

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Feb. 18, 2020

WILKINS GOMEZ-FLORES v. MK CONCRETE CONSTRUCTION
AMERICAN ZURICH INS CO, Insurance Carrier
AMERICAN ZURICH INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA02000031788
Claim Administrator File No. 2440303493
Date of Injury: October 26, 2018

Robert J. Strayhome, Esquire
For the Claimant.

Joshua M. Wulf, 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 September 6, 2019 Opinion finding that he had not proven he sustained a compensable injury to his right foot. We REVERSE in part, AFFIRM in part, and REMAND.

I. Material Proceedings

The claimant filed a Claim for Benefits alleging he sustained an injury to his right foot as the result of stepping on a nail at work on October 26, 2018. He sought medical benefits, a closed period of temporary partial disability, and an award of attorney's fees under Virginia Code § 65.2-713. Pertinent to this review, the defendants denied the claimant suffered an injury by accident arising out of and in the course of his employment.¹

¹ Not reached below was the defense that the claimant failed to provide timely notice of an injury by accident.

The Deputy Commissioner found the claimant had not satisfied his evidentiary burden, stating that the evidence “rises only to the level of surmise” that the claimant sustained his injury at work. Pertinent to her decision was the claimant’s failure to discover the injury until two days after he last worked, when his wife observed the wound in his foot and his father-in-law discovered the nail in his work-boot. The Deputy Commissioner likewise denied the claim to assess attorney’s fees and costs against the employer.

The claimant filed a timely request for review by the full Commission. He argues the evidence in the record is sufficient to demonstrate that he sustained an injury at the work site, and its occurrence was bounded with sufficient temporary precision to be compensable.² He also argues the defendants raised an unreasonable defense and that the Deputy Commissioner erred by failing to award attorney’s fees.

II. Findings of Fact and Rulings of Law

A. Injury by Accident

“The burden is upon a claimant to prove by a preponderance of the evidence that 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;

² On November 26, 2019, the claimant filed a motion requesting that the Commission consider *Faszczka v. Farrish of Fairfax*, JCN VA00001269664 (November 22, 2019), when rendering its decision. Because the motion was received after the deadline for submitting written and responsive statements the substantive arguments of the motion may not be considered. Furthermore, as the case is on appeal before the Court of Appeals of Virginia, we do not find it appropriate to consider it at present.

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)).

Manifestly, whether the claimant sustained his evidentiary burden to establish a compensable injury by accident depends upon the facts presented. In this case, the facts are largely undisputed. On the morning of October 26, 2018, the claimant put on his work boots in preparation for departing for work. At that time, he observed no nail in the heel of his right boot. (Tr. 12, 21.) He left his residence and walked to his father-in-law’s vehicle. The claimant provided detailed testimony and photographic evidence of the path he took along a concrete sidewalk to the asphalt parking lot where the car was parked. From the parking lot, the claimant’s father-in-law drove to a work parking lot where the two transferred to a work van that transported them the remainder of the way to the construction site where the claimant was to work.

Upon arriving at the work site, the claimant observed that another contractor had buried the employer’s equipment and tools in dirt and debris. The claimant was sufficiently concerned that he took a photo documenting the condition of the job site and forwarded the photo to Velasquez, one of his superiors. The claimant was instructed to spend the day picking up debris around the job site, debris that included various construction materials with exposed nails. The claimant did this until the end of the work day, around 2:30 p.m. He was, by then, experiencing chills and symptoms he associated with the onset of a cold. He then returned home following the same route and upon entering his residence, he removed his work boots.

On the evening of Sunday, October 28, 2019, the claimant’s wife observed a wound in the heel of the claimant’s right foot. Soon thereafter, the claimant’s father-in-law examined the claimant’s boots and observed a nail in the heel of the right boot in the same area as the claimant’s

wound. The claimant was transported to the emergency room at Loudoun Hospital where he ultimately underwent surgery.

Complicating the factual scenario before us is the claimant's preexisting diabetic neuropathy creating numbness in his feet and his corresponding inability to detect the exact moment he sustained his wound. Consequently, the claimant was unable to provide direct evidence of the time or the location where he stepped on the offending nail. The Deputy Commissioner concluded that where the injury was sustained was the subject of surmise and so denied the claim.

"The triers of fact may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them; indeed it is their duty to make, and give consideration to, all inferences and deduction which may properly be drawn." *N. Va. Power Co. v. Bailey*, 194 Va. 464, 470 (1952) (citing 32 C.J.S., *Evidence*, § 1044, page 1129; *Wood's Adm'x v. S. Ry. Co.*, 104 Va. 650, 655 (1905)). Circumstantial evidence may allow us to infer that an injury arose out of the employment. *See City of Waynesboro v. Griffin*, 51 Va. App. 308, 316 (2008) (affirming the Commission's award of benefits because "this accident is not unexplained. The explanation can be found in the evidence and the reasonable inferences the commission drew from that evidence."), *Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352, 360 (2004) (circumstantial evidence "created the 'critical link' between claimant's employment, his fall, and resulting injury").

Whether an inference in any particular case is "reasonable and legitimate" is tested by the evidence presented. In this case, that evidence is of a claimant who put on his boots in the morning of October 26, at which point no nail was present in the heel of the right boot. When he returned home after his workday, he removed his boots and did not wear them again. Two days later, the

wound was discovered in the claimant's heel. Shortly thereafter, the nail was found in the claimant's boot. On this record, with a wound in the claimant's right heel and the discovery of a nail in the right boot, we deem it reasonable to infer that the nail caused the claimant's injury and that he stepped on the nail on October 26, 2018.

The remaining question is whether the evidence establishes the claimant stepped on the nail at work. Once again, the evidence is largely undisputed. The claimant spent his work day at a site where there existed scattered and obscured construction materials, some with exposed nails embedded therein. The claimant's evidence supports the proposition that he was exposed to the risk of stepping on a nail while performing his duty of picking up construction debris and we infer that he did so. We cannot completely rule out the possibility he stepped on the nail during his brief walk along the sidewalk running between his residence to the asphalt lot where the vehicle was parked from which he traveled to and from work. However, the law does not require that we entirely exclude that possibility.

It is the claimant's burden to prove by a preponderance of the evidence that he stepped on the nail while in the course of his employment. This evidentiary standard does not require that we exclude all other possibilities.

The weight or preponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a **preponderance of the evidence** if it is made to appear **more likely** or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal, notwithstanding any doubts that may still linger there.

Bailey, 194 Va. at 471 (quoting *Sargent v. Mass. Accident Co.*, 307 Mass. 246, 250, (1940)) (emphasis added).

Finally, we find the circumstances presented differ from those in *Powell v. Mathew Construction, Inc.*, VWC File No. 190-61-56 (May 28, 1999), which was relied upon by the Deputy Commissioner. The claimant in *Powell* also had diabetic neuropathy and filed a claim alleging an injury to his foot. He believed the injury occurred when he stepped on a piece of construction debris but, due to his neuropathy, he was unable to identify when he did so. At the end of the workday the claimant discovered blood in his sock, which he thought was caused by a blister which had burst. He did not find a screw or nail in his shoe which could have caused an injury. The claimant bandaged his foot and returned to work for the next day and a half until he began to feel feverish. After seeking medical attention, he was diagnosed with a foot infection, and two superficial wounds were found on the bottom of his foot in addition to the burst blister. The physicians were unable to determine which of these wounds, if any, was the cause of the claimant's infection, and they also noted he had a prior history of foot infections and cellulitis.

In contrast, in the present matter the claimant found a nail embedded in his boot in the same area where he sustained an injury, and he did not wear his boots or perform any work between the end of his workday and when the puncture wound was diagnosed. Though the claimant's preexisting neuropathy prevented him from detecting the moment of injury, he spent his workday at a job site where there existed the risk of stepping on the nail. Counterbalancing this is the possibility that he stepped on the nail during a relatively brief walk from and to his residence before and after work. We deem it more likely, indeed far more likely, that the claimant sustained his injury while at the construction site performing his master's service and we infer he did so. We therefore reverse the Deputy's denial of his claim, and find that the evidence preponderates to a finding that the claimant sustained an injury by accident to his right foot on October 26, 2018.

B. Attorney's Fees and Additional Defenses

“If an employer brings or defends a proceeding without reasonable grounds, the Commission is empowered to assess costs, including reasonable attorney’s fees, against the employer.” *Prince v. E.E. Lyons Constr. Co., Inc.*, 76 O.W.C. 35, 38 (1997). “The matter is left to the sound discretion of the Commission.” *Volvo White Truck Corp. v. Hedge*, 1 Va. App. 195, 200 (1985). The claimant argues that the defendants raised unreasonable defenses that were unsupported by evidence. However, the Deputy Commissioner found that “in a case such as this, where discovery of an injury is several days after the alleged event, we cannot conclude that the defenses were raised without merit.” (Op. 13.)

We limit our finding in this Opinion to the claimant having established by preponderating evidence the occurrence of an injury by accident that arose out of and in the course of his employment on October 26, 2018. As to these issues, we expressly find that the claim was not defended without reasonable grounds such as to trigger the claimant’s entitlement to relief pursuant to Virginia Code § 65.2-713. We deem this to be a close case and not one appropriate for consideration of sanctions. The claim is REMANDED in order for the Deputy Commissioner to address the remaining defenses raised and, as to those defenses, the claimant’s motion for attorney’s fees and costs relating thereto should he elect to pursue that motion.

III. **Conclusion**

The Deputy Commissioner's September 6, 2019 Opinion below is REVERSED in part. We find the evidence preponderates to a finding that the claimant sustained an injury to his right foot arising out of and in the course of his employment on October 26, 2018.

The finding that the defendants did not unreasonably defend the claim on the grounds that the claimant's injuries did not arise out of and in the course of employment is AFFIRMED.

The matter is REMANDED to the Deputy Commissioner in order to address the remaining defenses raised.

Pursuant to Virginia Code § 65.2-603, medical benefits are awarded for as long as necessary for reasonable, necessary, and authorized treatment causally related to the claimant's October 26, 2018 industrial injury.

This matter is hereby removed from the review docket.

APPEAL

Because this case has been remanded, no right of appeal to the Court of Appeals of Virginia will exist until the Commission issues a final decision.