VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

June 18, 2019

PARKER MIZELLE v. HOLIDAY ICE INC
GRAPHIC ARTS MUTUAL INS CO, Insurance Carrier
UTICA NATIONAL INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA00001515696
Claim Administrator File No. 10155419
Date of Injury September 6, 2018

Carlton F. Bennett, Esquire
For the Claimant.

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For the Defendants.

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

The defendants request review of a March 11, 2019 Opinion awarding the claimant disability and medical benefits. They assign error to the ruling that Virginia Code § 65.2-306(A)(4) does not bar the claimant's entitlement to an award. We REVERSE.

I. Material Proceedings

The claimant filed a September 17, 2018 Request for Hearing. He alleged a September 6, 2018 injury by accident. He sought temporary total disability from September 6, 2018 through December 5, 2018 and medical benefits for injuries to his left shoulder, ribs, liver, kidney, spleen, adrenal gland, right arm, right knee, right leg, and right second and third toes.

The parties agreed the claimant's accident occurred on September 6, 2018 while he was operating the employer's vehicle in the course of his employment. They agreed he suffered the

following injuries: a grade three kidney laceration, grade three liver laceration, grade two splenic laceration, left scapula fracture, pulmonary contusion, and right anterior fourth rib fracture.

The defendants asserted, among other defenses, that the claimant's application was barred by Virginia Code § 65.2-306(A)(4), specifically the claimant's failure to wear a seatbelt at the time of the accident in violation of Virginia Code § 46.2-1094.

Following an evidentiary hearing and submission of post-hearing briefs by the parties, the Deputy Commissioner issued a March 11, 2019 Opinion. He found a bump in the road surface caused the claimant to lose control of his vehicle, resulting in the accident. The claimant was ejected from the vehicle. The claimant acknowledged he was not wearing a seatbelt at the time of the accident. The Deputy Commissioner found the claimant forgot to use his seatbelt while rushing to expedite a delivery and his failure constituted inattention rather than a willful act. Furthermore, he found the claimant's injuries were not proximately caused by his failure to wear a seatbelt because there was no evidence the claimant would have been unharmed if wearing a seatbelt. Accordingly, he found an award was not barred by Code § 65.2-306(A)(4). The claimant was awarded lifetime medical benefits for the stipulated injuries and a closed period of temporary total disability.

The defendants filed a timely request for review.

II. Findings of Fact and Rulings of Law

Virginia Code § 65.2-306(A)(4) provides that no compensation shall be awarded to an employee for injury caused by "the employee's willful failure or refusal to use a safety appliance or perform a duty required by statute." To prevail on a willful misconduct defense, the employer must prove that: "(1) the safety rule was reasonable; 2) the rule was known to the employee; (3)

the rule was promulgated for the benefit of the employee; and (4) the employee intentionally undertook the forbidden act." Layne v. Crist Elec. Contr., Inc., 64 Va. App. 342, 349-350, 768 S.E.2d 261, 264 (2015) (citing Spruill v. C.W. Wright Constr. Co., 8 Va. App. 330, 334, 381 S.E.2d 359, 360-61 (1989)). Additionally, the employer must establish the misconduct proximately caused the employee's injury. Mailloux v. Am. Transp., No. 0636-18-4 (Va. Ct. App. Oct. 9, 2018) (citing Owens Brockway & Nat'l Union Fire Ins. Co. v. Easter, 20 Va. App. 268, 271-72, 456 S.E.2d 159, 161 (1995)).

Virginia Code § 46.2-1094 requires use of a seatbelt while driving a motor vehicle. The parties do not dispute that the claimant was aware of the Virginia law requiring use of a seat belt and that the claimant was not wearing his seat belt at the time of the accident. We therefore turn to the issue of whether the claimant willfully failed to use a seatbelt.

The claimant argues he did not have any "wrongful intent" or a "wrongful state of mind" as he failed to put on his seatbelt. However, as defined by the Supreme Court of Virginia and applied by the Court of Appeals of Virginia, willfulness in the context of Code § 65.2-306 means: "If the employee knows the rule, and yet intentionally does the forbidden thing, he has willfully failed to obey the rule. *It is not necessary for the employer to show that the employee, having the rule in mind, determined to break it; it is enough to show that, knowing the rule, he intentionally performed the forbidden act*." Layne, 64 Va. App. at 355, 768 S.E.2d at 267 (2015) (quoting Riverside & Dan River Cotton Mills, Inc. v. Thaxton, 161 Va. 863, 872, 172 S.E. 261, 264 (1934)). The Court further explained, "The adverb 'intentionally' is defined as: 'To do something purposely and not accidentally.'" Id. at 356, 768 S.E.2d at 267 (quoting Smith v. Commonwealth, 282 Va. 449, 454, 718 S.E.2d 452, 455 (2011)).

The Deputy Commissioner found "Mizelle's uncontradicted testimony establishes that his failure to wear a seatbelt constitutes inattention rather than a willful act" and that "Mizelle explained that he forgot to use this safety device in his rush to expedite a delivery for the employer at the end of his scheduled work shift." Having thoroughly reviewed the record, we cannot agree with this interpretation of the evidence.

The claimant, age 24, testified he has been driving since age 16. He has been aware of Virginia's seatbelt law since that time. The truck was equipped with a seatbelt that had nothing wrong with it. He agreed the law required him to put on his seatbelt before he started driving. On the date of the accident, he got into the driver's seat of the truck and started driving without putting his seatbelt on. He further agreed that he knew he had to put on his seatbelt and did not do so. He intended to put his seatbelt on. He drove for less than five minutes before the accident occurred, but estimated it would take less than fifteen seconds to put on his seatbelt.

There is no evidence the claimant negligently forgot to wear his seatbelt. Nor was his failure due to inattention. The claimant knew of his obligation to wear the seatbelt. He drove the truck with knowledge that he was not wearing his seatbelt and that he needed to put it on. He admitted he intended to put the seatbelt on, but nevertheless failed to do so. The circumstances establish the claimant's failure to wear his seatbelt was willful.

Furthermore, there was no exigency that would excuse the claimant's failure to fasten his seatbelt. The claimant was instructed to deliver a truck of ice to Smithfield. The claimant testified someone said the truck "needed to go; it needed to be done quickly. So it was kind of like in a hurry." (Op. 5.) But when asked if he knew which of the supervisors told him to hurry, the claimant responded, "No. I just think it was that it needed to be delivered by a certain time, just like most

of the trailers that are sent out like that need to be delivered by a certain time." (Op. 26.) Thus by the claimant's own admission, this delivery was like most routine deliveries. Like many employees, the claimant was merely on a schedule. There was no evidence this delivery was particularly urgent or rushed. The circumstances were insufficient to justify the claimant's failure to comply with the statute.

Having found the claimant's violation of a statute to be willful, we now turn to the question of whether the willful violation was the proximate cause of the claimant's injuries. The defendants have the burden to prove the claimant's failure to wear a seatbelt proximately caused his injuries. See Mailloux, No. 0636-18-4. In making this determination, the Commission may look to all evidence in the record, including medical evidence and the claimant's testimony. See id. On the evidence presented, we find the defendants satisfied their burden of proof.

The claimant agreed the purpose of the seatbelt was to safely hold him in place and to prevent bouncing around or ejection during an accident. The claimant testified he was driving over an overpass and hit a bump. He looked out of the driver's side mirror and the trailer was beside him. He attempted to correct the truck and went to the left through the median and into the head-on traffic going east-bound. He was bouncing around going through the grassy area and up onto the other side of the road. He was not sure if his body hit the inside of the cab of the truck before he was ejected. A dump truck hit the passenger side panel, right in front of the wheel well. Although there was intrusion on the passenger side, there was nothing out of place in the driver's seat area of the compartment. The claimant was ejected from the vehicle. When he came to, he was on the ground facing up. The first time he felt any discomfort was after he woke up on the pavement after being ejected from the vehicle.

The claimant was treated at Sentara Norfolk General Hospital. The parties agree he suffered multiple injuries from the accident: a grade three kidney laceration, grade three liver laceration, grade two splenic laceration, left scapula fracture, pulmonary contusion, and right anterior fourth rib fracture. Dr. Michael Martyak, an attending physician who assessed and treated the claimant during his post-accident hospital admission, responded to a medical questionnaire from defense counsel. He agreed the claimant's injuries were consistent with being caused by an ejection and impact with the ground. He agreed that it was more likely than not that use of a seatbelt would have limited or avoided the claimant's injuries.

Based upon the claimant's own description of the accident as well as the medical evidence, we are persuaded the claimant's injuries were proximately caused by his failure to wear a seatbelt and resulting ejection from the vehicle. The only impact the claimant testified to was that of his body hitting the ground after he was ejected from the vehicle. The claimant did not testify to any injuries, pain, or discomfort prior to his ejection from the vehicle. Dr. Martyak's opinion supports a conclusion that the claimant's injuries were caused by his impact with the ground after being ejected. As the evidence preponderates to show that the claimant's willful violation of a statute proximately caused the injuries he suffered, we need not determine whether the claimant would have been completely unharmed had he been wearing a seatbelt.

Accordingly, we reverse and vacate the Deputy Commissioner's award of benefits in this matter. The claimant's entitlement to an award is barred by his willful violation of his statutory duty to wear a seatbelt while driving.

III. Conclusion

We REVERSE the Deputy Commissioner's March 11, 2019 Opinion.

This matter is removed from the review docket.

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.

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