VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT
Commissioner

Jan. 15, 2020

LINNEA MORRES v. EARTH TREKS CRYSTAL CITY CLIMB
EVEREST NATIONAL INS CO, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA02000032092
Claim Administrator File No. B960047319000101600
Date of Injury: November 11, 2018

W. David Falcon, Jr., Esquire
For the Claimant.

Marilyn N. Harvey, 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 August 13, 2019 Opinion finding the claimant failed to carry her burden of proving a compensable injury by accident in the course of her employment on November 11, 2018. We AFFIRM.[1]

I. Material Proceedings

On March 6, 2019, the claimant filed a Claim for Benefits alleging she suffered compensable injuries to her back and right ankle on November 11, 2018. She sought medical benefits pursuant to Virginia Code § 65.2-603.[2]

[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).

[2] At the hearing, the claimant withdrew without prejudice a claim for temporary total disability benefits. The Commission retained jurisdiction over a permanency claim.

The defendants defended the claim on the grounds the claimant did not experience a compensable injury by accident arising out of and in the course of her employment, and her injuries were not causally related to her employment.

Deputy Commissioner Nevin conducted an evidentiary hearing on July 31, 2019. He denied the claimant's claim. He explained:

> After carefully reviewing all the record evidence, and applying the above, we determine that the claimant failed to carry her burden of proving a compensable injury by accident in the course of her employment on November 11, 2018, as alleged. In reaching this conclusion, we determine that, at the time of her injury, the claimant was engaged in personal, recreational rock-climbing, and was not fulfilling the duties of her employment or anything reasonably incidental thereto. We further determine that the claimant was not supposed to commence working on November 11, 2018, until noon, and that her injury occurred sometime between 11:30 AM as indicated on the employer's Accident/Incident Report and 11:40 AM to 11:50 AM according to the claimant's testimony. The claimant had not yet clocked in to work at the time of her injury, and we credit Patrick's testimony that the employer's employees are not permitted to do any personal climbing while on the clock. We further credit Patrick's testimony that the claimant's climbing partner at the time of her injury, Gus, was not scheduled to work at all on November 11, 2018. We infer from this that the claimant and Gus were engaged in personal, recreational rock-climbing when the claimant fell prior to commencing her shift. We further credit both the claimant's and Patrick's testimony that the rope maintenance task the claimant intended to do is performed on the ground and does not require any climbing. We infer from this that the claimant was not required to warm up to perform rope maintenance and was certainly not required to perform the type of "lead climbing" activity she was performing when she fell. We instead conclude that the claimant went to the employer's premises on November 11, 2018, before her work shift so she could engage in some recreational lead rock-climbing before she started work. Although the employer benefits to some degree from the rock-climbing proficiency of its employees, we are not persuaded that, at the time of her injury, the claimant was furthering the business interests of the employer.

(Op. 7-8.)

The claimant requests review of the Deputy Commissioner's decision. The claimant asserts she was in the course of her employment when engaging in a recreational practice climb to

prepare herself for a subsequent climbing activity required by her employment. The claimant further maintains the employer derived a substantial benefit from the claimant's practice climb.

II. Summary of Evidence

The claimant worked as a shift supervisor for the employer's climbing fitness facility. She managed part-time employees, performed maintenance at the gym, and taught classes. She was scheduled to perform rope maintenance with another employee, Brady Smith, on November 11, 2018. Email correspondence reflects Mr. Smith and the claimant scheduled rope maintenance on that day at 12 p.m. (Cl.'s Ex. 2.) Prior to clocking in for her work shift, she met with Gus Mason to practice lead climbing. She indicated she wanted to "warm up for the rope maintenance," . . . "[b]ecause maintenance can be strenuous activity and I don't like doing strenuous activity without being properly warmed up. . . . So, warming up is essential part for me when I do activities, so that I don't injure myself further." (Tr. 5, 12.) During this climb, at approximately 11:30 a.m. to 11:45 a.m., she took a "practice fall," when she was approximately 25 feet above the ground "to get rid of the butterflies in [her] stomach," when she falls during climbing.[3] (Tr. 7, 8.) She had previously completed practice falls during her employment. Mr. Mason failed to stop her from falling to the floor, and she injured her back and right ankle. She denied the employer advised against warming up or taking practice falls. She recalled other employees took practice falls but was unaware of whether other employees warmed up before work shifts.

On cross-examination, the claimant agreed lead climbing was her hobby, and she utilized the employer's facilities for both personal and work climbing. She was not teaching a lead

[3] A practice fall is an intentional fall. (Tr. 8.) During a practice fall, the climber's fall is supposed to be arrested by the climber's partner holding the rope.

climbing class the day of the accident. She confirmed she was required to clock in for her work shifts, and she did not clock in prior to her fall. She agreed the employer did not advise her she needed to warm up for rope maintenance, and she chose to climb to warm up prior her to work shift. She explained rope maintenance, which included inspecting the climbing ropes, was performed on the ground.

On redirect examination, she could not recall whether she was going to perform any maintenance other than rope maintenance on the day of the accident. She indicated bolt maintenance involved climbing, stating:

> Like bolt maintenance is also something I want to learn about, that's where all the bolts that they have on the walls, like the ones holding the carabiners that we use for lead climbing. That's also part of maintenance to inspect those and make sure that they are correct and tight. If that makes sense.

(Tr. 23.) She agreed she was scheduled to perform bolt maintenance on the night of her accident if the email scheduling the rope maintenance reflected the same. The email reflects Mr. Smith wrote to the claimant on November 5, 2018, "I know we're both doing bolt maintenance that night so it'll make for a long day." (Cl.'s Ex. 2.) She subsequently confirmed her warm up was also intended to prepare her for bolt maintenance.

Erica Patrick, the employer's gym director, testified the employer's policy requires employees to clock in before they begin work. She denied there was any requirement to warm up prior to performing rope maintenance, and rope maintenance does not require lead climbing. She testified employees are not allowed to personally climb while they are on the clock. On cross-examination, Ms. Patrick agreed that bolt maintenance required climbing the ropes. She

confirmed every employee has the ability to climb. She testified that Mr. Mason, who was lead climbing with the claimant at the time of her accident, was not scheduled to work that day.

III. Findings of Fact and Rulings of Law

"Under the Virginia Workers' Compensation Act, an employee seeking compensation for an injury by accident must prove by a preponderance of the evidence that the injury arose 'out of and in the course of the employment….'" *Lucas v. Fed. Express Corp*., 41 Va. App. 130, 133 (2003) (quoting Va. Code § 65.2-101). "The phrase arising 'in the course of' [employment] refers to the time, place, and circumstances under which the accident occurred." *Combs v. Va. Elec. & Power Co.*, 259 Va. 503, 511 (2000) (quoting *Cnty. of Chesterfield v. Johnson*, 237 Va. 180, 183 (1989)). "An accident occurs 'in the course of the employment' when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling duties of his employment or engaged in doing something incidental thereto." *Id*. (quoting *Bradshaw v. Aronovitch*, 170 Va. 329, 335 (1938)).

"[A]n employer can enlarge the 'course of employment' by extending the scope of employment to embrace recreational and social events." *Kum Ja Kim v. Sportswear*, 10 Va. App. 460, 464 (1990). "The dispositive question is whether the social or recreational function is so closely associated with the employment to be considered an incident of it." *Id*. at 465. Factors to be analyzed when determining if an accident occurs in the course of employment include:

> The extent to which the employer expects or requires the employees to attend . . . . [T]he degree to which the employer derives a benefit from the activity, the degree of sponsorship and participation by the employer, whether the activity occurs on premises associated with the employment, when the activity occurs in relation to work, and the frequency or period over which the activity has been conducted.

Id. at 465-66. *See also Morgan v. City of Norfolk Sch. Bd.*, 76 O.W.C. 359 (1997) (finding a recreational activity was within the course of the employment included if the activity occurred on the premises as a regular incident of the employment, the employer required participation, or the employer derived substantial benefit beyond the intangible value of improving employee health and morale.). We do not deem the Courts' analysis in *Kim*, a case cited by the dissent, controls the outcome of this case. The claimant was not injured while attending an employer-sponsored event. She appeared at work of her own volition so she could practice her hobby with another employee who was not scheduled to work that day. There is no evidence that the claimant felt some obligation to practice her climbing while off the clock. Rather, the claimant used the facility for her personal use, an activity prohibited while on the clock. (Tr. 17, 29.)

We acknowledge the claimant's testimony that she was warming up to perform rope maintenance, and her subsequent testimony that she was also warming up to perform bolt maintenance later that evening. Nonetheless, the Deputy Commissioner was not persuaded by the claimant's testimony that she was fulfilling the duties of her employment or anything reasonably incidental thereto at the time of her accident. We also find the claimant's testimony that she was warming up to be unconvincing as she was scheduled to perform rope maintenance that day, an activity that is performed on the ground and did not require climbing. (Tr. 21, 27, 28.) Additionally, we do not find whatever ephemeral benefit the employer might receive from the claimant sharpening her climbing skills sufficient to bring the claimant within the course and scope of her employment. Such a consideration is relevant to the question of whether an employee otherwise within the course and scope of her employment has removed herself therefrom. In such a circumstance, an employee may be said to be on a frolic of their own making, and the employer is

no longer responsible for the employee's conduct. *See Taylor v. Robertson Chevrolet Co.*, 177 Va. 289, 295 (1941).

The record in its entirety preponderates to show the claimant was injured while she engaged in climbing that was voluntary and for her own personal benefit outside of her employment requirements. Employees were not allowed to engage in personal climbing while on the clock working for the employer, and the claimant had not clocked in at the time of her accident. Her climbing partner at the time of the accident, Mr. Mason, was not scheduled to work on the day of the accident. She was not teaching a climbing class on the day of the accident. The rope maintenance she was scheduled to perform for the employer did not require climbing. The bolt maintenance required climbing, but it was not to take place until the evening time. Significantly, we note, at the hearing, the claimant was initially unsure of whether she was going to perform any maintenance other than rope maintenance on the day of the accident.

The evidence also does not preponderate to show the claimant's purely recreational climbing prior to her work shift benefitted the employer beyond the intangible value of improving employee health and morale. There is not sufficient evidence in the record that the employer required, encouraged, or promoted personal climbing at the facility. Indeed, since many, perhaps most, jobs require some level of skill, a holding that an employee is within the course of their employment when engaged in an activity that hones that skill necessarily expands the concept of "in the course of" to a point of meaninglessness. Accordingly, we find the claimant did not meet her burden of proving she suffered her injuries in the course of her employment.

IV. Conclusion

The Deputy Commissioner's August 13, 2019 Opinion is AFFIRMED.

This matter is removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting:

Having considered the majority's thoughtful analysis, I register my respectful dissent. Applying the factors laid out in *Kim v. Sportswear*, 10 Va. App. 460, 465-466 (1990), the claimant's injuries occurred in the course of her employment. There is no question that the claimant was engaged in voluntary climbing at the time of her injury. However, "[t]he dispositive question is whether the social or recreational function is so closely associated with the employment to be considered an incident of it." *Id.* at 465.

The majority's reasoning is internally inconsistent. It cites *Kim* for the list of factors to be analyzed when determining if an accident occurs in the course of employment (Op. 5.), and then concludes, "We do not deem the Court's analysis in *Kim* . . . controls the outcome of this case." (Op. 6.) It reasons the claimant was not injured during an employer-sponsored event. However, "the degree of sponsorship and participation by the employer" is but one of six factors enumerated by the Court of Appeals in *Kim*. 10 Va. App. at 465-66. If the *Kim* analysis was meant to apply *only* to employer-sponsored events, the degree of sponsorship would not have been listed as *a factor* to be considered. We must also consider:

> The extent to which the employer expects or requires the employees to attend . . . . [T]he degree to which the employer derives a benefit from the activity, . . . whether the activity occurs on premises associated with the employment, when the activity occurs in relation to work, and the frequency or period over which the activity has been conducted.

Id. at 465-66.

As a shift supervisor, the claimant's employment duties consisted of managing other employees, performing administrative tasks, completing various maintenance duties around the gym, and teaching climbing and fitness classes. (Tr. 4.) While the claimant was not *required* to recreationally climb at the gym, the evidence established that her employer certainly *expected* it. Erica Patrick, gym director, acknowledged, "every employee climbs; it's why they work at Earth Treks because it's our passion." (Tr. 31.) In fact, the claimant was climbing with another shift supervisor, Gus Mason, at the time of her accident. (Tr. 5.) The claimant had never been told not to do a warm up or practice falls. (Tr. 13.) The only restriction on personal climbing mentioned by the employer was that employees were not allowed to personally climb while on the clock. (Tr. 29.) This evidence established that the employer anticipated that employees would engage in personal climbing on the employer's premises outside of work hours. In other words, personal climbing by employees was an accepted and normal activity at the gym. *See, e.g.*, *Homan v. Massanutten Dev. Co.*, 56 O.I.C. 175 (1974) (lodge manager engaged in personal skiing was in the course of his employment); *Shaffer v. The Tides Inn*, 36 O.I.C. 425 (1954) (waiter swimming in resort pool during break between meals was in the course of his employment).

Contrary to the majority's suggestion, it is not dispositive that the claimant was injured while performing a voluntary act, on her own volition, that was not required by the employment. The relevant question is whether the claimant was "reasonably fulfilling the duties of her employment or [was] doing something which was reasonably incidental thereto." *Thore v. Chesterfield Cty. Bd. of Supervisors*, 10 Va. App. 327, 331 (1990) (quoting *Conner v. Bragg*, 203 Va. 204, 208-09 (1962)). The Court of Appeals of Virginia recently reiterated this well-established principle, explaining:

> With respect to activities which are reasonably incidental to fulfilling employment duties, if an employee's "voluntary act . . . which causes an injury is sufficiently related to what [he] is required to do in fulfilling his contract of service, or is one in which someone in a like capacity may or must do in the interest of his employer's business," his right to receive compensation will not be impaired even though he was not required to perform the act. *Lucas v. Lucas*, 212 Va. 561, 564 (1972) (quoting 7 Sneider, Workmen's Compensation § 1662(a) (1945)). Thus, compensable injuries by accident that occur in the course of employment may result either from a claimant's acts performed in fulfillment of their required job duties, or from their voluntary acts which are reasonably related to the fulfillment of those required job duties.

Hayes v. Nobility Inv., LLC, No. 1610-18-2 (Va. Ct. App. Apr. 30, 2019).

Here, the evidence established that the claimant's recreational climbing benefitted the employer and was reasonably related to the fulfillment of her required job duties. Patrick, the gym director, agreed it was in the employer's best interest that the employees be able to climb adequately in order to teach classes and perform maintenance. (Tr. 31.) The claimant testified that on the date of the accident she was climbing in order to warm up before she began her shift performing rope maintenance. She explained that if a rope needed to be changed during rope maintenance, an employee would have to climb to change the rope. (Tr. 19.)[4] She was also going to be performing bolt maintenance later than evening, a task that involved climbing. (Tr. 22-23, 30-31.) Although the claimant was not teaching a climbing class on the day of the accident, her job included teaching classes (Tr. 4.), a duty that required her to be proficient at climbing. The claimant's climbing benefitted the employer by helping the her to warm up for her required work

[4] The majority finds the claimant's testimony in this regard unconvincing because "she was scheduled to perform rope maintenance that day, an activity that is performed on the ground and did not require climbing. (Tr. 21, 27, 28.)." (Op. 6.) The record does not support this conclusion. The claimant agreed rope maintenance was performed "mostly on the ground." (Tr. 21.) Patrick testified there was no requirement that employees warm up prior to performing rope maintenance (Tr. 27.) and that *lead climbing* was not required for rope maintenance (Tr. 28.) (emphasis added). There was *no evidence* that rope maintenance did not require *any* climbing. The uncontradicted evidence proved climbing *was necessary if a rope needed to be changed during rope maintenance*. (Tr. 19.)

duties that day and by maintaining and improving her climbing proficiency so she could better perform maintenance activities and teach classes.

The majority's analysis focuses on whether the claimant's precise type of climbing on the date of the accident was beneficial to her specific work duties that day. While this reasoning is tempting to embrace, in *Boys & Girls Club of Virginia v. Marshall*, 37 Va. App. 83 (2001), the Court of Appeals of Virginia did not engage in such a microscopic analysis. The claimant, a lifeguard, was found dead in a pool after completing supervision of children. He previously told the executive director he had been practicing endurance swimming underwater. This was not a required duty of his work, but the executive director did not discourage it. The Court affirmed the Commission's award of benefits under the Workers' Compensation Act. It held the Commission reasonably could infer the lifeguard's activity "had more than an incidental benefit to the employer" who depended on his skills. *Id.* at 91. The Court did not analyze whether the claimant's underwater endurance swimming was necessary for the specific job duties he was to perform that day. Rather, it noted, "It is apodictic that a lifeguard's swimming skills above and below water are integral to his employment responsibilities." *Id*. The same reasoning applies here. The claimant's recreational climbing, as a warm up for her work shift, benefitted the employer by conditioning her and honing skills necessary for her job duties.[5]

[5] The majority finds that such an "ephemeral benefit" insufficient to bring the claimant within the course and scope of her employment, and asserts that such a consideration is relevant to whether or not the claimant was engaged in a frolic outside of the course and scope of employment. (Op. 6-7.) They cite *Taylor v. Robertson Chevrolet Co.*, 177 Va. 289, 295 (1941), for this proposition. *Taylor* involved a claimant who was required by the employer to go from one work assignment to another, and made a detour to eat supper at home instead of in a restaurant. *Id.* at 297-98. The Supreme Court of Virginia found that the claimant was in the course of his employment when he slipped and fell near his home. *Id.* The Court did not engage in a discussion of whether the claimant's trip home for supper had more than an "ephemeral benefit" to the employer. *Taylor* is not supportive of the majority's reasoning and does not stand for the proposition cited.

The majority critiques that such reasoning "expands the concept of 'in the course of' to a point of meaninglessness." (Op. 7.) This would be accurate if the "in the course of" analysis hinged solely on whether a worker's activity benefitted the employer. However, the majority's statement ignores that other factors that must also be applied to determine whether an accident occurs in the course of employment. Here, in addition to being beneficial to the employer, other circumstances lead to the conclusion that the claimant's injury occurred in the course of her employment.[6] Her recreational climbing was expected and acquiesced to by the employer. There is no dispute that the claimant was on the employer's premises at the time of the accident. She was scheduled to begin working just thirty minutes after the accident occurred. She routinely warmed up before performing rope maintenance or instruction. (Tr. 12-13.) She had done so before using the employer's equipment. *Id.* She was warming up with a co-worker.

Under these circumstances, the claimant's climbing on the date of the accident was reasonably incidental to her employment. Thus, the claimant's injury occurred "at a place where she was reasonably expected to be while engaged in an activity reasonably incidental to her employment . . . ." *Briley v. Farm Fresh, Inc.*, 240 Va. 194, 198 (1990) (citing *Jones* v. *Colonial Williamsburg Found.*, 10 Va. App. 521 (1990)) (employee grocery shopping after her shift ended was in the course of her employment).

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

[6] Admittedly, if only one of the *Kim* factors supported the conclusion that the accident was in the course of the employment, this likely would not be sufficient for the claimant to make out her case.

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.