AFFIRMED by the Court of Appeals, 80 Va. App. 526 (April 2, 2024)

(Published Opinion)

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Feb. 27, 2023

JEREMIE DAVIS v. WAL-MART ASSOCIATES INC
AIU INSURANCE CO (NATIONAL UNION FIRE OF, Insurance Carrier
WALMART CLAIMS SERVICES, INC., Claim Administrator
Jurisdiction Claim No. VA02000037952
Claim Administrator File No. C2669117
Date of Injury: May 5, 2022

Darren Shoen, Esquire
For the Claimant.

Peter G. Irot, 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 October 26, 2022 Opinion finding he failed to prove his workplace accident caused a structural or mechanical change to the body and denying his claim.[1] We AFFIRM.

I. Material Proceedings

The claimant alleges he sustained a workplace injury to his back on May 5, 2022, and filed a claim seeking an award of medical benefits and temporary total disability. The defendants denied the claimant sustained an injury, contesting that he suffered a mechanical or structural change to

[1] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see Barnes v. Wise Fashions,* 16 Va. App. 108, 112(1993).

his back. Alternatively, they argued that any injury was a known and expected result of the claimant exceeding work restrictions.

The Deputy Commissioner ruled the claimant had not carried his burden of proving the accident caused a structural or mechanical change to his back and denied the claim. The Deputy Commissioner also found the claimant had not suffered an accident, noting that the claimant had been taken out of work in November 2019 after back surgery and had returned to work without first obtaining a release. Consequently, the Deputy Commissioner ruled that any injury was not by accident but was the expected result of returning to the workplace.

The claimant requests review.

II. Findings of Fact and Rulings of Law

The claimant has a history of pre-existing back problems and suffered two back injuries while working for a prior employer. He has submitted to three back surgeries, including a lumbar spine fusion performed by Dr. Joseph Orchowski in 2019. The claimant was assigned work restrictions after his most recent surgery, but at hearing he denied recalling what those restrictions were. Dr. Orchowski recommended the claimant engage in a weight loss program following surgery, and the claimant testified that he lost over a hundred pounds and his health greatly improved.

Medical records reflect the claimant sought treatment for back pain on October 19, 2010 and again on March 10, 2017 following incidents at work. He began treating with Dr. Orchowski on March 14, 2017, who performed a revision microdiscectomy at the left L5-S1 region on September 21, 2017 and a lumbar fusion surgery on May 8, 2018. The claimant continued to follow up with Dr. Orchowski following surgery, and on August 8, 2019, the claimant was kept out of

work until his next appointment. The claimant returned to Dr. Orchowski on November 1, 2019, and was again advised to remain out of work until a March 10, 2020 follow-up visit. However, the claimant cancelled this appointment, and there is no further record of him treating with Dr. Orchowski until 2022.

The claimant began searching for employment in 2021, and he did not believe he remained under any work restrictions at the time. He did not obtain a release to work from Dr. Orchowski before trying to find new employment because he "didn't feel like I needed to." After he was not offered a job following an interview, he declined to inform other potential employers of his prior back problems because he felt it might negatively affect his ability to secure employment. However, the claimant testified that after being hired at Wal-Mart he advised his supervisors of his pre-existing condition.

The claimant was hired at Wal-Mart as a stocker in July of 2021, and he remained employed without incident until the incident of May 2022. His job required him to move pallets or carts through the store and restock food items. On May 5, 2022, the claimant knelt down to place a twelve-pack of ginger ale on a bottom shelf and felt a sharp pain in his lower back. His back pain increased when he attempted to walk, and he had to rest on a cart and text his supervisor for help. The claimant was then taken by ambulance to Lynchburg Hospital.

The records from Lynchburg General Hospital reflect the claimant reporting an onset of back pain after kneeling down to pick up a twelve-pack of soda off a pallet. It was noted the claimant had a significant history of back problems for which he underwent discectomies and a lumbar fusion. The claimant was assessed with acute low back pain and prescribed medication. X-rays revealed postoperative changes from a posterior spinal fixation at L5-S1 with intact

hardware. There was no evidence of acute fracture, subluxation, or disease involving the lumbar spine.

On May 9, 2022, the claimant sought treatment with Jacqueline Perdue, PA-C, his primary care provider. The claimant reported feeling immediate and sharp pain in the middle of his back after kneeling to stock a shelf, and was now experiencing constant pain with numbness of the left lower extremity. The claimant was assessed with acute low back pain and prescribed home exercises to begin once his condition had improved.

On May 12, 2022, the claimant was examined by Dr. Ghada Alsayed at MedExpress Linkhorne and reported hurting his back at work the prior Thursday. The claimant was assessed with lumbar radiculopathy. It was also noted the claimant had an acute, uncomplicated injury and he was provided discharge instructions relating to a lumbar sprain. At a May 19, 2022 appointment, Dr. Alsayed assessed the claimant with radiculopathy and radicular pain. Although it was noted that the claimant was following up on a workers' compensation back injury, no specific injury was diagnosed or documented. The claimant was referred to an orthopedist.

On June 10, 2022, the claimant returned to Dr. Orchowski and was diagnosed with lumbar radiculopathy and spondylosis. Dr. Orchowski ordered a lumbar MRI to evaluate for a significant disk protrusion or nerve root impingement. The claimant advised Dr. Orchowski the pain he was presently feeling was similar to what he experienced prior to surgery. The MRI was performed on July 11, 2022 and revealed surgical changes at the site of the prior fusion with no canal stenosis or foraminal narrowing. Dr. Orchowski reviewed the MRI with the claimant during an August 3, 2022 appointment and noted the results looked "similar to prior imaging."

Dr. Orchowski completed defense counsel's questionnaire on July 29, 2022, in which he agreed that when he treated the claimant on November 1, 2019, he informed the claimant he was placed on a no-work status to protect his back and prevent reinjury, and that he did not subsequently release the claimant to work. Dr. Orchowski also reviewed the July 11, 2022 MRI, and could not state within a reasonable degree of medical probability that the claimant sustained an actual mechanical or structural change to his body as a result of the May 5, 2022 work accident.

The Deputy Commissioner found the claimant did not carry his burden of proving the workplace incident resulted in a structural or mechanical change in his body. In so finding, the Deputy Commissioner relied on the opinion of Dr. Orchowski, who treated the claimant both before and after the accident and was unable to determine if the claimant suffered such a change. The Deputy Commissioner also held that the claimant had not obtained a release to work before seeking new employment, thus rendering any injury a known and expected result of exceeding his restrictions.

The claimant requests review, arguing that he proved the accident resulted in a sudden structural or mechanical change to his body and that his injury was not a predictable consequence of returning to employment.

A. Sudden Mechanical or Structural Change

The claimant argues the evidence proves he suffered a mechanical or structural change to his body. He did not suffer from back pain before the accident, and he was able to work for ten months as a stocker without any problems. The claimant argues the workplace accident exacerbated a pre-existing condition, which caused it to become painful and disabling.

The claimant bears the burden of proving, by preponderating 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)). This requires evidence that the claimant suffered "an obvious sudden mechanical or structural change in the body" as the result of an industrial accident. *Hoffman v. Carter*, 50 Va. App. 199, 212 (2007) (citing *Chesterfield Cty. v. Dunn*, 9 Va. App. 475, 476 (1990)). The Commission weighs and considers the evidence presented to determine if it is sufficient to carry the burden of proof. *Amelia Sand Co. v. Ellyson*, 43 Va. App. 406, 413 (2004).

If a claimant sustains an injury that "accelerates or aggravates a pre-existing condition, [the] disability resulting therefrom is compensable under the Workers' Compensation Act." *Olsten of Richmond v. Leftwich*, 230 Va. 317, 319-20 (1985) (quoting *Ohio Valley Constr. Co. v. Jackson*, 230 Va. 56, 58 (1985)). However, "an 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).

In *Jones v. Walgreen Co.*, JCN VA00001145400 (June 19, 2017), a claimant suffered an accident and 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.* Likewise, in *Bayne v. Horizon Behavioral Health*, JCN VA00001339173 (Nov. 19, 2019), a claimant suffered a workplace accident and the attending physician's report indicated she suffered a lower back strain. X-rays were taken, which failed to

show a mechanical change and indicated that fusion hardware was intact and properly placed. The claimant's treating physician, who examined "the claimant both before and after the incident, did not find a change after reviewing the imaging studies." *Id.* We concluded the claimant had not proven a sudden mechanical change in the body and denied benefits.

After our review of the evidence, we are not persuaded the claimant suffered a sudden structural or mechanical change to the back, as required to prove a compensable injury. Although Dr. Alsayed opined on May 12, 2022, the claimant sustained an uncomplicated acute injury and provided the claimant discharge information regarding a lumbar strain, any diagnosis of a specific type of back injury is absent from the record. Imaging studies revealed only normal, post-operative changes to the claimant's back. Dr. Orchowski also opined that MRIs taken before and after the accident were similar and he could not determine whether the claimant suffered a structural change to the back. As was the case in *Jones* and *Bayne*, we find the claimant has not carried his burden of proving an injury or compensable exacerbation of a pre-existing condition.

The claimant also argues the Deputy Commissioner erred by relying upon the opinion of Dr. Orchowski. He contends the questionnaire response required the doctor to offer a legal, rather than a medical opinion. However, questionnaires prepared by an attorney and reviewed and returned by a physician are frequently considered by the Commission. They may constitute credible evidence that carries the burden of proof. *See Martin v. Stillwater Inc.*, JCN 152-51-72 (Aug. 31, 2016) (treating physician's questionnaire response and other records found sufficient to reverse the Deputy Commissioner's denial of benefits); *Dignard v. Tidewater Cmty. College*, VWC File No. 223-43-53 (Nov. 8, 2006) ("[T]he Deputy Commissioner did not err by relying on the questionnaire response since [the physician's] office notes and findings at his examinations

were not inconsistent with his response."). Here, Dr. Orchowski's questionnaire response is consistent with his medical records, particularly his observation that imaging studies from before and after the accident were similar. We find no error in the Deputy Commissioner's reliance on Dr. Orchowski's opinion.

B. Known and Expected Result

The claimant further excepts to the finding that any injury sustained would have been a known and expected result of returning to the workforce without obtaining a release. He argues the defense contradicts the assertion that no compensable injury was suffered and should not have been considered. The claimant's argument is unsupported by authority. Parties before the Commission may argue alternative theories of recovery or defenses. *See Burney-Divens v. Cmty. Corr. Admin.*, No. 1588-15-2 (Va. Ct. App. May 3, 2016) (quoting Va. Sup. Ct. R. 1:4(k)) ("[I]n Virginia, a litigant 'may plead alternative facts and theories or recovery' and 'state as many separate claims or defenses as he has regardless of consistency.'"). The defendants were not prohibited from raising an alternative defense that the claimant's injury resulted from exceeding work restrictions.

Because the Deputy Commissioner found the claimant did not sustain a compensable injury, however, the defendants' alternative pleading that the injury was an expected result of exceeding work restrictions is moot. *See Nuara v. Obrist Americas, Inc.*, VWC File No. 237-13-17 (July 15, 2010) (holding a proffer of an "alternative pleading . . . that raised no additional issues is moot"). "'[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so.' The requirement of a live, litigable controversy precludes us from 'pronouncing that past actions which have no demonstrable

continuing effect were right or wrong.'" *Va. Dep't of State Police v. Elliott*, 48 Va. App. 551, 554 (2006) (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)). Accordingly, we decline to further address the alternative defense.

III. Conclusion

The Deputy Commissioner's October 26, 2022 Opinion is AFFIRMED.

This case is ORDERED removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting:

The majority opinion elicits my respectful dissent.

"[T]he Workers' Compensation Act 'is highly remedial.'" *Corporate Res. Mgmt. v. Southers*, 51 Va. App. 118, 126 (2008) (*en banc*) (quoting *Henderson v. Cent. Tel. Co.*, 233 Va. 377, 382 (1987)). It is liberally construed, "to advance its purpose . . . [of compensating employees] for accidental injuries resulting from the hazards of the employment." *Id*. (quoting *Henderson*, 233 Va. at 382). Accord *Masonite Holdings, Inc. v. Cubbage*, 53 Va. App. 13, 19-20 (2008). *See also Lynchburg Foundry Co. v. Irvin*, 178 Va. 265, 269-70 (1941) ("The expression[] 'injury by accident'. . . ha[s] given rise to many legal controversies[,] [but] [t]ime after time we have expressly held that [it] should be liberally construed in favor of the workmen to carry out the humane and beneficent purposes of the Act." (citations omitted)).

For the reasons stated in my dissents in *Bayne v. Horizon Behavioral Health*, JCN VA00001339173 (Nov. 19, 2019) and *Jones v. Walgreen Co*., JCN VA00001145400 (June 19, 2017), I would find the claimant proved a new injury to his back. After kneeling to place a twelve-pack of sodas on a low shelf on May 5, 2022, the claimant experienced acute low back

pain that required treatment in the emergency room. When he treated with Ghada Alsayed, MD, at MedExpress Linkholme on May 12, 2022, he was diagnosed with lumbar radiculopathy and given discharge instructions for a lumbar sprain. The contemporaneous onset of radiculopathy and discharge instructions for a sprain established a material aggravation of his pre-existing back condition. We have recognized that a lumbar sprain qualifies as a mechanical change to the body. *See e.g. Harrison v. MAC Constr.* Co., VWC File Nos. 160-11-61/175-80-71 (Sept. 20, 1996), *aff'd,* No. 2597-96-3 (Va. Ct. App. Mar. 11, 1997).

This is not a case in which the claimant was actively treating for his pre-existing back condition. After his visit to Dr. Orchowski on November 1, 2019, the claimant exercised and followed a diet which caused him to lose significant weight and feel better. The only recorded back complaint in the period between his November 2019 visit to Dr. Orchowski and the May 5, 2022 accident was a complaint of back pain at L1 and L2, a different area than his pre-existing condition, in an emergency room after a June 5, 2020 motor vehicle accident. He was able to engage in the work of a stocker for the employer for ten months before the May 5, 2022 injury.

While the majority does not address it on grounds of mootness, I do not agree that the claimant's injury was the known and expected result of violating medically imposed restrictions. The "expected result" concept must be read narrowly so as to advance the legislative intent behind the Workers' Compensation Act. *Staton v. Bros. Signal Co.*, 66 Va. App. 185, 195, n.1 (2016).

The Workers' Compensation Act does not contemplate benefits for injuries voluntarily inflicted. An injury which is the "expected result of an activity that violated a doctor's specific restrictions does not constitute an injury by accident." *Carpet Palace, Inc. v. Salehi*, 26 Va. App. 357, 362 (1998). In our cases, this rule has been applied sparingly. *See Harris v. Woodgrain*

Millwork, Inc., VWC File No. 221-07-50 (Oct. 6, 2006) (Claimant with fifteen-pound lifting restriction re-injured wrist while applying at least fifteen-pounds of force on a pry bar to remove baseboards. Held: injury was not the known and expected result of violating restriction). There are good reasons for this. First, most workers do not purposefully disregard their doctor's restrictions. ("Although 'few people intentionally persist in a line of conduct that expectedly results in personal injury . . . such cases can be found.'" *Id*. (citing 2 Arthur Larson, *Workers' Compensation Law* § 38.83(f) (1977)).

Second, the law is clear that the aggravation of a pre-existing condition due to a work accident is compensable. "[T]he employer takes the employee as he finds him, and if the accident accelerates or aggravates a pre-existing diseased condition, the injured party is entitled to compensation." *Liberty Mut. Ins. Co. v. Money*, 174 Va. 50, 55-56 (1939). An expansive view of the "expected result" analysis would unreasonably undermine the general rule of coverage for pre-existing conditions aggravated by compensable work accidents.

Third, we must assiduously protect the fundamental tenet of our workers' compensation law that contributory negligence and assumption of the risk are not valid defenses to a claim. "The common law defense of contributory negligence is abolished by the Act. . . . Negligence, regardless how gross, does not bar a recovery for workers' compensation benefits." *Uninsured Emp'r Fund v. Keppel*, 1 Va. App. 162, 164-65 (1985); *see Buzzo v. Woolridge Trucking, Inc.*, 17 Va. App. 327, 333 (1993). "Evidence of a hazardous act involving obvious danger, without more" is insufficient to bar recovery under the Act. *Harbin v. Jamestown Village Joint Venture*, 16 Va. App. 190, 196 (1993). Assumption of the risk is not a defense to a workers' compensation claim.

See Roller v. Basic Constr. Co., 238 Va. 321, 327 (1989); *Rasnick v. The Pittston Co*., 237 Va. 658, 660 (1989).

We cannot allow a broad interpretation of the "expected result" concept to introduce a fault-based analysis incorporating contributory negligence and assumption of the risk under the Workers' Compensation Act. There is a very thin line between a worker who knows he has a medically imposed restriction and is injured when he intentionally disregards it, and one who holds a general belief that he should avoid certain exposures but negligently on a single occasion does not. This narrow factual spectrum makes clear the "expected result" analysis implicates fault principles.[2] The legislature recognized this concern when it provided, by statute, a specific defense which bars recovery for willful misconduct for an "intentional self-inflicted injury." Va. Code § 65.2-306(A)(1)

Dr. Orchowski's off-work status was issued in November 2019. The claimant's previous FCE found him capable of medium work. This, with the passage of two- and one-half years, the claimant's successful performance of his work duties for ten months, and the evidence of his improved health, made his return to work reasonable. His subsequent injury was not the expected result of violating his physician's restrictions.

For these reasons, I respectfully dissent.

[2] Under common law, "a person's voluntary assumption of the risk of injury from a known danger operates as a complete bar to recovery for a defendant's alleged negligence in causing that injury." *Thurmond v. Prince William Prof'l Baseball Club*, 265 Va. 59, 64 (2003)(citing *Arndt v. Russillo*, 231 Va. 328, 332 (1986); *Landes v. Arehart*, 212 Va. 200, 202-03 (1971)). The defense addresses, "whether a particular plaintiff fully understood the nature and extent of a known danger and voluntarily exposed herself to that danger." *Id.* (citing *Hoar v. Great E. Resort Mgmt.*, 256 Va. 374, 390 (1998)).

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 Clerks' Offices of the Commission and the Court of Appeals of Virginia.