VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

June 9, 2021

ELMIRA ROUNTREE v. TRADITIONS SENIOR MANAGEMENT, INC.
ACCIDENT FUND GENERAL INS CO, Insurance Carrier
UNITED WISCONSIN INSURANCE CO, Claim Administrator
Jurisdiction Claim No. VA00001742408
Claim Administrator File No. UHC230311200
Date of Injury: June 7, 2020

Elmira Rountree
Claimant, pro se.

Scott C. Ford, Esquire
For the Defendants.

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

The claimant requested review of the Deputy Commissioner's February 3, 2021 Opinion denying her July 9, 2020 Claim for Benefits. We AFFIRM.

I. Material Proceedings

The claimant, a licensed practical nurse, contracted COVID-19 and contends it qualifies her for benefits as either an injury by accident or a compensable ordinary disease of life. She asserted an accident date of June 7, 2020. Pertinent to this review, the defendants denied an injury by accident or that the claimant's disease met the statutory criteria to qualify as a compensable ordinary disease of life.[1]

[1] The defendants also contended the claimant could not rule out non-work-related causes for her disease.

The Deputy Commissioner denied the claim, finding the medical evidence did not establish that the claimant was exposed to COVID-19 at work and that the claimant "failed to prove her COVID-19 infection was contracted at her place of employment by clear and convincing evidence." (Op. 5.)

The claimant requests review.

II. Findings of Fact and Rulings of Law

The claimant works as a nurse at a long-term care facility. Except when eating or drinking, she wore a mask while on duty. On June 6, 2020, she came home from work to discover she could neither smell nor taste food, causing her to suspect she had contracted COVID-19.[2] The following morning she developed a cough, and went to the emergency room where it was determined she was running a fever. She was diagnosed with COVID-19 and admitted to the hospital where she stayed for twelve days.

The claimant testified that her work station was positioned approximately three feet from Shannon Wallace, another nurse at the facility with whom the claimant shared a phone. Her co-worker Wallace did not wear a mask and coughed with frequency. Around June 2, 2020, the employer's director of nursing advised the claimant that Wallace had been hospitalized, though the claimant was not told why.

During cross-examination, the claimant stated that she had been out of work from May 1, 2020 through May 23, 2020 due to the death of her brother and the need to make funeral

[2] At hearing the claimant stated that she noticed she could not smell or taste food on June 7, 2020. However, she also testified that this occurred on a Saturday night, which fell on June 6, 2020.

arrangements. She admitted to making weekly shopping trips to Walmart and Food Lion prior to her June 7, 2020 hospitalization.

A June 19, 2020 medical record confirms that the claimant was hospitalized from June 7, 2020 through June 19, 2020 "[w]ith COVID-19 related concerns," and that she was to remain under self-quarantine per CDC guidelines after her release.

The Deputy Commissioner found that although the claimant's co-worker coughed at work, never wore a mask, and was subsequently hospitalized, no evidence was presented demonstrating that the co-worker was infected with COVID-19. He also noted that the medical records did not relate the claimant's COVID-19 diagnosis to workplace exposure, and in the absence of evidence that the claimant was exposed to the infection at work, she had not carried her burden of proving that her COVID-19 infection was contracted at her place of employment.

The claimant excepts to this finding, arguing that she contracted COVID-19 at work and that she should have been awarded benefits. In her request for review and written statement the claimant also asserts facts that were not introduced as evidence at hearing.

A. Additional Evidence

In her request for review and written statement the claimant states that her co-worker Wallace had a confirmed diagnosis of COVID-19, that she died of the disease in January of 2021, and that many patients in the facility where she worked also contracted and died of COVID-19. These allegations were not presented before the Deputy Commissioner and have been asserted for the first time on review.

"[A] party requesting the admission of additional testimony or evidence must be able to conform to the rules prevailing in the Courts of this State for the introduction of after-discovered

evidence." *Miller v. Dixon Lumber Co.*, 67 O.I.C. 71, 72 (1988). In order to justify reopening the record it must be established that the proffered evidence was discovered after the Deputy Commissioner's hearing, that it could not have been discovered before through the exercise of due diligence, that it is material to the case and not merely cumulative, and if its admission at another hearing ought to lead to a different result on the merits. *Chenault v. Blue Roofing, Inc.*, No. 0405-85 (Va. Ct. App. Feb. 12, 1986).

The primary issue in the present case is whether or not the claimant was exposed to COVID-19 at work. After working at the facility during the pandemic, the claimant either would have known or could have found out through the exercise of due diligence if patients had been diagnosed with the disease. The claimant likewise could have determined if Wallace had been diagnosed with COVID-19 before the evidentiary hearing was convened.[3] Because the proffered evidence could have been discovered through the exercise of due diligence prior to the evidentiary hearing, it is not admissible on review.

In addition, the claimant did not submit any medical evidence corroborating the additional facts proffered in her request for review or written statement. A bare assertion by a claimant regarding the relationship of a disease to her work, without other supporting evidence, does not satisfy the "clear and convincing" standard required to prove that an ordinary disease of life was contracted in the workplace. *Steadman v. Liberty Fabrics, Inc.*, 41 Va. App. 796, 806 (2003) (citing *Lanning v. Va. Dep't. of Transp.*, 37 Va. App. 701, 708 (2002)). We do not find the proffered

[3] The claimant also alleged that Wallace died from COVID-19 after the evidentiary hearing. However, that Wallace died of the disease does not establish that she was positive for the disease at the time she interacted with the claimant.

evidence sufficient to lead to a contrary result. Consequently, even if the evidence satisfied the other conditions necessary for its admission, it would not lead to a different result and we may not now consider it on review.[4]

B. Injury by Accident/Compensable Ordinary Disease of Life

The claimant argues that her COVID-19 infection constituted an injury by accident. 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)). Injuries resulting from "cumulative events, as well as injuries sustained at an unknown time, are not 'injuries by accident' within the meaning of [the] Code." *Morris v. Morris*, 238 Va. 578, 589 (1989).

We find no evidence that the claimant suffered an accident. She first noticed that she had COVID-19 related symptoms while at home on the evening of June 6, 2020. Wallace, the nurse next to whom the claimant worked, who coughed frequently and did not wear a mask, had been hospitalized days before. The claimant has not identified a specific incident at a reasonably definite time she associates with the onset of the disease. Accordingly, we find the claimant failed to prove her disease was contracted in an accident as defined by the Act.

Left to be decided is whether the claimant's Covid-19 diagnosis qualifies as a compensable ordinary disease of life. Virginia Code § 65.2-401 allows for such a disease to be treated as an

[4] In her written statement, the claimant also requested another hearing. However, review by the full Commission is ordinarily conducted on the record, and a party making a request to present oral argument must do so at the time the request for review is filed. Va. Workers' Comp. R. 3.4.

occupational disease if it is proven by clear and convincing evidence "[t]hat the disease exists and arose out of and in the course of employment as provided in § 65.2-400 with respect to occupational diseases and did not result from causes outside of the employment." "Evidence is clear and convincing when it produces in the fact finder 'a firm belief of conviction as to the allegations sought to be established. It is . . . more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases.'" *Gwaltney of Portsmouth v. Pelham*, No. 0661-06-1 (Va. Ct. App. Oct. 31, 2006) (quoting *Fred C. Walker Agency v. Lucas*, 215 Va. 535, 540-41 (1975)). Although both medical evidence and the testimony of the claimant may be utilized to establish that the claimant's disease arose from her employment, it "is essentially a medical issue to be decided by the trier of fact based on the evidence presented." *Knott v. Blue Bell, Inc.*, 7 Va. App. 335, 338 (1988).

The defendants contend the claimant is unable to prove by the requisite burden that she contracted her disease at work. We agree. The claimant's medical evidence establishes that she contracted the disease but offers no clue from where the infecting virus came. While the claimant testified to her proximity to Wallace who did not wear a mask, frequently coughed, and was hospitalized, the claimant also made weekly shopping trips in public venues. While conceding the possibility that the claimant contracted COVID-19 from her co-worker, the evidence does not persuade us to the critical benchmark of clear and convincing evidence that the claimant contracted her disease in the course and scope of her employment. Consequently, we find no error in the denial of her claim.

III. Conclusion

The Deputy Commissioner's February 3, 2021 Opinion is AFFIRMED.

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 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.