

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

03/17/99

**Reversed by the Court of Appeals at  
Record No. 0895-99-2 (February 29, 2000)(unpublished)**

HAROLD E. MCGOWAN, Claimant

Opinion by TARR  
Commissioner

v. VWC File No. 643-186

SAFEWAY STORES, INC., Employer  
SELF INSURED

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Review on the record before Commissioner Tarr, Commissioner Diamond and Commissioner Dudley in Richmond, Virginia.

This case is before the Commission on the employer's request for Review of the Deputy Commissioner's October 5, 1998, Opinion that it is responsible for treatment given by Dr. John W. Hall, Jr., D.C. The employer alleges that the Commission does not have jurisdiction over the medical expenses at issue. For the reasons stated, we find that the employer is responsible.

Harold E. McGowan was injured on October 22, 1979, while working for Safeway, Incorporated when he slipped and fell. His claim was accepted as compensable and the parties submitted a Memorandum of Agreement from which the Commission entered an Award providing for temporary total benefits from October 29 through November 4, 1979.

The Memorandum of Agreement stated that the claimant sustained "bruised shoulder, lac (?) forehead" in his accident.<sup>1</sup> The treatment for which payment is sought now was to the claimant's neck and back. The employer argues that we do not have jurisdiction to order payment because claims for injuries to the neck and back never were filed with the Commission within two years of the date of injury. The employer asserts that the Deputy Commissioner's Opinion requiring payment for treatment to the neck and back is void ab initio.

The employer's jurisdictional challenge appears to be based on the holding in Shawley v. Shea-Ball Construction Company. 216 Va. 442, 219 S.E. 2d. 849 (1975). In Shawley, the Supreme Court held that the Compensation Act requires a claimant assert "any claim that he might have for any injury growing out of the accident" within the limitations period.

In Shawley, the Supreme Court distinguished between injuries that are attributed to the accident itself and injuries that occur as a consequence or result of the injuries received in the accident. The Shawley court affirmed the Commission's holding that claims for injuries received in the industrial accident to body parts not identified on the

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<sup>1</sup>The Memorandum of Agreement is not in our file. For the purposes of this Opinion, we have relied on the employer's representation of what is stated on that form.

Memorandum of Agreement were time-barred.

We need not decide whether Shawley controls the present dispute because the employer's jurisdictional challenge is barred by the doctrine of res judicata.

In his June 7, 1995, application, the claimant filed a Claim for Benefits to require the employer to pay for treatment given by Dr. Hall in 1994 and 1995. The employer refused to pay and in its statement for the on-the-record hearing said "I have enclosed copies of our most recent medical reports from Dr. John W. Hall and would (sic) to advise the Commission that we are questioning causally related medical care, excessive medical care and reasonable and necessary medical care. (September 22, 1995, letter to the Commission from Terry J. Riddick, emphasis added.)

In Bates v. Devers, 214 Va. 667, 202 S.E.2d. 917 (1994), the Virginia Supreme Court discussed the four res judicata pleas: merger, direct estoppel, bar and collateral estoppel. As to bar, the Court noted:

Res judicata-bar, is the particular preclusive effect commonly meant by use of the term 'res judicata'. A valid, personal judgment on the merits in favor of defendant bars relitigation of the same cause of action, or any part thereof which could have been litigated, between the same parties and their privies.

The barring of a cause of action 'which could have been litigated' is not directed to an unrelated claim which might

permissibly have been joined, but, to a claim which, if tried separately, would constitute claim-splitting. 214 Va. at 670 - 671, 202 S.E.2d. at 920 - 921. (Citations omitted).

The employer's current argument, in effect, is that the Commission does not have jurisdiction because the neck and back treatment is not causally related to the shoulder and forehead injuries listed in the Memorandum of Agreement. This argument is so related to its 1995 defense that Dr. Hall's treatment to, among other areas, the claimant's neck and back was not causally related medical care, that it is barred by the doctrine of res judicata. Although it is not the exact same defense, we find the present defense is barred because it could have been litigated in its 1995 defense and, as in Bates, the present defense and the 1995 defense are claims which, "if tried separately, would constitute claim-splitting."

While it is true that the question of subject matter jurisdiction may be raised at any time, the principle of res judicata commands that the defense may be presented and decided only once. East v. Piedmont Manufacturing Co., VWC File No. 152-34-77, (June 4, 1996, aff'd sub nom. Piedmont Manufacturing Company v. East, Record No. 1546-96-3 (February 25, 1997) (Unpublished).

For these reasons, we AFFIRM the Deputy Commissioner's

decision.

APPEAL

This Opinion shall be final unless appealed to the  
Virginia

Court of Appeals within thirty days.

cc: Safeway, Inc.  
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