VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

HERMAN BLAIR, Claimant

v. JCN VA000 0051 4319

BLAIR CONSTRUCTION, Employer
- Erie Indemnity Company, Insurer

Opinion by BURCHETT
Deputy Commissioner

March 12, 2012

H. Ronnie Montgomery, Esquire
For the Claimant.

Richard D. Lucas, Esquire
For the Defendants.

Hearing before Deputy Commissioner Burchett at Big Stone Gap, Virginia, on January 26, 2012.

PRESENT PROCEEDING

This case is before the Commission on claimant's claim filed September 29, 2011 alleging injury by accident and seeking temporary total disability benefits commencing September 8, 2011 and continuing, and medical benefits.

STIPULATIONS

The parties stipulate that claimant's average weekly wage was $500.00.

DEFENSES

The claim is defended on the basis that the evidence fails to establish injury by accident arising out of the employment, that claimant's fall is unexplained, and the presumption set forth in Code §65.2-105 is inapplicable to this case.

PRE-HEARING AND POST-HEARING EVIDENCE

Although the parties did not submit any discovery, the parties requested that a decision on this matter be held in abeyance in order to permit them to attempt a settlement. The parties subsequently advised that settlement did not result, therefore, the Deputy Commissioner was requested to issue an opinion.

SUMMARY OF THE EVIDENCE

Andrew Williams testified that he is 19 years of age, and he was working for the employer on the day in question. His testimony is that they were working on a garage for an individual located in the Flatwoods community located west of Jonesville, Virginia. He testified that this was an addition to a garage, and that the metal roofing had not yet been placed on the building. He described the trusses and purlins being in place. He said he and claimant had been measuring the end of an overhang in order to make sure that it was square. He testified that at some point during the course of the work day claimant had indicated that he had an appointment with his physician. Claimant then proceeded to start to climb down from the roof of the building.

Andrew Williams testified that there was an "A" ladder that was being utilized. He said this ladder had four legs, and it was setting on a concrete slab. He testified that the ladder was tall enough for the top of the ladder to approximate the bottom of the roof overhang. His testimony is that he observed claimant at the bottom of the roof getting ready to get off onto the ladder. He then turned around to continue with his work duties; however, a sound caused him to turn around. When he turned, he observed that claimant was in mid-air falling to the ground. He observed that the ladder had moved, and two legs of the ladder remained on the concrete while two legs were off the concrete, and the ladder was leaning toward the building.

Andrew Williams testified that there were no walls on the building. He said the ladder was under the overhang where the truss extended, and that a person could step off the top of the ladder onto a truss. He said that a person could hold onto either a truss or a purlin as they stepped off onto the top of the ladder.

Although Andrew Williams stated that he had observed claimant at the bottom of the roof getting ready to get onto the ladder, he did not actually see claimant after that. He therefore did not know whether or not claimant had actually stepped off onto the ladder before falling. He testified that when he last observed claimant, claimant had a tool belt around his waist; however, he did not have any tools or other items in his hands.

Andrew Williams testified that he did not know why claimant was going to see his doctor on the day in question.

On cross examination, Andrew Williams testified that he did not see why claimant had fallen, and he did not know why claimant had fallen. He did not know if claimant had passed out. As the ladder had moved from the position that it had been in previously, he felt that claimant had struck the ladder when he fell.

On questioning by the Deputy Commissioner, Andrew Williams testified that the building was a two-car garage, the trusses were sitting on 10 foot centers, and were comprised of 2 by 6's. The purlins were also comprised of 2 by 6's; however, he did not know how far apart they were placed.

Andrew Williams said that when he reached claimant on the ground, claimant indicated that he had to urinate; however, claimant did not relate anything else to him at that time. The rescue squad was called, and claimant was taken for medical treatment.

Claimant appeared at the hearing, and he was in a wheelchair. However, claimant was able to testify that he is 64 years of age, soon to be age 65. He said that he was a Vietnam veteran, and he knew that his business was engaged in building construction. Claimant said that although he did not recall how he had been injured, and although he did not recall anything that occurred on the day of the accident, he did remember sometime after he had been in the hospital.

As there is no dispute that claimant sustained significant injuries and required the medical treatment described in the record, we will not recite the medical record at length. Suffice it to say that claimant was transported to the Wellmont Holston Valley Medical Center on September 8, 2011, and he was admitted and underwent extensive treatment. Claimant was evaluated by Dr. Ken W. Smith, neurosurgeon, and Dr. Smith noted that claimant had suffered a severe closed head injury with a right subdural hematoma, comminuted depressed skull fracture of the right frontotemporal bones, and Dr. Smith recommended that claimant have emergent craniotomy for evacuation of the subdural and elevation of depressed skull fracture. Dr. Smith indicated that claimant was not able to consent to the treatment, therefore, claimant's daughter acted on his behalf.

When claimant was discharged from the Wellmont Holston Valley Medical Center on September 26, 2011, the discharge diagnoses included:

1. Massive right subdural hematoma with midline shift.
2. Right periorbital ecchymosis and facial fractures.
3. Segmental skull fractures.
4. Left shin abrasion.
5. Diabetes.
6. Hypertension.
7. Respiratory failure.
8. Sepsis.

The discharge record reflects that claimant underwent several procedures while in the hospital. The discharge physician noted that claimant was being transferred "to a vent weaning facility for further care."

When claimant was admitted to the Select Specialty Hospital on September 26, 2011, Dr. Jose Garrido performed a lengthy evaluation, and it was noted that no family members were present at that time, therefore, the only information available was that contained in the medical records. Claimant was admitted to that facility for additional treatment of his respiratory failure. It was noted that claimant required mechanical ventilation, and he was status post tracheostomy.

On September 27, 2011, claimant was seen by Dr. Matthew Beasey at the Select Specialty Hospital, and when Dr. Beasey personally examined claimant, he noted that claimant was awake and alert; however, he had "an orogastric tube in place, as well as being ventilated." He noted that claimant had lost the ability to open the right eye, however, he could open the left eye. It was noted that he "quickly drifts back to sleep."

Claimant was also seen by Dr. Alan Carnell on September 27, 2011 at the Select Specialty Hospital, and it was noted that claimant had undergone "multiple surgeries," and that he had "also developed respiratory failure and sepsis." Dr. Carnell indicated he was obtaining history from claimant's daughter. He noted that claimant's daughter advised that claimant "has a history of stricture of his esophagus and had dilations at the Veterans Administration Hospital." She also advised that claimant "has had chronic diarrhea for years and has had colonoscopies at the Veterans Administration Hospital that have been normal." It was noted that claimant had also had a previous ileus and had been hospitalized at UVA for that.

On October 20, 2011, claimant was evaluated by Dr. Morgan Lorio, orthopedic surgeon. Dr. Lorio reported the following:

> The patient is a 63-year-old male who was admitted after sustaining a subdural hematoma secondary to a fall greater than 18 feet from a roof. It is noted on speaking with the patient that he has fallen several times, recently from height. The purpose for the consultation was complains (sic) of back pain and a questionable thoracic herniated nucleus pulposus.
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> . . . Upon review of the patient's physical exam, he denies any radicular symptoms. Denies any pain in his back at least at this point in time. Denies any leg pain. Denies any thoracic type pain. He generally is nontender to palpation over his thoracic spine. Moves his lower extremities well. Light touch and sensation is intact.

As best as we can determine, this is the first time that any medical provider indicated that claimant was able to converse with them or to provide any information.

Dr. Lorio's October 20, 2011 history is the first time we see any information that claimant had fallen "several times." It is not apparent when claimant had fallen prior to the date of this accident, and it is not apparent why he fell those "several times."

On November 17, 2011, Dr. Garrido discharged claimant from the Select Specialty Hospital "in stable and satisfactory condition to Ridgecrest Nursing Home for further treatment under Dr. Quinn." Dr. Garrido provided a lengthy discharge summary setting forth the injuries claimant had sustained and the multiple treatment modalities he had received subsequent to the accident. It was noted that at the time of discharge, claimant was able to ambulate with the assistance of one therapist. It was noted that there was some discussion with claimant's wife about removing the percutaneous endoscopic gastrostomy tube, and it apparently was decided to let the tube remain in place. There is no indication that claimant participated in any of the discussions at the time of discharge.

Dr. Gary S. Williams provided a letter on stationary that appears to be from the Department of Veterans Affairs dated January 24, 2012. He advised that he had been caring for claimant since January of 2010, and that claimant had not history of strokes, TIAs, or seizures.

We do not have any records from Dr. Williams or the Veterans Hospital. It is therefore unclear as to when or how Dr. Williams became aware that claimant had sustained traumatic brain injury from a fall on September 8, 2011. He advised that claimant continued to have "significant cognitive deficits including amnesia for events around the time of his accident." Dr. Williams indicated he had last seen claimant on January 13, 2012, and at that time, claimant did "not have capacity to make decisions regarding his medical care, business affairs, or legal affairs."

We see no other pertinent medical opinion.

ISSUES

The issue for resolution is whether or not claimant sustained injury by accident that arose out of the employment with this employer on September 8, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In view of the stipulation by the parties, we find that claimant's average weekly wage was $500.00 which yields a compensation rate of $333.33.

As the evidence before us is uncontradicted, we find that claimant sustained injury by accident, and that said accident occurred during the course of his employment with this employer. We find that claimant was where he was expected to be at the time in question, performing the duties he was expected to be performing. Therefore, the accident occurred during the course of his employment. As a consequence of said accident, claimant sustained multiple serious injuries, and as a consequence, has required the medical treatment described in the record. We find that claimant requires ongoing treatment to treat injuries sustained in this accident. Additionally, as a consequence of said accident, claimant has been totally incapacitated for all work continuously since September 8, 2011.

The critical issue remaining for resolution is whether or not the accident in question arose out of the employment.

In order to be compensable under the Act, an accident must both arise out of and occur during the course of the employment. It is not sufficient to show one without the other. An accident arises out of the employment when some risk, hazard, defect or exertion associated with the performance of the employment duties causes, contributes to or precipitates the accident.

Pertinent to the arising out of issue, the General Assembly enacted Code §65.2-105 to be effective July 1, 2011. This code section provides:

> **Presumption that certain injures are work related.**
>
> In any claim for compensation, where the employee is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of a preponderance of evidence to the contrary, that the injury was work related.

Due to the recent enactment of this code section, there are no Virginia cases interpreting it. However, we note that the time of enactment, it was indicated that the language of this section was premised upon a similar code section in effect in Kentucky. The particular code section in Kentucky is KRS §342.680 which provides:

> **Presumptions in the case of death or of physical or mental inability to testify.**
>
> In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work related, that sufficient notice of the injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

The parties have not cited any case law interpreting these particular words set forth in KRS §342.680, and we have been unable to find any such case from the Kentucky Supreme

Court or the Kentucky Court of Appeals. However, we take note that there is an unpublished Kentucky Supreme Court case affirming a decision of the Workers' Compensation Board that addressed language similar to that contained in Code §65.2-105.[1]

In this case, claimant appeared at the hearing, and was able to testify relative to several aspects of his life and about his business and military service. He was not able to recall any aspect of the incident in question or any of the events that occurred on the day in question.

With regard to interpreting the meaning of the various aspects of the Act, the Virginia Court of Appeals has instructed that our duty is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature. We must assume that the Legislature chose, with care, the words it used when it enacted Code §65.2-105, and we are bound by those words. Marshall v. Commonwealth of Virginia, 58 Va. App. 210, 708 S.E.2d 253 (2011). We must determine the General Assembly's intent from the words contained

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[1] Beatty also wishes to be afforded the rebuttable presumption of KRS 342.680 which states:

> In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work related, that sufficient notice of injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

In doing so, she refers to Coomes vs. Robertson Lumber Company, Ky., 427 SW2d 809 (1968). Coomes, however, is not premised upon KRS 342.680. Instead, the Court espoused a general analysis of the "unexplained" fall, although it did not identify it as such. In Coomes, the reason the individual was hurt was never known. It remained unexplained and in that instance Coomes himself was unable to testify. However, nowhere in Coomes does the Court refer to or rely on KRS 342.680. As the ALJ noted herein, it is applicable in instances where the individual is "physically or mentally unable to testify," and in the instant action Beatty testified not once but twice. It does not state nor imply that the individual is unable to testify about what happened. In reviewing the cases referring to KRS 342.680, each involved an employee who was deceased before the filing of the claim. See Wilson vs. Wizor, Ky., 544 SW2d 231 (1976); Teague vs. South Central Bell, Ky., App., 585 SW2d 425 (1979); and Evansville Printing Corporation vs. Sugg, Ky. App., 817 SW2d 455 (1991). We believe the applicability of KRS 342.680 is limited to those instances in which the individual whose injury giving rise to the claim for benefits is either deceased prior to offering testimony, is deceased as a result of the event or was so physically and mentally injured as being unable to offer testimony in the proceedings. Neither applies to the instant action. Linda Beatty v. Norton Healthcare, Claim No. 02-02045 (Kentucky Workers' Compensation Board) (October 15, 15, 2003 at page 4; aff'd Case No. 2004- SC – 046-WC (Kentucky Supreme Court May 19, 2005) unpublished).

in the statute, and when the language of the statute is unambiguous, we are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated. Wilson v. Commonwealth of Virginia, 58 Va. App. 513, 711 S.E.2d 251 (2011). The plain, obvious and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, Scott v. Commonwealth of Virginia, 58 Va. App. 35, 707 S.E.2d 17 (2011), and a statute is never to be construed so that it leads to absurd results. Pitts v. Commonwealth of Virginia, 58 Va. App. 741, 716 S.E.2d 137 (2011). Furthermore, the Act is to be liberally construed so as to effect the beneficent purpose of the Act. Byrd v. Stonega Coke & Coal Co., 182 VA 212, 28 S.E.2d 725 (1944).

With these instructions in mind, we must determine whether or not Code §65.2-105 applies to this particular case. Critical to this determination is the meaning of "where the employee is physically or mentally unable to testify." In this case, we have no medical evidence stating that claimant was or is physically or mentally unable to testify. Instead, claimant appeared at the hearing and testified. Although claimant could testify about various aspects of his life both before and after the accident in question, he had no recollection of the particular event that caused his injury, and he had no recall of the day on which the event occurred. Therefore, as the General Assembly did not indicate in the language set forth in Code §65.2-105 that it intended the presumption to apply if the employee was unable to testify about the particular facts and circumstances of the accident in question due to amnesia while being able to testify about other events, we conclude that had the General Assembly intended to make that a part of the statute, it would have said so. In view of the specific language utilized by the General Assembly when it enacted Code §65.2-105, we conclude that it meant for the presumption to apply when the

employee, although alive, is physically unable to testify due to the extent of the injuries, or is so mentally impaired as to be unable to testify. We conclude in this case that claimant was neither physically nor mentally unable to testify. He was just unable to recall the events surrounding the day of and this accident. Therefore, the presumption set forth in Code §65.2-105 does not apply.

Assuming that there is no presumption, we must next determine whether or not claimant's accident and injury arose out of the employment.

In this regard, we have reviewed the case law in Virginia ranging from Marion Correctional Center v. Henderson, 20 Va. App. 477, 458 S.E.2d 301 (1995); PYA/Monarch and Reliance Insurance v. Harris, 22 Va. App. 215, 468 S.E.2d 688 (1996); to VFP, Inc. v. Shepherd, 39 Va. App. 289, 572 S.E.2d 510 (2002); Basement Waterproofing & Drainage v. Beland, 43 Va. App. 352, 597 S.E.2d 286 (2004); Lysable Transport, Inc. v. Patton, 57 Va. App. 408, 702 S.E.2d 596 (2010); Liberty Mutual Insurance Company v. Herndon, ___ Va. App. ___, ___ S.E.2d ___ (2012); and GC Construction, L.L.C. v. Cruz, Record No. 1245-11-4 (Va. App. March 6, 2012) (unpublished) to ascertain whether it can be inferred from the evidence before us that this accident arose out of the employment. Measuring the circumstances of this case by the circumstances described in the above-cited cases, as claimant and Andrew Williams were unable to explain or identify a cause of claimant's fall, we conclude that there is no basis for such an inference and that the circumstances before us most closely parallel the circumstances set forth in PYA/Monarch. In that regard, we find footnote 1 set forth on page 7 of the Court's Opinion in Cruz to be most instructive. The Court said:

> 'Every unexplained accident, by definition, means that no one can relate how the accident happened.' Pinkerton's, Inc. v. Helmes, 242 Va. 378, 381, 410 S.E.2d 646, 648 (1991). However, here, claimant fully described the circumstances leading to the fall. See Beland, 43 Va. App. at 360, 597 S.E.2d at 290 (although 'claimant did not recall the specific moment of falling, he described his actions and locations immediately before the fall in detail [and this] evidence, combined

> with the other circumstances, created the "critical link" between claimant's employment, his fall and resulting injury.'). Cf. PYA/Monarch, 22 Va. App. at 224-25, 468 S.E.2d at 692, 93 (Reversing Commission's compensation award, in part, because claimant's fall was unexplained accident where claimant was unable to recall any details of fall and no one witnessed fall).

This is the situation we have here. Although Andrew Williams observed claimant preparing to disembark from the roof, he did not see what action claimant took in order to come down from the building. Neither witness described any circumstance similar to that described in Cruz. When Andrew Williams next observed claimant, claimant was in mid-air falling to the ground. Neither Andrew Williams nor claimant was able to provide any details as to why claimant fell. Neither could explain whether or not claimant had actually fallen from the trusses and purlins, or whether he had actually gotten onto the ladder and consequently fell from the ladder.

There is no doubting that claimant suffered horrendous injuries, and that he has incurred extensive medical expenses and he will likely require ongoing treatment for the remainder of his life. There is little doubt that claimant will be incapacitated for work for the remainder of his life. It is equally unquestioned that claimant sustained an accident, and that said accident occurred during the course of the employment. However, as neither claimant nor Andrew Williams were able to identify any aspect of the employment that caused claimant to fall, and as there is no evidence as to where claimant fell from, and no evidence advising how or why he fell, there is no evidence upon which we can base a reasonable inference that some risk, hazard, defect or exertion associated with the employment caused the accident. Thus, we are left to surmise and speculate as to why he fell and suffered injury on the day in question. We are not permitted to do that.

We note that the Court of Appeals stated in Cruz that the Commission had determined that because Cruz was working at a height of 25 feet from the ground and that was sufficient to

show that the accident arose out of the employment. However, the Court stated on page 6 of its Opinion, "We disagree with the Commission's rationale." In this case, the only thing we can determine is that claimant was on the roof some several feet above ground and he fell; however, that in and of itself does not establish that the fall arose out of the employment.

For the above stated reasons, we are constrained to conclude that the evidence fails to preponderate to establish that claimant sustained injury by accident that arose out of the employment. That being the case, this claim must be, and it hereby is, denied.

This claim is dismissed and removed from the hearing docket.

REVIEW

You may appeal this decision to the Full Commission by filing a Request for Review within 30 days of the date of this Opinion.