VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Mar. 17, 2021

TSEDALE M. DAWIT v. SP PLUS CORPORATION
XL INSURANCE AMERICA INC, Insurance Carrier
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, Claim Administrator
Jurisdiction Claim No. VA00001708797
Claim Administrator File No. C060031615000101600
Date of Injury February 15, 2020

Eric S. Wiener, Esquire
For the Claimant.

Matthew J. Sheptuck, 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 July 24, 2020 Opinion which found she failed to prove her injuries arose out of her employment and denied her claim. We REVERSE and REMAND.

I. Material Proceedings

On February 15, 2020, the claimant fell while attempting to sit down at her desk, while preparing for her work shift. Her claim sought medical benefits and alleged multiple injuries due to the fall.[1] The defendants denied the claimant's injuries arose out of and during the course of her employment. They also defended on causation.

[1] The claimant alleged injuries to her right knee, head, neck, chest wall, and back with right leg radiculopathy. The April 15, 2020 claim also sought an award of temporary total disability, which was withdrawn at the time of the hearing.

The Deputy Commissioner found the claimant did not prove a compensable injury. She found the claimant's testimony did not establish how the accident occurred, and that the claimant "failed to prove that the accident was caused by any work-related risk or significant work-related exertion." (Op. 8.) She found the claimant was in the course of her employment at the time of the fall. Because she ruled the injuries were not compensable, she did not reach the issue of causation.

The claimant requests review.

II. Findings of Fact and Rulings of Law

The claimant worked for the employer validating parking at a desk inside a shopping mall. Shortly before her February 15, 2020 shift, she stood up to greet her supervisor. When she tried to sit down afterwards, the chair was no longer underneath her, causing her to fall to the floor. The claimant testified that when she "went back to sit . . . I might have pushed [the chair] . . . with my leg and that's what could have happened. And I thought that it was still there and I sat down and I fell." (Tr. 9.)

During cross-examination, the claimant stated that her job did not require any unusual maneuvering or balancing. The chair moved easily because it was on a hard surface. (Tr. 25.) On the day of the accident, she thought the chair was underneath her when she sat down, but she did not see the chair move before sitting. (Tr. 24.) She testified that it was "possible [that] I might have touched the chair," and that it "might have moved back," but she didn't know "how I actually moved it back." (Tr. 25.)

The employer's senior facility manager, James Hobbs, testified that he met with the claimant after her accident. The claimant told him that "the chair slipped out from under her when she was going to sit down," but she did not say what caused the chair to move. (Tr. 31.)

The claimant sought treatment at the emergency room on February 16, 2020. The medical history states, "yesterday evening, she was attempting to sit in a chair, but she missed the chair and fell backwards." (Cl.'s Ex. 1-1.) On February 18, 2020, the claimant treated with Dr. Yared T. Tadesse, who noted that the accident occurred when the claimant missed the chair and fell on her back while trying to sit. (Cl.'s Ex. 1-2.)

To be compensable, an injury by accident must arise out of and in the course of employment. Va. Code § 65.2-101; *Cty. of Chesterfield v. Johnson*, 237 Va. 180, 183 (1989). The claimant bears the burden of proving her injury arose out of her employment. *Mktg. Profiles, Inc. v. Hill*, 17 Va. App. 431, 433 (1993).

On the particular facts of this case, the only rational conclusion is that the claimant's accident and injuries arose out of her employment.

Not every fact in human transactions can be corralled within the boundaries of observation and perception. Pondering the intersection between quantum physics and reality, Albert Einstein asked his colleague Abraham Pais, "Do you really believe the moon exists only when you are looking at it?"[2] This case presents a similar problem. It asks whether we must suspend our rational beliefs due to the human, but limited, imperfections in the claimant's observation and perception.

The facts are undisputed. The claimant usually sat at her work station. She had a chair with four wheels. (Tr. 7.) The floor was a hard surface. (Tr. 16.) The claimant believed it was concrete or cement. (Tr. 14-15.) The claimant stood to greet her supervisor, then attempted to sit down in the chair and fell. She testified "I went to sit, I thought the chair was there, and that's what happened." (Tr. 7.) She described the mechanism of her fall. "And so, when I actually went back

[2] A. Pais, *Einstein and the Quantum Theory*, Rev. Mod. Physics, Vol. 51, N. 4, 863, 907 (1979).

to sit . . . I thought that it was still there and I sat down and I fell." (Tr. 9.) "And so, when I, when I fell . . . my butt is what actually hit the floor first. And, and my head went backwards and initially it hit the chair and, and then it bounced from the chair and then it hit the floor as well." She described the chair as being about the length of her body from where she attempted to sit. She testified, "my head first hit the chair. It was, must've been it as far as just my height, because that's when I fell, that's essentially the, what I hit on my head." (Tr. 9.)[3]

The Supreme Court of Virginia has been clear. Repeatedly, it has held, "arising out of and in the course of the employment," should be liberally construed to carry out the humane and beneficent purposes of the Workmen's Compensation Act. *Connor v. Bragg*, 203 Va. 204, 207 (1962) (citing *Norfolk & Washington Steamboat Co. v. Holladay*, 174 Va. 152, 157 (1939); *Bradshaw v. Aronovitch*, 170 Va. 329, 336 (1938); *Cohen v. Cohen's Dep't Store*, 171 Va. 106, 109 (1938). However, the burden of supplying evidence from which the inference can be legitimately drawn that the injury arose out of and in the course of the employment rests upon the claimant. An award based upon surmise or conjecture will be set aside. *Sullivan v. Suffolk Peanut Co.*, 171 Va. 439, 443 (1938).

The words "arising out of," have been construed to refer to the "origin or cause of the injury." An injury arises out of the employment "when there is apparent to the rational mind upon consideration of all of the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 571 (1968) (quoting *In re McNicol*, 215 Mass. 497 (1913)). "A risk is incidental to the

[3] The claimant's hearing testimony, at times, reflects a lack of clarity. At least some of the challenges of grammar and wording are likely the result of translation. The claimant testified at hearing in the Amharic language with the assistance of a translator.

employment when it belongs to or is connected with what the employee has to do in fulfilling his contract of service." *Id.* at 572 (quoting *S. Motor Lines v. Alvis*, 200 Va. 168, 170-71 (1958)).

The Court of Appeals of Virginia has observed:

> It is, of course, true that a factfinder must base its decision on evidence presented rather than mere surmise or conjecture. However, it is equally true that factfinders, whether jurors or trial judges, do not abandon their common sense or experience in performing their function.

Wynnycky v. Kozel, 71 Va. App. 177, 203 (2019); *see Schneider v. Commonwealth*, 230 Va. 379, 383 (1985) (explaining that a trial judge as factfinder is entitled to use "common sense" in evaluating testimony); *Morton v. Commonwealth*, 13 Va. App. 6, 11 (1991) (recognizing that "[t]o measure the likelihood of occurrence of an inferred fact, a court may rely on common experience or the evidence in the case" (internal quotation marks and citation omitted)). Accordingly, factfinders may draw inferences from the evidence so long as those inferences do not "defy logic and common sense." *Kozel*, 71 Va. App. at 203 (quoting *Fox Rest Assocs., L.P. v. Little*, 282 Va. 277, 283 (2011).

The Deputy Commissioner erred in her analysis. She concluded the accident did not arise out of the employment because the claimant "does not know what happened. She said she did not see the chair move and does not know if it actually moved back; she testified as to what happened 'if' she had pushed the chair unintentionally with her legs." (Op 7.) The claimant's testimony directly contradicts this finding.

The claimant's unequivocal testimony at hearing was that when she attempted to sit down, the chair was not beneath her. This was demonstrated by her testimony that as she fell, she struck her buttocks on the floor and then her head hit the chair. There is no evidence in the record that

from the time she stood up to greet her supervisor to when she attempted to sit, that she had moved the location of her body. The desk was directly in front of her when she stood, so there was nowhere for her to move forward. There is no evidence that she moved to one side or the other when she stood up. Because the chair was not beneath her buttocks and her head hit it as she fell backwards, the *only* rational conclusion is that the wheeled chair on a solid surface moved when she stood up. It was not in the same location when she attempted to sit back down, and as a result she fell and was injured.

The claimant could not explain in detail exactly why or how the chair moved. She was plainly uncertain on this point. But not knowing why the chair moved does not undermine the fact that it did move. The only rational conclusion is that the chair, a piece of the claimant's work equipment designed to move freely on the floor, *did in fact* move. To reach the conclusion that the accident did not arise out of the employment we would have to disregard the only rational analysis and resort to irrational speculation and conjecture. The chair moved. The claimant was the only force in motion that could have freed it from its state of static rest

The evidence supports the finding that the chair moved, causing the claimant to fall and sustain injury. The claimant's injury arose out of a risk of her employment.

III. Conclusion

The Deputy Commissioner's July 24, 2020 Opinion is REVERSED. We REMAND for findings addressing the defendants' causation defense and for an Opinion consistent with this Review Opinion.

This matter is hereby removed from the review docket.

RAPAPORT, COMMISSIONER, Dissenting:

As I believe the majority opinion assumes facts not in evidence and effectively shifts the burden of proof to the defendants, I respectfully dissent. The majority improperly relies upon a theory of "the only rational conclusion" is that the injury must have arisen out of the employment. This theory, as posited, is based on speculation and surmise. We cannot presume to know what must have happened rather than relying upon what the presented evidence established – or did not establish.

The claimant arose from a wheeled chair, stood erect to greet her supervisor, made some further movement that is not described in the record, and attempted to return to a seated position, and fell to the floor. These facts did not establish a cause of the fall beyond the absence of the chair. Hence, the Deputy Commissioner properly held that "[t]he claimant's testimony leads us to conclude she does not know" how the accident happened. (Op. 7.) The claimant "did not see the chair move and does not know if it actually moved back; she testified as to what could have happened 'if' she had pushed the chair unintentionally with her legs." (*Id.*)

An injured worker has the burden of proving "that the conditions of the workplace . . . caused the injury." *Plumb Rite Plumbing Serv. v. Barbour*, 8 Va. App. 482, 484 (1989). "[A] claimant cannot recover if the cause of the accident 'remains speculative.' . . . And if the evidence does not prove by a preponderance 'how the accident happened,' . . . it is by definition unexplained and thus speculative." *Lysable Transport, Inc. v. Patton*, 57 Va. App. 408, 419 (2010) (quoting *Pinkerton's, Inc. v. Helmes*, 242 Va. 378, 380-81 (1991)).

Smith v. VCU Health System Authority, JCN VA00000839939 (Aug. 1, 2018), parallels and controls a denial in the case before us. In *Smith,* the claimant testified that she fell after trying

to sit down on a light-weight, easily movable chair. The Commission discussed that the claimant was unable to remember whether she touched the chair before attempting to sit, did not observe it moving, and was unable to explain why it may have moved. We denied compensability because "'the claimant, who is in a position of being able to explain the occurrence,'" failed to present evidence establishing that her injuries arose out of the employment. *Id.* (quoting *Mem'l Hosp. of Martinsville v. Hairston*, 2 Va. App. 677, 682 (1986)).

Similarly here, the claimant simply could not testify with certainty that the chair moved or whether anything caused the chair to move. She supposed that she "might" have pushed the chair with her leg "and that's what could have happened." (Tr. 9.) The claimant did not see the chair move and speculated that possibly her touch moved it. (Tr. 24-25.) Lastly, the claimant said that the chair "probably" moved back, but she did not know how it was moved, only that "I might have touched it when I got up." (Tr. 25.) This evidence remains insufficient to establish that the claimant's chair moved before she tried to sit down or that "she, or some other outside force, caused it to move." *Smith*, JCN VA00000839939.

I fully understand that the Commission may make reasonable inferences. However, the majority's opinion is based on the fact "that when she attempted to sit down, the chair was not beneath her." (Maj. Op. 5.) It is just as likely that she simply missed the chair when she attempted to return to her seat. The evidence does not support a theory of the accident occurring when she stood and directly returned to a sitting position. The claimant did not testify she did not move or that she immediately was returning to a seated position. In fact, the claimant testified that she stood and "did like this" and went to sit down, but the chair was not where she thought it would be. (Tr. 9.) The record is devoid of what the claimant actually did or did not do during this time.

I am not suggesting that an injured worker's observations meet a standard of perfection. However, I strongly disagree against drawing one inference over the various other equally possible inferences to establish a party's burden of proof. I find the presented scenario to be no different to one where an employee was walking, fell, and cannot explain the cause of the fall. We categorically deny compensation in these cases as unexplained accidents and as a failure to carry one's burden of proving that the injury arose out of the employment. *See Pakravan v. Pizza Hut Inc.*, No. 1960-00-1 (Va. Ct. App. Jan. 16, 2001); *Atkins v. Medshares of Sw. Va.*, VWC File No. 189-49-43 (Mar. 29, 2000); *Crisi v. E.A. Breeden, Inc.*, VWC File No. 191-09-96 (Feb. 22, 2000). "Every unexplained accident, by definition, means that no one can relate how the accident happened." *Pinkerton's*, 242 Va. at 381. Here, the claimant has not explained how the accident occurred, and "it is by definition unexplained and thus speculative." *Patton*, 57 Va. App. at 419.

The majority states that the law regarding the definition of an injury by accident should be "liberally construed." (Maj. Op. 4.) However, that does not mean the facts are to be liberally construed. Facts are, by definition, things that are known or believed to be true. The claimant was in the best position to know what happened. This is not a case where she cannot recall or remember the events that led to her accident. Her best evidence is that the chair "might" have moved. Under these circumstances, what might have happened is not sufficient to carry her burden of proof that her accident and injuries arose out of her 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.