



Is there a new definition of injury by accident in Virginia?

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For over thirty years, the Virginia Workers' Compensation Commission and the appellate courts have consistently defined an "accident" as an identifiable incident or sudden precipitating event, which occurs at some reasonably definite time and is bounded by rigid temporal precision, and not the result of repetitive movement or cumulative trauma. However, the recent case of *Riverside Regional Jail Authority v. Dugger*, 68 Va. App. 32, 802 S.E.2d 184 (2017) seems to have expanded, or at least altered, the application of that legal standard in some cases.

Our firm served as defense counsel in *Riverside Regional Jail Authority v. Dugger*, 68 Va. App. 32, 802 S.E.2d 184 (2017). Because the Supreme Court of Virginia recently issued a decision refusing to consider our appeal to the Supreme Court, the published opinion by the Court of Appeals panel issued on July 25, 2017 remains the law in that case. But, until the Supreme Court of Virginia takes up the issue, there is still quite a bit of uncertainty as to how the highest court defines an "accident."

Dugger was a corrections officer who had been participating in defense tactics training over a period of four hours. She testified vaguely that during this four-hour period, she had been practicing defense tactics moves on partners, and that she was "tossed around and taken down." She did not notice pain in her knee until after the four-hour morning training session had ended, when she was walking up steps to go to the afternoon classroom session.

On appeal, we argued that the Supreme Court has held numerous times, in cases with similar factual scenarios to *Dugger*, that physical injuries are not compensable when symptoms develop after three or four hours of repetitive movements, cumulative trauma, or strenuous physical work, or when injuries are sustained at an unknown point in time. We asserted that four hours was simply too long to constitute an "accident" under the facts of *Dugger*. However, the Commission and Court of Appeals disagreed and awarded the claim by focusing on the perceived non-repetitive aspect of Dugger's movements. The Court of Appeals did not distinguish the facts of *Dugger* from the Supreme Court opinions in which claims with analogous facts were denied.

Because the *Dugger* decision is now final, we need to consider how to defend claims in the future involving cumulative trauma over the course of several hours. A recent full Commission opinion issued on March 8, 2018 gives employers some hope that the injury by accident doctrine is not extinct. In *Daggett v. Old Dominion University*, JCN VA00001318459 (March 8, 2018), a claimant had moved 14 heavy, awkward smart boards over the course of one to one-and-a-half hours. He also had to move around other equipment in the room. He testified that he did not know when he began to feel sore, but noticed his shoulder hurt at the end. He did not stop working and did not report the injury until days later. The Commission denied the claim. The Commission found that Daggett's injury was the result of repetitive movement and distinguished the facts from *Dugger* and *Van Buren v. August County*, 66 Va. App. 441, 787 S.E.2d 532 (2016), reasoning that those cases did not involve repetitive movement. We expect *Daggett* to be appealed to the Court of Appeals, and will let you know of any further developments.

Despite the fact that the long history of Supreme Court case law does not support a distinction between hours of repetitive trauma versus hours of cumulative trauma involving a variety of movements (neither one is compensable), it appears the Commission and Court of Appeals find this factor to be important. They seem to say that repetitive trauma (essentially the same movement done over and over) is not compensable, but cumulative trauma caused by a variety of movements is compensable.

When defending injury by accident cases similar to *Dugger* and *Daggett*, here are few steps you can take to try to prove the claim is not compensable:

- Remember that the Supreme Court of Virginia did not affirm the Court of Appeals' opinion in *Dugger*. They merely found the case not worthy of review, for unknown reasons. The Supreme Court may be willing to consider another case with slightly different or more developed facts. This arguably leaves the line of Supreme Court cases intact, including *Morris v. Morris*, 238 Va. 589, 385 S.E.2d 858 (1989).
- Prove the claimant engaged in repetitive movements over the course of several hours or days and that the injury was caused by those repetitive movements.
- Even if the facts of a new case are very similar to those in *Dugger*, continue to assert the defense that the claimant did not prove the injury was caused by an "accident" at a reasonably definite time.
 - We believe the Supreme Court law conflicts with the Court of Appeals's decision in *Dugger*.
 - But, if this is the only defense to the claim and you cannot easily distinguish the facts from *Dugger* or prove repetitive movements, recognize that you are not likely to win before the Commission or the Court of Appeals.
- Prove that the activity was not uninterrupted.

- Try to establish that the claimant took several breaks during the several hours of activity that is alleged to have caused the accident. This may prove there were several separate incidents, not one of which the claimant can point to as the cause of the injury. This would also help to distinguish the facts from the recent case of *Van Buren v. Augusta County*, 66 Va. App. 441, 787 S.E.2d 532 (2016), which involved a non-stop 45-minute rescue.
- Talk to the doctor and get a medical report.
 - Get a medical opinion that the injury was caused by the claimant's repetitive movement over the course of hours, the entire day, or several days, as the case may be. The longer the time period, the more likely you are to succeed in proving there was no identifiable incident.
 - Question causation.