

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Aug. 3, 2023

WILLIE ALLEN v. ABF FREIGHT SYSTEMS, INC
ABF FREIGHT SYSTEM, INC., Insurance Carrier
ABF FREIGHT SYSTEM, INC., Claim Administrator
Jurisdiction Claim No. VA00001772218
Claim Administrator File No. ABF201249
Date of Injury: September 21, 2020

WILLIE ALLEN v. ABF FREIGHT SYSTEMS, INC
ABF FREIGHT SYSTEM, INC., Insurance Carrier
ABF FREIGHT SYSTEM, INC., Claim Administrator
Jurisdiction Claim No. VA00001877064
Claim Administrator File No. ABF211131
Date of Injury: July 28, 2021

Stephen A. Strickler, Esquire
For the Claimant.

Daniel E. Lynch, Esquire
For the Defendant.

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

The claimant requests review of a December 16, 2022 Opinion which found his need for left knee replacement was not causally related to the September 21, 2020 work accident and found he failed to prove his right knee injury on July 28, 2021 arose out of a risk of his employment. We AFFIRM in part, REVERSE in part, and REMAND.

I. Material Proceedings

In JCN VA00001772218, the parties agreed the claimant sustained a compensable injury by accident to his left knee on September 21, 2020. A November 18, 2020 Award Order granted lifetime medical benefits for left knee strain and temporary total disability from September 24, 2020. A Termination of Wage Loss Award indicated the claimant returned to work on June 2, 2021 at a wage equal to or greater than his pre-injury average weekly wage. The Commission issued a Notification of Terminated Award on June 9, 2021.

A May 11, 2022 claim sought a left total knee replacement and alleged a right knee injury as a compensable consequence of the left knee injury. The claimant sought various periods of temporary total and temporary partial disability between October 15, 2021 and March 22, 2022.

In JCN VA00001877064, the claimant filed a November 4, 2021 Request for Hearing. He alleged a new injury to his right knee as the result of a July 28, 2021 accident. As clarified at the hearing, he requested a lifetime medical award for the right knee and the same periods of temporary total and temporary partial disability, excepting a period related to the left knee replacement.

The Deputy Commissioner found the claimant's ongoing left knee condition was not causally related to the September 21, 2020 accident in JCN VA00001772218. He relied on the opinion of Dr. Sheldon Cohn, the claimant's initial treating physician, with whom an IME physician agreed. He denied the May 11, 2022 claim.

Regarding JCN VA00001877064, the Deputy Commissioner found the claimant failed to prove the right knee injury on July 28, 2021 arose out of risk of his employment. He found the claimant's testimony regarding the onset of right knee pain with his first step onto a ladder to be

credible. He recognized there may be inherent risks associated with descending a steep and narrow ladder, but he found the claimant failed to establish that such a risk contributed to the cause of his knee injury. He denied the August 4, 2021 claim.

The claimant requests review.

II. Findings of Fact and Rulings of Law

A. Ongoing Left Knee Treatment

The claimant has the burden to prove that the medical treatment, for which payment is sought, is causally related to the work accident. *Watkins v. Halco Eng'g, Inc.*, 225 Va. 97, 101 (1983) (citing *Ins. Mgmt. Corp. v. Daniels*, 222 Va. 434, 438-39 (1981)). The factual determination regarding causation is usually proven by medical evidence. *Clinch Valley Med. Ctr. v. Hayes*, 34 Va. App. 183, 192 (2000) (citing *Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 570 (1968)). In reviewing the medical evidence, the Commission generally gives great weight to the opinion of the treating physician. *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 439 (1986).

After the September 21, 2020 work accident, the claimant began treatment with Sheldon Cohn, M.D. of Atlantic Orthopaedic Specialists. On October 30, 2020,¹ Dr. Cohn accurately noted the claimant tripped over a piece of metal on September 21, 2020 and his left knee twisted. Dr. Cohn reviewed June 1, 2020 x-rays to reveal end-stage medial compartment and significant patellofemoral disease of both knees. The MRI showed significant chondral lesions and a medial meniscal tear. Dr. Cohn's impression was that the claimant exacerbated his pre-existing

¹ The visit note was transcribed on November 2, 2020.

arthritis and may have torn his medial meniscus. Dr. Cohn stated an arthroscopic debridement would be reasonable to try to reduce his mechanical symptoms and return him to his pre-injury state. He wrote, “His arthritis certainly is pre-existing and if indeed he requires a total knee replacement following his knee arthroscopy, this would not be due to his work injury.” The knee arthroscopy was necessary due to his work injury to address the mechanical symptoms. Dr. Cohn opined, “He has significant pre-existing osteoarthritis and total knee replacement in the future would not be referable to his work injury.”

The claimant returned to Dr. Cohn on January 15, 2021, about one month after the arthroscopic debridement. Dr. Cohn noted he still walked with a cane. He decided to try viscosupplementation. If this did not help, the claimant may require a total knee replacement. Dr. Cohn stated, “His knee replacement would not be due to his work injury, but due to his pre-existing disease.”

When the claimant returned to Dr. Cohn on June 1, 2021, he was still having significant left knee pain, five- and one-half months after the left knee arthroscopy. Dr. Cohn stated he had reached MMI and had a 2% permanent impairment due to the meniscus tear, which was his work injury. He opined he had no restrictions due to the work injury but did have restrictions due to pre-existing arthritis. Dr. Cohn answered “no” when asked whether a left knee replacement would be related to the work injury of a torn meniscus of the left knee.

The claimant began treating for his left knee with William Byrd, M.D. on August 3, 2021.² Dr. Cohn had retired. The claimant complained of left knee pain of two years’ duration. Dr. Byrd

² Dr. Byrd also practices at Atlantic Orthopaedic Specialists.

wrote that Dr. Cohn debrided the torn meniscus in January 2020. X-rays showed severe bilateral varus deformities with bone-on-bone osteoarthritis. Dr. Byrd discussed operative and non-operative treatment and provided a steroid injection.

The claimant presented to I & O Medical Centers on August 27, 2021 for review of an MRI in follow up of his July 28, 2021 right knee injury. Edward J. Downs, M.D. stated his impression of “complex medial meniscal tear, current injury, left knee.” He issued a referral to orthopedics on the same day, for the diagnosis of internal derangement of right knee. It appears the reference to a left knee condition was a scrivener’s error.

At a September 16, 2021 visit, Dr. Byrd noted the steroid injection was ineffective and planned a total left knee replacement. X-rays taken October 26, 2021 showed severe arthrosis of both knees with complete joint space loss, peripheral osteophytes, and sclerosis. The history indicated the claimant’s symptoms began on July 28, 2021, when he injured his left knee at work. Dr. Byrd planned a left total knee replacement.

Defense counsel offered Dr. Byrd a statement regarding causation of the left knee arthroscopy. “Regarding Mr. Allen’s left knee injury sustained on 9/21/2020, Mr. Allen’s need for a total knee arthroplasty is due to pre-existing osteoarthritis, aggravated by his trip and fall at work on 9/21/2020.” Dr. Byrd checked “yes” and initialed the response on January 11, 2022.

Anthony M. Bevilacqua, D.O., reviewed records through June 1, 2021 and examined the claimant at the defendant’s request on January 14, 2022. Dr. Bevilacqua assessed the claimant with bilateral knee and hip primary osteoarthritis. He stated Dr. Cohn’s treatment was appropriate and noted Dr. Cohn stated the arthroscopy was intended to treat the meniscal pathology but would not

treat the pre-existing arthritis. He opined the claimant needed bilateral knee replacements for his advanced osteoarthritis. He felt the claimant was capable of work with restrictions which were related to his arthritis and unrelated to the work injury.

Dr. Byrd performed the left total knee replacement on March 21, 2022. He noted the overall examination looked great on April 19, 2022 and released the claimant to full duty on May 9, 2022.

Dr. Byrd responded to the claimant's questions on July 12, 2022. He checked "yes" to each of these statements:

His workers' compensation accident of September 21, 2020 with respect to his left knee caused aggravation of pre-existing osteoarthritis in his left knee.

With regard to his left knee replacement, which I recently performed on March 21, 2022, it is my opinion that knee replacement resulted from a combination of factors to include his pre-existing osteoarthritis and his work accident of September 21, 2020.

Before the September 21, 2020 work accident, the claimant received orthopedic treatment from Mark Bewley, M.D.³ On March 28, 2018, an x-ray showed the left knee was nearly bone-on-bone. Dr. Bewley prescribed anti-inflammatory medication for left knee osteoarthritis. He discussed operative and nonoperative treatment and advised of the possible need for arthroplasty due to the severity of the changes noted. The claimant complained to Dr. Bewley of difficulty walking in May 2018. Dr. Bewley administered a steroid injection to the left knee on June 1, 2018. If the claimant failed with steroids, he discussed options of viscosupplementation or an arthroplasty.

³ Dr. Bewley practices with Atlantic Orthopaedic Specialists.

On November 27, 2018, the claimant reported five months of relief from the steroid injection. He told Dr. Bewley he wanted to avoid an arthroplasty. Dr. Bewley performed another left knee steroid injection for left knee severe arthritis on February 12, 2019. Dr. Eric Neff aspirated fluid from the left knee and performed a steroid injection on July 26, 2019.

Dr. Bewley performed steroid injections to both knees on January 20, 2020 due to severe osteoarthritis of both knees. He provided hinged knee braces for both knees and again discussed operative and nonoperative treatment.

The claimant consulted Dale Fluegal, NP, at OrthoNow on June 1, 2020 with complaints of right ankle and left knee pain. Review of x-rays from previous visits showed bone-on-bone appearance of the medial compartment of both the right and left knees, marked degenerative change at the stage of severe.

The claimant's primary care physician, Nandita K. Pandiyar, M.D., saw him on June 19, 2020. Among his problems was left knee pain. Dr. Pandiyar wrote that the claimant had an injection in February 2020 and was "due for surgery."

The claimant failed to meet his burden to prove a causal relationship between his ongoing left knee treatment and the September 21, 2020 work injury. Dr. Cohn, the initial treating physician, was aware of an accurate history of the accident and opined the total left knee replacement was unrelated to the work injury. The record shows the claimant's left knee arthritis was already severe at the time of the September 21, 2020 accident. We considered Dr. Byrd's opinion that the accident aggravated the arthritis and contributed to the need for the knee replacement, but we do not find it persuasive. An accurate history of the accident and the

claimant's pre-existing symptoms was not reflected in his reports. Where medical opinions are based upon an incomplete or inaccurate history, the Commission is entitled to conclude that those opinions are of little probative value. *See Clinchfield Coal Co. v. Bowman*, 229 Va. 249, 251-52 (1985); *Sneed v. Morengo, Inc.*, 19 Va. App. 199, 205 (1994).

B. July 28, 2021 Right Knee Injury

The claimant challenges the Deputy Commissioner's finding that his right knee injury did not arise out of a risk of his employment. We have carefully considered his testimony regarding the onset of his right knee pain on July 28, 2021 and his description of the ladder.

The claimant bears the burden of proving his injury arose out of his employment. *Mktg. Profiles, Inc. v. Hill*, 17 Va. App. 431, 433 (1993). "The phrase arising 'out of' refers to the origin or cause of the injury." *Cty. of Chesterfield v. Johnson*, 237 Va. 180, 183 (1989). "[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 (1938). In determining whether an injury arises out of the employment, "the Commission is authorized to draw reasonable inferences from the evidence." *Turf Care Inc. v. Henson*, 51 Va. App. 318, 324 (2008) (citing *Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352, 359 (2004)).

In *VFP, Inc. v. Shepherd*, 39 Va. App. 289, 293 (2002), the Court of Appeals of Virginia held, "analysis pertaining to ordinary steps and stairways is inapplicable to ladders or scaffolding because of the increased risk." The claimant was descending from a scaffold on ladder-like vertical

steps with a remote-control device over his right arm when he slipped and injured his back. The Court affirmed the Commission's finding that although the claimant's activity at the time of his injury was not particularly awkward or strenuous, the claimant offered sufficient proof that his injury was caused by a risk or hazard of the workplace. *Id.* at 292-94. It noted this was not a hazard to which the claimant would be equally exposed outside of the workplace. *Id.* at 292 (citing *United Parcel Serv. v. Fetterman*, 230 Va. 257, 258-59 (1985)). It affirmed the finding his injury arose out of a risk of his employment. *Id.* at 290, 294.

The Court of Appeals of Virginia subsequently held that "[l]adders, in and of themselves, are dangerous, and accidents involving ladders cannot be properly evaluated without taking into consideration the increased risk." *Beland*, 43 Va. App. at 360. In *Beland*, the claimant was working on a ladder, in a confined space, and holding tools in each hand prior to falling from the ladder. Though the claimant could not explain why he fell, the Court noted the dangers of ladders, and that the claimant described in detail his actions and location immediately before the fall. *Id.* at 360. The court held, "that evidence, combined with the other circumstances, created the 'critical link' between claimant's employment, his fall and resulting injury." *Id.*

Here the claimant, a truck driver, backed his truck and trailer up to a loading dock at a warehouse. He needed to descend from the loading dock to the ground. To do so, he went to a ladder that was attached to the side of the trailer. The rungs were about a foot apart. As he came down the first step he took, the claimant felt right knee pain. On the second step, he felt like something snapped and popped in his right knee. The claimant described the ladder as "pretty steep." (Tr. 41.) He felt pain as soon as he stepped down. He testified, "As soon as I got on the

ladder and I was standing like this here, I felt the pain. And then I took a second step and I felt that. And that's when I felt like it snapped and popped all the way to the ground." (Tr. 41.) When asked what he thought caused the pain, the claimant answered, "Me coming down the steps," and "Coming down the ladder." (Tr. 43.) There was one grab bar or handle that the claimant held the entire time he descended. He had nothing in his hands. The steps were tight, and the claimant could barely get both feet onto a rung. He could not recall anything unusual or defective or dangerous about the ladder. On redirect examination, the claimant testified there was very little space between the rungs of the ladder and the side of the trailer. He repeated that the rungs were a foot apart and the ladder was barely wide enough for him to place both feet on one rung.

We find sufficient evidence that the claimant's right knee injury arose out of a risk of his employment. The ladder was steep and narrow. The rungs were about one foot apart with very little space between each rung and the side of the trailer. From the circumstances, we conclude the unusual configuration of the ladder required the claimant to step down awkwardly. As a result, he sustained a right knee injury arising out of a risk of his employment.

Because he denied the claim, the Deputy Commissioner did not address the defense that the claimant's right knee treatment was unrelated to the July 28, 2021 accident. Therefore, we REMAND to the Deputy Commissioner to decide this question and, if warranted, enter a suitable medical award.

III. Conclusion

We AFFIRM the December 16, 2022 Opinion regarding the left total knee replacement (JCN VA00001772218).

We REVERSE the finding the claimant did not sustain an injury to the right knee arising out of and in the course of his employment on July 28, 2021 (JCN VA00001877064).

We REMAND the claim for the July 28, 2021 accident to the Deputy Commissioner to address causation of the claimant's right knee treatment and enter a medical award if warranted.

This matter is ORDERED removed from the review docket.

NEWMAN, COMMISSIONER, Concurring:

I agree that the claimant failed to prove his ongoing left knee treatment is causally related to his September 21, 2020 accident. I similarly agree that the claimant proved a compensable right knee injury of July 28, 2021. I do not join the majority in its discourse on the compensability of injuries sustained on ladders.

“In deciding whether a claim arises out of the employment . . . [t]he facts in no two cases are identical and to a certain extent each case must stand alone.” *Haley v. Springs Global U.S., Inc.*, 54 Va. App. 607, 614 (2009) (quoting *Richmond Mem’l Hosp. v. Crane*, 222 Va. 283, 286 (1981)) We adjudicate cases on the particular facts presented. The facts here do not involve a “normal” ladder. Neither do I view the salient issue as whether injuries on ladders are compensable but rather whether this claimant proved a causal link between his injury and his activity of descending a ladder that was steep, narrow, and affixed to the side of a trailer with only one

handhold for stability. On these facts, I am persuaded the claimant proved he was exposed to a risk of his employment and suffered an injury causally related thereto. Consequently, I join with the result reached by the majority.

RAPAPORT, COMMISSIONER, Dissenting in Part:

I respectfully dissent from the portion of the majority opinion finding the claimant met his burden of proving by a preponderance of the evidence that a risk of his employment caused his right knee injury on July 28, 2021 (JCN VA00001877064). I would affirm the Deputy Commissioner's decision finding the claimant failed to establish his injury arose out of his employment.

“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.” *UPS v. Fetterman*, 230 Va. 257, 258 (1985) (citing *R & T Invs. v. Johns*, 228 Va. 249, 252 (1984)). The claimant bears the burden of proving this causal connection. *See Marketing Profiles, Inc. v. Hill*, 17 Va. App. 431, 433 (1993) (citation omitted).

The claimant is required to establish that the conditions of the workplace or some significant work-related exertion *caused* the injury. *Plumb Rite Plumbing Serv. v. Barbour*, 8 Va. App. 482, 484 (1989) (emphasis added). The Commission may debate the potential risks of using a ladder as it applies to what constitutes an employment related risk so as to satisfy the arising out of test, but we do not predicate awards on no evidence of causation. There must be sufficient

evidence in the record to establish the claimant's injury was the result of the increased risk of using the ladder.

The majority ultimately finds the configuration of the ladder required the claimant to step down awkwardly, and, as a result, the claimant sustained a right knee injury arising out of a risk of his employment. The Commission is authorized to draw reasonable inferences from the evidence. *Basement Waterproofing v. Beland*, 43 Va. App. 352, 359 (2004). However, inferences must be supported by the evidentiary record, and we cannot base an award on conjecture or speculation. *See Cent. State Hosp. v. Wiggers*, 230 Va. 157, 159 (1985). In this case, the majority's decision to "infer" causation renders meaningless the claimant's burden to prove the statutory precondition to a compensable injury, that is "arising out of" the employment. Va. Code § 65.2-101.

While the evidence supports certain conditions of the ladder, there is no evidence that any of those conditions either caused or contributed to the injury alleged. The claimant only described the ladder as steep and narrow. He did not testify he descended the ladder awkwardly or his injury was caused by the configuration of the ladder. Significantly, the claimant testified he felt pain as he first stepped down "[a]s soon as he got on the ladder," and then he took a second step and "felt like it snapped and popped all the way to the ground." (Tr. 43.) The claimant did not recall anything unusual, defective, or dangerous about the ladder. He attributed his pain to descending the ladder generally.

The majority's reliance on *Beland*, 45 Va. App. at 352 and *VFP, Inc. v. Shepherd*, 39 Va. App. 259 (2002), is misplaced. In *Shepherd*, the claimant testified to slipping on the ladder

resulting in his injuries. In *Beland*, the evidence established that the claimant was in a confined space and holding tools in each hand prior to falling from the ladder. *Id.* at 360. The Court found that the claimant's evidence "combined with the circumstances, created the 'critical link' between the claimant's employment, his fall and resulting injury." *Id.* Lacking in the case *sub judice* is that "critical link." The ladder was not defective, and the claimant did not slip or have anything in his hands. The claimant simply stepped down one rung on a ladder.

The fact the claimant descended one rung on a steep and narrow ladder is not sufficient to establish the cause of the claimant's right knee injury. Based on the evidence before us, I find it requires impermissible speculation to infer a causal connection between the configuration of the ladder and the claimant's work injury. Accordingly, I would affirm the Deputy Commissioner's finding that the claimant failed to prove his July 28, 2021 right knee injury arose out of his employment.

APPEAL

Because a final decision has not been rendered in this matter, there is no right of appeal to the Court of Appeals of Virginia at this time.