VIRGINIA WORKERS' COMPENSATION COMMISSION
EDUCATIONAL CONFERENCE

October 17-18, 2018

Recent Decisions of Interest

Presented by:[1] **R. Ferrell Newman, Commissioner**
Wesley G. Marshall, Commissioner
Robert A. Rapaport, Commissioner

THE COURT OF APPEALS OF VIRGINIA

Compensable Consequence

- Vital Link, Inc. v. Hope, 69 Va. App. 43, 814 S.E.2d 537 (2018).

The Court upheld the awarding of benefits for a left knee fracture and temporary total disability benefits. The claimant sustained a compensable left knee injury on June 23, 2015. A fracture in the knee area was discovered during post-operative treatment and physicians diagnosed the problem as cartilage loss in the area of the injury. Dr. Buchanan attributed the cause to post-operative healing from the surgery, and Dr. Badarudeen (original treating physician) linked the cartilage loss to the workplace injury. On July 14, 2016, the claimant filed a claim for temporary total disability benefits from May 11, 2016, and continuing. On the line titled "Parts of Your Body Injured," the claimant wrote, "It was my left knee. Done had one surgery and waiting on a second one." The claimant did not mark the box indicating he sought a lifetime award of medical benefits. The defendants argued that the Commission erred by considering a claim of compensable consequence (a left knee fracture) sua sponte without proper notice to the defendants and that the condition was a compensable consequence.

The Court held that the Commission did not err in awarding benefits and that the statute of limitations of neither Virginia Code § 65.2-601 nor Virginia Code § 65.2-708 applied:

> The only body part at issue is the medial femur condyle of the left knee. Dr. Buchanan treated the area during arthroscopic surgery when he trimmed and smoothed the cartilage. Dr. Buchanan later found the fracture in that area of the knee and tried various treatments. Accordingly, the subchondral fracture of the left

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femur condyle at issue here is not a new injury to a different body part; as factually determined by the Commission, it was a subsequent injury in the form of a stress fracture to the very same area of the left knee directly related to the surgical reshaping of a portion of the knee done as part of the procedure to repair the damage from the original workplace injury. Hope was not required to file a claim for new injury under Code § 65.2-601. Neither could the Commission review the award for change of condition pursuant to Code § 65.2-708 because no award had yet been given. Until now, we have not had occasion to address notice requirements for compensable consequences, such as aggravation or complications due to medical treatment, to the original injury that occur *prior* to the initial award.

The Act focuses on treatment to the injured body part. It requires employer to provide medical benefits related to Hope's compensable injury "as long as necessary after [the] accident" and "[any] other necessary medical attention *related* to the compensable injury." *See* [Nelson Cty. Sch. v.]Woodson, 45 Va. App. [674,] 678, 613 S.E.2d [480,] 482 (quoting Code § 65.2-603(A)(1)) (emphasis added). An employer is responsible for the medically necessary treatment regardless of claimant's "failure to specifically request an award of medical benefits in [his] application to the commission." *See* id. at 678, 613 S.E.2d at 483. Moreover, "we have held that, as long as the employee's application for benefits provides an employer with notice 'of the potential issues in a case,' the claim will satisfy 'minimal due process safeguards.'" Id. at 681, 613 S.E.2d at 483 (quoting Johnson v. Paul Johnson Plastering, 37 Va. App. 716, 723, 561 S.E.2d 40, 44 (2002), rev'd in part on other grounds, 265 Va. 237, 576 S.E.2d 447 (2003)); Code § 65.2-708.

Accordingly, we hold that since notice of a workplace injury claim to an employer is also sufficient notice that any medical treatment in the record of injured body parts listed in the claim of benefits *may* be the basis of an award by the Commission, such notice necessarily includes the reasonable *possibility* of subsequent deterioration or complications of the primary injury or aggravation of the primary injury due to medical or surgical treatment. If an employer wishes to defend against compensability for any or all of the treatment to the body part or parts listed on the claim form, it must do so at the hearing.

. . . .

> [F]or the purpose of procedural due process, notice of a claim for medical benefits is also implied notice of potential subsequent medical complications for the treatment of injuries to the named body part(s) injured.

Id. at 58-60, 814 S.E.2d at 544-45.

The Court further held that the subsequently discovered fracture was a part of the left knee, the only body part at issue in this claim, and the claimant was not required to check the box indicating that he sought a medical award. The defendants had sufficient notice: the claimant wrote on the claim form that he injured his knee, no award had been entered, and medical treatment was in the record provided to the defendants. Also, the Court agreed that the fracture was a compensable consequence as either a complication or aggravation of the primary injury.

The Court agreed that the claimant was justified in seeking treatment with Dr. Badarudeen. The claimant continued to have symptoms after Dr. Buchanan released him to full duty. The claim administrator authorized Dr. Badarudel;en to take an MRI scan and did not instruct the claimant to return to Dr. Buchanan. Dr. Buchanan's treatment was inadequate, and Dr. Badarudeen's care was medically reasonable and necessary. The defendants then denied liability so the claimant was free to choose a physician. Lastly, the Commission did not err in accepting, as evidence of the claimant's disability, a "To Whom It May Concern" letter on clinic letterhead which listed Dr. Badarudeen by name.

Composition of Review Panel

- Dollar Tree Stores, Inc. v. Tefft, 69 Va. App. 15, 813 S.E.2d 908 (2018).

The Court held that the Chairman of the Commission, pursuant to Virginia Code § 65.2-705(D), properly appointed a Deputy Commissioner to participate in the review panel in light of the Commissioner's absence. (The panel consisted of Commissioners Marshall and Newman, and Chief Deputy Commissioner Szablewicz, who participated on the panel by appointment because Commissioner Rapaport had recused himself.) The Court explained that the Deputy Commissioner was not and had never been a "retired member" of the Commission, and hence, his background as either an employee or employer representative was irrelevant:

> Code § 65.2-200 formulates the Commission. It provides that the Commission "shall consist of three members" elected by the General Assembly. Code § 65.2-200(B). In addition, Code § 65.2-200(D) provides that

> [n]ot more than one member of the Commission shall be a person who on account of his previous vocation, employment or affiliation shall be classified as a representative of employers, and not more than one such appointee shall be a person who on account of his previous vocation, employment or affiliation shall be classed as a representative of employees.

Code § 65.2-705 outlines the procedure for reviewing an award. It directs the full Commission to hear appeals. Code § 65.2-705(A). Further, Code § 65.2-705(D) mandates that

> [w]hen a vacancy on the Commission exists, or when one or more members of the Commission are absent or are prohibited from sitting with the full Commission to hear a review, the Chairman may appoint one or more deputy commissioners or recall one or more retired members of the Commission to participate in the review. The retired member or members recalled shall be the member or members who occupied the seat for which such member or members are being recalled, unless the parties otherwise consent.
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> . . . .

[T]he statute provides that the Chairman may appoint either a deputy commissioner or, in the alternative, a retired member of the Commission, to serve on a review panel if a member of the Commission is absent. The next sentence of the statute reads: "[t]he retired member or members recalled shall be the member or members who occupied the seat for which such member or members are being recalled, unless the parties otherwise consent." Code § 65.2-705(D). . . . Clearly the term "member" in the statute exclusively references "the retired member or members recalled"–*i.e.*, retired members of the Commission that can participate in review panels by designation of the Chairman. Under the plain language of Code § 65.2-705(D), the statute only requires that when a retired member of the Commission is recalled to serve on a review panel, they must occupy "the seat"–*i.e.*, be of the same classification under Code § 65.2-200–as the Commission member they are replacing. As this portion of the statute plainly refers only to "retired members" of the Commission, it does not compel the conclusion that a deputy commissioner, serving by appointment on a review panel, must be of a certain affiliation.

> A review of Code § 65.2-200(D) further supports this conclusion. Code § 65.2-200(D) provides that "[n]ot more than one member of the Commission" shall be an individual with an employer representation background or an individual with an employee representation background. This code section refers solely to the composition of the Commission itself; its plain language provides no commentary on any prior affiliation requirement for deputy commissioners appointed to a review panel under Code § 65.2-705(D). This reading of the statute is supported by other sections of the Virginia Workers' Compensation Act, as the Act clearly distinguishes members of the Commission from deputy commissioners. *See* Code § 65.2-201(B) (providing that one of the powers of the Commission is the ability to appoint deputies); Code § 65.2-203(A) (outlining the duties and powers of deputy commissioners including the ability to subpoena witnesses, administer oaths, take testimony, decide the issues in a summary manner, and make award decisions, as well as "exercise other powers and perform any duties of the Commission delegated to them by the Commission"). . . . If the General Assembly had intended for deputy commissioners appointed to sit on review panels to have the same prior experience as the Commission members they were replacing, it could do so, but clearly has not.

Id. at 23-27, 813 S.E.2d 912-14.

Injury by Accident

- Lewis v. Covenant Holdings Grp., LLC, No. 1977-17-4 (June 5, 2018).

The Court affirmed the Commission's finding that the claimant failed to prove that her injury arose from an actual risk of her employment. While carrying frozen soup out of a walk-in freezer, the claimant slipped and fell forward onto both knees. The claimant argued on appeal that the Commission failed "to draw a reasonable inference from the evidence regarding the floor on which [she] slipped." The Court elaborated:

> Claimant testified that she slipped and fell in the walk-in freezer while carrying soup. She did not give any reason for her fall, such as ice on the walk-in freezer floor. She also never suggested that carrying the soup caused her to fall. Additionally, none of her medical records indicated that any substance on the floor caused her to slip. Instead, Dr. Tao noted twice that claimant slipped and fell because of her pre-existing knee pain. Claimant correctly notes that the Commission is entitled to draw reasonable inferences from the evidence. *See*

> Basement Waterproofing & Drainage v. Beland, 43 Va. App. 352, 358-61, 597 S.E.2d 286, 289-90 (2004). However, claimant failed to present sufficient evidence from which the Commission could infer that ice was present on the walk-in freezer floor. The evidence at the hearing supports the Commission's finding that claimant fell as a result of pain from her pre-existing knee condition.

The Court declined to take judicial notice of the First Report of Injury contained in the Commission file which "was never offered as evidence or introduced at the hearing," nor requested that the Commission take judicial notice of it. The Court noted, "Whether claimant slipped on ice is neither 'generally known' within the jurisdiction nor 'easily ascertainable.'"

Lifetime Benefits for Coal Workers' Pneumoconiosis

- Paramont Coal Co. Va., LLC v. Vanover, No. 1658-17-3 (Apr. 17, 2018).

The Court upheld the Commission's awarding of benefits pursuant to Virginia Code § 65.2-504(A)(4) which provides, in part, the following:

> For coal worker's pneumoconiosis medically determined to be A, B or C under the I.L.O. classifications or which involves progressive massive fibrosis, or for any stage of coal worker's pneumoconiosis when it is accompanied by sufficient pulmonary function loss as shown by approved medical tests and standards to render an employee totally unable to do manual labor in a dusty environment and the employee is instructed by competent medical authority not to attempt to do work in any mine or dusty environment and if he is in fact not working, it shall be deemed that he has a permanent disability and he shall receive 66 2/3 percent of his average weekly wage as defined in § 65.2-101 during the three years prior to the date of filing of the claim, up to 100 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500 for his lifetime without limit as to the total amount.

The Commission held that to qualify for lifetime benefits under Virginia Code § 65.2-504(A)(4), a claimant must prove one of the following factors:

> (1) he suffers from coal workers' pneumoconiosis medically determined to be A, B, or C under the I.L.O. classifications, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working, *or* (2) he suffers from coal workers' pneumoconiosis involving progressive massive

> fibrosis, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working, *or* (3) there is sufficient pulmonary function loss as shown by approved medical tests and standards to render him unable to perform manual labor in a dusty environment, and he has been instructed not to work in a mine or dusty environment by competent medical authority, and he is not working.

On appeal, the Court declined to read the statute conjunctively: "[t]here is nothing to suggest that the legislature's 'obvious intention' was for this Court to read the statute conjunctively. Accordingly, because the language of the statute is unambiguous, we are bound by its plain meaning." The Court recognized "the great weight placed on the Commission's interpretation of Code § 65.2-504(A)(4)," and agreed that "based upon the plain language of the statute, the correct interpretation of Code § 65.2-504(A)(4) is in the disjunctive."

Marketing Residual Work Capacity

- Dollar Tree Stores, Inc. v. Tefft, 69 Va. App. 15, 813 S.E.2d 908 (2018).

The Court affirmed the Commission's finding that the claimant's marketing was reasonable in light of her education, experience, and work restrictions. The defendants had argued that the claimant's job search record was unreasonable because two employers represented over 90% of her employment applications. The Court agreed that the job search was not unreasonable:

> Our case law only demands that a claimant's marketing efforts be reasonable, not perfect or successful. Here, claimant had a limited educational background, significant work restrictions, and past work experience that best suited her for positions precluded by those restrictions. The record also demonstrates that claimant applied for a variety of positions in different Sears and SuperValu locations.

Id. at 29, 813 S.E.2d at 915.

The Court agreed that the job search was good faith and "While claimant did apply only for five jobs a week, . . . she applied for a variety of distinct positions . . . that could accommodate her work restrictions." Id.

Medical Treatment

- Pittsylvania Cnty. Bd. of Supervisors v. Hall, No. 1869-17-3 (June 12, 2018).

The Commission affirmed the awarding of medical benefits for requested prescription medications and denied the defendants' renewed motion for a medical examination pursuant to Virginia Code § 65.2-606. The Court found no error in awarding medical benefits and the declining to appoint a disinterested physician pursuant to Virginia Code § 65.2-606. The Court instructed:

> The Commission weighed the opinions of seven different doctors, and decided that the medical treatment was compensable. Employer asserts that "the Commission fundamentally misconceive[d] the significance of the evidence." This is simply another way of complaining about how the Commission weighed the conflicting evidence. The Commission was unconvinced by the evidence presented by employer. "It is not our function, but the Commission's, to weigh conflicting evidence, and when there is credible evidence to support the Commission's findings, we are bound thereby." Chandler v. Schmidt Baking Co., 228 Va. 265, 268, 321 S.E.2d 296, 298 (1984).
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> Code § 65.2-606 states, in relevant part: "The Commission or any member thereof may, upon the application of either party or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination and to testify in respect thereto . . . ." By implication, employer argues that although the statute says the Commission *may* appoint a disinterested physician to conduct an examination, in situations like employer's, the Commission *must* do so. We cannot countenance that interpretation of the statute.
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> We see no indication that the legislature intended the word "may" contained in Code § 65.2-606 to be interpreted as "shall" or "must"; therefore, we give the word "may" its ordinary meaning. Ordinarily, "may" is a permissive word. It follows that if the Commission is permitted to take certain action, the Commission is also permitted *not* to do so. . . . The Commission exercised its legislatively-bestowed discretion not to appoint a disinterested physician.

Permanent Partial Disability Benefits

- Rivera v. Kohl's Dep't Stores, Inc., No. 0031-18-4 (July 10, 2018).

The Court affirmed that the claimant failed to prove sufficient evidence of permanent impairment within the thirty-six month limitation period set by Virginia Code § 65.2-708. The claimant sustained compensable injuries to her back, right leg, and left elbow on April 26, 2012. The claimant filed a claim for left leg permanency on March 9, 2017. She relied upon an evaluation of December 20, 2016 assessing that she had a 60% loss of use of the left leg. The claimant timely filed for permanent disability within the three-year period with a previous claim. However, the Court emphasized that the claimant was required to show she suffered the disability to the claimed body part within thirty-six months of the occupational injury and the medical evidence did not support such.

Res Judicata

- Levy v. Wegmans Food Mkts., Inc., 68 Va. App. 575, 811 S.E.2d 849 (2018). (Claimant's appeal to Supreme Court of Virginia dismissed for "lack of jurisdiction" on Aug. 18, 2018.)

On June 26, 2011, the claimant suffered a compensable injury by accident to her right knee which had pre-existing arthritis. She filed a claim in April 2015 seeking authorization of knee surgery. The Commission held that the medical evidence failed to show that the compensable injury played a role in the claimant's disability and the surgery was related solely to the pre-existing arthritis. On December 30, 2015, Levy filed "new" claims for a 27% permanent partial disability to the right leg and "aggravation/acceleration of [her] right knee arthritis as a compensable consequence of the June 26, 2011 injury." She relied upon the deposition of her treating physician, Dr. Stanton. A Deputy Commissioner found that the doctrine of res judicata barred the claims. The Commission affirmed, finding that while the surgery had not been a claim considered at the previous hearing, the "medical evidence supporting the need for that surgery was fully considered" and as a result "the concept of issue preclusion bars reconsideration of whether the need for surgery is causally related." The Commission agreed that whether the claimant's "pre-existing arthritis was aggravated as a compensable consequence of her June 26, 2011 injury" was "a new issue not previously litigated" but claim preclusion barred the claim because no evidence was presented which could not have been presented at the previous hearing.

The Court agreed with the Commission and summarized:

> The Commission's September 21, 2015 determination that there was no medical evidence causally linking Levy's workplace injury to her arthritis was not an invitation for Levy to create this evidence and "take another swing," but rather a plain statement that no such evidence had been presented at the hearing. At that hearing, Levy had the opportunity to offer evidence of causation for the contemplated surgery, she chose not to, and to reward her with another opportunity to do so would incentivize piecemeal litigation, undermine the finality of judgments, and multiply the number of proceedings - the very evils the doctrine of res judicata was developed to address.

Id. at 853.

The Court compared the situation to Brock v. Voith Siemens Hydro Power Generation, 59 Va. App. 39, 716 S.E.2d 485 (2011) and elaborated:

> In Brock, the claimant sought "benefits for injuries to his shoulder, back, and hips," which was later amended to include additional injuries to his head and leg. Id. at 42, 716 S.E.2d at 486. The claimant was notified by the Commission that a hearing would be held to address "all issues." Id. At this hearing, the claimant produced no evidence of injuries to any body part but his left shoulder. The claimant later attempted to bring "new" claims for injuries to his back, hip, and legs from the same accident. Id. at 43, 716 S.E.2d at 486. We reiterated Virginia's "could-have-litigated-should-have-litigated principle" as applied to compensation claims, which holds that claim preclusion bars not only the claims made in the pleadings but any claim which "'incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered.'" Id. at 46, 716 S.E.2d at 488 (quoting Lofton Ridge, LLC[v. Norfolk S. Ry., 268 Va. 377, 381, 601 S.E.2d 648, 650 (2004)]).
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> Regardless of who raised the issue, the Commission addressed causation. . . . The Commission noted in its September 21, 2015 opinion that Levy's "pre-existing arthritic condition could have been aggravated by the compensable injury and subsequent surgery, but that there was no medical opinion before it to support such a finding." Therefore, neither the issue of causation nor the evidence relayed in Dr. Stanton's deposition, concerning a condition which predated the initial 2011

> injury, may be fairly categorized as "new." Levy states that she did not depose Dr. Stanton at an earlier date because it is an expensive process. If the claimant chooses not to gather as much medical information as is necessary for the Commission to make a determination, they are gambling with their chances of success; an unwise decision, and a decision in which the courts will not act as underwriters.

Levy, __ Va. App. at ___, 811 S.E.2d at 852.

Lastly, the Court disagreed with the claimant's assertion that the Commission violated her due process rights: "an application of res judicata does not violate due process as that has already been provided by the prior litigation opportunity but, rather, 'is a fundamental concept in the organization of every jural society.' Funny Guy, LLC [v. Lecego, LLC, 293 Va. 135, 142, 795 S.E.2d 887, 890 (2017)]."

Statute of Limitations

- Campbell v. Newport News Shipbuilding & Dry Dock Co., No. 0055-18-1 (July 17, 2018).

The Court affirmed that no tolling provision saved the claimant's application from the applicable one-year statute of limitations for filing a Claim for Benefits. The claimant filed a claim in July 2016 alleging that he suffered a work-related wrist injury in 1972. He sought the payment of medical benefits. The Deputy Commissioner and the Commission denied the claim as barred by the statute of limitations and unsaved by any tolling provision. The Court agreed:

> Although a tolling provision regarding the statute of limitations for workers' compensation claims has existed in some form in the Code of Virginia since the adoption of Code § 65.1-87.1 in 1984, there was no such statutory tolling provision when the bar of the statute of limitation attached to Campbell's claim in 1973. As noted above, once the bar attached, the General Assembly was powerless to remove the bar by "retroactive legislation." Kopalchick [v. Catholic Diocese of Richmond, 274 Va. 332, 336, 645 S.E.2d 439, 441 [(2007)]. Given that Campbell's injury by accident unquestionably occurred in 1972, no statute enacted after May 1, 1973 can revive Campbell's claim.

VIRGINIA WORKERS' COMPENSATION COMMISSION

Attorney's Fees

- Rivers v. United Airlines, JCN VA02000022276 (Aug. 17, 2018).

The Deputy Commissioner awarded medical benefits and temporary total disability benefits to the claimant while also assessing an attorney's fee against the defendant pursuant to Virginia Code § 65.2-713 for failing to appear at two hearings. The Commission reversed the assessment of the attorney's fee:

> A hearing was required to ascertain the facts and determine if the claimant sustained her burden of proving a compensable ordinary disease of life. The defendant did not raise an affirmative defense that required it to present evidence to prove.
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> We deem it most consistent with the intent of the statute that we employ our discretion and not blindly assess fees characterizing in every case the defendants' failure to appear conduct as an unreasonable defense. Rather, each case should be viewed through the lens of its particular facts and procedural posture.
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> [T]he claimant had the burden of proof of demonstrating disability and the marketing of her residual work capacity. The claimant was required to bring forth evidence to prove her claim, including sworn testimony. The claimant was obliged to make such efforts regardless of the defendant's appearance or non-appearance.

(Op. 6-7.)

(Commissioner Marshall dissented: The defendant unreasonably defended the claim. The defendant's failure to appear at two hearings, to advance any defenses, to present any evidence, to call witnesses, and to challenge the claimant's medical evidence justified an award of attorney's fees.)

Certificate of Insurance

- Rivera-Cortez v. Charter Homes & Remodeling, LLC, JCN VA02000025805 (July 17, 2018).

The Commission issued an amended opinion to supersede a June 19, 2018 Opinion as the employer asserted that "the Opinion failed to state whether suspension of the $500 for fifteen days to allow it to submit proof of insurance coverage fine was affirmed or denied," and the employer submitted a Certificate of Insurance on July 13, 2018. The Commission footnoted the following regarding this issue:

> The $500 fine is suspended on the condition that the employer obtain workers' compensation coverage and files evidence of same with the Commission within 15 days of the date of this Opinion. The employer is admonished that the Certificate of Insurance submitted on July 13, 2018 is insufficient because: (1) the listed policy number corresponds with a different business entity; (2) with a different federal employer identification number and address; (3) it bears an incorrect date of issuance of November 7, 2018, a date which has not yet occurred. The Commission's records indicate the employer's policy of insurance was cancelled on March 7, 2017. Also, the Certificate indicates the insurance has defined policy limits. Virginia Code § 65.2-811 provides, "[n]o policy of insurance against liability arising under this title shall be issued unless it contains the agreement of the insurer that it will promptly pay the person entitled to the same all benefits conferred by this title . . ."

(Op. 4, n 4.)

Claim for Benefits

- Roberts v. Novant Health, Inc., JCN VA00000905384 (Apr. 25, 2018).

The claimant filed a February 26, 2016 claim stating, "This represents my claim for any workers' compensation benefits to which I may be entitled for all injuries and disabilities sustained by me on March 24, 2014 . . . ." No medical records were filed at that time. The claimant filed medical records on May 2, 2016, the most recent of which was dated January 12, 2015. She filed additional records and requested referral of the February 26, 2016 claim to the evidentiary docket on April 19, 2017. On June 1, 2017, she filed a claim alleging total disability beginning May 16, 2017. She attached a May 23, 2017 work slip. At the hearing, the claimant sought temporary partial disability

from January 1, 2016 through March 2, 2016, temporary total disability from March 3, 2016 through July 3, 2016, temporary partial disability from July 9, 2016 through May 22, 2017, and temporary total disability from May 23, 2017. The defendants objected to the claimed periods of disability before May 2017 based on Rule 1.2 of the Rules of the Virginia Workers' Compensation Commission. The Commission found that the Deputy Commissioner did not err in declining to interpret the February 26, 2016 and April 19, 2017 claims as seeking wage benefits:

> We have held generic claims seeking all benefits to which an injured employee may be entitled under the Act are not sufficient to enable the employer and insurer to determine the nature of the change in condition for which benefits are sought. . . . Some identification of benefits requested is necessary for a valid change of condition claim. . . . The generic claim filed by the claimant in February 2016 did not afford the defendants sufficient notice of the change in condition or the dates of disability sought. The additional medical evidence she filed was insufficient to provide this notice to defendants in this case.

(Op. 7-8.)

Discovery

- Garner v. Amazon.com, Inc., JCN VA00000978462 (June 8, 2018).

The claimant filed a claim seeking the payment of medical benefits and relied upon three "Physician's Statements" signed by his treating psychiatrist, Dr. James E. Sellman. Thereafter, the defendants filed a Motion to Compel regarding a subpoena duces tecum issued to Dr. Sellman's office. The defendants asserted that Dr. Sellman's office was refusing to fully comply and that they could not "fully cross-examine and/or rebut Dr. Sellman as to the basis of his opinions without all documentation and information upon which he may have relied in forming his opinions. Documents or evidence in the possession of a non-party, who is called to offer evidence at the upcoming hearing, does not fall under the scope of the work product doctrine."

The claimant filed a Motion to Quash. He maintained that he had "a vested interest in preventing dissemination of those materials which contain my mental impressions, trial strategies and theories of the case." Claimant's counsel advised, "I scheduled specific conferences with Dr. Sellman at my expense to discuss contested medical issues in the claimant's workers' compensation claim. As such he was for purposes of those interactions, in a dual role as both a treating physician and my retained expert."

By letter order dated May 29, 2018, the Deputy Commissioner denied the claimant's Motion to Quash and granted the defendants' Motion to Compel. She ordered Dr. Sellman to produce "all documents requested in the defendants' subpoena duces tecum, including any and all emails, letters, or other forms of written communication between Dr. Sellman and Attorney Davis." She further elaborated:

> [T]o the extent that Attorney Davis provided documents or information to Dr. Sellman upon which Dr. Sellman's opinion testimony is based, and if the intention is to offer Dr. Sellman's testimony, as it clearly is, then the defendants are entitled to such documents or information. Dr. Sellman's opinions may be based, at least in part, on statements made by Attorney Davis. Therefore, such information is relevant and important. The defendants cannot properly cross-examine Dr. Sellman about the basis for his opinions without having the documents upon which Dr. Sellman relied in forming his opinions. Therefore, I find that the defendants have a substantial need for written communications between Dr. Sellman and Attorney Davis and their offices. It does not appear that the defendants can obtain these written communications by other means.

(Op. 5.) The Commission denied interlocutory review.

Employee Status

- Paternite v. Allusive Cloud Factory, LLC, JCN VA02000024869 (Apr. 13, 2018).

The Deputy Commissioner found that the claimant established that he was an employee of the employer. On appeal, the Uninsured Employer's Fund maintained that the claimant was an independent contractor as the employer did not exercise the requisite amount of control over the salespeople who were free to determine how to build the vapes to suit the customer's needs. The Commission affirmed, noting that the claimant was hired as a general manager, was paid a weekly salary, followed employer-set hours, and could be terminated. The Commission stated:

> While the claimant possessed specialized skills in customizing vaping devices, the fact that an employee brings valuable knowledge and experience to the workplace does not necessarily mean he is an independent contractor. We do not find these specialized skills render the claimant outside the control of the employer, especially when he had other duties outside his role of customizing vape devices, including

> open[ing] and closing the store, cleaning, ordering inventory, and being responsible for the cash in the stores.

(Op. 6.)

Funeral Expenses

- Valencia (Deceased) v. Valencia, JCN VA00001311652 (May 22, 2018).

The decedent was installing foam insulation to the exterior of a building using scaffolding. He was wearing a safety harness, but fell to the basement level while climbing to the sixth floor. The Commission affirmed that the presumption of Virginia Code § 65.2-105 applied to the case as the decedent never regained consciousness after the accident, and the factual circumstances sufficiently showed that the only rational inference to be drawn was that the accident arose out of and in the course of the employment. Notably, the Commission reversed the Deputy Commissioner's denial of funeral expenses because the claimant failed to present documentation, such as receipts, to prove her actual expenses:

> Virginia Code § 65.2-512 provides that where death results from a compensable injury, the employer "shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000." Thus, a claimant is entitled to be reimbursed for his or her expenses in this regard. While it would be preferable to submit the receipt for such funeral expenses at the hearing, we do not find that the lack of such documentation precludes the claimant's entitlement to the statutorily mandated expenses.

(Op. 8.)

Guardian Ad Litem

- Rusk v. C.R. Smith Transp., LLC, JCN VA00001356500 (July 31, 2018).

The Commission granted interlocutory review of the Deputy Commissioner's ordering of the defendants to petition a circuit court to appoint an appropriate guardian ad litem to represent the interests of three potential beneficiaries who were minor children. The Commission held that it had the inherent authority to require the appointment of a guardian ad item, and whether to exercise the authority was within its discretion. The Commission found the appointment of a guardian ad

litem was not necessary in the case at this stage of the proceedings in the absence of legal representation of the minor children of the claimant:

> Virginia Code § 8.01-8 provides "[a]ny minor entitled to sue may do so by his next friend. Either or both parents may sue on behalf of a minor as his next friend." Rivera v. Nedrich, 259 Va. 1, 4, 529 S.E.2d 310, 311 (1999). Any person may bring a suit in the name of an infant. If it appears to the court that the suit is not for the benefit of the infant, or the person named as next friend is not suitable for the purpose, the court may dismiss the suit without prejudice or assign another person to prosecute it as next friend. Wilson v. Smith, 63 Va. (22 Gratt) 493, 505 (1872)[;] Womble v. Gunter, 198 Va. 522, 530, 95 S.E.2d 213, 219 (1956).
>
> In this case, the maternal grandparents, who are the custodians of the Rusk children, are acting as next friend for the workers' compensation claim. Darin Quann and Sue Quann have no personal financial interest in the Rusk children's claims. A court has found residing with them is in the children's best interests. Darin Quann and Sue Quann appear to be appropriate to act as next friends for Emillie Rusk, Bradley Rusk and Michael Rusk, the minor beneficiaries.
>
> When a minor or other person under a disability is a party defendant, Virginia Code § 8.01-9 (A) requires the appointment of a guardian ad litem. However, "in any suit where a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian ad litem." Va. Code § 8.01-[9] (B). The court in its discretion may appoint the representing attorney as guardian ad litem for the person under the disability. Id.

(Op. 6-7.)

Injury by Accident

- McConnell v. East Coast Gen. Constr., LLC, JCN VA02000028451 (Aug. 17, 2018).

The Commission reversed the lower denial and held that the claimant's injury arose out of his employment. The claimant, a carpenter, was standing in the driveway of a residential job site and

"[a] low cable extended from the front of the house toward the street. . . . A passing school bus caught the cable and separated it from the house. The cable hit the claimant." The Commission explained that:

> The unusually low cable was a proximate cause of the accident. It was a peculiar condition of the claimant's workplace, and it increased the risk of injury to him. . . . The unusualness of the event has no bearing on our analysis. The claimant described it as "very freaky," but most accidents are surprising or unpredictable. . . . Their surprising nature does not change the analysis.

(Op. 5.)

(Commissioner Rapaport dissented: The evidence failed to support that the claimant's employment exposed him to a heightened risk of injury or that he was engaged in an employment-related task which made it more likely that he would be struck by the cable. "The claimant was, unfortunately, in the wrong place at the wrong time which is a positional risk . . . . [T]here is no evidence . . . that the height of the cable was unusually low or any lower on the day of the accident than it had been on any other day . . . ." (Op. 7.))

- Norris v. Etec Mech. Corp., JCN VA00001317384 (June 25, 2018).

The Commission agreed that the claimant's injuries did not arise out of the employment. The claimant was driving a company vehicle home from the job site, and he fell asleep. The vehicle ran off the road and struck a tree. The claimant asserted that his work was fatiguing and contributed to him falling asleep. The Commission agreed with the lower finding that the claimant failed to prove a causal connection between the work conditions and falling asleep, such as he did not explain why he was tired, and it had been a normal work week. The Commission noted that the decision was not controlled by the actual street-risk rule: "[w]e do not read the rule so broadly as to embrace under the Act's protection every accident that occurs while driving on a street. Belying such an interpretation is the denial of benefits in cases where vehicular accidents occur for unknown reasons." The Commission recognized that the cause of the accident was known, yet "the operative question is whether driving a vehicle confronted the claimant with a risk of falling asleep. We hold that it does not. Absent affirmative evidence establishing a causal connection between the claimant's employment and his untimely slumber, his claim must be denied." (Op. 5-6.)

(Commissioner Marshall dissented: The claimant's "employment placed him in a position increasing the dangerous effects of a motor vehicle accident. The accident resulted from a hazard incident to his presence on the streets. It arose out of the employment under the street risk doctrine

and the actual risk test. An employee should not be required to prove a work related factor caused him to fall asleep while driving in the course of his employment." (Op. 7.))

- Price v. Canon Solutions Am., JCN VA00001275942 (June 22, 2018).

The Commission upheld that the claimant's injury did not arise out of the employment. The claimant repairs industrial copiers. He was replacing a component while sitting on the floor with his legs stretched out in front of him. The claimant rolled over and placed his left knee on the ground. He then placed his right foot on the floor, grabbed the copier with both hands, and stood up. He felt a pop and pain in his knee. The claimant was not holding anything in his hands when he stood up, nor was he in a confined space. The Commission found that no condition represented a work-related risk:

> The claimant was sitting down with his legs outstretched prior to attempting to arise. He did not testify that the work he was performing before arising was strenuous or required him to be in an awkward position. He was not in a confined location, nor was he holding anything in his hands when he stood up. He attempted to arise in an entirely normal fashion from a normal siting position.

(Op. 4-5.)

- Deegan v. N. Va. Cmty. Coll., JCN VA00001235732 (June 19, 2018).

The Commission affirmed that the claimant's injury did not arise out of the employment. The claimant has multiple sclerosis; thus, her left foot drags, and she walks with a cane. She walked through the entrance door and "tripped on the mat and fell into the second set of doors." The mat had a rubber-like border, and her foot caught on the lip. The claimant agreed that the mat was flat and "wasn't rolled up or anything." The supervisor stated that the rug was "a thin rubber membrane with carpet on top. And they have a tendency to bunch up." He agreed that the surface on which the rugs were placed was not a flat surface and had grates in it. The Commission explained the denial:

> [T]he mat was lying flat before the claimant's fall. There is no evidence that the mat was defective or contributed to the claimant's fall in any way. Nor is there any evidence that the grated floor on which the mat was placed was defective or contributed to the fall. The claimant presented no evidence of obstruction or

> distraction. Instead, she was simply walking with her cane when her foot caught on the rug, causing her to fall.

(Op. 5.)

The majority disagreed with the dissent's contention that the claimant's pre-existing disease caused her to drag her left foot, plus the presence of the mat upon which she tripped, implicates the settled rule applicable to idiopathic falls. However, "the claimant's accident was manifestly not an idiopathic fall because she tripped on a mat." (Op. 8.)

(Commissioner Marshall dissented: "The claimant had an idiopathic, or pre-existing, physical infirmity which contributed to the accident. She suffered from multiple sclerosis and her left foot tended to drag. Her left foot caught the rug, rumpling it and causing her to fall against a door. Given the claimant's infirmity, the employer's mat presented an increased risk of injury and the accident arose out of the employment."(Op. 10.))

- King v. DTH Contract Serv., Inc., JCN VA00001225281 (June 19, 2018).

The Commission upheld that the claimant's injuries sustained during an assault did not arise out of the employment. The claimant worked as a janitor/attendant at a rest area on the interstate. While performing his rounds, he was viciously attacked by a previous co-worker (Privott). On several occasions, the claimant had reported the co-worker's tardiness to work to a supervisor. The Commission noted that compensability did "not hinge on whether his place of employment was or was not dangerous" as the claimant was attacked by a former co-worker. The Commission found that the evidence did not prove that the assault was due to the claimant's status as an employee or because of his employment:

> [H]is assailant expressed no motive for the attack, either in person or in the written journal . . . . There is no evidence Privott expressed hostility to his workplace, his supervisor, or his former coworkers, even while being reprimanded and subsequently resigning. . . . [T]he parties stipulated[] that the assailant was under the influence of a synthetic cannabinoid at the time the assault occurred. Privott had previously had adverse reactions, including psychosis, as a result of using the substance. (Defs.' Ex. 2-27, 28)
>
> We are unable to divine a motive from the direct evidence, nor draw any reasonable inferences as to why the attack occurred. While it is possible that Privott was motivated by some lingering resentment toward his former employer or the

> claimant, on the evidence presented drawing such an inference would be to indulge in speculation.

(Op. 7.)

- McKinney v. Suburban Used Auto Parts, Inc., JCN VA00000993511 (June 14, 2018).

Citing Lysable Transport, Inc., v. Patton, 57 Va. App. 408, 419, 702 S.E.2d 596, 601 (2010), the Commission upheld that the claimant failed to prove that his injury arose out of the employment as he could not prove the cause of his accident. The Commission could not determine whether the accident arose out of the employment "[w]ithout a more detailed explanation":

> The claimant recalled making a bank deposit for the employer not long before the motor vehicle accident. . . . The claimant remembered driving normally in his lane. He next recalled seeing the grill of the dump truck and hearing a helicopter. He then remembered waking up in the hospital. The claimant believed he lost consciousness and veered into the path of the truck. The police report confirmed the route of the claimant's car. There were no skid marks on the road and the officer documented the path of his car traveling in the truck's lane before making the head-on impact. The claimant was wearing his seatbelt. The claimant could not explain why he lost consciousness. The medical records reflected the claimant lost consciousness but do not indicate whether this was before or as a result of the accident.

(Op. 2-3.)

- Romano v. Univ. of Va. Health Sys., JCN VA000001353632 (June 8, 2018).

The Commission affirmed that the claimant's injury did not arise out of the employment. The claimant was crossing a road and her right foot hit the inside, left portion of a manhole cover, and she turned her foot. The outer rim of the manhole was flush with the road surface, and there was a "depression" on the inside of the manhole cover. The Commission held that the manhole cover was not sufficiently unusual or defective to establish it as a particular risk of her employment. The Commission noted that there was no evidence offered regarding the actual height difference between the street and the manhole cover, and the photograph showed only an insignificant height difference.

- Lamonds v. Lake Ridge Parks & Recreation, JCN VA00001268665 (June 6, 2018).

The Commission agreed with the Deputy Commissioner that the claimant's assault did not arise out of his employment as a maintenance worker. Two men came to the apartment complex to tow away a vehicle belonging to a co-worker. The claimant parked his truck to block the tow truck's exit, and the men assaulted the claimant. The Commission emphasized that the claimant's "job involved maintenance, and no evidence established that he was involved in any employment-related task when he blocked the exit or attempted to investigate the towing away of a co-worker's personal vehicle." (Op. 4.)

- Powell v. Merck & Co., Inc., JCN VA00001233899 (May 4, 2018).

The Commission upheld that the claimant's injury did not arise out of the employment. The employer required the claimant to change from his personal clothes into new scrubs provided by the employer each time he returned to work from breaks. After the claimant's last break around 2:00 p.m., he heard a pop and felt sharp pain in his left knee as he put his right leg into the scrub pants. The Commission found that there was no causal link between the employer's requirement to change clothes and the claimant's injury:

> The evidence in the record is insufficient to show a condition of his employment caused his injury. His testimony does not reflect he was in an awkward or unusual position at the time of his injury. Instead, his testimony reflects he does not know what occurred when his knee popped as he was putting on scrub pants in a normal manner. While it may be true that the claimant was required to his change his clothes multiple times a day, there is no evidence that his doing so created a heightened risk of injury.

(Op. 4.)

- Hall v. Abbott Labs., JCN VA02000028517 (Apr. 11, 2018).

The Commission upheld that the claimant's injuries arose out of the employment. The claimant was a chemist, and she climbed partially inside a four-foot high tank to obtain a sample. The defendants asserted that the claimant was simply bending, turning, or twisting when she injured her knee. The Commission disagreed:

> The claimant was not merely bending, but had to both bend at the waist and crouch. She had a bottle in her left hand and needed to use the other hand to operate a spigot. Taking the sample required her to be in an awkward position and perform awkward movements. Because the tank which she was drawing the sample from was small,

> she had to perform her task in a confined space, which has been found to constitute a risk of employment. . . . Lastly, the event that led directly to the claimant's knee injury—being startled by the sound of metal hitting metal behind her and twisting to look—constitutes yet one more employment-related risk the claimant was exposed to.

(Op. 4-5.)

- Howard v. S. L. Nusbaum Realty Co. Inc., JCN VA00001288113 (Mar. 30, 2018).

The Commission affirmed the lower finding that the claimant failed to prove a compensable injury by accident. The claimant testified to moving a minivan stuck in mud onto solid traction with some co-workers. He stated that "we kept on pulling and pushing and we did that for like 45 minutes . . . while it was happening, I felt the strains and the pains in my body." After the claimant's lunch break, his back symptoms increased, and he had shoulder pain. Next, he bent over to finish a caulking task and felt a sharp back pain. Medical records reported that the claimant "was trying to help get a van stuck in mud out with fellow coworkers. Pushing, pulling and trying to move it. Started to feel discomfort in back and right shoulder," and "he was trying to free a van from the mud. Pushing and pulling it, developed symptoms afterwards." A third history noted that the claimant "was trying to lift a van and push it out of [mud] while it was stuck. He did not have a distinct fall or injury but afterwards he said the right shoulder hurt the low back hurt and the right knee." The Commission found the case analogous to Kim v. Roto Rooter Services Co., No. 1053-16-4 (Va. Ct. App. Mar. 7, 2017), and elaborated upon its denial:

> [T]he claimant failed to establish an obvious, sudden mechanical or structural change in the body or a causal connection between the incident and the bodily change alleged. Notably, the claimant consistently conveyed that he continuously pulled, pushed, and lifted the vehicle over a span of time. The claimant stated that during these actions he "felt the strains and the pains in my body" and reported having "twinges." He took a lunch break, and thereafter, while bending over to complete a task, he suffered distinctive back pain. Correspondingly, no health care provider indicated a specific bodily change resulting from a particular incident. . . . See Daggett v. Old Dominion Univ., JCN VA00001318459 (Mar. 8, 2018) (Injury did not result from an identifiable incident or sudden precipitating event: the claimant engaged in repetitive movements of lifting and turning boards for 60 to

> 90 minutes and could not pinpoint a particular movement or action that resulted in symptoms.).

(Op. 5-6.)

(Commissioner Marshall dissented: The claimant established a compensable injury by accident because the time spent pulling, pushing, and lifting the van was discrete enough under Riverside Regional Jail Authority v. Dugger, 68 Va. App. 32, 802 S.E.2d 184 (2017), and Van Buren v. Augusta County, 66 Va. App. 441, 787 S.E.2d 532 (2016), to constitute an identifiable incident.

Marketing Residual Work Capacity

- Simmons v. Bath Cnty. Sch. Bd., JCN VA00001321893 (May 1, 2018).

The claimant, a teacher's aide, sought wage loss benefits while released to sedentary duty from July 14, 2017 until August 8, 2017 when her employment with the employer resumed. The Commission held that the claimant did not have a duty to market during this brief time period. The Commission noted:

> Our analysis requires that, against the claimant's obligation to take reasonable steps to mitigate the employer's obligation to pay wage loss benefits, we weigh the corresponding risk that the employer's duty to pay is predicated upon the claimant engaging in a useless act. If we excuse marketing for too long a period, then we render meaningless the claimant's duty to the employer. If we demand marketing for too brief a period, then for the lack of a futile exercise, we frustrate the Act's humanitarian ideals by the arbitrary denial of an intended benefit.

(Op. 5.)

Medical Treatment

- Seifried v. Karr Constr. Inc., JCN VA00001054947 (July 30, 2018).

The Commission upheld the lower determination that the defendants failed to prove that the claimant unjustifiably refused medical treatment. The claimant's treating physician "formally discharged" the claimant for non-compliance with an opioid agreement when he refused drug screening. The claimant's neuropsychologist explained that the claimant's refusal to take the drug

screen test was causally related to his traumatic brain injury. The medical provider opined, "He reports a strong desire to comply with treatment, but may not be consistent in doing so secondary to his cognitive dysfunction." The claimant also cured any refusal by promptly contacting the neuropsychologist as referred to by the treating physician. The Commission reversed the Deputy Commissioner's ordering of a life care plan because the parties did not request such relief. The Commission found that the defendants were not responsible for the payment of home attendant care. The claimant sought reimbursement for in-home care provided by his girlfriend. The treating physician opined that the claimant needed daily supervision to take medication, paying bills, and food preparation. The Commission held, "The prescribed care, which includes reminders to take medication, meal preparation, and general companionship, does not constitute 'necessary medical attention.' . . . [W]e are unable to find this type of care is beyond the scope of normal household duties." (Op. 10.) The Commission found the case to be analogous to Graves v. E.C. Management Services, VWC File No. 209-13-17 (Feb. 26, 2010), in that the claimant "can typically function in his home without assistance." (Op. 13.)

(Commissioner Marshall dissented in part: "[T]he claimant's evidence satisfied the four conditions for employer responsibility for home health care set forth in Warren Trucking Co. v. Chandler, 221 Va. 1108, 1116, 277 S.E.2d 488, 493 (1981)." (Op. 14.))

- Peralta v. Benedictine Sisters of Va., JCN VA00001072042 & JCN VA00001136456 (June 6, 2018).

The claimant sustained a compensable injury by accident on May 17, 2015 and a second injury on November 7, 2015. The claimant had been treating with Dr. Lotfi for the first injury. After the second injury, the employer suggested that she see a doctor and did not provide a panel of physicians. She saw a Dr. Qureshi who then referred her to Dr. Sabet. The defendants never offered a panel of physicians and maintained they were not required to provide such. The Commission emphasized that the Act plainly mandates that "[a]s long as necessary after an accident, the employer shall furnish . . . a physician chosen by the injured employee from a panel of at least three physicians selected by the employer." The Commission disagreed that the case of Dawson v. York County, VWC File No. 174-77-73 (June 20, 1997), absolved an employer "from offering a second panel for a subsequent injury" or stood for the principle that "an injured employee must continue treating with a previously selected physician from a prior injury." (Op. 7.)

- Cooper v. Quik Cash 211, JCN 2159285 (May 10, 2018).

The Commission upheld the denial of the payment of concierge fees charged by the doctor and reimbursement to the claimant for concierge fees she paid to the doctor. The treating physician described his concierge practice model as providing better individual attention to patients, which

he found essential in managing chronic pain. All of his patients who were managed for chronic pain with controlled substances participated on a concierge basis. The Commission found that the concierge fees were not a reasonable and necessary cost of medical treatment. The Commission noted, "The Deputy Commissioner's solution to allow the claimant to opt to pay the concierge fees herself or request a pain management panel . . . is an appropriate compromise."

- Castellanos v. MLSC, LLC, JCN VA02000027036 (May 4, 2018).

The Commission upheld that a panel of physicians offered twenty-four days after the date of the accident was reasonable as it was offered "six days after learning that the claimant needed specialized care." (Op. 5.) The Commission detailed the timeline: "The evidence reflects the claimant was able to seek treatment at Concentra. When the claimant recognized his symptoms were not resolving the employer responded with an offer of a panel of orthopedic physicians after the claimant informed the employer he was not satisfied with his treatment at Concentra, which indicated a need for specialized care." Id. The claimant's action to seek treatment with another physician, Dr. Farooque, prior to the offer was reasonable, and the defendants were responsible for that one treatment. However, after the offering of the panel, the claimant unreasonably refused the panel by not selecting a physician and continuing to see Dr. Farooque.

- Sojka v. City of Radford, JCN VA00001135103 (May 3, 2018).

The Commission affirmed that the claimant sustained her burden of proving causally-related incapacity through the assessment of her treating nurse practitioner. The claimant had suffered a compensable traumatic brain injury. The nurse practitioner restricted the number of hours the claimant could work per day. The Commission noted that the nurse practitioner "consistently evaluated the claimant and . . . considered [her] complaints of multiple increased symptoms when working more than six hours per day." (Op. 8.) Also, the claimant testified to her inability to complete eight hours of work, and the Deputy Commissioner found no reason to discount her testimony. Lastly, an evaluating psychologist "instructed the claimant to discuss the issue with her actively treating health care provider . . . . The only definitive opinion on the subject of the number of hours per day the claimant could work is the one expressed by" the nurse practitioner. (Op. 8.)

Notice of Accident

- Franchi v. Eaton Elec. Holdings, LLC, JCN VA00001309713 (May 1, 2018).

The Commission held that the claimant provided actual notice of his injury through a foreman or other superior officer. The claimant slipped and fell exiting a truck. The co-worker driving the

truck assisted him immediately thereafter. The co-worker was not a designated supervisor; however, he had seniority and instructed other employees. The Commission explained that the co-worker "acted as a foreman or superior officer in that he provided work assignments to the crew and oversaw their work. The claimant understood that he could report accidents to [him]." (Op. 4.) The defendants also failed to show any prejudice by a lack of timely written notice, and the claimant did not seek medical treatment until after reporting the accident.

Permanent Partial Disability Benefits

- Guendel v. Ruan Transport Corp., JCN VA00001184667 (July 31, 2018).

The Commission affirmed the Deputy Commissioner's determination that the Estate of Daniel Guendel was not entitled to receive compensation through Virginia Code § 65.2-503(B)(11) for the loss of use of Mr. Guendel's right arm.

Mr. Guendel filed claims alleging that he suffered an injury by accident on March 22, 2016 and seeking compensation. He filed a claim on June 2, 2017 requesting permanent partial disability benefits for a 27% loss of use of his right upper extremity. He attached a rating from a Functional Capacity Evaluation performed on March 1, 2017. Mr. Guendel died on June 25, 2017 from a cause unrelated to his work injury. Thereafter, the estate requested permanent partial disability benefits. The defendants agreed that Mr. Guendel injured his right upper extremity during the occupational accident. The parties agreed to a closed period of wage loss benefits. However, at the time of Mr. Guendel's death, the insurer had not executed the agreement forms. Mr. Guendel had no dependents. The Commission agreed with the Deputy Commissioner's denial based upon the application of Code § 65.2-511:

> [T]here was no award for benefits under Virginia Code § 65.2-503 prior to death. We cannot conclude Mr. Guendel was entitled to those benefits before he died; thus we cannot award them to his estate after his death. Virginia Code § 65.2-511 provides this compensation is payable after death only to statutory dependents. See Thomas Refuse Serv. v. Flood, 30 Va. App. 17, [21], 515 S.E.2d 315, 317 (1999); Runyon v. CBS Constr. Co., No. 1720-10-2 (Va. Ct. App. Feb. 22, 2011) (finding Code § 65.2-511 only authorizes an award to a statutory dependent). Mr. Guendel did not have any statutory dependents. As a result, any compensation which might

have become payable under Virginia Code § 65.2-503 cannot instead be directed to his estate.

(Op. 3-4.)

Permanent Total Disability Benefits

- McCoy v. Paramont Coal Co. Va. LLC, JCN VA02000020271 (Apr. 11, 2018).

Claimant proved entitlement to permanent total disability benefits for pneumoconiosis under Virginia Code § 65.2-504(A)(4). The Commission noted that the "claimant ceased working in coal mines after receiving Dr. Raj's advice to do so on September 21, 2016. Dr. Raj's report excluding the claimant from coal mining in a dusty environment" and evidence showing that he "has a moderate obstructive lung defect, a moderate to moderately severe restrictive lung defect, a moderate decrease in diffusing capacity, and moderate shortness of breath requiring bronchodilators and oxygen therapy. He has documented stage one pneumoconiosis." (Op. 11.)

Referral to Hearing Docket

- Allen v. Cnty, of Henrico Schs., JCN VA00001254534 (May 1, 2018).

On November 18, 2016, and October 4, 2017, the Commission entered awards pertaining to the awarding of medical benefits and wage loss benefits for the claimant's compensable injury. By application filed on February 8, 2018, the defendant requested an award for permanent partial disability on behalf of the claimant. The defendant submitted: (1) a functional capacity evaluation dated October 4, 2017 ordered by the claimant's treating physician, Dr. Sanjay Desai, and (2) an unexecuted Award Agreement for a 2% loss of use award for the left arm. The claimant opposed the docket referral and asserted that the permanent loss claim was premature. She attached: (1) a Demonstrated Functional Capacities Form signed by Dr. Desai on October 19, 2017, (2) an Industrial Rehabilitatio Services' Impairment Evaluation Summary signed by Dr. Desai October 19, 2017, (3) a medical note dated July 6, 2017, and (4) Dr. Desai's October 19, 2017 note releasing the claimant from his care. Relying on the plain language of Virginia Code § 65.2-702, the Commission concluded that, "the defendants may request a hearing to determine their rights and responsibilities under the Act after the Commission has entered an Award for compensation but where there is no open Award." (Op. 3.)

Virginia Code § 65.2-702 provides:

> A. If the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this title, or if they have reached such an agreement which has been signed and filed with the Commission and compensation has been paid or is due in accordance therewith and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Commission for a hearing in regard to the matters at issue and for a ruling thereon.

Selective Employment

- Ratcliff v. Workforce Unlimited, LLC, JCN VA00000935460 (June 19, 2018).

The Commission affirmed the termination of the claimant's outstanding award of wage loss benefits based upon his justified termination from selective employment. The claimant was working at a Goodwill store. He took a jacket outside of the shop and into his vehicle. He stated that he was using the jacket to ward off rain as he went to his truck to retrieve medication. He said that he forgot the jacket and did not return it. The claimant was terminated for cause on the grounds of misusing, destroying, or stealing property of a client. The claimant defended that his compensable traumatic brain injury rendered him distracted, cognitively deficit, and lacking memory. He asserted that these problems resulted in the misappropriation of the jacket, and that he did not voluntarily or knowingly keep the garment.

The Commission held that the evidence established that the claimant "was responsible for such wrongful act" and declined to "find that he merely forgot to return the jacket." The Commission found that the claimant simply did not establish "that the symptoms of his traumatic brain injury were causative factors for the incident and/or failure to bring the merchandise into the store upon his return from the truck." (Op. 7.)

(Commissioner Marshall dissented: The claimant's "work-related traumatic brain injury contributed to his termination" as "the claimant's use of a jacket . . . and act of leaving it in his truck, were not voluntary. (Id.)

- Norman v. Taco Bell, JCN VA00001306338 (May 10, 2018).

The Commission agreed that the employer made a bona fide offer of selective employment which the claimant unjustifiably refused. The Commission found that the employer provided sufficient

information about the light-duty job offer to the claimant, i.e., informing her that she would work the cash register and have a high chair to accommodate her restrictions. The Commission noted that any confusion about her work restrictions were clarified: "[T]he text messages and the hearing testimony show, as of March 23, 2017, the employer had a written copy of the updated restrictions through the fax sent by the claimant, and the employer was willing to comply with all work restrictions and work around the claimant's therapy schedule." (Op. 7.)

(Commissioner Marshall dissented: "The terms and conditions of the alleged light duty offer lacked sufficient specificity . . . The employer's generalized statements proposing accommodations did not constitute a bona fide offer of selective employment." (Op. 9.))

Statute of Limitations

- Freeman v. Miller Oil Co., JCN VA00000789220 (July 2, 2018).

The Commission upheld that the claimant's claim for wage loss benefits was barred by Virginia Code § 65.2-708. A medical benefits award was entered on June 9, 2015, regarding the claimant's occupational accident of May 24, 2013. Accordingly, the statute of limitations of Section 65.2-708 applied to, and barred, the claim for wage loss benefits filed on August 24, 2016. A de facto award was properly not imposed. The defendants voluntarily paid wage loss benefits for several months after the two-year statute of limitations had expired. The claimant did not establish detrimental reliance upon the employer's voluntary payment. The evidence did not show that the defendants intended to waive their right to a statute of limitations defense by the mere payment of the voluntary wage loss benefits. The doctrine of imposition should not be applied. The claimant was not totally disabled until after the statute of limitations had run, and the Commission declined to attribute the lack of medical evidence to the defendants' litigation of the claim.

- Brown v. Ford Motor Co., JCN 224750 & JCN 2281317 (June 14, 2018).

The claimant sustained a compensable injury by accident to his right knee on July 26, 2005 (JCN 2247540). The defendant paid medical benefits, temporary total disability benefits from September 25, 2005 through November 27, 2005, and temporary partial disability benefits from November 28, 2005 through March 20, 2006. The claimant sustained a second compensable injury by accident to his left knee on March 21, 2006 (JCN 2281317). Following this incident, the defendant paid medical benefits and 500 weeks of temporary total disability benefits through February 17, 2017. The claimant filed claims in October 2016 alleging a change in condition of the right knee. He sought the commencement of temporary total disability benefits for the right

knee injury beginning when indemnity benefits were exhausted regarding the left knee (February 17, 2017).

Virginia Code § 65.2-506 provides:

> If an employee receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries . . . . [I]f, at the time of the second injury, he is receiving compensation under the provisions of § 65.2-502, then no compensation shall be payable on account of the first injury during the period he receives compensation for the second injury.

The Commission upheld that the statute of limitations of Virginia Code § 65.2-708 barred the claim as the claimant did not file a claim seeking additional wage loss benefits for his first injury within twenty-four months of the date of last receipt of compensation (March 20, 2006) for that first injury and that the doctrine of imposition is inapplicable. (The Deputy Commissioner dismissed the claimant's argument that he was "prohibited" from timely filing his change in condition as it would have been dismissed due to the application of Virginia Code § 65.2-506.)

Temporary Total Disability Benefits

- Davis v. Bon Air Juvenile Corr. Center, JCN VA00001333182 (June 22, 2018).

The claimant injured his left knee on May 5, 2017. He underwent surgery on May 17, 2017. The claimant sought wage loss benefits four days in May and six days June. He testified to the doctor telling him to stay home and recover and did not provide a specific date to return to work. The Commission held that one could infer total disability from surgery in some cases without an express statement from the doctor: "[W]e find it reasonable to conclude from the claimant's testimony, his injury, and the extent of his post-operative care that he established entitlement to disability benefits for a brief period of recovery time." (Op. 4.)

- Asante v. Goodwin House Alexandria, JCN VA00001335038 (June 21, 2018).

The Commission affirmed the awarding of temporary total disability benefits effective August 9, 2017. The claimant had an injury on May 21, 2017. She had returned to light duty as of July 14, 2017. On August 9, 2017, her physician reviewed the claimant's MRI scan showing disc ruptures and wrote, "Pt should continue to not work for the next 6 weeks," and "patient will remain off

work starting today and she will remain off work for the next 6 weeks." (Op. 4.) Defendants argued that the physician was not aware that the claimant was working when she saw him. The Commission disagreed and held that the doctor's statements that the claimant will "remain" out of work or "continue" out of work do not undermine the total disability claim where previously the claimant was on light duty restriction.

- Williams v. Briggs Home Health Agency LLC., JCN VA02000024788, JCN VA02000024785 & JCN VA02000024790 (June 1, 2018).

The claimant sustained multiple injuries, including a traumatic brain injury, as a result of assaults occurring on May 26, 2016 and May 31, 2016. The Commission held that where there is concurrent total disability for two accidents, the payment of benefits will be assigned to the later claim. The claimant is not entitled to two concurrent temporary total disability payments, and the employer is not entitled to credit one payment against two awards.

Willful Misconduct

- Mailloux v. Am. Transp., JCN VA02000022106 (Apr. 9, 2018).

The Commission reversed the Deputy Commissioner and found that the claimant's claim was barred by his willful misconduct. The claimant was a bus driver transporting riders. The claimant was not wearing his seatbelt, had an accident, and was thrown from the vehicle. The Commission explained its holding:

> This claimant's failure to wear his seatbelt in this case was entirely willful. He knew of his obligation to wear the belt and that the seatbelt was a safety appliance designed to protect him from being thrown from his seat in the event of an accident. He drove the bus with knowledge that he was not wearing the seatbelt. These facts are undisputed. The question confronting the Commission is not, therefore, whether the claimant's failure to employ the seatbelt was willful but whether it was excused under the circumstances presented.
>
> The issue before us is not whether we agree the claimant was justified in leaving the area in front of the bar without fastening his seatbelt due to fear of a ticket, essentially risking a ticket for violating a statute to avoid a ticket for a brief delay in complying with a police officer. If the exigencies of the moment justified the claimant's delayed compliance, it did not excuse his compliance in perpetuity. He had an affirmative obligation to take the necessary steps to fasten his seatbelt.

> If that meant finding a safe place to stop to fasten his seatbelt, then that is what he was obligated to do. Even so, we are unable to reconcile his testimony of driving through light traffic, necessarily affording him an opportunity to take the few seconds necessary to employ his seatbelt, something familiar to anyone who operates a motor vehicle. Yet, he failed to comply for a period of over one hour.

(Op. 7.)

Next, the Commission held that the defendants proved that the claimant's injuries were a direct consequence of his failure to comply with the employer's rule and the statutory mandate:

> It is manifest that the seatbelt is intended to secure the rider to the seat, and the claimant admitted that he suffered no injury prior to being thrown from the driver's seat of the bus. (Tr. 79.) From the driver's seat he was thrown to the passenger side of the bus. He subsequently was ejected from the bus entirely and regained consciousness under the hood and still running engine. Consequently, we find persuasive and preponderating evidence establishes that the claimant's injuries were directly the product of his failure to wear his seatbelt. We do not deem it necessary to assess what injuries the claimant may have suffered had he been wearing his seatbelt. Neither does the language of Virginia Code § 65.2-306 compel us to engage in this speculative analysis.

(Op. 9.)

(Commissioner Marshall dissented in part: "The conclusion that the claimant's failure to wear a safety belt was the cause of his injuries is particularly speculative. . . . [I]t was unreasonable to conclude the claimant would have suffered fewer or no injuries if he had been wearing a seatbelt. This was a severe accident. We cannot conclude his injuries were the proximate cause of being thrown about in the vehicle or ejected from it. (Op. 11-12.))