

# VIRGINIA LEGAL UPDATE VIRGINIA WORKERS' COMPENSATION

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Another opinion recently issued by the Full Commission serves as a reminder that every case is fact specific. In *Agyemang v. The Gardens at Warkwick Forest, JCN VA00001874767* (January 10, 2023) the Full Commission reversed and vacated an award issued by the Deputy Commissioner. In doing so, the Commission interpreted the “actual risk test.”

The Claimant, a food attendant, alleged that she sustained an injury by accident to her left hand on May 1, 2021. She sought medical benefits and periods of indemnity benefits. The Employer raised numerous defenses against the claim, including that the Claimant did not suffer a compensable injury by accident arising out of and in the course of her employment.

The Deputy Commissioner concluded that the Claimant proved that her injury arose out of her employment. The Deputy Commissioner summarized the evidence as follows:

The Claimant testified that as she was placing several small, light plastic coffee mugs atop a refrigerator in a kitchen in the course of her work as a food attendant, she jammed her left hand on the refrigerator. The histories contained in the available medical records as well as her report of injury to the employer track the Claimant’s credible testimony regarding this incident. Although the Claimant’s injury may have occurred as a result of her own inadvertence, a Claimant’s negligence does not bar an award of compensation and it is found that her injury occurred as a result of an accident as defined under the Act. This incident is an “identifiable incident or sudden precipitating event,” that occurred as a result of a condition of the Claimant’s work place.

On appeal, the Employer argued that the Claimant failed to meet her burden of proving an injury by accident arising out of the employment. In a 2-1 decision, the Full Commission reversed and remanded the matter to the Deputy Commissioner finding that the Claimant did not establish that an actual risk of the employment caused or contributed to her injury.

The claimant testified that she went to the “washing” room where

staff members typically placed coffee cups on top of a refrigerator. She had a coffee cup in her hand. She explained, “So, I’m using my two hands to put it like that. So, all of a sudden, my hand just jammed the fridge.” When she jammed her hand, she felt pain in the fifth finger on her left hand.

On cross-examination, the claimant testified to putting a coffee cup or cups on top of the refrigerator, which was slightly below waist level. She used both hands. The claimant agreed that the cups were very light-weight. As she was placing a cup on top of the refrigerator, her left hand lunged forward. Pertinent medical histories reported on July 29, 2021 that the claimant “[i]njured left hand while at work on May 1st. Was placing coffee cup onto fridge when jammed left 5th finger against refrigerator,” and reported on August 12, 2021 that the claimant was “placing coffee cups on top of refrigeration, and left small finger jammed into front.”

“[A]n 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.’” That test ‘excludes an injury which comes from a hazard to which the employee would have been equally exposed



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apart from the employment.” [citations omitted].

As always, feel free to contact any member of the KPM Workers’ Compensation Team to discuss any questions that you might have.

“The actual risk test ‘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.’” “[A]n ‘actual risk of employment’ is ‘not merely the risk of being injured while at work.’” However, demonstrating an increased risk is not the only method of proving actual risk.

A claimant can satisfy the actual risk test with evidence of a workplace condition that is “peculiar,” “unusual,” or otherwise “qualitatively different” than a risk to which the general public is exposed. (noting that in cases involving tripping on workplace steps, an injury is generally only compensable if the steps are “unusual” because they are ‘slightly higher than normal’ or otherwise peculiar” and thus present an enhances risk, qualitatively different from the steps most people walk up and down on and off the job.

Absent a showing of an actual risk, the claim is not compensable.

The majority of the Full Commission held that the evidence here simply failed to establish a causative risk. The claimant, using both hands, was placing light-weight coffee cups on top of a small refrigerator and “all of a sudden, my[left] hand just jammed the fridge.” This testimony fully illustrates the lack of an actual risk of the employment as required by our longstanding law. There was no testimony that any condition of the claimant’s work caused or contributed to the injury beyond the existence of a refrigerator in the office space. There is no evidence as to the configuration of the kitchen or implication that the area was cramped or crowded. This is not a case where an awkward movement associated with the claimant’s work occurred. *Davis v. Little Gen. Store, Inc.*, JCN 2117177 (October 14, 2003) (injured worker bending to retrieve pans from lower shelf and arising and twisting to put pans onto table). Rather, the evidence is more akin to cases where we denied compensability as there was no causative danger peculiar to her employment. See, i.e., *Coles v. TJZ Cos./Marshalls*, JCN VA00001284982 (Aug. 21, 2019) (housekeeper struck her wrist on a desk edge while cleaning); *Romero v. Sears Roebuck & Co.*, VWC File No. 207-36-43 (May 2, 2003) (salesperson knelt to retrieve a fallen shoe and struck her knee on a small table).

Practice Pointers:

- When taking the Claimant’s statement explore the following issues:
- Was there any evidence of any unusual movements by the Claimant?
- Was there any evidence of an awkward position or movement by the Claimant?
- Was there any evidence of an unusual work related exertion?