility. DC found that although the door was unique to the claimant's employment, it did not present a peculiar risk or hazard of employment. DC found, however, that nature of the claimant's job required him to ensure that the door had been secured behind him after he walked through it. FC agreed with DC that claimant's accident arose out of his employment. Per the FC: "...the nature of the door and the claimant's job duties created a risk of accident, and the claimant proved a link between his work conditions and the injury." In a footnote, the FC said: "The fact that there may have been a better or safer way to check that the door was locked does not mean that the claimant's activity was not a risk of the employment."

### **Injury by Accident – Slip and Fall**

***Meador v. Dudley's Truck Stop Restaurant, Inc.***, JCN VA02000034752 (Dec. 1, 2021) - Reversed and Remanded – Marshall w/ Rapaport Dissent

DC denied the claim, finding that the claimant's fall was unexplained. Claimant, a waitress, slipped and fell coming through the kitchen. She could not identify what caused her to slip, and DC found no substance or physical defect on the floor that caused or contributed to the injury. Employer did not see the fall but saw claimant on floor immediately after; inspected the area, and determined floor was not wet in area where claimant fell, but saw spoonful of water near claimant's head. Employer acknowledged there could be water near the sink, 83 inches away. There were no defects in the floor. Video of accident showed claimant walking through kitchen, across tile floor, when her left foot abruptly and quickly slid forward, causing her to slip and fall. There was no visible substance on the floor or claimant's shoes. Good discussion by Majority of case law where claimants slip on unknown/unidentified substances and the inferences made to conclude that those accidents arose out of employment. Majority held: "We can infer from the manner in which the claimant's foot moved across the floor as she slipped and fell that the floor was slick or slippery for some reason. As in *Republic Airways Holdings, Inc.*, it was reasonable for the claimant to conclude she slipped on something because of the way her foot moved."

In his dissent, Commissioner Rapaport agreed caselaw has established that it is unnecessary to exactly identify the substance, but argued "the evidence must show more than conjecture regarding the *existence* of a substance." Commissioner Rapaport argued same cases relied on by Majority prove his point. Claimant did not know why she slipped, there was no evidence of any substance on the floor, and there was no defect. Per Commissioner Rapaport: "If we infer that every time a person slips the accident is compensable, then virtually every slip and fall injury is compensable."

### **Res Judicata - Settlement with One Employer**

***Reinhardt v. Walden Hatton***, JCN VA00001465677 (Sept. 8, 2021) – Vacated/ Remanded

The claimant alleged he sustained a back injury on January 17, 2018. His claims seeking medical and disability benefits identified his employer as Walden Hatton (Hatton). Hatton denied liability and that the claimant was his employee, but it agreed to a settlement by which the claimant would release liability in exchange for Hatton's payment of \$100,000. The Commission approved the Petition and Order in December 2018. Hatton's insurer paid it in January 2019.

In February 2019, the claimant filed a claim alleging a back injury on January 17, 2018 while employed by Forest Hills Manor, L.L.C. ("Forest Hills Manor"). Because the claims stated the same injury and date of accident, the Commission consolidated the new claim with the claim against Hatton. Forest Hills Manor defended that the claim was barred by res judicata. Hatton and its insurer were joined as interested parties and joined the res judicata defense. The Deputy Commissioner found res judicata barred the claim filed against Forest Hills Manor.

The Commission vacated and remanded. It discussed the party asserting a res judicata defense "must establish the following four elements with respect to the claimant's [prior and] subsequent claim[s]: '(1) identity of the remedies sought; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the persons for or against whom the claim is made.'" *Boukhira v. George Mason Univ.*, No. 0204-15-4 (Va. Ct. App. Dec. 8, 2015) (quoting *Smith v. Ware*, 244 Va. 374, 376 (1992)). For res judicata to bar the present claim, Forest Hills Manor and Hatton had to be identical or in privity. The Commission vacated and remanded for the Deputy Commissioner's determination whether privity exists between Forest Hills Manor and Hatton.

### **Average Weekly Wage**

*Sinkovic v. Crane Service Company, Inc.*, JCN VA00000879152 (Sept. 24, 2021) – Affirmed

The claimant sought review of the calculation of her TPD rate, arguing FICA reimbursement pursuant to her union contract is a fringe benefit that should be excluded from calculation of her post-injury average weekly wage. The Commission affirmed, stating the claimant had not met her burden of proving this should be excluded from her post-injury average weekly wage. The Commission did not find the employer's characterization of the FICA reimbursement as a fringe benefit determinative and found it dissimilar from those benefits historically excluded from average weekly wage calculations. The Commission explained in this regard that we use gross wages, prior to deductions such as FICA to calculate the pre-injury average weekly wage. The reimbursement here varied as her wages varied. By reimbursing this, the employer increased her take home pay and it was therefore part of her wages. Because of this, the Commission agreed with the DC that the FICA reimbursement should not be excluded from the post-injury average weekly wage calculation. This Opinion did not make clear if the FICA reimbursement had been used in the pre-injury average weekly wage calculation.

### **CBD Oil**



***Lifsey v. DBHDS \ Central State Hospital*, JCN 1849677 (Oct. 1, 2021) – Affirmed**

The claimant remains entitled to medical benefits for compensable injuries she suffered on March 27, 1997. She treats with a chiropractor and a psychiatrist for pain and anxiety related to her compensable injuries. In 2021, she filed a claim seeking approval for treatment with CBD oil suggested by her chiropractor, Dr. Hennessey, to treat anxiety and pain.

The Commission found CBD oil was not reasonable and necessary treatment for the compensable injuries. The claimant believed the CBD oil treatment helped her sleep and reduced her pain from a seven to a five or six out of ten. Dr. Hennessey indicated CBD oil helped reduce the claimant's pain and anxiety between appointments. Dr. Thomas Scioscia indicated the CBD oil used by the claimant was an over-the-counter product with no medical evidence or human studies that supported the product as effective for pain relief. He had no basis to support it was medically necessary. The Commission gave less weight to Dr. Hennessey's opinion as a treating physician because of his vague explanation of why he recommended CBD oil for the claimant's condition. By contrast, Dr. Scioscia explained no medical evidence or human studies supported CBD oil as effective for pain relief. In addition, although Dr. Hennessey was competent to treat the claimant's back injury, her anxiety was outside the scope of his chiropractic practice.

**Permanent Partial Disability (PPD) - Evaluation Cost**

***Elliott v. Sam Green Vault Corporation*, JCN VA00001108316 (Oct. 8, 2021) – Reversed**

A Deputy Commissioner denied physical therapy the claimant sought. The defendants disputed the physical therapy was for medical treatment, asserting it was solely to obtain a functional capacity evaluation and a permanent partial impairment rating to the claimant's injured leg. The treating physicians ordered an FCE.

Commissioner Newman's majority opinion reversed. He found the Deputy Commissioner followed existing Commission precedent and the evidence supported the finding the FCE was solely to assess and assign a PPD rating. He cited four justifications for this reversal of course. 1) Obligating the claimant to pay for a disability rating offends the Act's fundamental premise that financial burdens of industrial accidents or diseases be borne by industry. 2) Prior decisions compelling an injured employee to finance a disability rating interpret "necessary medical attention" in Va. Code § 65.2-603 too narrowly. He noted FCEs are considered necessary medical care in the context of establishing a claimant's ability to work. 3) Holding the employer liable for an FCE to assess the claimant's permanent impairment is a matter of fundamental fairness. 4) Holding the employer liable for an evaluation of the claimant's permanent disability promotes our charge to administer the Act and decide controversies.

Commissioner Marshall's concurrence explained no one seriously doubted that undergoing an FCE to obtain a disability rating was reasonable and necessary medical treatment for 87-and-

one-half years until 2005, when the Commission decided *Morgan v. Proffitts*, VWC File No. 180-18-10 (Dec. 28, 2005). He described the legal rule announced in *Morgan* as “created out of nothing,” unconscionable, and totally inconsistent with the purposes of the Act.

Commissioner Rapaport’s dissent disagreed with the sudden departure from longstanding existing case law. He noted the claimant bore the burden to prove the FCE was “necessary medical attention” and stated he failed to prove the FCE was necessary medical treatment. He offered his contrary view of the four reasons stated in the majority opinion. He indicated he would find the FCE medically necessary treatment if it was being conducted to determine the claimant’s ability to work.

### **Employer’s Application for Hearing - Disability Not Presumed**

*Pope v. Loudoun Cty. Public Sch.*, JCN VA00001702307 (Nov 5, 2021) – Reversed

The claimant fractured her left ring and pinky metacarpals on February 10, 2020. An August 24, 2020 Award Order granted medical benefits and temporary total disability from February 20, 2020 and continuing. The defendants filed an April 26, 2021 application for hearing seeking termination of the award, stating “The Claimant has no disability noted from her treating physician; ongoing disability is not presumed.” The employer sought a credit.

The Deputy Commissioner found the disabling effects of the compensable disability had fully dissipated and “no restrictions were placed on the claimant’s ability to return to work as of August 2020.” She terminated the award effective April 26, 2020 but denied the credit, finding the employer had not set forth grounds for it. Both parties requested review.

The Commission found the employer failed to articulate a legal basis for the relief it sought. The August 24, 2020 Award was final thirty days after it was issued. The final Award absolved the claimant from the burden of proving ongoing disability. It entitled the claimant to ongoing payments. In addition, the employer did not produce any evidence that the claimant was released to return to work without restrictions. The Commissioner reversed the termination of the Award. It found the request for a credit was moot.

### **Willful Misconduct - Intent v. Negligence**

*Saythong v. Phoenix Packaging Operations*, JCN VA00001818213 (Nov. 5, 2021) – Affirmed

The claimant, a material handler assigned to work on an extruder machine, suffered partial amputation of his left third and fourth fingers. The defendants argued his claim was barred by willful misconduct. They proved the existence of two safety rules which prohibited “reaching into an operating grinder, shredder or chopper” and “physical contact with a nip point of any operating equipment such as rollers or conveyors.”



For over a year, the claimant's duties included cleaning drips from the front of the machine after the roller was changed. On the day of his accident, he cleaned the left side of the machine with his gloved left hand. He then bent to check the right side of the machine, putting his hand on the machine in the process. His gloved left hand came into contact with the roller and was pulled into the machine, crushing his hand. The claimant testified he did not intentionally put his hand near the roller. He testified he knew about the rules, but this was an accident.

The Commission found the issue in the case was the claimant's intent. While the claimant may have violated a safety rule, the evidence was uncontradicted that the rule violation was not intentional. The willful misconduct defense failed because the defendants did not prove the violation was intentional.

### **Vocational Rehabilitation - Actions of Attorney Bind Claimant**

***Hernandez v. Loudoun County Public Schools***, JCN VA00001297984 (Nov. 23, 2021) - Affirmed/Modified

The defendants appealed this case to the Court of Appeals, where it is pending. Full and final mediation has also been scheduled.

While pursuing appeals of an earlier award of temporary total disability, the defendants filed a March 3, 2020 application for hearing alleging the claimant refused vocational rehabilitation. In November 2020, the defendants filed an application for hearing alleging the claimant was released to return to pre-injury work.

The Commission affirmed a Deputy Commissioner's finding that an email exchange between claimant's former counsel and defense counsel established her refusal of vocational rehabilitation. In a February 20, 2020 email addressing a possible meeting between the claimant and the rehabilitation counselor, claimant's former counsel stated, "My client will only participate in voc if we can get a stipulated order awarding her benefits while she participates in voc. Otherwise we wait until the hearing in April and have the Deputy Commissioner order voc and have the claimant under an order for benefits. Please let me know if we can do a stipulated order stating such[.]"

A "client is generally bound by the actions of her attorney." *Raboteau v. Macy's*, JCN VA00000396199 (Nov. 28, 2017) (citing *Conner v. The Martin-Brower Co., LLC*, JCN VA00001149244 (Aug. 16, 2016); *Morison v. Mount Vernon Med. Grp.*, 65 O.I.C 286 (1986)). "'The attorney-client relationship presumes that attorney and client . . . will communicate about all the important stages' of the proceedings." *Id.* (quoting *Hunter v. Commonwealth*, 15 Va. App. 717, 722 (1993)).

The Deputy Commissioner found the defendants failed to prove the claimant was released to pre-injury work. He found the claimant cured her refusal of vocational rehabilitation when she met with the rehabilitation counselor on February 16, 2021. The Commission modified the award,

finding a January 21, 2021 letter from claimant's counsel stating the claimant stood ready to meet with a vocational rehabilitation counselor amounted to a good faith cure of her refusal.

### **Mechanical or Structural Change**

*Sturgill v. Wise County Public Schools*, JCN VA00001824513 (Dec. 1, 2021) – Affirmed

The only issue on appeal was DC's finding that the claimant's post-accident low back complaints were compensable. Despite a records review neurosurgeon's opinions that the evidence was insufficient to conclude the claimant sustained a mechanical or structural change to her lower back/lumbar spine, FC found that the evidentiary record, taken as a whole, met claimant's burden of proving a sudden and mechanical change to the body. FC relied on claimant's credible report after the accident of low back pain and her testimony about new onset of symptoms; the treating physician's opinion that the claimant suffered an aggravation; and video evidence of the accident, which showed the claimant striking the floor. FC stated: "As with other factual questions, the occurrence of an obvious sudden mechanical or structural change in the body may be proved either by direct or circumstantial evidence, including medical evidence or a claimant's testimony." See *United Airlines, Inc. v. Hayes*, 58 Va. App. 220, 238 (2011).

### **Willful Misconduct - Inference on Disability**

*Fogel v. Abacus Remodeling & Construction*, VA02000031767 (Dec. 1, 2021) – Affirmed – Marshall w/ Rapaport Dissenting, in part

Five evidentiary hearings were held over a 1.5-year period with multiple witnesses and exhibits and post-hearing position statements. Contested issues were whether claim was barred by willful misconduct; whether certain body parts were injured; and disability.

FC agreed with DC that defendants failed to prove the willful misconduct defense. No evidence that claimant intentionally tried to hurt himself. His use of a particular ladder was unwise or negligent only. The evidence failed to show that intoxication caused the accident. While the claimant may have smelled of alcohol on the morning of the accident, he and his wife, both of whom were found credible, denied that he drank that morning or was intoxicated. The ladder slipped on a concrete floor and the evidence failed to show "a nexus between the claimant's alleged intoxication and the sliding of the ladder." FC also dismissed safety rule violation argument as it was not persuaded the employer had a safety rule regarding the use of ladders in place. Per FC: "Advising employees to work safely or not do something negligent does not constitute a reasonable safety rule."

Regarding indemnity, DC awarded TTD except for period claimant admitted to no marketing. DC was not persuaded claimant had abandoned his job, when he left worksite after the accident, such that his termination was justified, and found that the claimant was taken totally out of work beginning June 5, 2019; a status which was confirmed several times through April 2, 2020.



Majority noted claimant was continued out of work on April 2, 2020, completed his testimony at a September 2019 hearing, and closed his case in chief on March 5, 2020. Majority also noted that the defendants provided no medical attention and claimant lacked health insurance. Majority concluded: "Given the severity of the claimant's injuries, we infer that he remained disabled as of the date of the Opinion and continuing. *See Smith v. Dominion Tech. Solutions*, No. 0475-14-3 (Jan. 27, 2015) (reversing Commission's denial of disability benefits based on lack of recent medical evidence). The absence of a recent medical report specifically declaring a claimant unable to work does not, in itself, preclude a finding that a claimant's disability is ongoing. *Id.*"

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.

### **Identifiable Incident**

*Ingream v. Northrop Grumman Systems Corp.*, JCN VA00001615292 (Dec. 2, 2021) – Affirmed

DC found that the claimant's injury resulted from a specific, identifiable incident and caused by conditions under which the claimant was required to perform his work. During two days before accident, claimant experienced transitory knee pain while working, including on his knees. On DOA, claimant was on a ladder adjusting a thermal blanket on a spacecraft, during which he leaned out across the spacecraft, lifted his right leg and put all his weight on the left leg. His left knee twisted, "triggering a 'pressure' sensation." Claimant knew something was wrong when he descended the ladder. Claimant gave same history to medical providers. DC found this to be a specific, identifiable incident. DC also held that claimant was "engaged in an awkward maneuver." FC affirmed. FC did not agree with defendants that injury resulted from simple act of reaching. FC held that combined motions of working on ladder and leaning so far across the aircraft that he lifted his right foot and stood solely on his left "are a portrait of awkwardness, entirely incompatible with a simple act of reaching." Like DC, FC rejected defendants' cumulative trauma argument.

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

*Barnett v. Alpha Metallurgical Resources, Inc.*, JCN VA00001662466 (Dec. 2, 2021) – Affirmed

DC granted ER's App and terminated TTD benefits, finding that defendants met their burden of proving that the claimant had been released to full duty. Claimant argued FCE report did not accurately reflect his inability to complete all tasks, and that treating doctor did not have a clear understanding of his strenuous job duties. In rejecting the claimant's arguments, FC noted that

long-term treating physician had released the claimant to full duty after work hardening and an FCE. FC also discussed how the claimant's subjective complaints of pain were said to be unexplained, and that the FCE found underlying pain behaviors and symptom magnification throughout the test.

Helpful caselaw cited:

An employer seeking to terminate disability benefits under an open award has the burden of proving that the claimant is fully able to perform the duties of his pre-injury employment. *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 438-439 (1986). A physician's release to regular work or full duty is not necessarily equivalent to an informed release to pre-injury work, unless the evidence shows that the claimant has no residual impairment or that the physician is fully aware of the nature and functional requirements of that pre-injury work. *Federow v. Borden Moores Quality Snack Foods*, VWC File No. 153-14-70 (Aug. 30, 1994) (citing *Morris v. Badger Powhatan/Figgie Int'l, Inc.*, 3 Va. App. 276 (1986)). Moreover, where the evidence does not suggest the claimant suffers from any residual physical limitations, the employer is not required to prove the claimant's treating physician, who had opined that the claimant was capable of returning to full duty work without restrictions, was aware of the claimant's pre-injury duties as a condition of establishing the claimant's informed release to pre-injury employment. See *Fingles Co. v. Tatterson*, 22 Va. App. 638, 642 (1996).

***Revels v. Costco Wholesale*, JCN VA00001537074 (Dec. 14, 2021) – Affirmed  
(Also addressed request for change in treating physician)**

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

Helpful citations:

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). "[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).

The claimant has the burden of proving that specific circumstances warrant a change in treating physicians. *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))).

## **Deputy Discretion on When to Close the Record**

***Richardson v. Phillips Programs***, JCN VA00001700002 (Dec. 2, 2021) – Affirmed as Modified

Compensability and entitlement to medical and indemnity benefits were at issue, but opinion is most instructive regarding the handling of discovery issues and the timing of closing the evidentiary record. FC had previously declined interlocutory review on DC's denial of motions for continuance and to compel discovery. FC again deferred to the DC, who, they said, "is granted substantial discretion over discovery issues." DC also "has broad discretion as to when to close the record, and any decision in that regard is reviewable for an abuse of that discretion." See *Jarrett v. The Martin Brower Co.*, VWC File No. 228-19-28 (Dec. 8, 2006), *aff'd*, No. 0079-07-4 (Va. Ct App. June 12, 2007).

## **PPD Ratings**

***Villatoro v. SA Halac Ironworks, Inc.***, JCN VA00001682248 (Dec. 6, 2021) – Affirmed

DC awarded 15% loss of use of claimant's right arm and 18% loss of left arm. DC adopted the treating physician's ratings over the IME physician's ratings, which were believed to be too low. DC also relied on claimant's testimony, which was found credible, about ongoing pain and limitations. FC accepted DC's assessment, and "decline[d] to average these disparate ratings to the left and right upper extremities." Helpful case citations from the FC re: PPD claims.

## **Termination for Cause**

***Brown v. Proving What's Possible, LLC***, JCN VA00001788990 (Dec. 26, 2021) – Affirmed in part, Reversed in part, and Award Modified

The only issue on review was DC's "determination that the claimant forfeited her entitlement to disability due to being terminated for cause...." Pre-DOA, claimant had been reprimanded for late submissions of progress notes and tardiness to meetings and supervision. DC found that the problems continued despite the claimant being disciplined twice and given time to correct them. Claimant was terminated over three months after first being disciplined. DC found that the problems were not related to the work injury, as the behavior began before the accident, and that her termination was for cause. The FC agreed.

Virginia Code § 65.2-510(A) provides that a claimant who refuses selective employment is barred from receiving indemnity benefits "during the continuance of such refusal, unless in the opinion of the Commission such refusal was justified." An employee who is discharged for "voluntary misconduct is deemed to have constructively refused an offer of selective employment, thereby justifying a forfeiture of benefits." *Artis v. Ottenberg's Bakers, Inc.*, 45 Va. App. 72, 91 (2005). An employer is not required to prove "that the employee's



wrongful act was intentional, willful or deliberate in order to justify a termination for cause and a forfeiture of compensation benefits.” *Riverside Behavioral Ctrs. v. Teel*, No. 2143-14-1 (Va. Ct. App. May 12, 2015). “[A]ll that is required is a showing: (1) that the wage loss is ‘properly attributable’ to the wrongful act; and (2) that the employee is ‘responsible’ for that wrongful act.” *Artis*, 45 Va. App. at 85 (citing *Walter Reed Convalescent Ctr. v. Reese*, 24 Va. App. 328, 336 (1997)).

FC disagreed with DC, however, that claimant would not be entitled to indemnity benefits after her termination for cause. Instead, FC held that “claimant’s termination from employment does not preclude her from receiving temporary total disability benefits during periods of injury-related total disability.”

### **Volunteer Firefighter not an Employee**

*Smorto v. Henrico County Government*, JCN VA02000035370 (Dec. 16, 2021) – Affirmed

DC found that claimant was not an employee but rather worked as a volunteer firefighter, and because the employer had not adopted a resolution to bring him under the Act, he denied the claim. Per FC, who agreed with DC:

Virginia Code § 65.2-101 defines an employee for purposes of the Act. Section 65.2-101.1(l) instructs under the definition of “Employee” 1.l. that a “volunteer firefighter . . . shall be deemed employees of (i) the political subdivision . . . if the governing body of such political subdivision . . . has adopted a resolution acknowledging those persons as employees for the purposes of this title.” Hence, the clear language of the Act instructs that for a volunteer firefighter to be considered an employee, the overseeing political division must adopt a resolution. The evidence established that Henrico County had no resolution, and in fact, the claimant did not contest the lack of a resolution.

Claimant argued he was a salaried firefighter because he received \$2 per fire call, which was to compensate for personal vehicle use and wear and tear on personal clothing. The FC was not persuaded that this compensation qualified as salary.

### **Contract Language Clear - No Virginia Coverage**

*Granado v. Wells & Associates, Inc.*, JCN VA02000033960 (Dec. 17, 2021) – Affirmed

Wells stipulated it was claimant’s statutory employer, but asserted that claim was covered under Rivera’s policy with Benchmark. Benchmark argued that its policy did not afford coverage for Virginia WC claims. DC found that policy’s provisions did not effectuate Virginia coverage, so held Wells and its insurer responsible for payment of benefits. FC found insurance contract language “clear and unambiguous” and concluded “that no provision of the Benchmark policy

provides Virginia coverage for this claim, and the Deputy Commissioner correctly held Builders Mutual Insurance Company responsible for payment of the claimant's benefits. Per FC:

“[I]n the absence of an ambiguity . . . we must interpret the contract by examining the language explicitly contained therein.” When a contract is complete on its face and is plain and unambiguous in its terms, a court is not free to search for its meaning beyond the contract itself. *Mgmt. Enter., Inc. v. Thorncroft Co.*, 243 Va. 469, 472 (1992) (citations omitted). We “cannot read into contracts language which will add to or take away from the meaning of the words already contained therein.” *Wilson v. Holyfield*, 227 Va. 184, 187 (1984) (citing *Virginian Ry. Co. v. Avis*, 124 Va. 711, 719 (1919)).

### **Proof of Total Disability**

*Wilson v. Mary Washington Healthcare*, JCN VA00001797437 (Dec. 20, 2021) – Affirmed

The claimant, an RN, had previously been awarded medical benefits after contracting COVID-19. She subsequently filed for TTD benefits, which the DC awarded, finding that the claimant was disabled from work due to COVID-19 and post-Covid syndrome. The uncontradicted medical evidence showing total disability along with the claimant's credible testimony was found to outweigh evidence from the claimant's Instagram account which showed a picture of her after a game of beer pong as well as a video of her dancing and carrying a case of beer.

### **Responsibility for Medical Treatment**

*Massenburg v. Verizon Virginia, Inc.*, JCN VA00001008433 (Dec. 20, 2021) – Affirmed

Medical benefits had been awarded for a 2014 left knee sprain. The pending claim was for authorization for treatment, including surgery to repair a diagnosed medial meniscus tear. The DC held the defendants responsible for treatment through and including the MRI which showed the torn meniscus, but not thereafter; finding the evidence insufficient to prove a causal connection between the accident and the meniscal tear. FC was “persuaded that her symptoms continued and she was entitled to seek medical treatment to determine the extent of her injury, whether her symptoms were ultimately deemed related to her work accident, and to any diagnostic testing used to make that determination. *See Koepfler v. Woody's Amoco*, VWC File No. 164-29-99 (Jan. 4, 1996) (employer is responsible for the cost of diagnostic studies to determine the extent of a workplace injury and its causal relationship to symptoms that may or may not relate to a compensable injury).” FC was not persuaded, however, “that the meniscal tear diagnosed so many years after the fact is associated with the accident suffered in 2014,” especially in the absence of a medical opinion on causation.



## Marketing

***Mirsharif v. Koons Tyson's Toyota***, JCN VA00001791103 (Jan. 21, 2022) – Affirmed

Defendants requested Review of DC's find that claimant adequately marketed his residual capacity for work. The marketing evidence included, contacting the former employer; registering with VEC; a 30-page job search log (with poor quality image in which employers could not be identified); and a list of 90 employers contacted.

Defendants alleged the claimant performed the job search in bad faith, asserting the claimant refused to accept employment offers outside his work restrictions. The claimant admitted he rejected some job offers because they did not offer enough compensation.

FC affirmed the finding that claimant's marketing efforts were reasonable based upon consideration of the totality of the evidence, pointing out that no further evidence was elicited regarding the specific jobs that were rejected or the amount of compensation that was offered. FC also pointed out that claimants are not required to pre-screen employers before applying to determine if they have work within his restrictions.

## Employee

***Gristo v. Miguels Carpentry***, JCN VA02000034188 (Feb. 2, 2022) – Reversed

The FC reversed the DC's finding that the claimant was not an employee for purposes of the Act, and was, at best, a casual employee. FC found that an employment relationship existed between the claimant and Miguels Carpentry. The claimant had worked for Miguels at various times since 2016 and the FC found that the hotel framing job where claimant was injured resulted in "some regularity expected in the claimant's work". Claimant's outside work as a painter, and work at the job site only 2-3 days per week did not negate that he was regularly working for Miguels Carpentry. Claimant was found to be a statutory employee of EN & SH Properties because Miguels Carpentry was uninsured.

***Kenny v. Hicks Contracting***, JCN VA02000034441 (Feb. 2, 2022) – Affirmed

The FC affirmed DC's finding that claimant was an employee of Hicks Contracting. The employer attempted to designate all of his workers as "independent contractors", but paid workers an hourly wage, provided needed tools, supervised the claimant's work, and maintained the power to hire and fire. The FC also affirmed the DC's assessment of a \$7,500 fine for failing to maintain workers' compensation insurance.

***Riggins v. Dept. of Aging and Rehabilitative Services***, JCN VA02000035942 (Feb. 2, 2022) – Affirmed

The FC affirmed the DC's finding that claimant failed to prove that he was an employee of DARS. 20 years earlier, claimant applied to be a caregiver through the Personal Assistance

Services Program administered by DARS. The claimant attended to the same client for 20 years. Claimant agreed that client set his work hours, directed his activities, and provided supplies. He was paid an hourly rate set by DARS. The client is responsible for hiring the caregiver under the DARS program. Citing *Cnty of Spotsylvania v. Walker*, 25 Va. App. 224 (1997), the FC affirmed the DC's finding that the client, not DARS directed the claimant's day to day activities, provided instruction and supplies, and maintained the right to fire the claimant. Affirming the DC, the FC noted that DARS had the right to control the result sought to be accomplished, the provision of services, rather than the methods and means of their provision.

This case has been appealed to the Court of Appeals.

***Sagastume Espino v. Reyes*, JCN VA02000034633 (Feb. 8, 2022) – Affirmed**

The FC affirmed the award and DC's findings that the claimant was an employee of Reyes, that Reyes was a subcontractor to Alpha Y Omega, and that Alpha Y Omega was a subcontractor to Modern Renovations. The claimant sustained injury due to a fall from a ladder. The DC found that although claimant was an experienced roofer with some of his own tools, claimant 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 claimant's work. The FC also affirmed a \$10,000 fine against the statutory employer, Modern Renovations, and the award of a limited period of TTD.

**Independent Contractor - Not an Employee**

***Dunn v. Cityscape, LLC*, JCN VA00001696324 (Feb. 7, 2022) – Affirmed**

The FC affirmed the DC's denial of claimant's claim, finding he was an independent contractor at the time of his injury. Claimant was hired to install cabinets and perform punch out work in a building being converted into apartments by Cityscape. Claimant was paid an hourly wage but used his own tools. Claimant did not require supervision to complete assigned tasks. Claimant had his own business "Wood and Tile Artistry by Scott" and a business-owned work truck. The FC noted that Cityscape retained the power to control the result to be attained, but not the means and methods by which the claimant's work was to be accomplished.

**Uber - Reimbursement of Transportation Costs**

***Jeffry v. Medical Management Intl.*, JCN VA00000865091 (Feb. 8, 2022) – Reversed (Rapaport dissenting)**

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. Defendants argued that 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 noted that claimant decided to use Uber for nine months without notifying the defendants of the need for transportation. It 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.

### **Unjustified Refusal of Light Duty**

*Herman v. RWECC*, JCN VA00001517573 (Mar. 4, 2022) – Affirmed

The claimant, a journeyman electrical lineman, was injured when he fell from a power pole, suffering multiple injuries. The DC found a bona fide offer of selective employment within the claimant's physical capacity. She ruled that the claimant refused the light duty job without justification, but partially cured the refusal. Based on light duty earnings from another employer claimant found on his own and the \$1000 per week the employer offered, the DC awarded ongoing temporary partial disability benefits of \$466.32 per week.

The claimant lives in a rural area. He was released to sedentary employment by the treating physician, who also approved the modified duty work the employer offered the claimant. The claimant testified he refused the job for multiple reasons, including the travel/commute required, lack of child care, lack of faith in the employer to look after his best interests, as well as his belief that he could not perform all the duties of the offered job.

The FC affirmed the finding of the DC that the employer had made a bona fide job offer of selective employment. The burden then shifted to the claimant to show justification for refusing the offer. The reasons advanced as justification for such refusal must be such that a reasonable person desirous of employment would have refused the offered work. *Food Lion, Inc. v. Lee*, 16 Va. App. 616, 619 (1993). The FC was not persuaded by the claimant's stated reasons, noting that he would have earned significantly more in the offered job than in his current job. The FC also stated, "[t]he distance to his work assignments, while significant, equals the distance to jobs he sought during his earlier marketing efforts." They also noted that the claimant made no effort to seek modification of the conditions which would cause problems. Therefore, they found his refusal of the light duty job unjustified.

## **Medical Provider Claim Barred by Laches**

***Joseph Verner v. United Parcel Service***, JCN VA 2326393 (Oct. 15, 2021) – Affirmed as Modified

The claimant sustained a compensable injury by accident to his shoulder on December 4, 2006 and received an initial award of disability and medical benefits on April 18, 2007. On February 24, 2020, the medical provider filed claims for additional reimbursement for its physical therapy charges for treatment to the claimant and seventeen other injured employees. The defendants defended that the doctrine of laches barred the medical provider's claims.

The manager for MedRisk's provider reimbursement services testified that if MedRisk received an unprocessed bill from 2007 today, they would be unable to determine the DxFee® because the DxFee® database ceased to exist in 2013.

The Commission found that the Deputy Commissioner correctly concluded the majority of the medical provider's claim for additional reimbursement was barred by the doctrine of laches. They found that the medical provider offered no evidence explaining why it filed its claims for additional reimbursement for treatment during 2007 on February 24, 2020, over twelve years later, which they characterized as "unexplained delay". The Commission stated:

The evidence established the DxFee® database no longer exists. After initial repricing by Ingenix, the DxFee® database was used by MedRisk in 2007 to reprice most of the bills at issue here. The defendants suffered prejudice in defending against the medical providers' applications due to the nonexistence of the DxFee® database. The defendants are no longer able to demonstrate the correctness of medical expenses determined and reduced based on the claimant's diagnoses and corresponding DxFee®.

For bills that implicated the DxFee®, additional payments were not awarded.

***Jack Powell v. Automatic Equipment Sales Of Norfolk Inc.***, JCN VA 1961810 (Nov. 30, 2021) – Affirmed

The claimant suffered a compensable injury by accident to his back on May 11, 1999. He was awarded medical benefits and temporary total disability benefits for periods of disability through January 15, 2001. On July 5, 2020, the medical provider sought payment of \$4,598.63 for services provided to the claimant in February, September, and October 2000. Pertinent to this discussion, the defendants defended the application on the basis the doctrine of laches barred the application. They asserted the disputed charges were appropriately paid pursuant to contracts between the provider and MedRisk and between MedRisk and Liberty Mutual. They alleged the claim for additional reimbursement was contractually barred because the provider failed to follow the appeal process specified in the contract.



The facts of this case reflect the medical provider maintained digital records related to billing, but destroyed records of care according to its own document retention policy. The Deputy Commissioner made the following finding:

...The Commission has noted that the general rule that a bill submitted by a medical provider constitutes *prima facie* evidence of the reasonableness of the medical provider's charges does not necessarily reach the issues of medical causation or necessity, citing *McMunn v. Tatum*, 237 Va. 558 (1989). See *Curro/Virginia Spine Institute v. Fairfax (County of) Police*, JCN 2249752 (November 9, 2011)...The medical provider's action prejudiced the defendants because they lost the primary source for requesting and receiving records through the discovery procedures set forth in Rule 1.8 of the Rules of the Commission that they could evaluate for the purposes of preparing their defense. In addition, the medical provider's action interferes with the Commission's jurisdiction "to do full and complete justice in each case" by depriving the Commission of the opportunity to review all of the relevant evidence that was in existence at the time the services were rendered that form the basis for its application.

The Commission stated:

We recognize medical bills are *prima facie* evidence that the charges were reasonable. See *Ceres Marine Terminals v. Armstrong*, 59 Va. App. 694, 703 (2012). The bills are some evidence that the charges are reasonable in amount, which should be considered by the fact finder along with other evidence in the case. *Curro/Va. Spine Inst. v. Fairfax (Cnty. of) Police*, JCN 2249752 (Nov. 9, 2011). Although the absence of medical records may not necessarily impact the medical provider's *prima facie* evidence that the charges were reasonable as it pertains to the prevailing community rate at the time, the medical provider's billing evidence does not provide sufficient information to adequately address the requisite issues of medical causation or necessity of the claimant's treatment, which prompted the medical charges. Due to the medical provider's delay in filing the application, the defendants were no longer able to request the medical records to fully prepare their defense to the medical provider's application.

The Commission agreed with the Deputy Commissioner's finding that the medical provider's destruction of the pertinent medical records demonstrates an abandonment of its claim against the defendants and prejudice to the defendants and held that the doctrine of laches barred the application.