Recent Case Decisions and Statute of Limitations Amendment 2018-2019 Update

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House Bill 2022

- Delegate Terry Kilgore, Chairman of the House of Commerce and Labor Committee was concerned by the "gotcha" moment in workers' compensation.
- Issue involves voluntary payment of medical bills and/or indemnity benefits to claimants who are allegedly "lulled" into a sense of security and therefore fail to file a timely claim for benefits within two (2) years from the date of accident.
- Bill that was introduced stated that if an employer made voluntary medical payments or voluntary indemnity payments, it would be deemed that a claim had been filed by the injured worker
  - This bill was defeated but the legislature still wanted the problem corrected.

House Bill 2022

- Example (actual) case which the proposed legislation would address:
  - Accident for injured right knee and Memorandum of Agreement filed with the Commission.
  - Low back also injured at time of accident, but no award entered for this body part.
  - Medicals paid for several back surgeries.
  - After three (3) years, further medicals are denied on the basis that the Statute of Limitations had expired.

Commission Appointment

- The Commission appointed three defense lawyers and three claimant's lawyers to act as stakeholders in crafting legislation that would address concerns of the legislature.
- The six stakeholders met in October 2018.
  - The meeting included all three Commissioners (Ferrell Newman, Robert Rapaport, Wesley Marshall) and Chief Deputy Commissioner Szablewicz

Section 65.2-602: "Tolling the Statute of Limitations"

- After five months of negotiations and drafts, it was agreed that:
  - If indemnity benefits are paid after 6 months from the date of accident, the statute of limitations is entirely reset for that period for which indemnity benefits are paid subsequent to six months from the date of the claim;
    - ***However*** any voluntary payments made after the two year statute of limitations has already passed will not apply to this provision;
  - If medical benefits are paid for treatment that occurs after 6 months from the date of injury, the statute of limitations is entirely reset for the period in which payments are made related to medical services provided after 6 months from the date of the injury;
  - In no event will the statute of limitations exceed 4 years;

Section 65.2-602: "Tolling the Statute of Limitations"

- In addition, if the employer has not filed the FROI as required by the statute within 10 days from the date of accident, the statute is tolled until the first report of injury is filed
  - The claimaint is no longer required to prove that he was prejudiced by the actions of the employer/carrier
  - The amendment eliminated the prejudice component of the tolling statute
- During negotiations, we checked the Commission's databank and found that less than 2% of claims involved an employer failing to timely file the FROI
  - Hence, elimination of this defense, although important, was not a signification concession.

Practice Tip

- **DO NOT** make voluntary payments more than four to five months after the date of accident.

Questions?

Williams v. Lowe's Home Ctrs., LLC

- No. 0120-18-2, (Va. Ct. App. Oct. 2, 2018)
  - Opinion by Judge Jean Harrison Clements
- Key Concept: Medical Causation
- Claimant had pre-existing epilepsy and a temporal lobectomy. While working, a cart landed on his head at the site of his lobectomy
  - This injury was found to be compensable and the Commission awarded the claimant various periods of TPD as well as lifetime medical benefits

Williams v. Lowe's Home Ctrs., LLC

  - Subsequently, claimant began having sudden "crying episodes".
  - Claimant's physicians said that the crying episodes were "highly suspicious of being epileptic in nature" but that the relation to the head injury was "not clear".
- Claimant filed a claim for benefits on May 31, 2017 requesting payment/authorization for a vagus nerve stimulation operation as recommended by his treating physicians
- The Court found that the evidence was insufficient to prove that the need for a "vagus nerve stimulation operation" was causally related to his compensable injury by accident

Canada Dry Potomac Corp. v. Anderson

- No. 0309-18-2 (Va. Ct. App. Oct. 9, 2018)
  - Opinion by Judge Jean Harrison Clements
- Key Concept: Weight Given to the Opinion of the Treating Physician.
- The Court affirmed the Commission's finding that physical therapy and massage treatment was "reasonable, necessary, and causally related to the work injury".
  - Defense argued that Dr. Bonner's opinions were "subjective and conclusory".
  - Defense relied on the IME opinions of several doctors who found that the claimant did not need to continue treatment with Dr. Bonner and that at-home exercises would be sufficient
- ***Compare*: Calafactor**
  - Truck mechanic falls off of two-step ladder and scrapes calf.
  - Developed lymphedema.
- Question of treating physician vs. medical expert.
  - Commission tends to put the greatest weight on the treating physician's opinion.

Practice Tip

- Risk/reward analysis
- One claimant won and one claimant lost
- Be aware of the doctor-patient history/relationship
  - Doctors becoming patient advocates

Andre Jones v. Crothall Laundry

- No. 1070-18-4 (Va. Ct. App. Feb. 12, 2019)
  - Argued by Charles F. Midkiff
  - Opinion by Chief Judge Marla Graff Decker
- Key Concept: Violation of Known Safety Rule
  - To prevail, employer must prove:
    - Safety rule reasonable
    - Known to the employee
    - Rule promulgated for the benefit of employee
    - Employee intentionally undertook the forbidden act

Andre Jones v. Crothall Laundry

- Claimant entered fenced off area without first entering through an interlock gate that would deactivate all machinery in the area.
  - Moving machine pinned his leg against a conveyer belt.
- Approximately $1 million incurred in medical expenses
- Claimant admitted at deposition that he knew that a safety rule existed and that it was enforced but argued at trial that the rule was not enforced

Andre Jones v. Crothall Laundry

- Claimant argued that once inside the gated area he pressed a button and a kick plate that would stop the machinery.
  - Not observable on video and this was still a violation of the safety rule
- Enforcement
  - Claimant's witness testified that he had seen others enter the fenced-in area without properly going through the gate and that those had done so in the presence of supervisors.
  - Defense had two managers testify to the enforcement of the safety rule.
- Court affirmed the Commission's decision finding that the employer enforced the safety rule

Rodell Callahan v. Rappahannock

- No. 0661-18-4 (Va. Ct. App. Oct. 23, 2018)
  - Argued by Steven H. Theisen
  - Opinion by Judge Rossie D. Alston, Jr.
- Key Concept: Bona Fide Enforcement of Safety Rules
- Claimant sustained injuries while unloading a company truck.
  - The claimant maintained that he had shifted the truck into neutral and engaged the emergency brake in addition to inserting wheel chocks under the tires.
  - The truck began to roll away as the claimant was reversing a forklift out of the truck and the claimant fell out while astride the forklift, sustaining injuries.

Rodell Callahan v. Rappahannock

- Court affirmed the Commission opinion and held that employer "strictly enforced" rules even though there had been no specific instances of employee discipline for violations.
- Court affirmed that employer can establish "bona fide enforcement" with proof of communications of the rules.
- Further, the Court rejected the claimant's contention that a safety rule must be for the sole benefit of the employee stating that "a safety rule may have numerous benefits".

City of Henrico v. Callawn

- No. 0406-18-2 (Va. Ct. App. Oct. 16, 2018)
  - Opinion by Judge Wesley G. Russell, Jr.
- Key Concept: Common to the Neighborhood Standard for Compensability
- Claimant fell stepping out of a school bus.
  - The Commission "concluded that the bus steps were 'unusual in their configuration' and 'the unusual steepness of the bus steps was an actual risk of the claimant's employment.'"

City of Henrico v. Callawn

- Court of Appeals affirmed the Commission's opinion, finding that while "normal" steps are a common risk of the neighborhood because individuals are equally exposed to them whether at work or at home, "unusual" steps add a risk.
  - Specifically, the Court said that the "relevant question…becomes, whether an employee faces the hazards posed by *school bus* steps as often outside of employment as while on the job. The answer, of course, is no."

Norris v. ETEC Mech. Corp.

- No. 1054-18-2 (Va. Ct. App. Dec. 26, 2018)
  - Opinion by Judge Robert J. Humphreys
- Key Concept: Street Risk vs. "Critical Link" Element of Actual Risk Doctrine
- Claimant fell asleep driving home from work in company car and crashed into a tree. ("In the course of" is satisfied).
  - Had worked normal eight hour shift.
  - Job involved manual labor fixing leaks in air conditioning refrigerator lines which required that he go up and down a ladder several times throughout the day.

Norris v. ETEC Mech. Corp.

- The DC found that the claimant did not prove a **causal connection** between the conditions of his work and falling asleep behind the wheel.
  - The Commission affirmed, finding that Norris was indeed in the course of his employment but that his accident did not arise out of his employment.
  - The Commission found that the street risk doctrine was not controlling in this case.
- The Court of Appeals focused on the actual risk test and whether "the manner in which the employer requires the work to be performed is causally related to the resulting injury".
  - Specifically, the Court found that the claimant failed to establish a **"critical link"** between the conditions of his work and falling asleep behind the wheel.

O'Donoghue v. United Continental Holdings

- No. 1149-18-4 (Va. Ct. App. Mar. 26, 2019)
  - Opinion by Chief Judge Marla Graff Decker
- Key Concept: "Arise Out Of" in extreme weather cases
- Claimant was working on outdoor ramps at an airport during a thunderstorm.
  - As he touched a toggle switch to operate the cargo door of a lithium battery powered Boeing 787, "a blue arc came out of the control panel."
  - There was a question as to whether he was shocked due to an actual lightning strike or due to a sudden discharge of static electricity from the plane.

O'Donoghue v. United Continental Holdings

- Court noted that when an injury "may have resulted from one of two causes" and only one of these causes is compensable, the claim fails unless evidence shows the damage was produced by the compensable cause.
  - "Although a person in the same general vicinity who was not working for the employer might have chosen to go indoors due to the danger associated with the lightning visible in the distance, the evidence did not compel the Commission to find as a matter of law that a nonemployee in the area would likely have done so."
- Court of Appeals affirmed Commission's denial of benefits.

City of Virginia Beach v. Hamel

- No. 1531-18-1 (Va. Ct. App. Feb. 26, 2019)
  - Opinion by Judge Teresa M. Chafin
- Key Concept: "Arise out of" for injury on the way into a mandatory off-site training
- Claimant was employed by the City as a counselor and was required to go to mandatory training session at a community college
  - Claimant parked "really far" from the building and asked for directions
  - As she approached the building, she stepped over a curb and tripped over two raised tree roots causing injury

City of Virginia Beach v. Hamel

- The Court of Appeals reversed the Commission decision and stated that:
  - "While the training attended by Hamel was deemed mandatory by her employer, the City did not instruct her where to park or which route to take to the building in which the training was being held. There were no parking permits issued or parking spaces assigned to City employees…[t]herefore, Hamel's risk of tripping over the tree roots was equal to that of any member of the general public"

Henderson v. City of Va. Beach

- Commission Case: JCN VA00000873556 & VA00001047755
  - Opinion by Ferrell Newman
- Key Concept: Need a Specific Condition of Employment to "Arise Out Of"
- Claimant was injured in March of 2015 after she entered a cubicle to put down files and pivoted to leave.
  - As she was pivoting, her knee popped.
- Claimant filed a claim for benefits.

Henderson v. City of Va. Beach

- The Commission talked about how such a movement was “routine activity” and was not “unique to her employment”.
- The Commission stated that she, “did not engage in any significant exertion, her action of pivoting did not involve any awkward position, and there were no obstacles or barriers on the floor or in the workspace that caused her injury…[T]here was no condition of the workplace or additional exertion necessitated by work…that caused her injury.”

City of Charlottesville v. Sclafani

- No. 1999-18-3(Va. Ct. App. July 23, 2019)
  - Opinion by Judge Teresa M. Chafin
- Key Concept: Timeline required for cumulative trauma
- Claimant was employed by the City as a police officer and participated in an eight hour training session.
  - Sclafini played the role of suspect in a training exercise wherein he was repeatedly handcuffed, thrown, and picked up off the ground.
  - There was no immediate onset of a left arm injury, but, at the conclusion of the eight hours, he found he could not straighten or lift his left arm. Pain began the next day.
  - He testified that he felt no pain during the first four hours, but a bit of a “tweak” during the last four hours after lunch.

City of Charlottesville v. Sclafani

- The Court of Appeals reversed the Commission decision that Sclafini met the burden of establishing temporal precision and stated that:
  - "It appears from the record, however, that the Commission assumed but failed to find that Sclafani's testimony established an identifiable incident with sufficient temporal precision. The training spanned eight hours, with an interruption for lunch. The assumption that Sclafani sustained a non-cumulative injury during the last four hours of training was justified based on Sclafani's own testimony. However, there was no specific finding to this effect. Therefore, we remand this case for the Commission to make a factual finding consistent with this opinion as to whether Sclafani's injury occurred during the four post-lunch hours of the training."

Carrington v. Aquatic Co.

- Supreme Court of Virginia (July 18, 2019)
  - Opinion by Judge D. Arthur Kelsey
- Key Concept: Two-Causes Rule
- Claimant had begun working for Aquatic in 1992 with a pre-existing kidney injury that was not disabling.
  - Claimant injured his left arm at work in 2013, which was deemed a compensable injury.
  - In 2014, Claimant's kidney condition deteriorated.
  - He sought an award of TPD due to his "new" condition of polycystic kidney disease.
  - The Commission held that Carrington was not entitled to continuing temporary total-disability benefits. It concluded that neither Carrington's preexisting kidney disease nor his kidney failure in October 2014 had any connection to his employment.

Carrington v. Aquatic Co.

- The Supreme Court affirmed the Court of Appeals and Commission, stating:
  - “Workers' compensation law distinguishes between preexisting conditions that are solely responsible for a total disability and preexisting conditions that combine with a work-related injury to create a total disability. Failing to distinguish between these differing scenarios would convert the Workers' Compensation Act "into a form of health insurance,", and, …would encourage "the potential mischief of affording a license to refuse otherwise appropriate light duty work because a pre-existing benign, asymptomatic condition eventually deteriorates to the point of causing restrictions,"

  Because the two-causes rule does not apply to this case, we affirm the judgment of the Court of Appeals.

Questions?

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