**VIRGINIA WORKER'S COMPENSATION COMMISSION**
**EDUCATIONAL CONFERENCE**

**October 28-29, 2019**

## Recent Decisions of Interest

**Presented by:** **Wesley G. Marshall, Commissioner**
**R. Ferrell Newman, Commissioner**
**Robert A. Rapaport, Commissioner**

## SUPREME COURT OF VIRGINIA

### Two-Causes Rule

- *Carrington (Estate of) v. Aquatic Co.*, No. 180243 (July 18, 2019).

The Supreme Court of Virginia affirmed the determinations of the Court of Appeals of Virginia and the Virginia Workers' Compensation Commission that the injured employee was not entitled to wage loss benefits for his total disability caused by kidney failure unrelated to his employment. (The injured worker passed away in 2018.)

The decedent suffered pre-existing kidney disease that did not inhibit his work capacity. In 2013, the decedent sustained a compensable injury by accident to his left arm. He had total disability and then returned to light-duty work for the employer in November 2013. At that time, the employer had full-time, light duty available for the decedent at his regular wages. In October 2014, the decedent's kidney condition rendered him totally incapacitated from work. The decedent sought temporary total disability benefits. The Commission denied benefits, holding that the kidney failure was unrelated to his employment. The Court of Appeals affirmed.

On appeal to the Supreme Court, the decedent's estate argued that pursuant to the two-causes rule, full benefits should be allowed because the work-related arm disability was a contributing factor to his disability. The Supreme Court disagreed:

> The two-causes rule does not apply to cases involving two causes that result in *dissimilar* disabilities, as was the case here, when a partial disability caused by a work-related arm injury (resolved by the availability of suitable, light-duty employment) was followed by a total disability caused by non-work-related kidney failure.
>
> . . . .

> It does not matter that either or both of Carrington's ailments kept him "from returning to his pre-injury duties," *id.* What matters is whether either injury (and, if so, which one) kept him from working at all — thus rendering him totally disabled. The undisputed facts resolve this question. Carrington's work-related arm injury did not prevent him from returning to full-time work, albeit in a less physically demanding job. Carrington's non-work-related kidney failure, however, rendered him unable to perform any job. Thus, the two-causes rule does not govern this case because there was only one cause of Carrington's total disability: his non-work-related kidney failure.

(emphasis in original.)

## THE COURT OF APPEALS OF VIRGINIA

### Arising Out of

- *City of Charlottesville v. Sclafani*, No. 1999-18-3 (July 23, 2019) (published).

The Court reversed the Commission's finding that the claimant's injury met the burden of establishing temporal precision and remanded for further fact finding.

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. The claimant was repeatedly handcuffed, thrown to the ground, and picked up off the ground while in handcuffs. The claimant testified to having mild discomfort throughout the day, but no "pop" or sudden acute pain. The claimant informed his doctors that no immediate onset of significant pain occurred. When the claimant 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 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 that "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, post-lunch hours of the training.

- *Dep't of Motor Vehicles v. Bandy*, No. 1878-18-2 (Apr. 30, 2019).

The Court affirmed the Commission's finding that the claimant's injury arose out of the employment.

On August 18, 2017, the claimant, a law enforcement agent, participated in an eight-hour training session from 8:00 a.m. to 5:00 p.m. He performed several maneuvers in a morning training session that involved twisting his hand and wrist backwards and forcibly bending his wrist forward. He threw punches at another trainee who blocked them. After lunch, the claimant punched a hard rubber mannequin for two to three minutes at a time. Lastly, the claimant was required to hit four different mannequins in succession multiple times. The claimant estimated throwing 125-200 punches. Between 6:00 and 6:30 p.m., the claimant's watch began to feel tight on his left wrist. He thought he probably had strained his wrist, as it had not been swollen earlier in the day.

The Commission found that the wrist injury was not due to repetitive motion, and instead, was a "discrete and specific injury" attributed to "defensive tactic punching drills for work." The Commission noted that "[t]he eight-hour training session on August 18, 2017 during which [claimant] participated provided the necessary rigidity of temporal precision to constitute one event." The Commission concluded, however, that "[t]he defensive tactics punching training undertaken on August 18, 2018 [sic] was one 'piece of work'" and that claimant "sustained an injury caused by a particular piece of work occurring at a reasonably definite time."

The dispositive issue on appeal was whether the claimant's injury was caused by an event "bounded with rigid temporal precision" as required by *Morris v. Morris*, 238 Va. 578, 589 (1989). The Court affirmed: "The Commission clearly found that claimant's injury by accident occurred during the punching drills that took place in the afternoon training session, and the record supports that finding."

- *Conner v. City of Danville*, 70 Va. App. 192 (2019).

The Court upheld the Commission's finding that the claimant's injuries did not arise out of the employment. The claimant, a police officer, began interviewing a suspect on the sidewalk outside a duplex. The weather dramatically changed with increased wind, rain, and hail. The claimant slipped on wet grass and almost fell while seeking shelter from the storm.

The Court found the Commission's conclusions to be supported by credible evidence. The Court noted that when the claimant left the porch and slipped on the wet grass, she had ceased and suspended the work-related tasks. The suspect was not under arrest nor in custody such that the claimant needed to contain, control, or pursue him. The claimant's reason for trotting away from the interview was to remove herself from the rain as opposed to any employment-related purpose.

The Court agreed that the injuries were caused by an Act of God. The claimant chose to conduct the interview outside. The claimant was exposed to the risk of being injured due to the bad weather to the exact same extent as any member of the general public who decided to move indoors after being caught in a storm. The claimant failed to show that the "employment activity in which she was engaged exposed her to the injurious risk to an extent to which people were not ordinarily exposed, and thus caused her injuries."

Lastly, Virginia Code § 65.2-301.1 did not apply to make the claimant's injuries compensable under the Virginia Workers' Compensation Act. Code § 65.2-301.1 states, in pertinent part: "In situations where weather constitutes a particular risk of a public safety officer's employment and where the public safety officer's injury arose out of and in the course of his employment . . . such injury shall be compensable under this title." The plain text determines the meaning: the requirements of the statute necessary for compensability are joined by the conjunctive word "and," the plain language of the statute clearly still requires the public safety officer to prove that her

injuries "arose out of" the employment, and as discussed above, she failed to prove that her injuries actually arose out of her employment.

- *Snelling Staffing v. Edwards*, No. 1462-18-4 (Apr. 9, 2019).

The Court affirmed the Commission's findings that the claimant proved a compensable injury by accident arising out of his employment and that no willful violation of a known safety rule barred his claim. The Court was not convinced by the employer's arguments that the claimant's testimony was not credible and had too many inconsistencies to establish compensability. The Court affirmed that the safety rule of lifting boxes did not apply to the claimant as his injurious actions occurred when guiding a hand truck, not lifting boxes.

## Change in Condition

- *Morris v. Fed. Express Corp.*, 70 Va. App. 571 (2019).

The Court affirmed the Commission's ruling that the claimant's November 2017 change in condition claim for additional wage loss benefits correlating to a July 29, 2015 accident was barred by the statute of limitations of Virginia Code § 65.2-708(A).

The claimant initially claimed injuries to her "head, shoulder, hip, ribs, face." She filed a second timely claim alleging she suffered "head trauma, fractured ribs, [and] contusion/abrasions [to her] left arm [and] hip." On March 1, 2016, the Commission entered an award for wage loss benefits from July 30, 2015 to October 6, 2015, and lifetime medical benefits for her "head trauma and rib fracture." The claimant sustained a second compensable accident, fracturing her finger, in December 2016 while working for the employer. The Commission entered an award for temporary total disability benefits beginning December 27, 2016.

While receiving wage benefits for the December 2016 accident, the claimant filed a July 19, 2017 letter with the Commission. Referencing the prior grant of "Lifetime Medical" benefits related to the 2015 accident, she requested that the Commission amend the March 1, 2016 order to substitute the phrase "traumatic brain injury" for "head trauma." The claimant stated that the change should be made "[f]or the sake of clarity." On November 7, 2017, she filed a claim for wage benefits related to the July 2015 accident. She requested ongoing compensation for work missed beginning June 20, 2017, because of the "[t]raumatic [b]rain [i]njury." She attached medical records from visits occurring in June, July, and August 2017.

The Court found that the Commission properly treated the November 2017 application as a change in condition application and that "applying this plain statutory language to the undisputed facts leads inexorably to the conclusion that Code § 65.2-708(A) bars the November 2017 claim." The Court further explained that Code § 65.2-506 did not toll the limitations period of 65.2-708(A):

"By its terms, Code § 65.2-506 is a statute of limited scope addressing only how wage benefits are to be paid if a claimant simultaneously is otherwise entitled to wage benefits for two separate injuries that occurred at different times. . . . It contains no reference to filings, filing deadlines, statutes of limitations, tolling, or Code § 65.2-708(A)." The Court found no grounds to "equitably" toll Code § 65.2-708(A), explaining that the employer took no action upon which the claimant relied to prevent a timely filing, and she had information to timely make a claim. "Given these circumstances, we see no unfairness in requiring claimant to comply with the statutory scheme established by the General Assembly." Lastly, the Court dismissed the claimant's argument that the November 2017 filing related back to her July 2017 filing:

> The July 2017 filing makes no request that the Commission enter a revised award "ending, diminishing or increasing the compensation previously awarded." Code § 65.2-708(A). Although it references the prior award of "Lifetime Medical" benefits, it does not contain an express request that any additional medical benefits are requested. It contains *no* reference to wage benefits, whether previously awarded or that might be awarded in the future."

(emphasis in original.)

## Causation

- *Govstrive, LLC v. Bethea*, No. 0699-19-4 (Aug. 6, 2019).

The Court summarily affirmed the Commission's holding that the claimant suffered compensable injuries and proved entitlement to indemnity benefits. The Court found the appellants' assertions to be meritless.

- *Blow v. York Cnty. Pub. Schs.*, No. 1393-18-1 (Apr. 16, 2019).

The Court held that the Commission properly found that the claimant did not injure her neck when she slipped and fell from the top step of the bus to the floor. The claimant indeed suffered a compensable injury by accident with resulting injuries to her low back and right hip. However, the medical evidence failed to prove causation between her neck condition and the incident.

## Change in Treating Physician

- *Yahner v. Fire-X Corp.*, 70 Va. App. 265 (2019).

The Court upheld the Commission's denial of a change in treating physician and holding that the claimant was not justified in seeking unauthorized medical treatment. The Court noted that the claimant chose Dr. Richard Guinand, a spine specialist, from a panel, and he treated her with a course of medications and physical therapy. Her injury improved, but plateaued, and the claimant declined to undergo recommended injection therapy. The Court was not persuaded that Dr. Guinand discharged the claimant – Dr. Guinand did not refer the claimant to another physician, and he continued to recommended injections. Dr. Guinand's treatment was adequate, his difference of medical opinion with another physician did not render his care inadequate, and the defendants were not responsible for payment of unauthorized care.

## Compensable Consequence

- *Patterson v. United Parcel Serv.*, No 0057-19-1 (June 11, 2019).

The Court affirmed the Commission's determination that the claimant's shoulder injury sustained during physical therapy was not a compensable consequence of his occupational back injury. The claimant felt faint during an exercise, continued to feel light-headed during a sonogram, and when he stood up from a chair, blacked out, and fell onto his shoulder. The claimant had a pre-existing history of fainting and feeling light-headed. The Commission dismissed the claimant's testimony that he lost consciousness due to performing difficult exercises and held that no medical evidence linked his syncope to the occupational accident or treatment for his injury from that accident.

## Credibility

- *Verizon Va., Inc. v. Saliard*, No. 1556-18-4 (May 14, 2019).

The Commission awarded compensation benefits to the claimant upon the determination that he sustained a compensable injury by accident arising out of and in the course of his employment. On appeal, the defendants maintained that the Commission's credibility findings in favor of the claimant were in error in light of the medical evidence that failed to corroborate the claimant's testimony. The Court affirmed:

> [C]laimant explained at the hearing that he relayed the details of the injury "based on what [the medical personnel] asked [him]." Both the deputy commissioner and the full Commission accepted his explanation, deeming claimant credible. "Evidence is not 'incredible' unless it is 'so manifestly false that reasonable men

> ought not to believe it' or shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." *Gerald v. Commonwealth*, 295 Va. 469, 486-87, 813 S.E.2d 722 (2018) (quoting *Juniper v. Commonwealth*, 271 Va. 362, 415, 626 S.E.2d 383 (2006)). Claimant's explanation did not stray so far from human experience as to suggest it was beyond belief. The fact that claimant's medical records did not initially reflect that his injury had occurred while he was pulling cable on May 12, 2017, did "not necessarily render [his] testimony unworthy of belief." *Juniper*, 271 Va. at 415. Rather, "[t]his circumstance [was] appropriately weighed as part of the entire issue of witness credibility," to be determined by the fact finder. *Id.*

The Court also noted that the claimant identified the time, place, and source of his injury and reported such to his supervisor the next day. Lastly, the Court reiterated that the Commission was not required to give greater weight to the medical evidence over that of the claimant, who was found to be credible.

**Extent of Disability**

- *Hayes v. Nobility Invs., LLC,* No. 1610-18-2 (Apr. 30, 2019).

The Court agreed that the Commission did not err in finding that the claimant's restrictions did not prevent her from performing her pre-injury job tasks. The claimant, a hotel night auditor, sustained a left knee injury after falling from a ladder while removing a battery from a guest's smoke detector. Her restrictions were no lifting or pulling greater than twenty-five pounds, prolonged standing, kneeling, squatting nor overhead reaching. The claimant contended that her pre-injury duties, such as preparing breakfast and restocking the sweet shop, required these activities. The employer maintained that the claimant's efforts were appreciated, but that she was not instructed to perform these tasks, and they were not an essential function of her job.

The Court noted that although the parties had agreed to compensability, this did not amount to an adjudication that climbing ladders was a required duty of her pre-injury employment, and thus, the defendants were not precluded from arguing that her pre-injury job tasks excluded climbing ladders. The Court was not persuaded that other forbidden activities were pre-injury job tasks based upon other witness testimony. The Court disagreed that certain tasks should be considered job duties since the employer knowingly acquiesced to and benefitted from them. The Court reiterated the following:

> [C]ompensable injuries may arise from acts voluntarily performed by an employee if those acts are reasonably incidental to the employee's fulfillment of their job duties. . . . Here, the Commission, while it "recognize[d]" that claimant's "performance of the extra duties was for [employer's] benefit," ruled only that it

> was unconvinced that claimant's pre-injury job position "*required* these particular tasks." (Emphasis added). . . . [T]he Commission only made a finding with respect to what pre-injury tasks were required of claimant by employer. It did not make a finding with respect to whether any non-required tasks performed by claimant were sufficiently incidental to the performance of her required work duties that they could potentially support a compensation award for any resulting injuries.

Accordingly, the Court declined to consider this newly-presented legal issue on appeal.

## Injury by Accident

- *Alexandria City Pub. Schs. v. Handel*, 70 Va. App. 349 (2019).[1]

On appeal, the defendants argued that the claimant must demonstrate a sudden mechanical or structural change to each part of the body in which she experienced pain for the injury to be compensable. The Court affirmed "the Commission because claimant must only prove her accident caused one sudden mechanical or structural change to her body to collect compensation for any injury caused by that accident. Proof of a 'sudden mechanical or structural change in the body' is required only to establish that a claimant suffered an 'injury by *accident.*'" (emphasis in original).

The parties agreed that the claimant suffered a compensable injury by accident to her right hip, neck, back, right ankle, and right knee, but disputed claims for her right shoulder. The defendants maintained that there was no structural or mechanical change to the shoulder, and the pain complaints were not caused by the structural or mechanical changes elsewhere in her body. The Court dismissed these assertions:

> A single "sudden mechanical or structural change" anywhere in the body suffices to establish that a claimant has suffered an "injury by accident." Once an injury by accident is established, any injury causally connected to the accident—even if not connected to the sudden mechanical or structural change—is compensable. In other words, a claimant does not need to prove a structural or mechanical change in every body part affected by an obvious accident as long as there is at least one sudden mechanical or structural change and each injury is caused by the accident.
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> The requirement that a claimant prove she suffered a "*sudden* mechanical or structural change" exists only to establish that the injury is accidental and not the result of a gradual change over time. The Supreme Court and this Court have only

[1] On July 24, 2019, the defendant filed an appeal to the Supreme Court of Virginia.

> applied the "sudden mechanical or structural change" requirement in three general circumstances. In each circumstance, the courts ultimately use it only to establish that the claimant's injuries are accidental. It is not used to establish that the injuries are "injuries" within the meaning of Workers' Compensation statute.
>
> First, a claimant suffers an "injury by accident" when she suffers a "sudden mechanical or structural change" in the body, even if the claimant's injury is caused by the usual exertions of her job—even when there is no "accident" within the ordinary sense of that word.
>
> Second, a claimant has not suffered an "injury by accident" when the injury is gradually occurring. Suffering a "mechanical or structural change to the body" is insufficient. Rather it must be a "sudden mechanical or structural change."
>
> Third, a claimant may prove a purely psychological injury to be an "injury by accident" without proving she suffered a "sudden mechanical or structural change" to her body. Rather, she can prove she suffered an "injury by accident" by demonstrating an "obvious *sudden* shock or fright" caused her purely psychological injury, such as post-traumatic stress disorder. The claimant may still prove the purely psychological injury is an injury by accident by showing a "sudden mechanical or structural change" to the body, but is only required to when she cannot prove her psychological injury was caused by an "obvious sudden shock or fright."
>
> These three uses of the test demonstrate that the purpose of proving the "sudden mechanical or structural change" is to establish the injuries are accidental.

(emphasis in original).

**Occupational Disease**

- *Iglesias v. QVC Suffolk Inc.*, No. 1292-18-1 (Apr. 16, 2019).[2]

The Court held that the Commission erred in holding that the claimant's claim for an occupational disease was time-barred.

Virginia Code § 65.2-406(A)(6) provides that "[t]he right to compensation . . . shall be forever barred unless a claim is filed with the Commission within . . . two years after a diagnosis of the disease is first communicated to the employee or within five years from the date of the last

[2] On June 19, 2019, the claimant filed an appeal to the Supreme Court of Virginia which was procedurally dismissed on July 30, 2019. A Petition for Rehearing was filed on August 13, 2019.

injurious exposure in employment, whichever first occurs." The Court emphasized that because the claimant did not receive a diagnosis of an occupational disease and complained of a collection of symptoms, one must consider the date of the last injurious exposure – "an exposure to the causative hazard of such disease which is reasonably calculated to bring on the disease in question." Code § 65.2-404. The claimant testified that she was last exposed to a bat on a Sunday morning when she placed the box containing the bat in her vehicle. Five years from Sunday, August 26, 2012, is August 26, 2017, a Saturday. Accordingly the claim filed on Monday, August 28, 2017, was timely. Regardless, the Commission correctly found that the claimant failed to prove that her physical condition arose out of her employment: no medical evidence attributed the claimant's physical condition to bat exposure.

## Permanent Partial Disability Benefits

- *Hicks v. Giant Landover*, No. 1674-18-4 (June 4, 2019).

The Court upheld the Commission's awarding of a 75% impairment of the right lower extremity based upon the conclusion of Dr. M. M. Malek over that of Dr. John Bruno who had assessed an impairment rating of 50%. The Court noted that the Commission could consider the claimant's pre-existing condition in evaluating the degree of her impairment. Although a May 2012 determination concluded that the claimant's "right knee condition is, at least in part, attributable to the compensable injury," the claimant still had the burden to prove the level of impairment from her work-related injury. The Court emphasized that the employer was "liable only for the amount of injury sustained by the employee in the conduct of his particular business.'" *Fairfax Cnty. Sch. Bd. v. Martin-Elberhi*, 55 Va. App. 543, 546 (2010). The Court agreed that the record substantiated the Commission's finding that the claimant failed to establish that her right leg impairment was entirely a result of her work accident. The Court noted that Dr. Bruno's impairment did not include the pre-existing knee condition, and hence, the Commission could discredit his opinion as "it ignored relevant facts."

- *Loudoun Cnty. v. Richardson*, 70 Va. App. 169 (2019).[3]

The claimant suffered a left hip injury. He underwent arthroscopic surgery in July 2014 and hip replacement on May 7, 2015. On November 4, 2016, his physician assessed an 11% impairment of the claimant's leg. On January 25, 2017, the physician issued a report explaining that the claimant reached maximum medical improvement three to four months after arthroscopy. He concluded that the claimant suffered a 74% loss of use of his leg.

The Court held that the Commission did not err in determining that claimant's injury to his hip that manifested in his leg was compensable pursuant to Code § 65.2-503. Code § 65.2-503

[3] On May 14, 2019, the defendant filed an appeal to the Supreme Court of Virginia.

enumerates the body parts eligible for compensation under the Act. Although legs are listed in the statute, hips are not. *See* Code § 65.2-503(B)(13). This Court has interpreted the statute to allow compensation for a work-related injury which "manifests" in a listed body part.

The Commission also correctly found that the claimant's functional impairment was the extent of loss prior to the hip replacement. Functional loss of use is measured by a claimant's status at the time of the necessary implantation of a "corrective device." *Creative Dimensions Grp., Inc. v. Hill*, 16 Va. App. 439 (1993). Lastly, the awarded 74% impairment rating was credible and not speculative: the physician had treated the claimant before and after surgeries and described how he calculated the rating.

## Procedural Issues

- *Mallard v. Next Day Temps, Inc.*, No. 0028-18-4 (May 14, 2019).[4]

The Court emphasized that it was limited to the record of the proceedings which took place in the lower court and had been certified to. The Court found the lower record to be complete "[a]bsent any legal argument explaining why the Commission's response to the writ of certiorari was insufficient." The Court also instructed that all parties, even a pro se claimant, must comply with the rules of the court and held several assignments of error to be barred by Rule 5A:20(e). Rule 5A:20(e) requires an appellant to include argument, including principles of law and authority, for each assignment of error in the opening brief. (The Court also affirmed the lower decision's findings regarding causation and wage loss benefits.)

[4] On June 14, 2019, the claimant filed an appeal to the Supreme Court of Virginia which was procedurally dismissed on August 2, 2019.

## VIRGINIA WORKERS' COMPENSATION COMMISSION

### Arising Out of

- *Childress v. Faneuil, Inc.*, JCN VA00001225007 (Aug. 6, 2019).

The Commission reversed the Deputy Commissioner's determination that the claimant sustained a right shoulder injury arising out of her employment when she tripped over an area rug. The claimant was walking toward the rug when her "toe hit just right at the edge . . . and it rolled forward a little bit and I tripped, kind of did a little dance to keep myself from falling but ultimately I fell on my right shoulder." The rug was on a slate or tile floor, thinner than a pen, and had a narrow strip of rubber around the fabric. The claimant denied that there was anything wrong with the rug and did not identify any defects to it. Relying upon *Kelley v. Monticello Area Community Action Agency*, JCN VA00000748221 (May 31, 2016), *aff'd*, No. 1083-16-3 (Va. Ct. App. Dec. 13, 2016), the Commission emphasized that "[N]o defect or extraordinary circumstance is presented by the facts before us. The arising out of test is satisfied when an accident is *caused by* an employment-related risk." (emphasis in original)

(Marshall dissent: The unsecured edge of a rug, and its tendency to move and to create an obstruction when acted upon by a worker's foot, creates a hazard which is a risk of the employment.)

- *Housden v. James Madison Univ.*, JCN VA00001436050 (July 11, 2019).[5]

The Commission found that the claimant proved that her injury, a spider bite, arose out for the employment. The claimant's "work environment during the construction exposed her to the risk of spiders. Spiders were present in the area where the claimant worked both before and after the accident." The Commission noted that the pest control technician had seen spiders in the mechanical rooms, the claimant had killed two spiders, and co-workers had seen spiders.

(Newman concurrence: There was evidence of significant presence of spiders in the work area and a corresponding risk of being bitten that is greater than that to which the general public was exposed.)

(Rapaport dissent: The presented evidence did not establish that the claimant's employment exposed her to a particular risk of spider bite. The pest control technician did not see spiders in the offices, and it was speculation that nearby construction played a role in a spider being on the third floor.)

[5] On August 6, 2019, the defendant filed an appeal with the Court of Appeals of Virginia.

- *Williams v. CJ Designs, Inc.*, JCN VA00001427406 (July 8, 2019).[6]

The Commission held that the claimant proved that her injury arose out of her employment. The claimant, a certified nursing assistant, was transferring a patient from a wheelchair into the front passenger seat of a SUV. The claimant described that "two nurses they got her under her arm and pivoted her around, and I got under legs to raise her feet up to get in the floor board. When I bent over to pick her feet up to get them in the floor board, I felt something pop in my back." During the claimant's deposition, she stated that when she first felt the pop in her back, she was not touching the patient. At the hearing, the claimant explained, "I had been touching her. I had my hands under her feet putting her around and when I raised up I said, 'Oh, my God. My back.'" The Commission elaborated:

> We find the claimant's actions in bending down to lift her patient's feet and placing them into the vehicle arose out of her employment. The claimant bent straight forward from the waist, her arms in a U-shape to scoop them under the patient's legs and pivot her so that her feet were on the floorboard of the front passenger seat. The claimant was required to bend straight from the waist to perform this maneuver because of the placement of the patient's wheelchair next to the vehicle. We find her injury was caused by the conditions of her workplace. She was not simply bending or arising from a bent position. Rather, the manner in which she was required to perform the task was sufficiently awkward to arise out of her employment. Moreover, we find that the motions the claimant described were all part of one continuous event that led to her back strain.

(Rapaport dissent: "The claimant bent straight forward from the waist and assisted the patient with putting her feet on the floorboard of the vehicle. She felt a pop and pain as she straightened from her bending position. The claimant had nothing in her hands at the time of her injury as she had already released the patient's feet at the time she felt the pop and pain. The claimant was simply rising from a bent position when she suffered her injury. . . . [T]he record fails to support the majority's conclusion that the manner in which she was required to perform the task was sufficiently awkward.)

- *Hurst v. New River Valley Cmty. Servs.*, JCN VA00001501255 (June 14, 2019).

The Commission reversed the Deputy Commissioner to hold that the claimant's injury did arise out of her employment. The claimant's foot hit an incline between a parking lot and the sidewalk, causing her to fall. Notably, the claimant was escorting a client on a shopping trip, and she was concentrating on staying close to the client and not watching where she was walking. "[T]he

[6] On July 26, 2019, the defendants filed an appeal with the Court of Appeals of Virginia.

claimant's testimony demonstrates that her job duties distracted her at the time of the accident" and this constituted a risk of her employment.

- *Bowers v. Amazon.com, Inc.*, JCN VA00001229297 (Apr. 23, 2019).[7]

The Commission held that the claimant failed to prove that his injury arose out of the employment. The claimant's duties involved bringing boxes to the front of stacks of merchandise and removing plastic from the boxes. During his recorded statement, the claimant reported that he pulled or tugged on the plastic to pull the boxes "closer on the pallet so that the outbound people could reach them." He said he "pulled the plastic . . . slowly" with "no jerkin[g]" and "no heavy force." At the hearing, the claimant testified, "I came across a pallet that had some plastic around the backside of it, with two boxes on it and used the plastic . . . the looseness of the part of the plastic to bring the box forward to where I could reach them." After he moved the boxes, he then "proceeded to pull the plastic to throw away. . . . When I pulled the plastic, I tugged at it, my shoulder gave – I heard a pop and it just started hurting." In the claimant's deposition, he said, "It was a simple pull to try to get the plastic off the bin area around the pallet and my arm gave." He testified that he used more force to tug the plastic off the pallet than he had in moving the boxes, but he agreed "that either pulling the boxes over or when [he was] tugging it wasn't a huge amount of force."

The Commission found that there was no significant work-related exertion which caused the injury: "[T]he claimant . . . was simply tugging with little force on plastic wrap when he suffered injury. He was not reaching overhead. He was standing, and the shelf on which he pulled the plastic wrap was at shoulder level. He conceded there was nothing awkward or unusual about the manner in which he pulled the plastic wrap. He performed this task in an unremarkable manner, not leaning, stretching, or straining to reach the plastic or to pull it free." (transcript cites omitted).

(Marshall dissent: "[T]he act of reaching and tugging at the plastic that was wrapped around a pallet in this manner was sufficiently peculiar to constitute a work-related hazard.")

- *Dunham v. Journey Christian Church*, JCN VA00001466722 (Apr. 19, 2019).

The Commission upheld the Deputy Commissioner's determination that the claimant's injury did not arise out of the employment. The claimant testified to sitting "crisscross applesauce" on the floor with "a child on each leg." Each child weighed twenty to twenty-five pounds. After twenty minutes in this position, "the two children got up, I turned to my right, put my hands down, and went to push myself up, at which time I felt a pop in my back." The claimant felt a pop at approximately one-third of the process of arising: "I put both hands on the ground, sir. I twisted to my right and put both my left and right hand down, pushed myself up, and was coming up with enough space to get my left hand off the ground, when I felt the pop twist in my back." The Commission declined to find that the evidence proved an awkward or physically stressful condition

[7] On May 14, 2019, the claimant filed an appeal with the Court of Appeals of Virginia. Mediation is also pending in this matter.

which the claimant asserted on appeal. The Commission emphasized that "the presented record established that the claimant had been sitting on the floor, and during the motions of arising to a standing position, she incurred back pain. . . . [N]o evidence convincingly attributed any portion of these conditions as having any impact upon the onset of pain. Most notably, the claimant provided no testimony to such and the medical reports similarly lacked this contention."

(Marshall dissent: *Stallard v. Appalachian Regional Community Head Start, Inc.*, VWC File No. 206-69-80 (June 27, 2003), is controlling, and the evidence "plainly demonstrates that sitting cross-legged with the resting weight of children on the legs for an extended time is an awkward and physically stressful condition resulting from the work.")

- *Miller v. Loudoun Cnty.*, JCN VA00001452541 (Apr. 17, 2019).

The Commission agreed that the claimant failed to prove that his injury arose out of the employment. The claimant, a deputy sheriff, testified to feeling a pop in his right knee at a definite time during an active shooter training. Towards the end of the training session, he went into the school building, moved to the first room on his right, and cleared the room. As he "spun around," he felt a pop in his right knee. The Deputy Commissioner found that the remaining evidence did not support the claimant's testimony: The medical records did not reflect that the claimant's injury was due to a particular movement or incident, and during the claimant's recorded statement, he stated he could not say at which point the injury happened. The Commission agreed with the Deputy Commissioner's weighing of the evidence and distinguished the current case from previously held compensable cases in which a law enforcement officer was injured during a training session. In the compensable cases, the injured employees provided testimony of each respective injury; here, the crucial element is that the claimant provided inconsistent statements regarding the mechanism of injury.

- *Butler v. Newport News Pub. Schs.*, JCN VA00001406631 (Apr. 17, 2019).

The Commission found that the claimant's injury arose out of a risk of her employment. The claimant, a teacher, chaperoned students at a football game. She was injured while trying to catch a prize thrown into the bleachers:

> As a part of her work supervising students, under circumstances less structured than a school classroom, Butler attempted to catch a prize at a student's request. This was a peculiar and unique request related to the work. The claimant's effort served to fulfill the employer's goal of exposing promising students to a college atmosphere and encouraging improved classroom performance. . . . The claimant's action and its purpose were reasonably incidental to her work and provided a critical link between it and the accident.

> More broadly, attendance at a sporting event exposes fans to the ubiquitous risk of being struck by implements of the game, whether a baseball, a football, a hockey puck, or flying and falling basketball players. Novelties launched or thrown to fans during the event are no different. As long as the work necessitates the worker's attendance at a sporting event, the common and reasonable risks associated with objects projected into the stands are peculiar to, and constitute a risk of, the employment.

(footnotes omitted.)

(Newman concurrence.) (Rapaport dissent: "[T]he claimant, like any other attendee, reached to catch a prize and unfortunately sustained an injury in the process. Whether the prize was intended for herself or a student is immaterial. The claimant's self-elected activity was not a risk peculiar to her employment or connected to a work-related hazard.")

- *Kaur v. Tysons Corner Marriott Hotel*, JCN VA00001403269 (Apr. 16, 2019).

The Commission agreed that the claimant failed to prove that her injury arose out of the employment. The claimant, a cafeteria worker injured her back when picking up a bowl. She stated that "when I was about to lift the bowls, that's when I got hurt." She also testified, "So, while I was lifting the bowl, I felt something popping in my back." The claimant demonstrated for the Deputy Commissioner that she was "bent at the waist, and also bending at the knees and reaching with the hands down below the knees. And then . . . she went from that position to a standing up position as if she was holding something in her hands." She testified that she bent at the waist but also with her knees when she picked up the bowls, which were light. She denied the bowls were heavy. The claimant told medical providers that "she bent down to pick up a heavy bowl and felt a sudden 'pop' in her back" and that "picking up some bowls from bottom cabinet in kitchen – unable to stand up straight as she got severe pain in the right low back."

The Commission instructed that no activity could be meaningfully characterized as a significant work-related exertion, and that the claimant did not prove that her bending action involved any unusual or awkward position, or that any condition peculiar to her workplace caused her injury.

(Marshall dissent: The injury was not the result of simple bending or reaching.)

## Assault

- *King v. DTH Contract Serv., Inc.*, JCN VA00001225281 (Aug. 8, 2019).

The claimant worked as an attendant at the Interstate 66 westbound rest area during a night shift. His duties were to keep the rest area clean, respond to inquiries from visitors, and complete

maintenance tasks. When not performing these duties, he remained in a locked office. On July 13, 2016, the claimant was returning to the office when he was attacked and stabbed multiple times. The assailant committed suicide and was later identified as a former co-worker who had resigned in March 2015. In a June 19, 2018 Opinion, the Commission found that the claimant failed to prove the assault arose out of the employment. The claimant appealed. The Court of Appeals remanded the case for consideration of whether the claimant established the arising out of test of compensability by proof that his employment increased his risk of being the victim of an assault. On remand, the Commission held that the evidence failed to preponderate that either the nature of the claimant's job or the location where he worked augmented the risk of assault.

The Commission declined to conclude that the greater an employer's attention to safety, the greater the corresponding level of risk: "prudent safety precautions, standing alone, [do not] allow for the conclusion that the claimant's work environment exposed him to a greater risk of violent crime." The Commission did consider evidence relevant to the danger posed to him by the work environment. However, the Commission could not "conclude that the claimant's work at the Interstate 66 rest area exposed him to a greater risk of assault than that to which the general public was exposed." The "peculiar character" of the claimant's work did not create a risk of employment: The assailant did not steal anything from either the claimant or the workplace after the assault and the claimant was not required to handle or carry money as part of his employment. The Commission summarized the denial, "With disturbing clarity, we know how the claimant was injured. What we do not know is why. Proof of injury is insufficient unless it is causally related to a specific risk inherent to the claimant's work."

(Marshall concurrence.)

**Attorney's Fee pursuant to Va. Code § 65.2-714(B)**

- *Baker v. Lifenet Health*, JCN VA00001139303 (Apr. 10, 2019).

The Commission held that the claimant's counsel could seek attorney's fees pursuant to Virginia Code § 65.2-714(B) from the medical provider.

The claimant had an Award for medical benefits entered on March 11, 2016. On January 11, 2018, the claimant sought payment of medical treatment, including surgery by Dr. Byrd. The defendants denied the request for surgery. On July 19, 2018, the claimant advised that the parties had resolved all issues pending before the Commission and asked to remove the hearing from the July 20, 2018 docket. The Deputy Commissioner ordered the parties to submit an executed agreement within 30 days. The claimant underwent surgery on August 7, 2018. The parties filed a signed Stipulated Order on September 12, 2018 which was approved on October 1, 2018. The Order awarded payment of medical benefits, including surgery. On November 29, 2018, claimant's counsel sought attorney's fees pursuant to Virginia Code § 65.2-714(B) from the medical provider.

The Commission held that the surgery was not rendered after the defendants abandoned their defenses; hence, the claimant's counsel could seek payment from the medical provider:

> Virginia Code § 65.2-714(B) provides for the award of a reasonable attorney's fee "from the sum which benefits the third party insurance carrier or health care provider," following the adjudication of a claim. It states:
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> > If a contested claim is held to be compensable under this title and, after a hearing on the claim on its merits or after abandonment of a defense by the employer or insurance carrier, benefits for medical services are awarded and inure to the benefit of a third-party insurance carrier or health care provider, the Commission shall award to the employee's attorney a reasonable fee and other reasonable pro rata costs as are appropriate. . . . In determining whether the employee's attorney's work with regard to the contested claim resulted in an award of benefits that inure to the benefit of a third-party insurance carrier or health care provider, and in determining the reasonableness of the amount of any fee awarded to an attorney under this subsection, the Commission shall consider only the amount paid by the employer or insurance carrier to the third-party insurance carrier or health care provider for medical, surgical, and hospital service rendered to the employee through (i) the date on which the contested claim is heard before the Deputy Commissioner, is settled, or is resolved by order of the Commission or (ii) the date the employer or insurance carrier provides written notice of its abandonment of its defense to the contested claim and shall not consider additional amounts previously paid to a health care provider or reimbursed to a third-party insurance carrier.
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> "Section 65.2-714(B) restricts the medical bills subject to an award of the claimed fee to those bills generated 'for medical, surgical and hospital service rendered to the employee *through the date on which the contested claim is heard before the Deputy Commissioner*.'" *Perkins v. MV Transp.*, JCN VA00000560190 (Jan. 4, 2019) (emphasis in original). The statute prohibits the Commission from awarding attorney's fees for post-hearing medical treatment. *Id.*
>
> . . . .

We do not find the medical service at issue, the claimant's surgery, was rendered after the defendants abandoned their defenses, pursuant to Virginia Code § 65.2-714(B). The July 20, 2018 hearing was not held to adjudicate the claimant's claim for surgery. Instead, on July 19, 2018, claimant's counsel notified the Commission that the parties had resolved all of the issues pending before the Commission. In response, on July 20, 2018, the Deputy Commissioner canceled the July 20, 2018 hearing and issued an Order to submit an agreement or settlement documents within 30 days. The claimant underwent surgery on August 7, 2018. The parties filed the signed written agreement on September 12, 2018, and the contested claim was resolved by order of the Commission on October 1, 2018.

Mr. Geib's July 19, 2018 letter and the Commission's July 20, 2018 Order are not sufficient to show the defendants abandoned their defenses as set forth in Virginia Code § 65.2-714(B). While the performance of the requested but previously denied surgery is evidence of the defendants' abandonment of their earlier denial, it does not satisfy the statutory requirements. The statute clearly requires the employer or insurance carrier to provide written notice of its abandonment of its defense to the contested claim. The August 7, 2018 surgery at issue was rendered prior to the September 12, 2018 filing of the defendants' signature memorializing their abandonment of their defenses as well as the October 1, 2018 Order entered by the Commission.

**Change in Treating Physician**

- *Clarke v. Hughes Ctr., LLC*, JCN VA00000728465 (July 29, 2019).

The Commission granted the defendants' request for a change in treating physician. The Commission agreed with the Deputy Commissioner that the typical factors which are considered when granting a change in treating physician did not exist, such as inadequate care, lack of improvement, or no plan of treatment. Rather, the Commission found that the offering of a new panel of physicians was reasonable as the claimant's travel distance was excessive.

The claimant moved from Virginia to North Carolina. Her mileage reimbursement request for an eleven-week period equated to over 340 miles per week traveled to medical appointments. The Commission found "a 320-mile round trip is unreasonable. Moreover, there is no evidence that Dr. Winikur or Ms. Giles are providing specialized treatment that is unavailable closer to the claimant's residence." The Commission noted that if the claimant elected to not choose a new physician, the defendants would be responsible for reimbursement of the mileage she would have traveled if she had remained in her former residence in Virginia.

## Compensable Consequence

- *Martin v. United Cont'l Holdings, Inc.*, JCN VA00000893504 (June 12, 2019).[8]

The Commission held that the claimant's left shoulder condition was not a compensable consequence of his right shoulder occupational injury. The claimant asserted that the left shoulder condition resulted from overuse as he compensated for his right shoulder, post-surgery. The Commission afforded weight to Dr. Lorenzetti, orthopedist, who understood that the shoulder pain began nine to twelve months after the surgery and in correlation with personal weight lifting. The Commission noted that Dr. Lower, the treating surgeon, diagnosed lateral epicondylitis and his contemporaneous notes that did not mention shoulder complaints.

(Marshall dissent: Dr. Lower attested to causation and was the treating physician.)

## Economic Loss

- *Villalobos v. Wagman Cos., Inc.*, JCN VA00001190121 (Apr. 16, 2019).

The Commission found that the claimant proved a causal link between his claimed economic loss and his work-related injury. The claimant was performing light-duty work for the employer. The employer laid him off on two occasions. The Commission found that the "layoffs in this case occurred due to the unpredictable nature of the construction industry and varying economic conditions" and the length of each layoff was not pre-determined. The Commission noted the factors discussed in *Utility Trailer Manufacturing Co. v. Testerman*, 58 Va. App. 474 (2014): "(1) the length of any furlough from work; (2) whether that furlough included all employees, restricted or not, of the same class; (3) the reason for the furlough; (4) whether the term of the furlough was pre-determined by the employer; and (5) whether employees were offered employment at the termination of the furlough." The Commission noted that in *Carr v. Atkinson/Clark/Shea, A Joint Venture*, 63 Va. App. 281, 287 (2014), the employee was found entitled to benefits:

> [W]ith a short furlough of a defined duration, particularly an annually recurring one as in *Utility Trailer*, the employees, whether on selective employment or not, have little reason to seek employment elsewhere. With recurring furloughs of an undefined duration, however, the injured employee is placed at a disadvantage in seeking alternative employment, not only because his capacity to work has been

[8] On July 10, 2019, the claimant filed an appeal with the Court of Appeals of Virginia.

> reduced due to a work-related injury, but also because Virginia Code § 65.2-510 constrains him as a practical matter to return to selective employment when it resumes.

(Rapaport concurrence: *Carr* controlled the outcome of the case.)

## Injury by Accident

- *Jones v. BAE Sys., Inc.*, JCN VA00001423367 (July 11, 2019).

The Commission awarded benefits to the claimant, a defense contractor, who fell on ice exiting her car which was parked in a lot at Camp Peary. The employer had assigned the claimant to work at Camp Peary, and the location was remote from the employer's offices. The Commission advised that "[w]e are not willing to deny the claim because a defense contractor injured on a federal installation failed to prove the federal government owned or controlled the place where the accident occurred."

(Rapaport dissent: No evidence supports an exception to the coming and going rule in this case, nor does the record show that the extended premises doctrine applies. The claimant presented no evidence regarding ownership or control of the lot, and she was not required to park in a certain area.)

- *Bell v. II Perrys, Inc.*, JCN VA00001283966 (Apr. 24, 2019).[9]

A Deputy Commissioner held that the claimant's act of stacking the empty pallets after consolidating freight did not serve the employer's interests, and therefore the claimant failed to prove his injury occurred in the course of the employment. The Commission reversed. The Commission acknowledged that the claimant's action of stacking pallets was not required by his employment and could have been performed by a warehouse employee. Regardless, the claimant's voluntary act was sufficiently related to what the employee is required to do in fulfilling his contract of service and should not bar his right to recovery:

> The claimant moved the empty pallets so the warehouse employee could drive the forklift into the trailer to load full pallets. (Tr. 33, Sept. 28, 2018) This was related to the goal of making sure the trailer was promptly and properly loaded in an efficient manner. The claimant undertook the act so he could continue on his route. He felt the need to, "try and hurry up time because we'd already wasted time consolidating the pallets. . . ." (Tr. 32, Sept. 28, 2018). . . . There is no evidence the claimant acted out of a personal desire to move the pallets, and he was not on a

[9] On May 21, 2019, the claimant filed an appeal with the Court of Appeals of Virginia.

> mission of his own unconnected to the employment. His activity, even if not required by the employer, was beneficial to the employer and incidental to the employer's business.

(Rapaport dissent: The employer hired the claimant to drive trucks. The claimant was not required to stack empty pallets or assist the employees at the warehouse. The stacking was not in the employer's interests – the claimant was instructed to quickly unload his load and attend to other customers.)

- *Stinson v. Game & Inland Fisheries,* JCN VA00001324372 (Apr. 22, 2019).

The claimant failed to prove a compensable injury by accident. The Commission emphasized that the claimant testified to feeling some tightness about halfway through the task of moving multiple gates, but also stated, "it's like any type of physical work you do, you're gonna get to that point where you're gonna get, something." The claimant did not describe what he was doing when he felt the tightness in his back, and he did not feel pain until later that evening. The claimant's co-worker did not observe him having an injury while moving the gates. Also, the claimant reported to medical providers that there was no known injury, and the medical evidence was silent regarding the cause of the lumbar disc herniation. The Commission concluded, "At best, the evidence suggested the claimant's injury was gradually incurred as a result of the repetitive task of unloading the gates." The Commission distinguished the case from *Van Buren v. Augusta County,* 66 Va. App. 441 (2016), where "[t]he medical records demonstrated a distinct injury, inherently consistent with acute trauma by its nature," which was absent in the current case.

**Medical Expenses**

- *Hansen v. TMA Trucking, Inc.,* JCN VA00001001203 (May 28, 2019).

When a claim is filed by a medical provider, the medical bills qualify as prima facie evidence. The same applies when a claimant files for payment of a bill, and it is not the claimant's burden to establish the prevailing community rate:

> The injured worker is in the worst position to wade into disputes over the cost of medical treatment and saddling them with the burden of establishing the prevailing community rate would relegate to the realm of fantasy the Act's humanitarian ideals. We find the claimant's medical bills were relevant to the proceedings, and their admission made a *prima facie* case "that the medical expenses were incurred and that they are reasonable." *Banks v. Plow & Hearth,* JCN 2381811 (Aug. 26, 2013).

## Notice of Injury

- *Phelps v. Fairfax Cnty. Gov't*, JCN VA00001509475 (July 29, 2019).

The Commission found that the claimant provided a reasonable excuse for delay in providing notice of her injury to the employer. The claimant's accident occurred on May 6, 2018 and she reported it "on August 29, 2018, soon after the August 23, 2018 left hip MRI revealed its seriousness. She had received palliative chiropractic care for aches and pains to her neck and low back for several years. It was reasonable for the claimant to believe her left hip injury was minor and would improve with chiropractic treatment. As soon as she appreciated the seriousness of the injury, she reported it to her employer."

(Rapaport dissent: The reporting delay was unreasonable for several reasons. The claimant's condition persisted and warranted immediate medical attention. Multiple chiropractic treatments transpired and a high-level diagnostic study was prescribed. The claimant never questioned, nor was mistaken about, the onset of the condition. She also knew of the importance of immediately reporting an occupational accident.)

## Post-Traumatic Stress Disorder

- *Musgrove v. Bedford Cnty.*, JCN VA00001270176 (July 23, 2019).

The Commission upheld the determinations that the claimant, a firefighter, failed to prove he suffered post-traumatic stress disorder (PTSD) as an injury by accident or occupational disease. On November 10, 2016, the claimant responded to a house fire involving a tractor trailer. When the truck collapsed into the basement, the claimant "was in shock. I kind of felt my heart racing. Kind of cool, maybe, just didn't really know what to think. You just look out there and you've never seen something like that, so you're just kind of shocked at what's going on." He felt helpless and tried to protect younger co-workers from the gruesome scene. The claimant worked with the driver's charred body for 45 minutes in the basement. He testified, "I don't think I've ever had an experience like that. That's one of the first." The claimant began suffering anxiety, insomnia, and intrusive thoughts for which he obtained medical treatment.

Relying upon *Bennett v. EHS Support Services., LLC*, JCN VA02000026728 (Nov. 28, 2017), the Commission held that the incident was not "sufficiently shocking, frightening, traumatic, or unexpected" given the nature of the claimant's occupation, experience, and training to constitute a compensable injury by accident. The Commission also agree that the medical evidence was insufficient to establish that the claimant's PTSD is either a compensable occupational disease or a compensable ordinary disease of life. The Commission explained that "[a]ccording to the medical evidence in this case, the cause of the claimant's PTSD was the single incident on

November 10, 2016, not his repeated exposure to trauma during his work as a firefighter/EMT. Therefore, it would be considered an injury by accident rather [than] occupational disease."

(Marshall dissent: The claimant's PTSD was compensable as an occupational disease. Virginia Code § 65.2-400 does not limit an occupational disease to be only caused by a series of events, repeated exposures, or a single event. Instead, the "suddenness" is the essential element distinguishing an injury by accident from an occupational disease. Also, the claimant proved that he was diagnosed with PTSD, and he met the criteria for a compensable occupational disease.)

## Standing

- *Hansen v. TMA Trucking, Inc.*, JCN VA00001001203 (May 28, 2019).

The claimant sought full payment of medical bills for treatment rendered. The defendants defended that there were only "underpaid" bills at issue, the medical providers had not pursued the balances of the subject bills, and the claimant could not be held personally liable for the subject balances. The defendants thus contended the claimant had no interest in the payment of the balances and lacked standing to prosecute the claim. The Deputy Commissioner denied the defendants' motion, citing the 2012 amendment to Virginia Code § 65.2-713(A) which grants the Commission jurisdiction "for employees to pursue payment of charges for medical services notwithstanding that bills or parts of bills for health care services may have been paid by a source other than an employer, workers' compensation carrier, guaranty fund, or uninsured employer's fund." The Commission affirmed that the claimant has rights at stake when pursuing the payment of his medical expenses by his employer/insurer:

> Immunity from balance billing does not render the claimant one with "no dog in the fight." An injured worker's access to treatment can too easily be relegated to the status of pawn when disputes arise between insurers, employers and the claimant's medical providers. Safeguarding an injured workers' right to medical treatment, a most fundamental tenet of the Act; mandates that the claimant have a judicable interest in securing payment for that treatment.
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> . . . .
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> We expressly find that the claimant's right to prosecute a claim for the payment of his medical bills pre-existed the 2012 amendment . . . relied upon in the decision below.

## Statute of Limitations of Va. Code § 65.2-601

- *Brown v. A-Annandale, Inc.*, JCN VA00001083206 (May 20, 2019).

The Commission held that the claimant's claim for vestibular therapy for a traumatic brain injury was not barred by the statute of limitations of Virginia Code § 65.2-601. The claimant suffered multiple compensable injuries and her award included a head contusion. The claimant sought authorization for prescribed treatment for a "concussion" and "BBPV, dizziness s/p mild TBI." The defendant maintained that the medical care pertained to a mild traumatic brain injury, and such was not covered by the award and was barred by the statute of limitations.

Relying upon *Philip Morris USA, Inc. v. Mease*, 62 Va. App. 190 (2013), the Commission held that the statute of limitations did not bar a claim for a traumatic brain injury:

> The December 3, 2015 Award Order provided the claimant medical benefits for a head contusion. However, the medical records as well as the claimant's testimony indicate that she suffered a loss of consciousness due to her accident and experienced memory problems, headaches, and episodes of dizziness afterward. (Defs.' Ex. 1-4.) She was diagnosed as having sustained a mild traumatic brain injury, for which she received treatment from Dr. Kunz. The defendants have paid the bills for the claimant's related treatment including for vestibular therapy. Lastly, the defendants themselves relied upon medical records provided by Dr. Kunz when they filed an Employer's Application for Hearing, as well as a written summary of an appointment with him at which the treatment of the claimant's traumatic brain injury was discussed. We find that the defendants had ample notice that the claimant sustained a traumatic brain injury in addition to a head contusion.

(Rapaport dissent: The controlling facts of *Mease* greatly differ from the current case, and the majority is improperly shifting the burden of proof and the responsibilities of the parties. The Act requires an injured employee to file a claim for any injury within two years of the incident. The facts that the employer had notice of an injury and paid for some medical treatment of such do not necessarily render a claim timely nor an injury compensable.)

## Temporary Total Disability

- *Asgedom v. Airport Terminal Servs., Inc.*, JCN VA00001261985 (June 25, 2019).[10]

The Commission reversed the Deputy Commissioner's reinstatement of temporary total disability benefits and found that the record as a whole established a return to pre-injury employment. The claimant's orthopedist reviewed the pre-injury job description and found the claimant could return to his regular employment effective September 19, 2017. The orthopedist saw the claimant again in June 20, 2018 and referred him to a pain management specialist, Dr. Balint. The orthopedist recommended no work pending this pain management evaluation. Dr. Balint found no objective problems and released the claimant to "his regular duties immediately." Lastly, another physician concluded in 2017 that the claimant had no abnormalities and could perform full, unrestricted, duty.

(Marshall dissent: The claimant continued to suffer from significant physical limitations, and there was no evidence that Dr. Balint was specifically asked to identify any physical restrictions that the claimant may have with respect to his ability to work. Dr. Balint did not acknowledge or identify the claimant's pre-injury job.)

## Two-Causes Rule

- *Baker v. City of Va. Beach*, JCN VA00001332358 (Apr. 9, 2019).

The Commission held that the claimant proved that his ongoing partial wage loss was caused by his occupational injury. The claimant had a compensable knee injury. On September 5, 2017, the claimant received permanent restrictions of no squatting, crawling, climbing or lifting over thirty pounds. On May 15, 2018, Dr. Cohn restricted the claimant from driving more than twenty hours per week and stated that this restriction was due to left knee osteoarthritis and was not related to his workers' compensation injury. The Commission found that under the two-causes rule the claimant established entitlement to wage loss benefits as full benefits are allowed when the employment-related injury is a contributing factor: "The claimant had causally related restrictions during this time which rendered him permanently incapable of performing his preinjury work for the employer. He also had a temporary driving restriction. There is no evidence in the record that the claimant was totally disabled due to his unrelated osteoarthritis or that he was unable to secure higher earnings solely because of it."

[10] On July 17, 2019, the claimant filed an appeal with the Court of Appeals of Virginia.