VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by NEWMAN
Commissioner

Mar. 18, 2026

YANCEY DAVENPORT v. D&D MECHANICAL INC
PINNACLEPOINT INSURANCE COMPANY, Insurance Carrier
BRICKSTREET MUTUAL INSURANCE COMPANY, Claim Administrator
Jurisdiction Claim No. VA02000038627
Claim Administrator File No. 2022026000
Date of Injury: June 09, 2022

Kenneth Brent Jones, Esquire
For the Claimant.

Michael P. Del Bueno, Esquire
Sarah V. Rose, 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 December 9, 2025 Opinion finding his claim barred by his willful misconduct pursuant to Va. Code § 65.2-306. Because we find the employer failed to prove the existence of a safety rule brought to the claimant's attention before the accident, we REVERSE and REMAND.[1]

I. Material Proceedings

The claimant, a welder, filed a claim for benefits alleging an injury to his left ear drum on June 9, 2022. In a November 8, 2023 Opinion, the Deputy Commissioner found the claimant sustained a compensable injury by accident and entered an award for temporary total disability

[1] Considering the issues involved and the complete record developed at the hearing and before the Commission, we find oral argument is unnecessary and would not be beneficial in this case. Va. Workers' Comp. R. 3.4; *see Barnes v. Wise Fashions,* 16 Va. App. 108, 112 (1993).

benefits for September 7, 2022, and from September 9, 2022 through October 12, 2022. The Opinion was reversed and remanded because the Deputy Commissioner failed to consider the defendants' willful misconduct defense. On remand, the Deputy Commissioner considered the defendants' assertion that the claimant's injury was the consequence of his willful violation of a safety rule and barred the claim.[2]

The Deputy Commissioner concluded that the claimant's claim was barred by his willful misconduct. He reasoned that the defendants had promulgated a rule requiring the claimant to wear hearing protection when exposed to hot sparks or molten metal, and that, knowing the rule, the claimant nonetheless willfully failed to follow it and was injured thereby. The Deputy Commissioner was not persuaded by the claimant's testimony that he was unaware that he had lost one of his earplugs before his injury. Thus, the Deputy Commissioner held that the claimant's actions fell "within the ambit of willful misconduct contemplated by Code § 65.2-306(A)(5) and bar his claim for medical benefits and compensation." (Op. 10.)

The claimant requests review.

II. Findings of Fact and Rulings of Law

Most of the relevant events giving rise to the subject injury are undisputed. The claimant is a welder; a card-carrying iron worker with decades of experience and intimate knowledge of the duties and the safety equipment necessary to protect against the trade's conspicuous risks. It was one such duty, "carbon arcing," in which the claimant was engaged when injured. At hearing, he

[2] The defendants also asserted that the claimant "did not suffer a compensable accident arising out of and in the course of his employment, that he did not require medical attention and was not disabled as a result of any compensable accident that is found to have occurred, that he was not disabled as alleged, and that he failed to make reasonable efforts to market his residual work capacity." (Op. 3.)

characterized "carbon arcing," as the reverse of welding, that rather than connecting separate pieces of metal together, a torch and air pressure are used to cut and separate metal.

Critical here is carbon arcing's production of "slag," sparks and pieces of molten metal made airborne by the blowing of air at eighty to one hundred pounds of pressure onto the site where the torch is cutting the metal. William Kuhlman, who initially hired the claimant, testified that the blown air prevents the slag from falling straight down, potentially onto the worker. However, depending on where the work is being performed, the production of slag in combination with the high-pressure air risks the molten metal blowing back onto the worker and posing a danger of fire on any exposed body parts. Such were the circumstances when the claimant suffered his injury. The exposed anatomy at issue was the claimant's left ear canal, into which fell a piece of molten metal that burned his eardrum.

Below, the Deputy Commissioner found the claimant's testimony regarding the circumstances of the accident credible. However, the Deputy Commissioner was not comparably impressed with the remainder of the claimant's testimony. Beyond the mechanics of injury, there is little agreement as to the relevant facts. The employer attributes this injury to the claimant's willful failure to comply with a safety rule requiring that he wear earplugs when carbon arcing, that such an earplug would have obstructed the ear canal and barred entry of the molten metal that burned his eardrum. The claimant counters, disputing the existence of such a rule. Nevertheless, he contends he was wearing earplugs, but without his notice, the left became dislodged leaving his ear canal exposed. Consequently, he contends that even if such a rule existed, its violation was not willful.

The Deputy Commissioner was unpersuaded by the claimant's testimony regarding the inadvertent loss of the left earplug. Fueling his skepticism was the testimony of Patrick Kuhlman, "an OSHA outreach trainer for the union representing [the claimant] and the employer's manager who hired [the claimant] and provided him with safety training." (Op. 5.) The description of injury was recorded in a Safety & Health Incident Report. (Cl.'s Ex. 2.) According to Kuhlman, the claimant knew the earplug had fallen from his ear as he observed it laying in some ground water. Having just a few moments of work left, the claimant elected to finish the job rather than replace the errant earplug, thereby leaving his left ear canal exposed. The Deputy Commissioner further discounted the claimant's testimony that he was ignorant of the earplug coming dislodged, noting that the precipitous increase in the volume of noise would have alerted the claimant to the earplug's loss.

We share the Deputy Commissioner's skepticism towards the claimant's profession of ignorance regarding the loss of the earplug, finding the explanation offered to Kuhlman to be more likely and more credible. Nevertheless, in weighing the evidence pertinent to the claimant's entitlement, we must be careful not to confuse separate issues.

In establishing the Act, the legislature enacted those elements necessary to prove a compensable injury, that it be by accident, that it arise out of, and that it occur in the course of the employment. Va. § 65.2-101. Like the Deputy Commissioner below, we find these elements have been established by credible evidence. The question posed by the defense raised cannot be answered by the prudence of the claimant's conduct which led to injury. Rather, the employer's contest to compensability is predicated upon the claimant's willful misconduct — his "willful failure . . . to use a safety appliance" and "willful breach of any reasonable rule or regulation

adopted by the employer and brought, prior to the accident, to the knowledge of the employee." Va. Code § 65.2-306(A)(4)-(5). As elucidated in the employer's Rule 1.10 notice,[3] that violation is that the claimant intentionally failed to wear earplugs while carbon arcing. As the party advancing entitlement to relief under statute, the burden of proof rests with the employer. Va. Code § 65.2-306(B). That burden requires proof that the rule was reasonable, known to the employee, for the employee's benefit, and intentionally violated. *Layne v. Crist Elec. Contr., Inc.*, 64 Va. App. 342, 349-50 (2015); *Spruill v. C.W. Wright Constr. Co*., 8 Va. App. 330, 334 (1989). Here, however, we must first address a more fundamental question: did the employer enact a rule requiring the wearing of earplugs while carbon arcing? The employer says "yes," and the claimant avers otherwise.

Like the Deputy Commissioner, we find Kuhlman to have been a credible witness and, to use common parlance, someone with no dog in this fight.[4] Moreover, Kuhlman was an OSHA safety trainer for the claimant's union and trained the claimant at the onset of his employment. Yet, Kuhlman never testified to the existence of a rule requiring the wearing of earplugs when carbon arcing. Indeed, he testified to the contrary. He denied the OSHA manual states that earplugs will protect against sparks or fire. While he acknowledged the need for earplugs due to noise exposure, the noise level is not the rule advanced nor the source of the claimant's injury. Moreover, on the Safety & Health Incident Report, when documenting the circumstances of the claimant's injury, Kuhlman wrote that "[e]arplugs are not required when burning or welding" and

[3] Commission Rule 1.10 provides: "If the employer intends to rely upon a defense under § 65.2-306 of the Act, it shall give to the employee and file with the Commission no less than fifteen (15) days prior to the hearing, a notice of its intent to make such defense together with a statement of the particular act relied upon as showing willful misconduct."

[4] At the time of the hearing, Kuhlman was no longer working for the employer.

checked the provided box that the claimant when injured "followed the rule(s), job hazard analysis or procedure." (Cl.'s Ex. 2.)

The employer's remaining witness, Jeffrey Weinz, is the safety director. Weinz denied any involvement in the claimant's safety training when hired. Referring to a PowerPoint presentation and various documents, Weinz identified various forms of personal protective equipment with "hearing protection required in designated high noise areas." (Tr. 71.) Weinz identified a Safety & Health Manual and two pages of safety rules. Asked whether he had any involvement in giving these documents to the claimant or going over the information with him, Weinz replied, "No." (Tr. 73.) Shown the safety manual, Weinz was asked about the requirement for hearing protection. Reading from the manual, he stated, "Hearing protection shall be worn by the employees in areas marked as high noise area or exposed to noise almost equal to or greater than 85 decibels." (Tr. 74.)

Critically, Weinz denied the existence of any rule requiring the wearing of hearing protection apart from noise exposure. (Tr. 74.) When specifically asked whether such protection was required in circumstances involving flying slag, Weinz responded, "Not particularly." (Tr. 75.)

We acknowledge Weinz identified one document which addressed the subject of hearing protection when in the presence of "hot sparks or molten metal." (Tr. 75.) (Defs.' Ex. 10.) The reference in question is from paragraph 6.8. in the Safety & Health Manual which states: "Specific hearing protection is required when exposed to hot sparks or molten metal." (Defs.' Ex. 10.) For several reasons, we find this statement insufficient evidence of the existence of a rule requiring earplugs in the circumstances presented in this case. First, the statement references "[s]pecific hearing protection" but fails to identify what that specific hearing protection is and makes no

mention of earplugs. Belying such an inference is the testimony of Kuhlman, the certified safety trainer who conducted the claimant's training when hired. Kuhlman testified that earmuffs, not earplugs, are the OSHA standard for ear protection when working around sparks and fire. (Tr. 41.) Kuhlman later confessed ignorance over whether a written rule existed requiring the wearing of earplugs when carbon arcing. (Tr. 56.) We also cannot ignore that a separate "D & D Mechanical Inc. Safety & Health Manual" expressly addressing "Welding, Cutting and Burning Safety" (Defs.' Ex. 11), is silent on the subject of wearing earplugs. (Tr. 77.)

Finally, if we were to conclude that the statement in the manual requiring specific hearing protection when exposed to hot sparks or molten metal established the existence of a safety rule, a fatal deficiency in the evidence necessary to trigger the Va. Code § 65.2-306 bar remains. The statute requires evidence that the rule be brought to the claimant's attention prior to the accident. Va. Code § 65.2-306(A)(5). On this necessary element to trigger the statutory bar, there is no evidence. When Weinz was asked how he concluded that the claimant had knowledge of the rule, he cited only the claimant's intelligence and a prior discussion leading Weinz to conclude that the claimant had a general knowledge about rules and safety. (Tr. 85.) We find this conclusion insufficient to prove a specific rule requiring hearing protection when exposed to hot sparks or molten metal was "brought, prior to the accident, to the knowledge of the employee." Va. Code § 65.2-306(A)(5).

Below, the Deputy Commissioner found the evidence sufficient to establish that the claimant had constructive knowledge of the rule, citing Weinz's testimony of supplementing the claimant's safety training with instructions regarding the wearing of earplugs. Authority for charging the claimant with knowledge was found in *VEPCO v. Kremposky*, 227 Va. 265 (1984). Therein, the Supreme Court addressed the level of evidence required to prove the element of willfulness necessary to trigger the statutory bar. First, the Court ruled that the adage that ignorance of the law is no excuse as inapplicable, due to the statutory requirement that a rule violation be willful. Proof of such willfulness requires at a minimum, evidence that the employee had knowledge of the rule or that the employer took steps to bring home to the employee knowledge of the rule's existence. *Id.* at 269. In the face of such evidence, the claimant could not defeat the statutory bar by a mere claim of ignorance of the rule's existence.

In *Kremposky*, the evidence established that an "Accident Prevention Manual" had been provided to the claimant at the time of his hire and that upon its receipt, he certified that he would study and familiarize himself with the rules relating to his work. Further, the claimant had undergone thrice-annual safety training over almost two decades of employment. Following his accident, he admitted to his supervisor and the employer's safety coordinator that he'd "messed up" by failing to use the necessary safety equipment. This evidence was weighed against a claim of ignorance. Confronted with this evidence, the Court noted that there was no evidence that would allow for the conclusion that he was ignorant of the rule. Therefore, the evidence should be weighed to determine its sufficiency to reasonably infer knowledge of the rule and its willful violation.

The license to infer knowledge of the existence of a violated rule preserves the legislative intent inherent in § 65.2-306 by allowing the Commission in the proper case to infer willfulness, even in the face of claimed ignorance. However, there is a counterbalancing threat to legislative intent if an inference is employed to impute a willful violation in the circumstance where the claimant is ignorant of the rule. Thus, our authority to infer is not unfettered, and the *Kremposky* Court sets the parameters. Consideration of whether the facts warrant the implication of knowledge is appropriate only when there is no proof of ignorance. *Id.* 269.

Unlike the facts in *Kremposky*, here evidence supports the claimant's contention that he was ignorant of the existence of a rule requiring the wearing of earplugs when carbon arcing. Kuhlman, the credible witness, safety expert and union representative who trained the claimant, denied the existence of such a rule. Indeed, the sole evidence of the rule being brought to the claimant's attention was that offered by Weinz, but only through safety training provided to the claimant *after* the accident. Therefore, we lack the facts of *Kremposky*, a history of pre-accident training that would allow for the reasonable inference that the claimant was knowledgeable of the rule or the claimant's post-accident admission that he knew he'd failed to employ necessary safety equipment.

None of the above is intended to imply that we deem the claimant was ignorant of the risk he was taking when he lost his earplug and chose to keep on working in an environment replete with airborne hot ash and molten metal, The evidence establishes that as an iron worker with many years' experience, he knew well what could happen. To employ Kuhlman's metaphor, would be like tying one's shoes in the morning to avoid tripping over the laces. (Tr. 48.) However, the claimant's continued labor in the face of known danger does not bar his entitlement to recovery.

There can nary be a more settled principle than that proof that the claimant performed his work in a careless or even willfully dangerous manner is not a bar to a claim for workers' compensation benefits. "Negligence, regardless how gross, does not bar a recovery for workers' compensation benefits." *Uninsured Employer's Fund v. Keppel*, 1 Va. App. 162, 164-65 (1985). Neither is assumption of the risk a defense to a workers' compensation claim. *See Roller v. Basic Constr. Co.*, 238 Va. 321, 327 (1989); *Rasnick v. Pittston, Co.*, 237 Va. 658, 660 (1989). However ill-conceived we deem the claimant's conduct that led to injury, we cannot deem it violative of a rule in the absence of proof that the rule existed and was brought to the claimant's attention before the accident.

For these reasons, we conclude that the defendants have not sustained their burden of proving that the claimant's injury was the consequence of a willful breach of a known safety rule. In light of our finding that the claim is not barred by operation of § 65.2-306, we remand to the Deputy Commissioner to address any outstanding defenses or claims and enter such award as is deemed appropriate and consistent with this Opinion.

III. Conclusion

The Deputy Commissioner's December 9, 2025 Opinion is REVERSED and REMANDED to the Deputy Commissioner.

This case is ORDERED removed from the review docket.

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.

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