

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT  
Commissioner

**Mar. 30, 2018**

GILBERT HOWARD v. S L NUSBAUM REALTY CO INC  
MASSACHUSETTS BAY INS CO, Insurance Carrier  
MASSACHUSETTS BAY INS CO, Claim Administrator  
Jurisdiction Claim No. VA00001288113  
Claim Administrator File No. 8300014825  
Date of Injury January 6, 2017

Sean P. Kavanagh, Esquire  
For the Claimant.

Jennifer G. Capocelli, Esquire  
For the Defendants.

REVIEW before Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport in Richmond, Virginia on March 9, 2018.

The claimant requests review of the Deputy Commissioner's June 29, 2017 Opinion denying benefits based upon the finding that he failed to prove a compensable injury by accident. We AFFIRM.

**I. Material Proceedings**

The claimant filed claims in early 2017 alleging that he sustained a compensable injury by accident to his back, right shoulder, right knee, and right hand on January 6, 2017. He wrote on his two claim forms that the injury occurred “[l]ifting pulling pushing a Mini Van stuck in mud” and “[l]ifting and pulling and pushing supervisor's van which was stuck in the mud.” The claimant sought medical benefits and temporary total disability benefits. The defendants raised numerous

defenses against the claim, including that the claimant did not sustain an injury by accident arising out of and in the course of his employment.

Deputy Commissioner Gillen conducted an evidentiary hearing on May 9, 2017. The Deputy Commissioner found that the claimant failed to prove a compensable injury by accident as there was no “identifiable incident or sudden precipitating event causing an obvious sudden mechanical or structural change in his body.” (Op. 8-9.) She explained:

At the hearing, the claimant testified that he felt a strain in his body after pushing and pulling on the front bumper of a van for about 45 minutes. He testified that he told a co-worker he thought he had hurt his back, but headed to lunch without notifying a supervisor. After returning from lunch, his back was hurting a little more, and he proceeded to tell Bettina, the property manager, what had happened. In his recorded statement, he stated the van was stuck in mud, and that he and a co-worker started pulling and pushing until they got the van unstuck, which he estimated took 45 minutes to an hour. In his recorded statement, the claimant indicated he felt the pain when he was leaving for lunch, but thought it was “just from me just doing what I was doing.” (Rec. Stmt., p. 14.) After returning from lunch, he felt a little pain and proceeded to the office to inform the office manager what was going on. He continued working and, while bending down to retrieve something from a cabinet, experienced sharp pain in the lower and mid part of his back. At that point, he told the office manager he wanted to get his back checked out and was instructed to go to Patient First. While driving to Patient First, he experienced sharp pain in his right shoulder.

The January 6, 2017, Patient First record indicates the following:

On 01.06.17 at 1:00 p.m. was trying to help get a van stuck in mud out with fellow coworkers. Pushing, pulling and trying to move it. Started to feel discomfort in back and right shoulder. Told boss he was having twinges but went to lunch. About 2:15 as he was trying to do other activities, started happening again. Comes in for evaluation. Denies new numbness or tingling though does have history of right hand peripheral neuropathy. Right knee is irritated but does not recall doing any specific injury to that.

The January 18, 2017, Ortho Virginia note reflects the following:

He was injured at work. He was trying to lift a van and push it out of moderate [sic] while it was stuck. He did not have a distinct fall or injury but afterwards he said the right shoulder hurt the low back hurt and the right knee per [sic] hurt. Several days later his right hand started to hurt.

Based on the facts before us, we find the claimant failed to prove that the cause of his injuries was an identifiable incident or sudden precipitating event causing an obvious sudden mechanical or structural change in his body. We find the claimant's testimony that he was "pulling and pushing and pulling and pushing" until the van was extricated from the mud, over a period of 45 to 60 minutes, (see Rec. Stmt., p. 13), to be credible. His testimony is supported by the medical records which indicate pushing, pulling, and no "distinct fall or injury."

We are cognizant of Van Buren v. Augusta County, Record No. 1975-15-3 (Va. Ct. App. Jul. 19, 2016), but we are reluctant to say, based on the totality of the evidence before us, that the claimant's injury occurred during a "reasonably definite time." We particularly find this to be true where: (1) the claimant testified only to strain and pain in his "body" contemporaneous with the activity; (2) informed the employer, after returning from lunch, of pain only in his back with no mention of the right shoulder, right knee or right hand; and (3) did not seek medical attention until after an incident later in the afternoon where he was bending over to get something in a cabinet and felt a sharp pain in his back. Given this evidence we do not find the "necessary rigidity of temporal precision to constitute one event," as discussed in Van Buren."

(Op. 7-9.) The claimant timely appealed.

## **II. Summary of Evidence**

At the hearing, the claimant testified to moving a minivan stuck in mud onto solid traction with some co-workers. He stated that "we kept on pulling and pushing and we did that for like 45 minutes . . . while it was happening, I felt the strains and the pains in my body. . . . So when we finished, I told the other guys, I think I hurt my back." (Tr. 6.) The claimant took a lunch break, and his back symptoms increased with the addition of having shoulder pain. He explained that he

bent over to finish a caulking task and felt a sharp back pain. The claimant ceased working, reported his back pain to a supervisor, and sought medical treatment.

The insurer took the claimant's recorded statement on January 17, 2017. (Defs.' Ex. 2.) The claimant described pushing and pulling the stuck vehicle for 45 to 60 minutes. He stated that thereafter he took an hour-long lunch break and then felt back pain. He also said that he felt some pain before leaving for lunch. The claimant explained that he attempted to resume working, bent down to retrieve caulk from a cabinet, and suffered sharp back pain.

The pertinent medical record reflects the following histories. On January 6, 2017, the attending health care professional noted that the claimant "was trying to help get a van stuck in mud out with fellow coworkers. Pushing, pulling and trying to move it. Started to feel discomfort in back and right shoulder. Told boss he was having twinges but went to lunch." A note dated January 12, 2017 described that "he was trying to free a van from the mud. Pushing and pulling it, developed symptoms afterwards." The orthopedist wrote on January 18, 2017, that the claimant "was trying to lift a van and push it out of [mud] while it was stuck. He did not have a distinct fall or injury but afterwards he said the right shoulder hurt the low back hurt and the right knee."

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

We have carefully considered the presented evidence, including assertions made by both parties on appeal. We agree with the lower denial.

To prove an "injury by accident," the claimant had the burden of establishing "(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, 648 S.E.2d 318, 325 (2007).

Accordingly, “injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events, as well as injuries sustained at an unknown time, are not ‘injuries by accident.’” Morris v. Morris, 238 Va. 578, 589, 385 S.E.2d 858, 865 (1989). Rather, the claimant must show that “the *cause* of his injury was an *identifiable incident or sudden precipitating event* and that it resulted in an *obvious* [or] *sudden mechanical or structural change in the body*.” Id. at 589, 385 S.E.2d at 865 (emphasis in original) (quoting The Lane Co., Inc. v. Saunders, 229 Va. 196, 199, 326 S.E.2d 702, 703-04 (1985)).

We find that the claimant failed to establish an obvious, sudden mechanical or structural change in the body or a causal connection between the incident and the bodily change alleged.<sup>1</sup> Notably, the claimant consistently conveyed that he continuously pulled, pushed, and lifted the vehicle over a span of time. The claimant stated that during these actions he “felt the strains and the pains in my body” and reported having “twinges.” He took a lunch break, and thereafter, while bending over to complete a task, he suffered distinctive back pain. Correspondingly, no health care provider indicated a specific bodily change resulting from a particular incident. Instead, notes of January 12, 2017 described the repetitive motions partaken by the claimant and then he “developed symptoms afterwards.” Likewise, the January 18, 2017 report described that there was no “distinct fall or injury but afterwards he said the right shoulder hurt the low back hurt and the

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<sup>1</sup> In Van Buren v. Augusta County, 66 Va. App. 441, 787 S.E.2d 532 (2016), and Riverside Regional Jail Authority v. Dugger, 68 Va. App. 32, 802 S.E.2d 184 (2017), the medical records supported a sudden mechanical structural change, i.e., a ruptured disc in Van Buren and a torn meniscus in Dugger. The injured employees in both cases simply could not pinpoint exactly when the injuries occurred while performing their work duties.

right knee [] hurt. Several days later his right hand started to hurt.”<sup>2</sup> Based upon longstanding case law and interpretation of the Virginia Workers’ Compensation Act, we find no error in the holding that the claimant failed to prove a compensable injury by accident.<sup>3</sup> See Daggett v. Old Dominion Univ., JCN VA00001318459 (Mar. 8, 2018) (Injury did not result from an identifiable incident or sudden precipitating event: the claimant engaged in repetitive movements of lifting and turning boards for 60 to 90 minutes and could not pinpoint a particular movement or action that resulted in symptoms.).

#### **IV. Conclusion**

We AFFIRM the Deputy Commissioner’s June 29, 2017 Opinion.

This matter is hereby removed from the Review docket.

#### MARSHALL, COMMISSIONER, Concurring:

I concur with the majority opinion as to the result. On the facts of this case, the claimant failed to establish a compensable injury by accident. The time spent pulling, pushing, and lifting the van was discrete enough under Dugger and Van Buren to constitute an identifiable incident.

The claimant’s descriptions at hearing and in the medical records were insufficient to establish that he sustained a sudden mechanical or structural change to the body. His statements that he “felt the strains and pains in my body” and “twinges” are vague. He initially described back pain but later complained of shoulder pain. Ultimately, he claimed to have injured both of them

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<sup>2</sup> We find this case analogous to the recent decision of Kim v. Roto Rooter Services Co., No. 1053-16-4 (Va. Ct. App. Mar. 7, 2017), which denied the compensability of an accident. In Kim, the Court emphasized that “unlike the claimant in Van Buren, who was not engaged in any repetitive activity, appellant was repeated the same motions and activities over and over again.” Also similar to Kim, the current claimant could not pinpoint when his symptoms began, and “it is unclear from the record when appellant actually sustained the injury.”

<sup>3</sup> We note that Van Buren did not create a “first responder” exception when considering the “rigid temporal precision” of Morris as discussed in dicta by the Deputy Commissioner on page 9. See Dugger.

and his right knee and right hand. There is no dispute he had a sudden onset of pain when bending to retrieve caulk from a cabinet later in the day. The medical records conflict with his descriptions. Contrary to his testimony, the January 12, 2017 note reflected the development of symptoms “afterwards.” The evidence in this case is too inconsistent for us to conclude the claimant met his burden of proof.

I do not join the majority’s reasoning in distinguishing Van Buren v. Augusta County, 66 Va. App. 441, 787 S.E.2d 532 (2016), and Riverside Regional Jail Authority v. Dugger, 68 Va. App. 32, 802 S.E.2d 184 (2017), on the basis of the nature of injury.

I do not join the majority’s reliance on Kim v. Roto Rooter Services Co., No. 1053-16-4 (Va. Ct. App. Mar. 7, 2017).

#### 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.