

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL  
Commissioner

**Jan. 24, 2020**

JONATHAN HERMAN v. RWEC  
AMERICAN ZURICH INS CO, Insurance Carrier  
ZURICH SERVICES CORPORATION, Claim Administrator  
Jurisdiction Claim No. VA00001517573  
Claim Administrator File No. 2440298457  
Date of Injury: September 12, 2018

Corey R. Pollard, Esquire  
For the Claimant.

Alan D. Sundburg, Esquire  
For the Defendants.

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

The defendants request review of an August 6, 2019 Opinion. They assign error to two findings: 1) the claimant did not willfully violate a safety rule; and 2) he was totally disabled from September 13, 2018 through March 17, 2019. We AFFIRM in part and REVERSE in part.

**I. Material Proceedings**

A September 28, 2018 Claim for Benefits alleged the claimant injured his left wrist, right pelvis, and nose on September 12, 2018. His March 7, 2019 claim alleged injuries to his left hand, face, hip, back, and spine. He requested temporary total disability from September 13, 2018 and continuing.

At the hearing, the claimant amended his claim. He sought temporary total disability from September 13, 2018 to March 17, 2019 and from July 3, 2019 and continuing. He withdrew claims

for injury to the face, back, and spine. He reserved future claims for diagnostic treatment to determine possible left arm/median nerve injury and for permanent partial disability.

The defendants contended the injury was not compensable because it was due to the claimant's willful breach of a safety rule. They stipulated he was totally disabled from September 13, 2018 through September 27, 2018. They alleged he was partially disabled beginning September 28, 2018 and failed to market his residual work capacity. Subject to these defenses, they agreed to injuries to the nose, left wrist, and right pelvis. They disputed injuries to the right hip and left hand.<sup>1</sup>

The claimant worked for another employer for eight days during October 2018. If the first claimed period of disability was awarded, he stipulated to a credit for this period.

The Deputy Commissioner found the claimant, a journeyman lineman, did not intentionally violate a safety rule by failing to use a buck squeeze<sup>2</sup> when climbing a wooden power pole. (Op. 11.) She found he credibly testified a bucket truck he intended to use would not work. He reported the problem with the truck. He then decided to climb the pole. He looked in the truck and other vehicles on site, but there was no buck squeeze. Steve DeSimone, the employer's general foreman at the time of the accident, testified buck squeezes were not available until after the claimant's accident. DeSimone testified a buck squeeze should be present on every truck in case of emergency. The Deputy Commissioner found the testimony of the claimant and DeSimone

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<sup>1</sup> The Opinion found the claimant's testimony and the medical record supported inclusion of the left hand and right hip as compensable injuries. (Op. 12.) No party requested review of this finding.

<sup>2</sup> A buck squeeze is a piece of fall protection equipment which wraps around a wooden pole and then attaches to the employee's climbing belt. (Tr. 25.) Instead of just going around the back of the pole, a buck squeeze is designed to wrap around the pole. (Dep. 51.) This piece of gear is variously spelled "buck squeeze," "BuckSqueeze", or "bucksqueeze." For consistency, we use "buck squeeze" unless quoting a document using another spelling.

more credible than the testimony of Charles Shenberger, the company president and safety director. He denied the truck was broken on the day of the accident and asserted a buck squeeze was issued if an employee needed to climb a pole. The Deputy Commissioner recited that Shenberger's facial expressions and body language created an impression of evasiveness in his answers.

The Deputy Commissioner found a valid reason for the claimant's inability to follow the safety rule. (Op. 12.) She noted his September 18, 2018 Witness Statement Form explained why the incident happened: "Failure to fix truck originally" and "Failure to have a Buck squeeze." (Defs.' Ex. 8.) She held the claimant climbed the pole in order to restore electric power. He judged connecting the power was important. He could not use a buck squeeze which he did not have.

The claimant last received treatment in January 2019. On January 24, 2019, Dr. Diminick restricted him from climbing until he was seen again in the office. He was uninsured and could not afford treatment. The Deputy Commissioner awarded temporary total disability from September 13, 2018 to March 17, 2019.<sup>3</sup> She denied the period of temporary total disability beginning July 3, 2019 as unsupported by medical evidence. (Op. 12.) She stated she would not consider the claimant's marketing efforts to be adequate. (Op. 13.)

The defendants request review.

## **II. Findings of Fact and Rulings of Law**

We have reviewed the entire record. We summarize briefly to explain our decision.

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<sup>3</sup> The Opinion mistakenly recited that the defendants stipulated to temporary total disability from September 13, 2018 to March 17, 2019. (Op. 2.) The actual stipulation was to disability from September 13, 2018 to September 27, 2018. (Tr. 9.)

A. Willful Violation of a Safety Rule

Virginia Code § 65.2-306 provides in part that no compensation shall be awarded for an injury caused by the employee's willful misconduct, willful failure or refusal to use a safety appliance, or willful breach of any reasonable rule or regulation adopted by the employer and brought, prior to the accident, to the employee's knowledge.

The employer must show that the willful misconduct was the proximate cause of the accident. *Smithfield Packing Co. v. Carlton*, 29 Va. App. 176, 182 (1999) (“[The] employer has the burden to prove that claimant’s conduct, *which caused his injury*, was in ‘willful’ disregard of a reasonable rule established by employer . . . .”). The “employee may rebut the defense by showing that the rule was not kept alive by bona fide enforcement or that there was a valid reason for his inability to obey the rule.” *Gwaltney of Smithfield, Ltd. v. Hagins*, 32 Va. App. 386, 393 (2000) (quoting *Buzzo v. Wooldridge Trucking, Inc.*, 17 Va. App. 327, 332 (1993)).

The defendants filed an April 4, 2019 notice of affirmative defense. They contended the claimant engaged in misconduct by willfully failing to use a required safety appliance when engaging in work on a wooden utility pole.

The employer's Employee Safety Manual required the employer to provide all personal protective equipment at no cost to employees. It prohibited employees from providing or using their own personal protective equipment without the employer's “expressed written permission.” (CI's. Ex. 2, p. 38.) The claimant worked for the employer in 2017 and again in 2018. He received an Employee Safety manual each time. He acknowledged reviewing part of the manual. He attended the employer's safety orientations. In 2018, he received a list of four questions to ask himself before beginning a task. (Defs.' Ex. 6.) The claimant agreed “Safe Practices for Personal

Fall Arrest Systems” in the manual included item 14: “Bucksqueeze, secondary safety, lineman’s belt and harness (or combination harness & lineman’s belt) shall be used when climbing all wood structures.” (CI’s. Ex. 2, p. 60.) The manual set out the required steps for preparing to ascend a pole: “Check climbers’ buck squeezes. Buck squeezes must be used on all wood poles.” (CI’s. Ex. 2, p. 116.)

The claimant, a journeyman lineman, agreed the use of a buck squeeze to climb a wooden utility pole was the industry standard. He understood buck squeezes are now required by OSHA. He owns one, but it was at his home at the time of the accident.

Required use of a buck squeeze had been the employer’s rule for only a few years. The claimant had climbed hundreds of wooden poles without using one. He had never had an accident. The claimant had known people to fall from a pole while using a buck squeeze. He stated they are designed to prevent falls but are not 100% successful.

The claimant’s task on September 12, 2018 was to reconnect the power to replacement wooden poles. He intended to perform this work from the boom truck with an insulated bucket. The truck did not work properly. The boom would not move, and he could not use it to complete the job. After he noticed the problem with the truck, he called the general foreman, Stephen DeSimone, to request a mechanic. He learned no mechanic was available to repair the truck. He did not tell DeSimone he planned to climb the pole.

The claimant considered the situation an emergency. It was getting late in the day, and he was losing the daylight. Multiple customers were without electric power. A triplex wire on the ground could have become energized and was a trip hazard. He decided to ascend the pole.

The claimant and his coworkers looked for a buck squeeze in the boom truck and all of the employer's other trucks on or near the job site. They searched the bins under the seats, the cab, and the tool bags on the trucks. They could not locate a buck squeeze.

The claimant climbed the pole using climbing gear, rubber gloves and sleeves, a belt, hooks, a safety, and a leather strap. He wore a hardhat. He did not use a buck squeeze because there was none present. He did not think he needed a buck squeeze to complete the job that day.

The accident occurred when the claimant finished the power connection and began to descend. His "safety" became hung up on the pole. He unhooked it and wiggled it free. When he tried to hook it again, he did not hit the D ring where the safety attached to the belt. He believed he had reattached it, let go to lean back into the safety, and fell from the pole, suffering multiple injuries.

When connecting electricity from a bucket truck, linemen were not required to have a buck squeeze. Climbing a wooden pole was not part of the work scheduled that day.

Stephen DeSimone, who worked as general foreman for the employer at the time of the accident, testified a buck squeeze was the industry standard safety equipment for climbing wooden utility poles. OSHA requires use of a buck squeeze. Normally, a buck squeeze should be present on a truck regardless of the specific job. Emergencies can arise, making it necessary to climb a wooden pole. Buck squeezes usually are stored in a bin on a bucket truck.

DeSimone understood the employer was responsible for providing safety equipment including buck squeezes to its employees. He had not seen any buck squeezes at the employer's job sites before the claimant's accident. Afterwards, within a few days, buck squeezes were delivered to the job site and stocked on the trucks.

DeSimone stated a mechanic found the bucket truck functioning normally when he checked it the day after the accident. DeSimone witnessed firsthand that the truck sometimes, “acted up.” It apparently had an electrical short. DeSimone described the claimant as a hard worker and reliable. He had no concerns about the claimant’s safe work habits.

Charles Shenberger, the president and safety director of the employer, described two different types of fall protection used by the company. An employee operating the bucket of a boom truck used a fall arrest system. For climbing wooden poles, it was mandatory to use a buck squeeze. He described a buck squeeze as a horizontal restraint system that kept the worker affixed to the pole and would not allow him to fall. He confirmed it was the industry standard to use a buck squeeze to climb a wooden pole. It was part of the employee safety manual.

The employer was required to provide all fall protection equipment to its employees. Individuals were not allowed to bring specialized personal protective equipment such as buck squeezes to the job. This rule ensured the equipment was compliant and had been tested.

Shenberger testified the employer provided buck squeezes to the general foremen for the project. They did not provide them directly to the linemen. Buck squeezes were not stocked on the trucks unless the project called for their use. They were expensive, costing \$700 to \$800 each. If stocked on each truck, Shenberger stated they were often stolen or used by people who were not qualified or authorized to climb. Shenberger had not personally supplied buck squeezes to the general foremen. Shenberger was not a lineman.

Shenberger denied the boom truck was broken on the day of the accident. His safety coordinator, Jim Corn, gathered witness statements as part of the investigation of the claimant’s accident. The Deputy Commissioner admitted witness statements from the mechanic and the three

groundmen who were present at the accident site (Cl.'s Ex. 4.) and from the claimant (Defs.' Ex. 8.). One of the groundmen, Bret Bolling, confirmed the claimant "had to climb the pole due to the bucket truck being broke down." (Cl.'s Ex. 4.)

The mechanic, Terry Eaton, looked at the truck the day after the accident. He found the truck outriggers set with ground pads under jack pads and the upper and lower booms in the air with the bucket down sitting on the truck bed. He had to adjust the position of the outriggers in order to operate the boom correctly. The crew was then able to run the bucket up and finish the task. Eaton concluded:

From what I found, the outriggers had settled, or ground pads under the outriggers had possibly settled in the wet mud or ground, loosing [sic] power to the boom. With that being said, I did find the diverter valve handle for outrigger to boom broken where it attaches to the diverter. This can be repaired.

(Cl.'s Ex. 4.)

The evidence showed the employer's safety rule regarding use of a buck squeeze was not regularly enforced before the claimant's accident. The claimant did not use a buck squeeze when he climbed the wooden pole. The greater weight of the evidence established the bucket truck he intended to use was broken down. We rely on the Deputy Commissioner's assessment of the relative credibility of the claimant, DeSimone, and Shenberger.

The claimant proved a valid reason for failing to follow the safety rule. He tried to follow the rule, but there was no buck squeeze available. He viewed the situation as an emergency and climbed the pole with no buck squeeze, believing he did not need one. We AFFIRM the finding the claims are not barred by willful misconduct, failure to use a safety appliance, or violation of a known safety rule.

B. Award of Temporary Total Disability September 13, 2018 to March 17, 2019

The defendants stipulated the claimant was totally disabled from September 13, 2018 through September 27, 2018. They asserted he was released to light duty at all other times.

On the hearing date, the claimant testified he continued to have severe left wrist pain, tingling and numbness of the fingers and thumb of his left hand. He was unable to climb a pole or structure or operate many of the tools used in his pre-injury job. Due to right hip and pelvis pain, he could not sit still, stand, walk, or maintain the same position for long periods.

Peter Caprise, Jr., M.D., performed surgery on the claimant's left arm on September 13, 2018. The claimant saw Dr. Caprise on September 28, 2018 for both the left distal radius fracture and his right sided acetabular fracture. Dr. Caprise instructed him to remain non-weight-bearing for four weeks and to use a platform crutch on the left. He released the claimant to light work with no use of the left upper extremity and no driving. On October 19, 2018, the claimant was to continue protective weight bearing for two more weeks and then discontinue the single crutch. On November 9, 2018, Dr. Caprise released the claimant to sedentary work only with no driving. On November 14, 2018, Dr. Caprise restricted him to lifting eight ounces with his left wrist and prohibited climbing for six weeks. He continued the same restrictions on December 26, 2018.

The claimant saw Michael Diminick, M.D., orthopedic surgeon, on referral from Dr. Caprise, on January 10, 2019. He complained of left wrist pain and of paresthesias about the left hand since the injury. Dr. Diminick recommended a nerve conduction study to determine whether the condition could be improved with surgery. Dr. Diminick stated the claimant "cannot climb but he can supervise."

At the hearing, the defendants agreed the claimant fractured his nose, subject to their defenses. Timothy Courville, M.D., evaluated the nose and diagnosed deviated septum on October 18, 2018. After trying conservative treatment, Dr. Courville performed a septoplasty under general anesthesia on January 15, 2019 to correct the deviated septum. On January 16, 2019, Dr. Courville advised the claimant to “hold all strenuous physical activity” and follow up in one week. When the claimant returned to Dr. Courville on January 23, 2019, he had no post-operative complications. Dr. Courville stated he “has returned to full activity.”

On January 24, 2019, Dr. Diminick continued to restrict the claimant from climbing. The restriction was to be in effect until his next follow up in Dr. Diminick’s office. The defendants rescinded authorization for treatment in writing on January 17, 2019.

The claimant “bears the burden of proving his disability and the periods of that disability.” *Hoffman v. Carter*, 50 Va. App. 199, 216 (2007) (quoting *Marshall Erdman & Assocs. v. Loehr*, 24 Va. App. 670, 679 (1997)). “There is no presumption in the law that once a disability has been established, a claimant will be assumed to remain disabled for an indefinite period of time.” *Loehr* at 679 (quoting *Hercules Inc. v. Carter*, 14 Va. App. 886 (1992))

The claimant was totally disabled from September 13, 2018 through September 27, 2018, as stipulated, and from January 15, 2019 through January 23, 2019. He underwent surgery under general anesthesia on January 15, 2019 to correct his nose fracture suffered in the accident. On January 16, 2019, Dr. Courville advised him to avoid all strenuous activities. On January 23, 2019, he was released to full activity. He remained under light duty restrictions from Dr. Diminick.

From September 28, 2018 through January 14, 2019 and from January 24, 2019 through March 17, 2019, the claimant was partially disabled due to the work accident. He failed to document his marketing efforts,<sup>4</sup> and we cannot award temporary total disability for these periods.

### **III. Conclusion**

The August 6, 2019 Opinion is **AFFIRMED** in part and **REVERSED** in part. For clarity, we include an amended award:

#### AWARD

An Award is hereby entered in favor of Jonathan Herman, employee, against Energy Services Holdings, LLC, employer, and American Zurich Insurance Company, insurance carrier, based upon a pre-injury average weekly wage of \$1,699.48, as follows:

1. \$1,082 per week during temporary total disability beginning September 13, 2018 through September 27, 2018, inclusive, and
2. \$1,082 per week during temporary total disability beginning January 15, 2019 through January 23, 2019, inclusive.

Pursuant to Virginia Code § 65.2-603, medical benefits are awarded for as long as necessary for reasonable, necessary and authorized treatment casually related to the claimant's September 12, 2018 injury to his left wrist, left hand, right pelvis, right hip, and nose.

Given the reduction in the indemnity benefits awarded to the claimant, the attorney's fee awarded by the Deputy Commissioner below, is reduced to \$650 to be deducted from accrued compensation and paid directly to Corey R. Pollard, Esquire, for legal services rendered to the claimant.

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<sup>4</sup> From his union and contacts, he found three light duty jobs: in October 2018 and March and April 2019.

This matter is hereby removed from the review docket.

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 thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerk's Offices of the Commission and the Court of Appeals of Virginia.