VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Nov. 19, 2019

JESSICA M. BAYNE v. HORIZON BEHAVIORAL HEALTH
KEY RISK INSURANCE CO, Insurance Carrier
KEY RISK MANAGEMENT SERVICES, Claim Administrator
Jurisdiction Claim No. VA00001339173
Claim Administrator File No. 17015679
Date of Injury: May 19, 2017

Bradford M. Young, Esquire
For the Claimant.[1]

Amanda Tapscott Belliveau, Esquire
For the Defendants.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's July 9, 2019 Opinion finding that she did not sustain a compensable injury by accident.[2] We AFFIRM.

I. Material Proceedings

The claimant, a clinical mental health counselor, contends she suffered an injury to her back while attempting to settle an agitated eight-year old child in a "calm down room." She testified that the child charged into her some ten to fifteen times as she stood with her back against

[1] John T. Cornett, Jr., Esquire, represented the claimant at proceedings before the Deputy Commissioner.

[2] The defendants also filed a request for review and assigned as cross-error the Deputy's failure to address the additional defenses asserted. In their written statement they clarified that the request was "made for procedural reasons to preserve the alternative defenses of the defendants in the event of a reversal of the compensability determination." (Defs.' W.S. 4.) As we are affirming the Deputy's denial of the claim, we will not address the defenses raised by the defendants on review, but note they are preserved in the event of a reversal by the Court of Appeals of Virginia.

the exit door. As a consequence, she alleges her back was pushed into the door handle precipitating the onset of sharp lower back pain that was "completely different" than that from previous back injuries for which she had undergone multiple surgeries. (Tr. 22.) For her injury she sought a medical award and temporary total disability from May 22, 2017 through September 22, 2017.

Pertinent to this review is the denial that the claimant suffered an injury by accident arising out of and in the course of her employment. After reviewing the testimony and evidence in the record, the Deputy Commissioner denied the claim for the following reasons:

> In the present case, we do not find the claimant has met her burden of showing a sudden mechanical or structural change in the body. Dr. Vanichkachorn, who treated the claimant and performed surgeries on her before the May 19, 2017 accident, did not relate the claimant's symptoms to the May 19th accident. He agreed the diagnostic studies taken before and after the May 19th accident did not show any structural or mechanical change as a result of the accident. While Dr. Julius related the claimant's symptoms to the May 19, 2017 accident, he also noted in his deposition that he saw nothing on the EMG or MRI to explain the incontinence. In addition, Dr. Andrews, who performed the IME, also noted the objective testing did not show any explanation for the claimant's back and leg pain or her incontinence. Given Dr. Vanichkachorn's treatment of the claimant both before and after the accident, we find him to be in the best position to evaluate the claimant's medical condition and thus, accord his opinion more weight. We are aware that a medical opinion of causation is not necessary to prove a compensable injury. However, we observed the claimant closely at the hearing and found her presentation to be more for a dramatic effect than for credibility. We also note the claimant [testified] her back felt fine on the day of the accident, however, the [chiropractic] records indicated the claimant had back pain, for at least one week prior to the accident, and that pain was a 6 or 7 on the pain scale. Given this evidence, we deny the claimant's Claim for Benefits.

(Op. 10-11.)

The claimant filed a timely request for review and argues the Deputy Commissioner erred by not finding she sustained an obvious sudden mechanical or structural change to her body as a result of the workplace incident of May 19, 2017. She also contends the defendants failed to

introduce contradictory witness testimony regarding the incident and that the medical records indicate the incident resulted in a sudden structural or mechanical change to her body.

II. Findings of Fact and Rulings of Law

"The burden is upon a claimant to prove by a preponderance of the evidence that [s]he sustained a compensable injury." *Va. Dep't of Transp. v. Mosebrook*, 13 Va. App. 536, 537 (1992) (citing *Woody v. Mark Winkler Mgmt., Inc.*, 1 Va. App. 147, 150 (1985)). In order to prove an injury by accident, the claimant must demonstrate "(1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change." *Hoffman v. Carter*, 50 Va. App. 199, 212 (2007) (citing *Chesterfield Cnty. v. Dunn*, 9 Va. App. 475, 476 (1990)). "[A]n aggravation of symptoms, without evidence of a sudden mechanical change in the body, is insufficient to qualify as an injury caused by a compensable accident." *Adu-Gyamfi v. Autostrade Int'l*, JCN 189-61-18 (Jan. 16, 2001), *aff'd*, No. 0382-01-4 (Va. Ct. App. June 26, 2001). For example, in *Jones v. Walgreen Co.*, JCN VA00001145400 (June 19, 2017), a claimant was diagnosed with a lumbar strain that aggravated a pre-existing condition. However, "imaging revealed no acute change or fracture in the claimant's lumbar region," and benefits were denied because neither the strain nor the aggravation caused "a mechanical change to the claimant's lower back." *Id.*

In the present matter, the claimant argues that the medical evidence when considered alongside her testimony, demonstrates that she sustained a mechanical or structural change to her back. We disagree and find the Deputy Commissioner's conclusions substantiated by the evidentiary record.

We first note the absence of evidence that the claimant suffered a mechanical change necessary to the finding of a compensable injury. The first medical record detailing the claimant's May 19, 2017 accident is the May 22, 2017 Attending Physician's Report which indicates the claimant suffered muscle spasms and a "strain of low back secondary to injury." However, x-rays taken after the incident showed "no acute fracture," and when compared with earlier imaging studies they indicated that "all fusion hardware is intact and in proper placement." (Cl.'s Ex. 1-2.)

An August 30, 2017 record prepared by Dr. Jed Vanichkachorn indicates that the claimant sustained a sprain in the lumbar region on May 19, 2017. Dr. Vanichkachorn has treated the claimant since 2014 and performed two back surgeries. However, when he compared diagnostic studies taken before and after the May 19, 2017 incident he found "no indication of any structural or mechanical change." (Defs.' Ex. 1-98.) Dr. Vanichkachorn subsequently opined that the claimant "did not sustain a new or acute injury" due to the workplace accident, and that any ongoing symptoms were related to her prior back surgeries. (Defs.' Ex. 1-102.) Because of his long history of treating the claimant and his familiarity with her condition, we deem Dr. Vanichkachorn's opinion entitled to substantial weight.

The claimant relies upon the opinion of Dr. Anthony D. Julius, who testified in a June 4, 2019 deposition that she suffered an injury "that may have exacerbated any pain that may have already been there." However, Dr. Julius stated that he would defer to Dr. Vanichkachorn's opinion regarding whether the claimant sustained a new injury.

The claimant also asks us to consider her testimony regarding the incident, which she claims is "unrebutted and unimpeached." (Cl.'s W.S. 17.) She argues that she has provided a consistent history of the May 19, 2017 incident and that it resulted in increased pain to her back.

However, the Deputy Commissioner "observed the claimant closely at the hearing and found her presentation to be more for a dramatic effect than for credibility." (Op. 11.) When "the commission does not follow the deputy commissioner's findings when these findings are based on a determination of a key witness's demeanor or appearance in relation to credibility, the commission must offer a rationale for its reversal and demonstrate on the record how the commission found the evidence credible." *Goodyear Tire & Rubber Co. v. Pierce*, 9 Va. App. 120, 122 (1989).

After reviewing the record as a whole we find no such rationale for reversing the Deputy's credibility determination. We first note that during a May 2, 2016 medical appointment she claimed that she suffered an exacerbation of her symptoms when a student "bodyslammed" her into a door, causing her back to strike a horizontal door bar. (Defs.' Ex. 1-98.) This is nearly identical to the accident she alleges she sustained on May 19, 2017. The claimant also testified that prior to her accident her lower back "was feeling fine" and she was not experiencing back pain. (Tr. 19.) However, records from the claimant's chiropractor indicate that she was experiencing lumbar pain at a level of six when she had adjustments performed on May 8, 10, 12, 15, and 17, 2017. Most notably, when she sought chiropractic treatment on May 19, 2017, the day of the alleged accident, she made no mention of a workplace injury and did not report an increase in pain, even though she testified that striking the doorknob caused "very sharp pain" in her lower back that was so significant she began to involuntarily cry. (Defs.' Ex. 1-84, Tr. 22.)

The claimant bears the burden of proving she sustained a compensable injury. After reviewing the testimony and medical evidence, we do not find it preponderates to a finding that the claimant sustained a sudden mechanical or structural change as a result of the May 19, 2017 workplace incident. Dr. Vanichkachorn, who has treated the claimant both before and after the

incident, did not find a change after reviewing the imaging studies. Dr. Julius opined that the claimant sustained an injury on May 19, 2017, but he also stated that he would defer to Dr. Vanichkachorn's opinion regarding whether the claimant sustained a new injury on that date. In addition, we do not find the claimant's testimony sufficiently persuasive to establish that she suffered a compensable accident.

III. Conclusion

The Deputy Commissioner's July 9, 2019 Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Concurring in part and Dissenting in part:

I join the majority as to the result. The Deputy Commissioner's express credibility finding, and the conflicts between the claimant's testimony and the medical records support the ruling that the claimant did not prove a compensable injury by accident. Further buttressing this decision are Dr. Vanichkachorn's opinion denying an injury and Dr. Julius' deferral to that opinion.

I dissent from the majority's reliance on *Jones v. Walgreen Co.*, JCN VA00001145400 (June 19, 2017), for the reasons stated in my dissent in that case. At best, *Jones* stands for the principle that where a new accident occurs during an active course of treatment for a pre-existing condition involving the same part of the body, *absent persuasive medical or other evidence*, an increase in symptoms *alone* is insufficient to prove compensability.

The Commission usually recites the principle that an increase in symptoms does not satisfy the burden to prove a compensable injury (the "increase in symptoms principle") where a new accident occurs while the claimant is still treating for a prior accident or pre-existing injury to the

same part of the body. Usually, it is recited where the question is whether a worsening relates to an old compensable work accident or a new one. In *Jones*, the claimant was in active medical treatment for a three-year-old work-related back injury when the new incident occurred. The question was did his new treatment relate to that work injury versus a new injury by accident. His treating physician authorized physical therapy for his old back injury "a mere two days before the accident that [was] the subject of" his new accident. *Id*.

Similarly, in *Adu-Gyamfi v. Autostrade International*, VWC File No. 189-61-18 (Jan. 16, 2001), *aff'd*, No. 0382-01-4 (Va. Ct. App. June 26, 2001), the claimant had an initial fall. He consulted with an orthopedist for persistent neck pain and arm numbness. The orthopedist recommended cervical spine surgery. Just "several hours" after that medical appointment, the claimant suffered a second fall at work. Subsequently, the orthopedist recommended and performed "exactly the same surgery" that was "recommended a few hours before the work-related injury." An MRI and x-rays revealed no noticeable physical change in his spine. *Id*. Several physicians offered differing opinions about whether the fall aggravated the pre-existing condition. On these unusual facts, the Commission held the claimant did not prove a new neck injury.

The increase in symptoms principle may be appropriate for cases where a course of ongoing treatment for the same injury occurs up to hours or "mere" days before a new accident. But for two reasons, enshrining it as an immutable legal rule or expanding its scope presents real danger.

If applied too broadly, the increase in symptoms principle undercuts a body of long-established law. In Virginia, it is well-settled that the aggravation or acceleration of a pre-existing condition as a result of a work accident is compensable. "When an injury sustained in

an industrial accident accelerates or aggravates a pre-existing condition, . . . disability resulting therefrom is compensable under the Workers' Compensation Act." *Ohio Valley Construction Co. v. Jackson*, 230 Va. 56, 58 (1985); *see also Liberty Mutual Ins. Co. v. Money*, 174 Va. 50, 55 (1939); *Russell Loungewear v. Gray*, 2 Va. App. 90, 95 (1986). The notion that an increase in symptoms inflexibly is insufficient to prove the acceleration, aggravation, or exacerbation of a pre-existing condition contradicts common sense and reason. If an increase in symptoms cannot, as a matter of law, establish an acceleration, aggravation, or exacerbation, then the increase in symptoms principle can eviscerate our workers' compensation law regarding them.

In many cases, an increase in symptoms may be compelling evidence – and the only evidence – of the acceleration, aggravation, or exacerbation of a pre-existing condition. There is no exclusive objective assessment which can establish the aggravation of a psychological injury. Not every physical injury can be objectively ascertained through imaging, testing, or the like. An x-ray objectively can illustrate a bone fracture. An MRI can objectively depict a herniated disc. Sometimes, strains, sprains, and other such injuries can be diagnosed through observable criteria such as muscle spasm or lost range of motion. But in many cases, increased symptoms may be the *only* evidence of an enhanced injury. Every health care professional knows the healing arts are not pure science, and arriving at a diagnosis requires consideration of both objective and subjective findings. A legal rule which declares increased symptoms *per se* insufficient to prove the acceleration, aggravation, or exacerbation of an existing condition undercuts the factfinding

characteristic of causation questions. It is unworkable and prone to creating illogical and unjust results.

Thus, I concur in part and dissent in part.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.