AFFIRMED by the Court of Appeals, Record No. 1054-18-2 (December 26, 2018)
(Published Opinion)

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

June 25, 2018

GEORGE NORRIS, JR. v. ETEC MECHANICAL CORPORATION
COMMONWEALTH CONTRACTORS GROUP SELF-INSURED, Insurance Carrier
THE LANDIN COMPANIES, Claim Administrator
Jurisdiction Claim No. VA00001317384
Claim Administrator File No. 602-3467-00-16-004
Date of Injury: March 31, 2017

William C. Carr, Esquire
For the Claimant.

Esther King, 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 16, 2017 Opinion finding that his injuries did not arise out of the employment and were not compensable. We AFFIRM.

I. Material Proceedings

On March 31, 2017, the claimant was involved in a serious automobile accident while driving home in a company vehicle at the end of his work day. He filed a Claim for Benefits on April 19, 2017, alleging injuries to his right hip, leg, and knee and his left shoulder, hip, leg, femur, knee and ankle. As clarified at the hearing, he sought medical benefits and temporary total disability. The claim was defended on the grounds the claimant's injuries did not arise out of the employment. The Deputy Commissioner agreed and denied the claim for the following reasons:

> Based on the claimant's undisputed testimony and considering the medical histories, which do not persuade us that the claimant either lost consciousness or

> was hypotensive prior to the motor vehicle crash, we find that the claimant fell asleep while driving on March 31, 2017 which, in turn, caused him to run off the road and crash the company vehicle into a tree. Unlike in the cases relied upon by the defendants, this case does not involve an unexplained accident, i.e. meaning that no one can relate how the accident happened. The claimant recalled the facts surrounding the accident, and we know why he ran into a tree. He fell asleep at the wheel.
>
> The question is whether falling asleep behind the wheel and crashing the vehicle arises out of the employment.
>
> The claimant alternatively testified that he does not know why he dozed off and that he dozed off because he was "tired, obviously." The claimant further testified that he gets tired in the evenings and had previously been dozy behind the wheel. However, the evidence does not sufficiently prove a causal connection between the conditions under which the claimant's work was to be performed, his falling asleep, and the resulting accident and injury. The evidence does not prove that there was anything usual about the claimant's work on March 31, 2017, or that his work—as opposed to something else—made him so tired that he fell asleep behind the wheel. Likewise, there is no evidence to suggest that the claimant had a long commute between the work site and his home or that he worked long hours, for example.

(Op. 5.)

The claimant filed a timely request for review by the full Commission. He argues the work he engaged in "was physically demanding and could reasonably be described as fatiguing" and that "[f]alling asleep while driving is a known hazard." (Cl.'s W.S. 6-7.)

II. Findings of Fact and Rulings of Law

The claimant bears the burden of proving his injury arose out of his employment. Mktg. Profiles, Inc. v. Hill, 17 Va. App. 431, 433, 437 S.E.2d 727, 729 (1993). "[A]n injury 'arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and resulting injury.'" Bradshaw v. Aronovitch, 170 Va. 329, 335,

196S.E.684, 686 (1938). This requires 'that the employment expose the workman to the particular danger from which he was injured, notwithstanding the exposure of the public generally to like risks." Lucas v. Lucas, 212 Va. 561, 563, 186 S.E.2d 63, 64 (1972) (citing Immer and Co. v. Brosnahan, 207 Va. 720, 725, 152 S.E.2d 254, 257 (1967)). "Whether an injury is incident to or connected with a particular business, that is, whether it arises out of and in the course of the employment, depends upon the peculiar circumstances of each case. No exact rule can by formulated by which every case can be decided." Railway Express Agency, Inc. v. Lewis, 156 Va. 800, 809, 159 S.E. 188, 191 (1931).

On March 31, 2017, the claimant was driving a company vehicle home from the job site. When he was some 200 yards short of his house he ran off the road and struck a tree, sustaining serious injuries. It is undisputed that the accident occurred because the claimant fell asleep. Under an established exception to the coming and going rule applicable to cases where the employer provides transportation to and from work, the claimant was in the course of his employment when his accident occurred. The question confronting the Commission is whether an accident occurring because the claimant falls asleep behind the wheel arises out of his employment.

Accidents that happen on public roadways during the course of employment may be found to arise out of the employment subject to the "actual risk test." Mktg. Profiles, Inc., 17 Va. App. at 434-35, 437 S.E.2d at 729-730. Under the actual risk test, it is the claimant's burden to prove, by a preponderance of the evidence, that the accident arose from an actual risk caused by his presence on the street. Hill v. S. Tank Transp., Inc., 44 Va. App. 725, 730, 607 S.E.2d 730, 732 (2005) (citation omitted).

We have held that, to be compensable, the claimant must establish a causal connection

between his work and falling asleep behind the wheel. For example, in Trent v. American Red Cross, VWC File No. 225-49-11 (Nov. 20, 2006), aff'd, No. 3115-06-04 (Va. Ct. App. May 8, 2007), a claimant who was involved in an accident after falling asleep while driving "testified that she was tired due to a very busy 60-hour week and a late drive the night before" another work event. She also stated that she had "taken measures to try and stay awake while driving." Id. We found this sufficient to establish that the claimant's injury arose out of her employment.

The Deputy Commissioner found the evidence did not persuasively establish a causal connection between the conditions of the claimant's work and his falling asleep. On review, the claimant argues that his work was fatiguing and contributed to him falling asleep. The claimant testified that he "dozed off" before the accident occurred, and that he got "tired in the evenings, and sometimes more so than others." (Tr. 10.) We agree with the Deputy Commissioner's finding that the claimant failed to prove the requisite causal connection between his work conditions and falling asleep on the drive home. He provided no convincing evidence to explain why he was tired on the evening in question. He agreed that it had been a normal work week and that he had not been on call for the employer. (Tr. 15.) At his pre-hearing deposition, he was unable to identify a reason he fell asleep. (Tr. 17.) Medical records prepared after the accident indicate that the claimant "fell asleep and crashed into a tree," but no specific factor was cited as the reason this occurred. (Cl.'s Ex. 1-1.)

During redirect examination, the claimant described the work he was performing that day. While that work is physical in nature, he did not refer to those tasks as more strenuous or difficult that normal, nor did he relate his fatigue or inability to stay awake to the activities he performed

for the employer. The evidence is insufficient to causally connect the claimant's accident with his work. Neither can we indulge in an inference that his injuries arose out of the employment.

Though not argued by the claimant, we have considered whether our decision is controlled by the actual street-risk rule which provides that "if the employment occasions the employee's use of the street, the risks of the street are the risks of the employment." Mktg. Profiles, Inc., 17 Va. App. at 435, 437 S.E.2d at 730 (quoting 1 Arthur Larson, Workers' Compensation Law § 9.40 (1993)). We do not read the rule so broadly as to embrace under the Act's protection every accident that occurs while driving on a street. Belying such an interpretation is the denial of benefits in cases where vehicular accidents occur for unknown reasons. See S. Tank Transp., Inc., 44 Va. App. at 733, 607 S.E.2d at 734 ("[C]laimant never explained how the hazards of the street caused his injuries . . . [c]laimant only proved that he was on the road, went off the road, and hit a tree."); Sweeney v. Qualicon Corp., VWC File No. 224-65-46 (Jan. 22, 2008), aff'd, No. 0409-08-2 (Va. Ct. App. July 1, 2008) (benefits denied because "the evidence failed to demonstrate that a condition of the workplace either caused or contributed to the claimant's loss of consciousness or the motor vehicle accident"); Byrd v. Oasis Servs., Inc. VWC File No. 210-68-56 (Aug. 8, 2003), aff'd, No. 2346-03-4 (Va. Ct. App. Apr. 20, 2004) ("We find no credible evidence that the claimant's work or work environment caused or contributed to the condition that precipitated the motor vehicle accident . . . ."); Rader v. Dominion Enters. Trading Publ'g, VWC File No. 231-77-32 (Oct. 8, 2008), aff'd, No. 2545-08-3 (Va. Ct. App. Mar. 17, 2009) (benefits denied when claimant "testified that she had no idea why her car went off the road" and "did not know if she fell asleep").

We recognize that what caused the claimant's accident in this case is known. While falling

asleep behind the wheel affords a virtual guarantee of an accident, the operative question is whether driving a vehicle confronted the claimant with a risk of falling asleep. We hold that it does not. Absent affirmative evidence establishing a causal connection between the claimant's employment and his untimely slumber, his claim must be denied.

III. Conclusion

The Deputy Commissioner's October 16, 2017 Opinion below is AFFIRMED.

This matter is hereby removed from the review docket.

MARSHALL, COMMISSIONER, Dissenting:

The claimant proved his injuries arose out of his employment. He fell asleep while driving on March 31, 2017. This was a risk of his employment.

We have "long recognized the general principle . . . [that] employees whose duties of employment require their presence or travel upon the public streets . . . are covered from hazards incident to that presence or travel by workers' compensation . . . In such cases, once commonly referred to as 'street cases', we employ the 'actual risk' test to the determination of whether the injury arose 'out of' the employment." Sentara Leigh Hosp. v. Nichols, 13 Va. App. 630, 634, 414 S.E.2d 426, 428 (1992) (en banc) (citations omitted).

"[I]f the employment occasions the employee's use of the street, the risks of the street are the risks of the employment." Mktg. Profiles v. Hill, 17 Va. App. 431, 435, 437 S.E.2d 727, 730 (1993) (citation omitted). Under the actual risk test, "it is immaterial even whether the degree of exposure is increased, if in fact the employment subjected the employee to the hazards of the street, whether continuously or infrequently." Immer & Co. v. Brosnahan, 207 Va. 720, 725, 152 S.E.2d

254, 257 (1967) (quoting 1 Arthur Larson, Larson's Workers' Compensation Law § 9.10 (1993)). Under this test, '[t]he hazards of highway travel thus became necessary incidents of [the] employment." Id. at 728, 152 S.E.2d at 259. See Keister v. Vaden Co. Inc., VWC File No. 153-58-63 (May 26, 1992), aff'd, No. 1170 92-2 (Jan. 25, 1994)

Here, the claimant was driving a company vehicle on the streets. He fell asleep and his vehicle hit a tree. His employment placed him in a position increasing the dangerous effects of a motor vehicle accident. The accident resulted from a hazard incident to his presence on the streets. It arose out of the employment under the street risk doctrine and the actual risk test.

An employee should not be required to prove a work related factor caused him to fall asleep while driving in the course of his employment. This specific question was addressed in Appeal of Kelly, 167 N.H. 489, 114 A.3d 316 (2015). A workers' compensation Appeal Board denied a claim because the claimant, who fell asleep while driving, did not prove he fell asleep because of his work. The New Hampshire Supreme Court reversed, holding:

> [t]here can be no question that the injurious effects of falling asleep were increased by the environment in which the petitioner found himself at the time he fell asleep – behind the wheel of a moving truck. We have no difficulty concluding on this record, as a matter of law, that the petitioner's employment was a "substantial contributing factor to the injury."

Id., 167 N.H. at 496, 114 A.3d at 322-23 (citations omitted).

The reasoning of Kelly is compelling. Where the claimant's work placed him in a position operating a motor vehicle, failing to prove the cause of falling asleep should not determine whether the accident arose out of the employment. See Wash DOT v. Sea Coast Towing, Inc., 148 Fed Appx. 612 (2005)(claimant in admiralty negligence case proved ship's crew fell asleep during

navigation; not required to prove cause of crew falling asleep); Lee v. Moore, 168 Va. 278, 282, 191 S.E. 589, 591 (1937) (mere fact of going to sleep while driving makes out prima facie case of negligence).

In Virginia, "[t]he key focus is not the relationship between the *injury and its cause* but rather the relationship between*the injury and the employment.*" Liberty Mut. Ins. Corp. v. Herndon, 59 Va. App. 544, 560, 721 S.E.2d 32, 40 (2012) (emphasis added). The Court of Appeals' analysis in Herndon is particularly instructive:

> An accident arises out of the employment when there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed. To determine whether such a causal connection exists, Virginia applies the "actual risk test." Under this test, we require "***only*** that the employment expose the workman to the particular danger from which he was injured, notwithstanding the exposure of the public to like risks." Accordingly, "the mere fact that the hazard is one to which the general public is likewise exposed . . . ***is not conclusive against the existence of [a] causal relationship***" between the injury and the conditions under which the work was required to be performed.

Id. at 59 Va. App. 544, 556, 721 S.E.2d 32, 38 (2012) (citations omitted) (emphasis added).

The majority's interpretation will lead to irrational and inconsistent results. Injured passengers in a work vehicle are not required to prove why a driver fell asleep. See Williams v. Indus. Flooring Sys., JCN VA00000584418 (Aug. 13, 2013); Spicer v. Indus. Flooring Sys., JCN VA00000580707 (Aug. 6, 2013); Compton v. Horner's Lawn Serv., VWC File No. 187-74-59 (Aug. 12, 1999), aff'd No. 2043-99-2 (Va. Ct. App. Feb. 8, 2000) (failure to recall cause of accident not fatal to claim). But the driver of a work vehicle must do so.

Also, an employee who can prove a pre-existing, idiopathic condition caused a motor vehicle accident during work related travel is entitled to compensation. This is so even though the idiopathic condition is *unrelated* to the work. Campbell v. Sentara Rehabilitation, Inc., VWC File

No. 220-55-28 (Oct. 13, 2005); Byrd v. Oasis Servs., Inc., VWC File No. 210-68-56 (Aug. 8, 2003), aff'd No. 2346-03-1 (Va. Ct. of Appeals April 20, 2004) (recognizing an employee is entitled to benefits resulting from a motor vehicle accident caused by an "idiopathic" medical condition unrelated to his work "where the employment places the employee in position increasing the dangerous effects' of the accident." (quoting Southland Corp. v. Parson, 1 Va. App. 281, 284-85, 338 S.E.2d 162, 164 (1985))). And yet, an employee who proves his accident resulted from a universally recognized risk of driving[1] – falling asleep – cannot recover without proving that was caused by his work. In the routine case of a motor vehicle accident during work travel, we do not require a driver to explain how his loss of control, his loss of focus or attention, or his failure to maintain a lookout were caused by his work.

These examples illustrate irreconcilable inconsistencies. In this case the claimant proved the cause of his accident during work related travel. The accident resulted from a known risk of operating a motor vehicle and arose out of the employment.

"It is generally held that the phrase 'arising out of' the employment should receive a liberal construction in order to effectuate the humane and beneficent purposes of the Act." Reserve Life Ins. Co. v. Hosey, 208 Va. 568, 572, 159 S.E.2d 633, 636 (1968) (quoting S. Motor Lines v. Alvis, 200 Va. 168, 170-71, 104 S.E.2d 735, 738 (1958)). The Act is highly remedial and should be liberally construed in favor of the employee. Brown v. United Airlines, Inc., 34 Va. App. 273, 276, 540 S.E.2d 521, 522 (2001), citing Ellis v. Commonwealth, 182 Va. 293, 303, 28 S.E.2d 730, 734

[1] The Virginia Department of Motor Vehicles website includes a page on "Drowsy Driving," which recites, "Driving while drowsy increases crash risk as drivers struggle to process complex information coming from different places at once. Drivers may make careless driving decisions, have trouble paying attention or fall asleep while driving." https://www.dmv.virginia.gov/safety/#programs/drinking/drowsy.asp. See Cheung v. Commonwealth, 63 Va. App. 1, 753 S.E.2d 854 (2014); Conrad v. Commonwealth, 31 Va. App. 113, 521 S.E.2d 321 (1999) (*en banc*).

(1944) and Barker v. Appalachian Power Co., 209 Va. 162, 166, 163 S.E.2d 311, 314 (1968). Parsing the causation analysis and requiring increasing levels of granular explanation conflicts with the overriding purposes of the Workers' Compensation Act.

For these reasons, I respectfully dissent.

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.