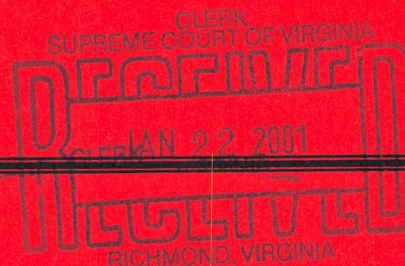


262 Va 270



IN THE
Supreme Court of Virginia

RECORD NO. 001740

**VAUGHN'S LANDSCAPING & MAINTENANCE
and VIRGINIA FARM BUREAU FIRE &
CASUALTY INSURANCE COMPANY,**

Appellants,

v.

TIMOTHY JASON DODSON,

Appellee.

JOINT APPENDIX

**Kevin M. Rose
WHARTON, ALDHIZER
& WEAVER, P.L.C.
100 South Mason Street
Harrisonburg, Virginia 22801-7528
(540) 434-0316**

Counsel for Appellants

**Jerry O. Talton
ATTORNEY AT LAW
118 East Main Street
Front Royal, Virginia 22630
(540) 636-7040**

Counsel for Appellee

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Form for Benefits

Form No. 5 (rev. 9/15/94)

15369

Virginia Workers' Compensation Commission

1000 DMV Drive, Richmond VA 23226

Fill this form out as completely as possible. See special instructions on the reverse.
Medical reports should be filed with this claim or as soon as possible.

Employee's name TIMOTHY J. DODSON Phone No. 540-635-450
Employee's address 314 CLOUD ST. Soc. Sec. No. 224-08-202
FRONT ROYAL, VA 22630
Employer's name DAVID W. VAUGHN Phone No. _____
Employer's address 18 Hites Spring Rd.
LURAY, VA 22835 *Mr. Vaughn, Darro*
VWC/IC file number: _____ (The file number is usually printed at the top right on
any mail you have received from us about this accident.) *W*

Have you ever received an award or any compensation payments for this accident or disease? NO

Average gross weekly wage at the time of the accident or diagnosis of the disease? \$ Pending

Employer's workers' compensation insurance carrier? VA. FARM BUREAU

1. Complete for accident, occupational disease, or both

Accident Accident date ON or ABOUT 6-24-95

Place where accident occurred _____ City or County: PAGE State: VA

How accident occurred CAR ACCIDENT

Nature of injury MULTIPLE INJURIES

Disease Date doctor told you the disease was caused by your work _____

Name of doctor _____

Nature or name of the disease _____

Date you last worked for this employer _____

2. What specific benefits are you seeking? Check all that apply.

☒ Compensation for lost wages for the periods listed below:

From: 6-24-95

To: Present + Continuing

From: _____

To: _____

From: _____

To: _____

☐ Compensation for partial wage loss

☐ Compensation for permanent disability

☒ Payment of lifetime medical costs for this accident or injury

☐ Payment of specific medical bills relating to this accident or injury

☐ Death benefits to dependents or funeral expenses

☐ Other - Specify: _____

Signature of claimant Jerry O. Talton

JERRY O. TALTON, Esquire
118 East Main Street
Front Royal, VA 22630

Date 12-9-96

Phone No. 540-836-2040



[Office Use: Filed _____ Last paid _____]

Docket for _____ on _____

Employer's First Report of Accident

Virginia Workers' Compensation Commission
1000 DMV Drive Richmond VA 23220
See instructions on the reverse of this form

The boxes to the right are for the use of the insurer	VWC file number 189-5-74	Reason for filing 1
	Insurer code 15369	Insurer location 7600
	Insurer claim number 6097980	

Employer			
1. Name of employer VAUGHAN'S Landscaping & Maint		2. Federal Tax Identification Number 54-1610328	
4. Mailing address 18 WITES SPRING RD		3. Employer's Case No. (if applicable)	
6. Parent corporation (if applicable) X		5. Location (if different from mailing address) 34m	
8. Insurer (name and location) VA. Farm Bureau (LURAY VA)		7. Nature of business LAWN maintenance & Landscaping	
10. Policy number WC-6097980-10		10. Effective date 12-21-94	
Time and Place of Accident			
11. City or county where accident occurred LAGE		12. Employer's premises? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
14. Date of injury 1-24-95		15. Hour of injury 5:00 o'clock PM	
16. Date of incapacity 1-24-95		17. Hour of incapacity 5:00 o'clock PM	
18. Was employee paid in full for day of injury? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		19. Was employee paid in full for day incapacity began? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
20. Date injury or illness reported 12-26-94		21. Person to whom reported	
22. Name of other witness		23. If fatal, give date of death	
Employee			
24. Name of employee (Last, First, Middle) Jackson Jason Timmy		25. Phone number	
27. Address 314 Cloud St. Front Royal VA		26. Sex <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female	
31. Occupation at time of injury or illness LAWN maintenance		28. Date of birth	
32. Department		29. Marital status <input checked="" type="checkbox"/> Single <input type="checkbox"/> Divorced	
33. Number of dependent children		30. Social security number 224-08-2027	
34. How long in current job? 5 to 6 months		35. How long with current employer? 5 to 6 months	
36. Was employee paid on a piece work or hourly basis? <input type="checkbox"/> Piece work <input checked="" type="checkbox"/> Hourly		37. Value of perquisites per week Food/meals Lodging Tips Other	
38. Days worked per week 5 to 6		39. Wages per hour \$ 6.00 per hr.	
40. Earnings per week (inc. overtime) \$ 240.00 to 240.00		41. Machine, tool, or object causing injury or illness TRUCK	
42. Describe fully how injury or illness occurred Employee threw an object out the window obstructing my driving.		43. Specify part of machine, etc. X	
44. Provided? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		45. Utilized? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
46. Describe nature of injury or illness, including parts of body affected crushed RIGHT ARM Below elbow AND Between wrist			
47. Physician (name and address)		48. Hospital (name and address) VUCA	
49. Probable length of disability		50. Has employee returned to work? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
51. EMPLOYER: prepared by (name, signature, title) David V. Vaughn		52. Date 1-2-95	
53. INSURER: processed by David V. Vaughn		54. Date 1-2-95	
55. Phone number 540 7434160		56. Phone number 7841661	

This report is required by the Virginia Workers' Compensation Act

JAN 07 1995 First Report of Accident
VWC Form No. 3 (rev. 10/1/91)

George R. Aldhizer, Jr.
Donald E. Showalter
Glenn M. Hodge
M. Bruce Wallinger
Ronald D. Hodges
William E. Shmidheiser, III
Douglas L. Gwynn
John W. Flora
Gregory T. St. Ours
Roger D. Williams
Charles F. Hilton
Daniel L. Fitch
Jeffrey G. Lenhart
Mark D. Obenshain
Thomas E. Ullrich

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Carolyn Madden Perry
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G. Chris Brown
Phillip C. Stone, Jr.
Cathleen P. Welsh
G. Rodney Young, II
Mark W. Botkin
Kevin M. Rose
Carla W. Tanner

W. W. Wharton (1907-1985)
George S. Aldhizer, II (1907-1986)
Russell M. Weaver (1901-1985)

March 31, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

The Honorable William R. Culbreth
Deputy Commissioner
Virginia Workers' Compensation Commission
Blue Stone Plaza
2061 Evelyn Byrd Avenue
Harrisonburg, Virginia 22801

Re: VWCC File No.: 183-34-74
Claimant: Timothy J. Dodson
Employer: Vaughan's Landscaping and Maintenance
Insurer: Virginia Farm Bureau Fire & Casualty Ins.
DOA: June 24, 1995

Dear Deputy Commissioner Culbreth:

Please accept this letter as the employer's and insurer's notice pursuant to Rule 1.10 of the Rules of the Virginia Workers' Compensation Commission that they intend to rely upon defenses under Va. Code § 65.2-306. Specifically, these defenses are as follows:

- (1) Willful misconduct - the claimant, while a passenger in his employer's vehicle, was throwing objects out of the passenger window. This conduct distracted his employer, who was driving the vehicle, and proximately caused the accident at issue. Such conduct is in clear violation of the law, and the claimant knew it was in violation of the law at all relevant times; and

March 31, 1997

Page 2

- (2) Intoxication - the aforementioned willful misconduct by claimant occurred while he was in a state of intoxication. Such intoxication contributed to his willful misconduct and further distracted his employer, thus causing the accident at issue.

In addition to the foregoing defenses, the employer and insurer intend to defend this claim on the grounds that the accident did not arise out of and in the course of employment. The employer and insurer reserve the right to assert such other defenses as may become apparent during discovery of this claim.

Please give me a call if you have any questions. Thank you for your attention to this matter.

Very truly yours,

Kevin M. Rose

Kevin M. Rose

KMR/48800/59/93976

cc: Ms. Ilene Silver, Virginia Farm Bureau Ins. (Claim No. 6098425)
Mr. David W. Vaughan
Jerry O. Talton, Esquire

EMPLOYER'S DESIGNATION OF MEDICAL RECORDS

NAME OF CASE: Timothy Jason Dodson, Employee, v. Vaughan's Landscaping & Maintenance, Employer, and Virginia Farm Bureau Fire & Casualty Insurance Company, Insurer

VWCC FILE NO: 183-34-74

Pursuant to Rule 2.2 of the Rules of the Virginia Workers' Compensation Commission, the Employer and Insurer designate the following medical records to be received into evidence at the hearing of this matter on Thursday, November 13, 1997. Employer and Insurer rely upon the entire record to the extent it is relevant to the defenses raised.

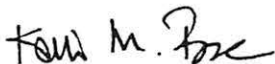
RECORDS:

1. University of Virginia Medical Center Operative Report, dated June 24, 1995.
2. Nursing notes dated June 25, 1997, signed by Carrie Harris, R.T.
3. Urinalysis Chemical Results from University of Virginia Health Sciences Center dated 6/24/95 and 6/25/97.

Respectfully submitted:

VAUGHAN'S LANDSCAPING &
MAINTENANCE, Employer
and
VIRGINIA FARM BUREAU FIRE &
CASUALTY COMPANY, Insurer

By Counsel



KEVIN M. ROSE
Of Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
P.O. Box 20028
Harrisonburg, Virginia 22801-7528
(540) 434-0316
Counsel for Employer and Insurer

JERRY O. TALTON

ATTORNEY AT LAW

118 East Main Street
Front Royal, Virginia 22630

(540) 636-7040

Medical Reports relied upon by Claimant

March 12, 1996 letter of Dr. Williams and Evaluation

November 10, 1997 Questionnaire completed by Dr. Williams

LIST OF SPECIALS - TIMOTHY DODSON / 195-134

PAGE MEMORIAL HOSPITAL

\$ 1,448.20

200 Memorial Drive
Luray, VA 22835

06/24/95 - \$ 1,448.20

COMMONWEALTH VALLEY IMAGING

\$ 33.00

Post Office Box 2080
Kilmarnock, VA 22482
800/335-1444

06/24/95 - \$ 33.00

UVA HOSPITAL

*Brent
804-*

\$ 39,343.40

*Fax 804
786-4839*

Box 277
Charlottesville, VA 22908
924-5376 (Hx.: 1165122)

06/24 - 07/03/95 - \$ 33,895.88

07/10/95 - \$ 168.65

07/28/95 - \$ 257.85

11/20/95 - \$ 197.40

06/24 - 06/25/95 - \$ 2,349.00 (Late Inpatient Charges)

07/12/95 - \$ 56.00

08/25/95 - \$ 56.00

12/04/95 - \$2,087.62

07/17/95 - \$ 59.00

10/02/95 - \$ 216.00

HEALTH SERVICES FOUNDATION

\$ 21,496.96

P.O. Box 7886
Charlottesville, VA 22906
980-6110 (Hx.: 1165122)

*804-980-6162
Angela Attw PT ACCOUNTS*

06/24/95 - \$ 16,568.96

06/30/95 - \$ 126.00

07/12/95 - \$ N/C

11/20/95 - \$ N/C

06/25/95 - \$ 409.00

07/01/95 - \$ 95.00

07/17/95 - \$ N/C

12/04/95 - \$ 4,237.00

06/27/95 - \$ 26.00

07/10/95 - \$ N/C

07/28/95 - \$ 35.00

01/02/96 - \$ N/C

TOTAL MEDICAL SPECIALS TO DATE:

\$ 62,321.56





Jerry Talton, Esquire
118 East Main Street
Front Royal, Virginia 22630
August 15, 1997

In Re: Workers' Compensation Claim of Timothy J. Dodson

Dear Mr. Talton:

Pursuant to our conversation today I am providing this letter to state the position of the University of Virginia Medical Center with regard to your intention to claim attorneys fees pursuant to Virginia Code Section 65.2-714(B). The Medical Center would have no objection to your receipt of reasonable attorneys' fees from the Award of the Commission. However, the Commission is certainly cognizant of the fact that any reduction in the amount of medical bills owed to University of Virginia Medical Center shall not be authorized without the written consent of the Office of the Attorney General (Virginia Code Section 65.2-714(C)). The attorney with whom you may speak at the Attorney General's Office is Susan Atkinson. You may reach her at (804) 786-7962.

I hope this letter assists in your determination of whether to continue the hearing slated for August 19, 1997, and best of luck in pursuit of your client's claim. Please do not hesitate to contact me if I can be of further assistance to you. I am

Very Truly Yours,

Brent C. McGhee
Assistant Director
Patient Financial Services

Via Facsimile Transmission 8/18/97 (540) 635-7036.

JERRY O. TALTON

ATTORNEY AT LAW

118 East Main Street
Front Royal, Virginia 22630

(540) 636-7040

August 15, 1997

Health Services Foundation
P.O. Box 788
Charlottesville, Va. 22906

ATTN: ANGELA Patient Accounts

Re: Claim for counsel fee in Worker's Compensation Case
of Timothy Dodson
History Number: 1165122

Dear Angela,

Tim Dodson owes Health Services Foundation \$21,496.96, and a workers compensation hearing is scheduled for Tuesday, August 19, 1997 at 1:30 P.M. in Harrisonburg.

The purpose of this letter is to request your consent to allowing the Commission to consider my request for an award of a counsel fee to be deducted from the above charges in the event that we are successful with this claim.

In the alternative, if the Health Services Foundation is in agreement to a specific percentage fee (one third or twenty five percent) being awarded in I can win the compensation case, I would appreciate a letter to this effect.

I do not want to continue the hearing to put the Health Services Foundation on notice, so a response before Tuesday would be very much appreciated. It can be faxed to 540-635-7036. Please feel free to call if there are any questions.

Very truly yours,



Jerry O. Talton

Quincy CHOICE

VIRGINIA:

IN THE WORKERS' COMPENSATION COMMISSION

TIMOTHY JASON DODSON, Claimant

v. Claim No. 183-34-74

VAUGHANS LANDSCAPING & MAINTENANCE, Employer

VIRGINIA FARM BUREAU FIRE & CASUALTY INS. CO., Insurer

Jerry O. Talton, Esquire
118 East Main Street
Front Royal, Virginia 22630
Counsel for Claimant.

Kevin M. Rose, Esquire
P. O. Box 20028
Harrisonburg, Virginia 22801
Counsel for Defendants.

Hearing before Deputy Commissioner CULBRETH in Harrisongburg,
Virginia on November 13, 1997.

All witnesses having been duly sworn, the following testimony
was taken:

DEPUTY COMMISSIONER CULBRETH:

We're here today on the case of Timothy J. Dodson versus
Vaughans Landscaping & Maintenance, 183-34-74. The claimant is
represented by Jerry Talton. The employer is represented by Kevin
Rose. We're on the claimant's claim filed 12/9/96 alleging
injuries from a motor vehicle accident on 6/24/95. Claimant is

seeking temporary total disability benefits from 6/25/95 through 3/11/96, as well as permanent partial disability benefits for 75 percent of the right upper extremity, as well as payment of medical benefits. The parties have stipulated to an average weekly wage of \$260 per week. The employer's defenses are no injury by accident arising out of or in the course of the employment, willful misconduct to include horseplay, severe intoxication and intoxication as willful misconduct, violation of statute as willful misconduct and to the extent the medical records do not support the period of disability alleged, failure to market. The two witnesses today will be Timothy Dodson and David Vaughan. Is that the claimant's case?

MR. TALTON:

Yes Your Honor. There was one potential witness that I don't think may arrive, Jason Fletcher. But just in the event...

DEPUTY COMMISSIONER CULBRETH:

I'll note Mr. Fletcher in case he does arrive and I will also note claimant's counsel's objection to the included variations of the willful misconduct defense asserted by the employer. But, I will allow those defenses to go forward.

MR. TALTON:

Could I also note for the record that I am claiming counsel fee with regard to the medical expenses in the event that the Commission would find this is a compensable case.

DEPUTY COMMISSIONER CULBRETH:

714 fees against UVA?

MR. TALTON:

UVA and the Health Sciences, Your Honor and any other medical provider that might...

DEPUTY COMMISSIONER CULBRETH:

And you have notified both of them of your intention to do that?

MR. TALTON:

I have Your Honor, on more than one occasion.

DEPUTY COMMISSIONER CULBRETH:

Thank you.

MR. TALTON:

You want me to proceed?

DEPUTY COMMISSIONER CULBRETH:

Please.

MR. TALTON:

I'd like to call Mr. Vaughan as an adverse witness.

DEPUTY COMMISSIONER CULBRETH:

Certainly.

DAVID VAUGHAN, WITNESS

BY MR. TALTON:

Q. You are David Vaughan, is that correct?

A. Yes.

Q. And Mr. Vaughan, you have operated, or probably continue to operate, a landscaping business in Luray?

A. Yes.

Q. Are you the owner of that business?

A. Yeah.

Q. Anybody else own the business with you?

A. No.

Q. Is that an incorporated business?

A. No.

Q. And what is the name that the business trades under?

A. Vaughans Landscaping.

Q. And you are the sole proprietor of that business?

A. Yes.

Q. And was Tim Dodson an employee of yours on or about June 24th of '95?

A. Yeah.

Q. And what was Tim's job? What was he hired to do for you?

A. To help me to do landscape work.

Q. Was he a laborer I guess or...

A. He worked along with me.

Q. And, we've already agreed to a wage on him. And you basically would control what work he did, tell him what to do and pretty much would provide whatever tools were needed to perform the work?

A. Yeah.

Q. And prior to this accident on June 24th of '95, you were aware, I guess, that Tim had no driver's license?

A. Yeah.

Q. And so, is it true that you would transport him to work, pick him up and take him to the jobs on virtually every occasion that he worked for you?

A. Yeah.

Q. And did---when did he start working for you? Approximately. You don't have to tell us the exact date.

A. Sometime in early spring.

Q. Of '95?

A. Yeah. I think that's about right.

Q. And how many days a week would he normally work for you?

A. Pretty much every day.

Q. And what time would his work day normally start?

A. It usually started about eight.

Q. And you would pick him up---and am I correct, he was living in Kendall at the time of this accident? Kendall, Virginia?

A. Yes.

Q. And you were operating your business I believe out of your home in Luray. Is that correct?

A. Yeah.

Q. And what address was that?

A. 18 Heights Spring Road.

Q. And I think you had a garage there that you would keep the equipment in?

A. Yeah.

Q. And you had a little office inside the garage as well?

A. Right.

Q. And I take it on a normal work day you would leave your home there in Luray and go to, taking what, the truck, your company

truck?

A. Yeah.

Q. What kind of truck?

A. Chevrolet.

Q. And would you normally have anything on the back of the truck? Any sort of a trailer with equipment on it or anything that you would carry?

A. Lawn mowers, yeah a trailer.

Q. You had a trailer?

A. Yeah.

Q. And you put the equipment and lawn mowers on the back of that. And so you would leave from your home in the morning normally and go to Kendall where Tim lived and pick him up?

A. Yeah.

Q. And then you would take him to the various sites where he'd perform landscaping work, cutting grass and bush hogging and weed whacking and things of that nature.

A. (No audible response).

DEPUTY COMMISSIONER CULBRETH:

You need to answer yes or no. This

is all being recorded.

A. Yes.

Q. And then is it true---then you would finish the last job of the day. On an average work day, you would finish the last job of the day at some location, cutting grass or whatever, and then is it true you would normally take Tim with you back to your home in Luray at which point you all would unload the equipment?

A. Not every time.

Q. Not every time but...

A. Sometimes, yeah, sometimes.

Q. It wasn't unusual for Tim to go back with you to your home and unload equipment?

A. No.

Q. And isn't it true that you would feed him dinner if you did that?

A. If I went home to eat I would ask him to come in and eat too.

Q. And how often would that happen?

A. A couple of times a week. It depends on where we was working at. I mean, if it was far from home we just didn't go.

Q. And then---so what was the normal time that he would be done

in any responsibilities he had for you, including unloading the equipment, if he went to your home. About what time would he normally be done? Approximately?

A. Three or four or five.

Q. Somewhere in there?

A. Yeah, somewhere in the neighborhood.

Q. And when you paid him, would you pay him through---let's say on these days when he would come to your house and have dinner and help you unload equipment and all, would you pay him through the time that he left your house? From when you picked him up, until he left your house. Would you normally pay him through that whole period?

A. Yeah. Usually took a half hour out for lunch.

Q. Took a half hour out for lunch. Okay. What about when he would eat dinner with you. Would you take any time out for...

A. Half hour.

Q. You'd take a half hour if he ate dinner?

A. Yeah.

Q. But if he unloaded tools and things of that nature, you would pay him for the time?

A. Yeah.

Q. And you all had a good working relationship. Is that true?

A. Yeah.

Q. And Tim was, in fact, friends with your brother before he came to work with you?

A. Yeah.

Q. And you and Tim weren't close personal friends before he came to work with you I assume? You were acquaintances but you wouldn't say that you were close personal friends.

A. Yeah. Right.

Q. But you were friends in terms of your work. In terms of working relationship, it was a friendly type of relationship?

A. Yeah.

Q. Okay. Let's go if we could to the date of the accident, June 24, 1995. You don't deny do you sir, that there was an accident on that date, on June 24, 1995?

A. No, I don't deny it.

Q. And at the time of the accident, you were the driver. Would you agree with that?

A. Yeah.

Q. And Tim was a passenger in the vehicle?

A. Yeah.

Q. Okay. Do you remember the approximate time of day when the accident occurred?

A. Not exactly, I don't.

Q. But it was sometime in the afternoon. Is that correct?

A. Yeah, it was in the afternoon.

Q. Did you have any specific plans---had you planned out what you and Tim were going to do on that work day before you picked him up?

A. I had some mowing I had to get done.

Q. So, did you have pretty much an idea of what you and Tim were going to be doing that day?

A. Yeah, roughly.

Q. Okay. And what did you plan? What were your plans, specifically, for Tim and the work that day? If you hadn't had this accident?

A. I had some mowing jobs I had to get done. Really, I don't know what my particular plans were exactly.

Q. Okay. You had some mowing to do at some different locations and then were you going to take Tim back to your home to help unload the vehicle that evening?

A. No, I don't think so.

Q. I think the record---well, where were you headed at the time

the accident happened? Where were you going?

A. Back to town. Back to Luray.

Q. Were you headed back to your home?

A. (Affirmative response).

Q. Because you had all this equipment on the back of your trailer. Is that right?

A. Yeah, I was going back home.

Q. Were you going to take that equipment off the back of the trailer when you got home?

A. No.

Q. Why do you say no. Why do you say you weren't going to---that you were going to leave the equipment on the trailer?

A. I had another job I was planning on doing that evening, starting.

Q. There was another job. Okay. You were going to do another job that evening. And were you going to take Tim with you?

A. No.

Q. Where was the other job you were referring to, if you can tell us?

A. I think it was Potomac Edison.

Q. Okay. The Potomac Edison job. And what were you planning to

do at the Potomac Edison location? What type of work?

A. Mow.

Q. Mowing work. Anything besides mowing?

A. No.

Q. Okay. And where is that Potomac Edison job situated. Where in terms of---is it a particular town or...

A. Luray.

Q. It's in Luray, the town of Luray. And then after you finished the Potomac Edison job what was you planning to do for the remainder of the day in terms of your activity?

A. I'm not really sure what I would do.

Q. Wouldn't you normally have---once you had finished that job wouldn't you have normally gone home, taken your equipment back to the garage that you had in Luray?

A. Well, yeah, I would have took it back home.

Q. Okay. Was it customary for you to unload your equipment at the end of the day once you were finished with the work?

A. Not always. Sometimes I would take the truck and just leave it at the house with everything on it. If I had to mow the next day I would just leave it.

Q. But in terms of what was your frequent practice, you would

frequently unload the truck when you got home, wouldn't you?

A. Yeah.

Q. And what sort of things---when you are unloading the truck, what sort of things would you have to take off the truck?

A. Weed eaters, gas, and so forth.

Q. Shovels? Is that something that would be on the ...

A. Could have been, yeah.

Q. Were there bush hogs or anything of that nature. When you use the term bush hogging, did you all do bush hogging in the landscaping business?

A. (Affirmative response).

Q. And did you have equipment to do bush hogging?

A. Yeah.

Q. And would that have been on the back of your vehicle?

A. No. It would not have been.

Q. I don't want to get too far aside. Why not? Why would that have not been on there?

A. I don't think you can get that on a pickup truck.

Q. Okay. It is a big piece of equipment?

A. Yeah.

Q. It wouldn't have been on the trailer behind the truck?

A. I had two mowers on the trailer.

Q. Two mowers on the trailer?

A. (Affirmative response).

Q. May I guess---if you recall on the date of the accident when you left Luray, what equipment was on--if you can recall, what equipment was on the truck and the trailer?

A. Two mowers on the trailer. I don't know what all was on the pickup truck. I know weed eaters was on it.

Q. Weed eaters. Okay. Any gas cans, anything of that nature?

A. Probably.

Q. Any tools?

A. Like I said, I'm not exactly sure.

Q. Was it customary for you to carry tools on the truck or the trailer?

A. Yeah.

Q. And can you think of any other equipment that would have been in the truck or on the trailer when you left to pick up Tim that morning?

A. No. I mean, it has been so long. I can't exactly remember what was on the truck.

Q. Okay. So you left that morning and you went to Kendall and

picked Tim up. Is that right?

A. Yeah.

Q. And then where did you all go next? Do you remember?

A. No, not exactly. I don't remember where we went the first---
you mean the first job we went to?

Q. Yeah. I was just wondering if you recall where the first job
was that you went to. Let me see. I may be able to help refresh
your memory.

A. I'm not exactly sure.

Q. But you went out and did some mowing. Is that right?

A. Yeah.

Q. And do you remember where you went after you did the first
job, when you were done with that? Did you do another job?

A. I know the last job I got done was in Compton. I do know
that.

Q. Okay. So you went to one job and done that...

A. I'm not sure how many jobs---how many yards we mowed that day.
I'm not sure.

Q. But the last job you finished was in Compton?

A. Right.

Q. Compton, Virginia. Right?

A. Yeah.

Q. And when you were done with the Compton job, I assume Tim was riding with you the whole time?

A. Yeah.

Q. Where did you all go when you had finished the Compton job?

A. I went to Bentonville.

Q. And what took place there?

A. Nothing. I stopped at the store.

Q. Okay. And what did you purchase at the store?

A. Beer.

Q. And was that cans of beer?

A. I don't remember. I don't know.

Q. And was any wine purchased?

A. Yeah.

Q. Was that two bottles of wine?

A. I don't think. I don't know. I'm not sure.

Q. But you are sure that beer and wine was purchased by you?

A. (Affirmative response).

Q. Okay. And did Tim purchase anything that you recall at the store that day?

A. I don't think so. I don't know.

Q. Now, am I correct, there was no beer or wine in your vehicle...

A. It was. I had a cooler on the back of the truck.

Q. You had a cooler on the back of the truck?

A. (Affirmative response).

Q. Okay. And was there any ice in the cooler?

A. Probably so.

Q. And was there anything else in the cooler besides ice?

A. I imagine there was some beer still in it.

Q. And was that your beer?

A. (Affirmative response).

Q. So, you all stopped at the store. Did Tim get out of the vehicle, if you recall? It's hard to remember I know back that far.

A. I don't remember.

Q. And then you and ---and you were driving. You drove away from the store in Bentonville. Is that right?

A. Right.

Q. And where did you drive to from there?

A. Headed back towards Luray.

Q. Okay. And what road do you normally take from Bentonville to

Luray?

A. A lot of times I cut off the back way and go up.

Q. Okay. But what is the customary way though that you would drive?

A. Either way. I mean, whichever way I decided to go.

Q. There were two different ways. Could you tell us the routes that you would take?

A. Whatever that road number is through there. I don't know what the number is. It's through Compton, up through Compton. 340 would have been the quickest way back if that is what you are asking me.

Q. Yeah, basically that is what I was asking. And you took a different way. You didn't go the 340 way on that particular occasion?

A. No.

Q. All right. And where---was any alcohol drank by either you or Tim on the trip?

A. I might have drank a beer.

Q. And how about Tim?

A. I'm not sure what he drank.

Q. Am I correct, did you---prior to June 24, 1995 you had not

told Tim that he was not to drink in your presence while he was accompanying you. You hadn't told Tim that he was not to drink anything.

A. I'm not understanding what you are asking me.

Q. I'm probably not asking it real clear. You didn't have any rules posted at your place of employment for Tim to follow?

A. No.

MR. ROSE:

I just want to note an objection to the extent that if he's trying to say that he was on the job at that time. You know, it sounds like an implication. I know that is what you are trying to avoid and I appreciate that. But if he is trying to ask him if he---if he is trying to imply that when they were driving around they were working at that time, that is really all my objection is, to the form of that

question.

MR. TALTON:

That is the ultimate issue for the Commissioner. I'm not trying to do anything except establish the factual predicate for his determination.

Q. I take it that you are not denying that you saw Tim drinking alcoholic beverages while you all were riding from Bentonville to the next stop, or the next place that you ended up. You are not denying that you saw him drinking alcoholic beverages?

A. No.

Q. And you are not denying, are you, that the alcoholic beverages that he was drinking belonged to you, or were purchased by you at some point. Or somehow came into your possession and they were your's as opposed to his? Let me rephrase this. You weren't aware of Tim bringing anything alcoholic to drink to work that day, were you?

A. I don't know. I don't know if he brought anything or not.

Q. All right. And you agree, do you not, that you observed him

drinking alcoholic beverages or an alcoholic beverage that belonged to you after you all left this store in Bentonville prior to reaching your next location?

A. I can't say that either.

Q. Okay. I think you just admitted that you had drank a beer in the course of that trip. And---well, do you recall what was present in the cab of the truck? After you left the store in Bentonville...

A. No, I don't recall what was present in it. I really don't know.

Q. Do you remember whether there was a bottle of wine up with you all in the vehicle?

A. No.

Q. Don't know? Don't remember?

A. No.

Q. Don't remember if there...

A. There could have been some beer bottles on the floor as far as that goes. I mean, people do drink beer in their vehicles.

Q. And I understand that. So, after you all went to the store in Bentonville, did you see Tim drink any alcoholic beverages that you had purchased or that belonged to you?

A. Like I told you, I'm not sure. I told you awhile ago.

Q. Okay. And where did you all go when you left that store?
Where did you all end up?

A. I stopped off at some people we knew. They were playing horseshoes.

Q. And at what point and time did you decide that you were going to stop there?

A. When I seen them. When I seen them there. I didn't plan it. I didn't know they was there.

Q. So, you were on your way to Luray using the back roads. Is that correct?

A. Using the back way to town, yeah.

Q. Using the back way to town. Even though that was a longer way than the 340 route?

A. Right.

Q. And were you doing that because you were consuming some alcohol and it made it less conspicuous to be taking the back way?

A. No.

Q. Or was there some other reason you were taking the longer way to Luray?

A. I just decided to go that way.

Q. And you say you stopped at the Presgraves?

A. Right.

Q. And did you observe Tim having anything alcoholic to drink at the Presgraves?

A. I don't know.

Q. Did you have anything alcoholic?

A. I opened up a beer there, which I didn't finish.

Q. So what happened at the Presgraves?

A. I really don't know what happened. I mean, what are you asking me what happened?

Q. Did you see anything---well, what did you all do? What did you observe Tim do?

A. I was talking to somebody. I don't know---he got in an argument with somebody. I really don't know. And we was asked to leave. We wasn't there but a few minutes.

Q. So, it wasn't a real long time that you all were there. Were you asked, is that true---was it a real long time that you were there?

A. It was not.

Q. And did you leave because of Tim? There was some problem in terms of Tim?

A. They asked us to leave, yeah.

Q. And wasn't that because---did you observe somebody take a wine bottle away from Tim?

A. No, I didn't see nothing like that. No.

Q. Did you see Tim with the bottle of wine that you had bought at the Presgraves?

A. No.

Q. But the Presgraves for some reason wanted you all to leave, or wanted Tim to leave or what? What was the story there? What happened? What did you see?

A. I seen him and another guy arguing and they just didn't want no trouble there I guess so we was asked to leave.

Q. So you all left the Presgraves, and where were you headed at that time, when you left the Presgraves?

A. Back to town.

Q. Back to town. Where in town?

A. Luray.

Q. Any specific location in Luray?

A. I would have went to my house.

Q. You were headed to your house in Luray?

A. That's where I would have went.

Q. And what would you have done had the accident not have happened at your house? More likely than not, what would you have done?

A. I would have went over to Potomac Edison and mowed probably.

Q. And would you have taken Tim with you?

A. No.

Q. What would you have done with Tim?

A. I would have took him home or where ever he wanted to go.

Q. So, tell us what happened once you left the Presgraves. You proceeded down---you headed towards Luray on what route, do you remember?

A. I don't know what the number of the road is. 624 I think it is. I'm not sure. 628. I don't know.

MR. TALTON:

Your Honor, I've got an extra state map out in my car...

MR. ROSE:

I'm going to have the police report if you want to hold on a second. That will be...

MR. TALTON:

I thought maybe he could indicate on the map...

DEPUTY COMMISSIONER CULBRETH:

Off the record.

(OFF RECORD)

Q. Am I correct that the accident happened on Route 611 about .4 miles north of Route 658?

A. Yes.

Q. And I think I showed you a map. Do you think you can just indicate where the Presgraves were. If you can find that location.

A. I don't see the road on here. That's what I am saying.

Q. It may not even be on there. So this may not be a proper map for this purpose. What was that...

DEPUTY COMMISSIONER CULBRETH:

611 and 658.

Q. If you can't do it on that map, that's just fine.

A. I can't. I mean, it's just not there.

Q. All right. At the time that Tim was hired---well, on the day of the accident did you know how old Tim was?

A. Nineteen or twenty.

Q. Okay. And tell us if you would how the accident happened?

A. From what I remember, he threw something out the window, some type of bottle. I don't know what kind it was. And whatever there caused me to get off the road. You can see how close the tree is to the road. Just enough that the truck skinned down the side of the tree.

Q. And he sustained an arm injury as a result?

A. Yeah.

Q. I think we had some photographs here. Maybe we could---can I show you some photographs here. I don't know if we should label them or...

DEPUTY COMMISSIONER CULBRETH:

Let's label them Claimant's Exhibits
1,2 and 3.

MR. TALTON:

Okay. Should each photograph be...

DEPUTY COMMISSIONER CULBRETH:

Any objection?

MR. ROSE:

No, they're actually mine. You can take those exhibit things right there and go ahead and put them on there. Do you want to do them by photograph, or do you want to do them just by page. You can do them just by page and just describe at the top or bottom.

MR. TALTON:

Sure. That will be great.

DEPUTY COMMISSIONER CULBRETH:

Do you have an objection to them being labeled claimant's exhibits?

I know that you said that...

MR. ROSE:

No. That's fine.

Q. Okay. If you look at claimant's exhibit number 1, is that the truck that you were driving on the day of this accident?

A. Yeah.

Q. And you can see on the passenger side there, it looks like a scrape mark down the front of the vehicle, running down to the rear wheel there. Was that caused by the accident on this particular occasion?

A. Yeah.

Q. And let me draw your attention to claimant's exhibit 3. There is a picture of a tree and Tim Dodson standing beside it. Is that the tree that came into contact with the passenger side of your truck on that occasion?

A. Yeah.

Q. And again, Claimant's Exhibit 2, that is a picture of the same tree from just a little different angle? Would you agree?

A. Yeah.

Q. Was it dark or light outside when the accident happened?

A. Light.

Q. What was the weather conditions like?

A. I think it was a sunny day. Hot.

Q. And, I think you said he threw an object or a bottle or something. Are you not sure whether it was a bottle or an object?

A. Some type of bottle.

Q. And was there---do you recall whether there was anything in

the bottle?

A. No, I don't know.

Q. Did it look like the wine bottle that you had purchased previously?

A. I just don't know.

Q. You can't say whether it was or wasn't that wine bottle?

A. I'm saying it could have been a bottle laying on the floor board or somewhere. I'm just not sure.

Q. Do you recall any bottle that was on the floor board of your vehicle before you left to pick Tim up that morning?

A. Like I said, it could have been. I'm not sure.

Q. Do you remember drinking any cans of beer after you left the store in Bentonville, or a can of beer?

A. I opened up a can of beer at the Presgraves. I don't know what kind it was.

Q. Do you know whether that was beer that you brought there or beer that you...

A. Beer that I got off of one of them.

Q. Whatever happened to the six pack of beer that you bought in Bentonville?

A. I put it in the cooler.

Q. So, if---and I know that you don't know whether you bought bottles of beer at Bentonville or cans of beer. Is that true, or not?

A. I don't remember what I got. When I buy beer I usually don't get any particular one.

Q. But you don't recall whether this was a beer bottle or a wine bottle?

A. I'm not sure.

Q. And then, after the accident, is it correct that you left? You didn't stay at the accident site very long?

A. No.

Q. In fact, you left before the police got there?

A. I waited---I made sure somebody was there.

Q. But before the police arrived, you departed from the scene of the accident. Is that true?

A. I was gone, yeah.

Q. Had you---before the accident had you passed Tim's house or not?

A. Before the accident?

Q. Before the accident had you gone by Kendall, or Tim's house in Kendall where you would have turned to go to his house?

A. Yes.

Q. Okay. So then I take it you were not taking Tim home at that time?

A. No, he wanted to go to town.

Q. Had you specifically discussed---do you specifically remember a conversation with him where he had told you that he wanted to go to town or was it just okay with him that you all were headed back to Luray?

A. I guess it was. I'm not too clear about the thing.

Q. Okay. But weren't you deciding where to go next? Wasn't that what you were doing?

A. Yeah.

Q. And so where specifically were you headed to at the time of the accident?

A. Back to Luray.

Q. Was it to your home in Luray?

A. Probably that is where I would have went.

Q. Would it have been necessary to have re-gassed up any of the equipment or done anything before you went to the Potomac job?

A. (Affirmative response).

Q. It would have been necessary...

A. I mean, I don't know.

Q. Would you have needed all of the equipment to do the Potomac job or not? Would you have taken all of the equipment?

A. I probably would have took it all over there, yeah.

Q. And if Tim had wanted to work on the Potomac job would you have let him?

A. I usually done that job myself.

Q. Had he ever worked on the Potomac job before?

A. I think, probably so. But like I say, usually I done it myself.

Q. But you would agree that you were headed to Luray because that is where you decided to go. Not because Tim had asked you to take him to Luray?

A. Right.

Q. And if you had wanted to use Tim to help you on the Potomac job, he would have been available to do that, because he was with you? He would have been available to do that if you had wanted him to? Is that correct?

A. Yeah.

Q. And if you had wanted him to gas up any of the equipment or sharpen any of the motor blades or anything like that to assist

any...

A. If I had needed the help I would have asked him.

Q. And he would have been available to do that for you?

A. I assume.

Q. He was still under your control as of the time of the accident?

A. Yeah.

Q. And you were anticipating he would continue to be under your control at least until you got to Luray?

A. Yeah.

Q. All right.

MR. TALTON:

No further questions.

DEPUTY COMMISSIONER CULBRETH:

Any questions at this point?

MR. ROSE:

Let me go ahead for continuity purposes.

BY MR. ROSE:

Q. What day of the week did this accident occur on?

A. Saturday.

Q. And how many hours did Mr. Dodson typically work on Saturdays?

A. It varied.

Q. From what to what?

A. What do you mean from what to what?

Q. Well, when you say varied...

A. Hour. What time of the day?

Q. Yes, did he work half a day most of the time or a full day most of the time or...

A. It depends on how much work I had.

Q. And was your practice taking him home on Saturdays the same as any other day? Picking him up and taking him home?

A. Yeah.

Q. And when you went to work that Saturday morning and you had picked up Mr. Dodson, at that time what was your intent with respect to what Mr. Dodson---what work he would do that day? Which jobs?

A. What do you mean? I don't know what you are asking me.

Q. You've indicated earlier that he assisted you with certain jobs in the morning, certain mowing jobs?

A. (Affirmative response).

Q. Was it your intent when you got up that morning that he would do anything other than those jobs?

A. No. Just mowing. That is what I had to do.

Q. So, when he finished the job in Compton, was it your understanding at that time that he was more or less done for the day?

MR. TALTON:

I've got to object because that is a leading question.

DEPUTY COMMISSIONER CULBRETH:

Sustained. If you could rephrase your question.

Q. What was left for Mr. Dodson to do that Saturday after you completed the Compton job?

A. Nothing.

Q. You indicated that after you left the Presgraves you were headed home. Was there anything that he needed to do when you got to your home?

A. Not that I can recall.

Q. I take it you didn't do the job, I think you said Potomac

Edison or whatever, that afternoon?

A. No, I didn't do it.

Q. If you had done that job, what was left for you to do to get ready for that job when you got back home?

A. What was left for me to do before I went over there to do it?

Q. Right. To get ready. Like, for example, did you have to put gas in the...

A. I would have checked them.

Q. You stated earlier that you went by the turnoff for Mr. Dodson's home. This is after you left the Presgraves. And when you were headed back to Luray you said you went by the turnoff for his home.

A. (Affirmative response).

Q. At that time was it your intent to take him....where was it your intent to take him? You said in the time---I guess I just want some clarification. It was clear to me, your response to him as to whether you were going straight to your house or dropping him off.

A. When I say into town, I mean, I don't know exactly where he would have got off.

Q. Was you planning on taking him to your house though? Or had

you all even decided that?

A. I hadn't decided exactly.

Q. Was it up to Mr. Dodson?

A. No.

Q. Why not?

A. Well, it just wasn't. He never asked me if I recall any favors or anything if that is what you mean. I don't know what you are asking me exactly.

Q. What I am asking, if he had wanted to be dropped off somewhere before he got to your house, would you have done that or...

A. Yes, if he had wanted to.

Q. So, I take it this was a situation where the issue of where he was going to go, didn't come up. Mr. Dodson didn't say take me here or take me there or anything like that. It was just your intent to go on back to your house. Is that correct?

A. (Affirmative response).

Q. Did you know most of the people at the Presgraves?

A. Yeah.

Q. How about Mr. Dodson. To your knowledge did he know most of the people at the Presgraves?

A. Yeah.

Q. Did your stop at the Presgraves have any connection to your work?

A. Not as I recall, no. I think that the guy that owns the place, I think that he did ask me---he had a tree there I think he asked me about taking it down or something. I'm not sure.

Q. That is just while you were there?

A. Yeah.

Q. That was something to be done in the future or that day?

A. No, in the future.

Q. Have you ever done any work at the Presgraves before?

A. No.

Q. Had Mr. Dodson ever done any work for the Presgraves through you?

A. No.

Q. Did you have any policies with respect to drinking on the job? Drinking alcoholic beverages?

A. I usually don't drink when I work. I mean, I don't.

Q. Okay. How about with respect to your employees?

A. No, I wouldn't allow that.

Q. Have you ever had occasion where you've had to tell employees? Have you caught an employee drinking on the job?

A. No.

Q. Have you ever had to give any kind of warnings to employees about drinking on the job?

A. Not as I can remember.

Q. At the time you left the Presgraves, can you describe the condition that Mr. Dodson was in?

A. Pretty drunk.

Q. And why do you say that? Can you describe his demeanor or just give me a description of how he was acting.

A. Well, like I say, he was arguing with somebody. I don't know what it was over. I was not around at the time and we was asked to leave.

Q. Did you have to assist him to the truck?

A. I don't remember. I don't remember how...

Q. What made you think he was pretty drunk?

A. The way he was acting.

Q. Which was? Can you give me a little more detail? In addition to what you have already said about his arguing with somebody. Can you describe how he was walking?

A. No, I don't remember how he was walking. I just---I mean, we was right at the truck. I don't---they just pulled off the side of

the road. I mean, everybody was right close.

Q. Did you have any idea how much Mr. Dodson had to drink up to that point and time?

A. Do I have any idea how much?

Q. Yes. How much alcoholic beverages?

A. No.

Q. Do you know whether he took any drugs that day?

A. No, I don't have no idea.

Q. At the time you left the Presgraves, can you tell me any job functions that he was capable of doing at that time?

MR. TALTON:

Objection. That calls for an expert opinion as to what the claimant could or could not perform. He can testify based on his observations. I think the Commission being just the same---having just the same ability to speculate on what his ability to work was as would the witness.

MR. ROSE:

I would think he ought to be able to testify. He saw his condition and he ought to know what was going on and know whether he would have stuck him behind a lawn mower or something like that and I think for what it is worth he ought to be able to say it. I will agree to an extent what he is talking about if he's saying a toxicologist or whatever ought to be able to address those issues. I'm sure there are some things they could shed a light on but I think to a certain degree lay people can understand this.

DEPUTY COMMISSIONER CULBRETH:

Well, from what I have in my notes--
-I'm going to have to sustain the objection, because from what I have in my notes he stated that the only

thing that he could point his finger to as to why he was acting drunk was the argument. He didn't have any recollection as far as how he was walking. He can ask him observations about talking but not about whether or not he could perform certain functions. I will sustain the objection to that extent. I will allow other questions as to specific observations. I will also take note of the VAC which was submitted.

Q. Did you observe him going to the truck when you were leaving?

A. Not too clearly.

Q. Do you know how he got to the truck?

A. I don't know exactly who---not exactly.

Q. Did he walk on his own?

MR. TALTON:

I'm going to have to---well, I think

he has already answered the question
and I've got to object to the
leading.

DEPUTY COMMISSIONER CULBRETH:

Sustained.

Q. Well, you said a minute ago you don't know who?

A. I don't know who or how. I mean, he was in the truck.

Q. Can you describe his eyes?

A. Not exactly.

Q. When you left the Presgraves, was there anything at the time
you left---strike that. You stated that a bottle or something,
some object was thrown out of the window. What was your reaction
immediately upon seeing this?

A. I asked him what he was doing.

Q. And what did he reply?

A. I don't remember exactly what he said or done. What he said,
I don't remember exactly.

Q. And what happened next?

A. Well, I got off the side of the road there just enough to go
down that side of the tree.

Q. What caused you to go off the side of the road?

A. The bottle being thrown out the window.

Q. And how did that cause you to go off the road? I mean, what was the reason that caused you...

A. I took my eyes off the road.

Q. And why did you take your eyes off the road? Where were you looking?

A. If I remember correctly I looked back to see where whatever bottle---where it went. Because there is a house right there close to. It's not in the picture.

Q. And how fast were you going?

A. I wasn't going fast at all. Twenty, twenty-five. Something like that.

Q. Can you describe the road?

A. It is a dirt road. Gravel. Dirt, gravel, whatever.

Q. One lane, two lanes?

A. One lane.

Q. Is there anything between the tree and the road?

A. No.

Q. I mean is there a grass strip or something?

A. I think it might be a narrow strip, yeah.

Q. Why did you leave the scene?

A. The guy was up there mowing his yard. I asked him to come down there to just---what happened there I guess kind of put me in shock. I was---he asked me to go up and sit on his porch and that is where I went.

Q. And then after you sat on the porch, what did you do? Or what did you observe down at the accident scene?

A. There was a lot of people starting to get there and I didn't want to go back down there so I headed towards home.

Q. And how far away was your home?

A. I'm not sure. A mile, something like that.

Q. And how were you getting there?

A. Walk.

MR. ROSE:

That's all the questions I have.

DEPUTY COMMISSIONER CULBRETH:

Any follow up?

MR. TALTON:

Just briefly.

BY MR. TALTON:

Q. With regard to the Potomac Edison job that you talked about needing to be done later on in the day or at some point, did that job require weed eating in addition to grass mowing?

A. Yeah.

Q. And had you made a definite decision as to whether or not you were going to take Tim along? Had you made a definite decision as to whether you would have allowed him to have worked on that job if he had wanted to?

A. Like I say, I usually done that job myself.

Q. I think you told us that you did have Tim help you at the Potomac Edison in the past.

A. I think so. I mean I can't...I'm not for sure.

Q. Would that have been on Saturday, or would you remember?

A. No, I don't remember.

Q. And did you have other employees that helped you at the Potomac Edison job in the past?

A. Just my girlfriend. She helped me. I've got several different contracts with Potomac Edison.

Q. And had you actually made up your mind that you were going to do that job that day or...

A. Pretty much.

Q. But it was optional whether you would do that job or not. Is that true? You didn't have to do it?

A. I didn't have to.

Q. You could have done it...

A. I could have done it Sunday or whenever, yeah.

Q. And if you had started the Potomac Edison job, you probably wouldn't have finished it that day. Is that a fair statement?

A. I don't know if I would have finished it or not. I mean, it is possible I would have and it is possible I would not have.

Q. And at the Presgraves, didn't you discuss some sort of road work, or didn't he ask you if you would do some work on his road. That there was some brush there that he wanted removed?

A. Yeah, I think so. Like I say, there was something.

Q. And, I don't know if we are in agreement---did you have three employees?

MR. ROSE:

I don't know.

MR. TALTON:

We don't have an issue over a

Statements

sufficient number of employees?

MR. ROSE:

You want to go off the record a second.

DEPUTY COMMISSIONER CULBRETH:

Let's go off the record.

MR. TALTON:

I have no further questions.

MR. ROSE:

No further questions at this time.

DEPUTY COMMISSIONER CULBRETH:

Thank you sir.

MR. TALTON:

I'd call Tim Dodson.

TIMOTHY DODSON, CLAIMANT
BY MR. TALTON:

Q. You are Tim Dodson. Is that correct?

A. Yes, sir.

Q. And on June 24, 1995 were you employed at Vaughans Landscaping and Maintenance Company?

A. Yes, sir.

Q. And you had an injury on that date to your right upper extremity?

A. Yes, sir.

Q. Is that correct? Any other injuries on that date?

A. No.

Q. Any other parts of your body besides your arm?

A. No.

DEPUTY COMMISSIONER CULBRETH:

You need to speak up a little bit so we can record this.

A. Okay.

Q. And you were released to return to work on or about what date?

A. March 11, 1996.

Q. And Dr. Gaylord Williams was your regular attending physician for you. Is that right?

A. Yes, sir.

Q. Your job duties with Mr. Vaughan, what did they consist of?

A. Mowing, weed eating, bush hogging, planting trees, landscaping in general.

Q. And on 6/24/95 you were living where?

A. In Kendall.

Q. And is it correct that---well, would Mr. Vaughan give you a ride to work?

A. Yes, sir.

Q. And would he give you a ride home?

A. Yes, sir.

Q. You did not have a drivers license at that time?

A. No.

Q. Do you recall any occasions where you---well, let me withdraw that. You all would go out and do work and at the conclusion of the jobs, when you finished mowing the last site of the day what would you all do from that point and time on, customarily?

A. Sometimes we would go back and unload the trailer and sometimes he'd take me home. It just depends.

Q. Where was the unloading done normally?

A. At his house.

Q. In Luray?

A. Yes, sir.

Q. Okay. And what sorts of things would you unload customarily?

A. All the tools and mowers, weed eaters, gas, whatever.

Q. Okay. Let's go back to June 24 of '95. You all finished at

the last mowing location. Is that right?

A. Yes, sir.

Q. And where was that?

A. Compton.

Q. And then where did Mr. Vaughan take you after that?

A. Up to Bentonville.

Q. And what occurred at Bentonville?

A. We stopped at the store and got some beer and some wine.

Q. And who bought the beer and wine?

A. Dave did.

Q. Did you buy any beer and wine?

A. No, sir.

Q. Did you take any beer and wine with you to work that morning?

A. No.

Q. Did anybody, prior to going to the store in Bentonville, did anybody give you any beer or wine other than Mr. Vaughan or did you get any beer or wine from any other source other than from Mr. Vaughan?

A. No.

Q. What was the first thing you had to drink after you all got to the store in Bentonville?

A. Wine.

Q. And tell us how did you get that wine?

A. We drank it going down the road.

Q. Who was drinking wine as you was going down the road?

A. Me and Dave.

Q. Was this the same bottle, separate bottles?

A. Same bottle.

Q. And do you recall how much wine was consumed before you arrived at the next location, the next place you stopped?

A. I don't remember.

Q. You don't remember exactly how much was drunk. Okay. And where did you all next stop?

A. In Raleighville at the Presgraves.

Q. At the Presgraves residence. Was it your decision to go to the Presgraves residence or---let me rephrase it.

A. We just rode by there and they were there so we stopped.

Q. Who decided to stop? Let me rephrase that. To what extent, if any, were you involved in the decision to stop at that location?

A. None really. I mean we just seen them there and we stopped to see what they were doing.

Q. Was it your idea to stop or not? That is what I'm driving at.

A. No.

Q. And, do you recall consuming any alcoholic beverages at the Presgrave residence?

A. Yeah, I drunk some there.

Q. What did you drink while you were at the Presgraves, if you recall?

A. Some wine. More wine.

Q. Did you see Mr. Vaughan----Did you observe him consuming any alcoholic beverages at the Presgraves residence?

A. Yeah, everybody there was drinking.

Q. Okay. And then, am I correct, you were asked to leave?

A. I think so, yeah.

Q. All right. Do you recall at any point in time on June 24, 1995 Mr. Vaughan telling you not to drink alcoholic beverages?

A. No.

Q. And who supplied the alcohol that you drank on that occasion?

A. We bought it at the store. He bought it at the store.

Q. Did you pay for any of the wine?

A. No.

Q. Did you pay for any of the beer?

A. No.

Q. And to what extent was there any other alcohol with you all? Do you recall any alcoholic beverages being on the truck or in either of your possession prior to going to the store in Bentonville?

A. No.

Q. Do you recall drinking any other---prior to getting to the Presgraves, do you recall drinking any other alcohol other than that which was purchased by Mr. Vaughan in Bentonville?

A. No, sir.

Q. Did you have anything to eat prior to stopping that day from the time you were picked up by Mr. Vaughan up until arriving at the Presgraves. Do you recall having anything to eat?

A. I can't remember. I don't think I did.

Q. Do you recall Mr. Vaughan having anything to eat?

A. No, sir.

Q. Okay. And how good is your recollection from the time you left the Presgraves forward in time?

A. Before or...

Q. After you left the Presgraves. How good is your recollection of events after you left the Presgraves?

A. I don't remember much of anything after that. I wish I could

but I don't.

Q. And there is some exhibits there...

MR. ROSE:

The marked ones are up here. You might want to use those.

Q. The tree---let me draw your attention to Claimant's Exhibit 3. I think you've heard the testimony of Mr. Vaughan that is the tree that was involved at the time of the collision. And I think this is you standing beside that tree?

A. Yes, sir.

Q. Coming from the Presgrave residence, and proceeding to that particular tree in the photograph, would you have already passed your home by the time you got to that tree?

A. Yes, sir.

Q. Had it not been for the accident, would you have been willing to help Mr. Vaughan on the Potomac job if he had requested that you help him with that work?

A. Yeah.

Q. Would you have been willing to help him unload the tools at his house if that is what he had wished?

A. Yes, sir.

MR. TALTON:

I have no further questions, Your Honor.

DEPUTY COMMISSIONER CULBRETH:

Mr. Rose.

BY MR. ROSE:

Q. The accident occurred on Saturday. Is that correct?

A. Yes, sir.

Q. And what were your typical hours on Saturday?

A. It depends on what we had to do. Sometimes it would be eight to twelve. Sometimes it would be eight to five. It depends on what we had to do that day.

Q. When you went to work on the morning of the accident, what was your understanding as to how long you were going to work that day?

A. We hadn't decided yet.

Q. Did you ever get to a point and time where you did decide?

A. No.

Q. Approximately what time did you finish the last job prior to the accident?

A. Say forty-five minutes before it happened. I'm not sure.

Q. Would you say about one o'clock to 1:30 p.m. Does that sound about right?

A. Yes, sir.

Q. And the job that you had just completed, that was in Compton. Is that correct?

A. Yes, sir.

Q. And were you aware that the Potomac Edison job still needed to be done later on that day and that Mr. Vaughan was considering doing that?

A. I don't remember him saying anything about it, no.

Q. So, after you had finished the Compton job had he informed you of any other jobs that needed to be done that day that you can remember?

A. Not really, no. We hadn't decided what we were going to do.

Q. Well, when you finished the Compton job, did you ask Mr. Vaughan to take you home?

A. No. If I had went home I wouldn't have been in the wreck. I'd done been at my house.

Q. And you indicated that you all picked up some beer and wine in Bentonville?

A. Yes, sir.

Q. Did you drink any of that beer?

A. I don't recall? I may have. I don't remember.

Q. But you definitely drank some of the wine?

A. Yes, sir.

Q. And I think it was your testimony that prior to first starting to drink the wine and/or beer that you picked up in Bentonville, you hadn't had anything else alcoholic?

A. No.

Q. Earlier in the day. Is no your answer.

A. (No audible response).

DEPUTY COMMISSIONER CULBRETH:

You need to say yes, or no.

A. Yes.

Q. Had you taken any drugs that day prior to getting to Bentonville?

A. No, sir.

Q. So, is it safe to say that sometime approximately between one o'clock and 1:30 p.m. is when you first started drinking that day, drinking alcoholic beverages?

A. I'm not sure what time it was. Whenever we got to Bentonville. After that when we hit the back road in Compton is when I started drinking. I don't know exactly what time it was.

Q. Okay. Did you want to drive around and drink or was you just tagging along with Mr. Vaughan. I mean, what was the game plan between the two of you?

A. I was thirsty at the time.

Q. Is it safe to say that you weren't in a position where you were basically stuck because you were having to ride along with him and he was your transportation and since he was stopping to get this beer and wine, you know, you had no choice?

A. It was just like every other Saturday. We went there and mowed and either I went to town or went home or went to work. We hadn't decided whether we was going to work or whether I was going to town yet.

Q. But you had no objection in picking up some beer and some wine and driving around?

A. No.

Q. And do you know how long the two of you drove around before you all rode to the Presgraves?

A. We went straight there on the way. Or straight by there. We

wasn't even planning on stopping there but we seen them so we stopped. They just happened to be out in the yard on our way home.

Q. Did you have any objections to stopping?

A. No.

Q. Do you recall being deposed in connection with a case, not this case but another case related to this accident by Joseph Roberts, an attorney?

A. No.

MR. TALTON:

If you're looking---I can assist if you would like for me to stipulate that my client gave a deposition on or about August 8 I believe.

MR. ROSE:

Yes, that's correct. August 8.

A. Was that in Mr. Shanks' office?

Q. In Mr. Shanks' office.

A. Yes, sir.

DEPUTY COMMISSIONER CULBRETH:

What year was this?

MR. ROSE:

That was August 8, 1996.

Q. In that deposition, you were asked a question about how long the two of you were basically driving around and you...

MR. TALTON:

Can I ask what page you are referring to.

MR. ROSE:

I'm sorry. I apologize. I'm on page 19. Down around line 18 and beyond.

Q. In any event in that deposition you indicated that you arrived at the Presgraves around 2:30 p.m. Does that sound about right?

A. I don't know. I made a few mistakes in that deposition.

Q. And that's fine. So you are really not sure whether it was 2:30. But it was sometime after 1:00 or 1:30 that you all left Bentonville, when you left Compton and went to Bentonville. Got to Bentonville sometime around 1:00 or 1:30 or something like that and then just headed on. So however long it would take you to get

there?

A. Yes, sir.

Q. Is it safe to say that you drove directly there. You all weren't just driving around killing time?

A. No, sir. We went straight there.

Q. When you arrived at the Presgraves, do you know how many beers you had drank up to that point?

A. I don't know.

Q. If I told you in your deposition you said you'd had a couple, does that sound right or has that changed?

A. I would say I had drank a couple of beers by then, yeah.

Q. How about, approximately how much wine had you had up to that time, the time you got to the Presgraves?

A. I'm not sure.

Q. If I told you in your deposition, and again we're on page 19, that you had indicated that it was about a bottle of wine, does that sound about right?

A. I would say so, yeah.

Q. And other than the beer and wine had you consumed any other alcohol or drugs while you and Mr. Vaughan were driving around?

A. No.

Q. After arriving at the Presgraves, how many more beers did you drink?

A. I'm not sure on that either. It's been so long ago. I can't remember back that far.

Q. On page 21 of the deposition, I told you in your deposition that you had stated that you had two or three more beers, does that sound about right?

A. Like I said, I'm not sure. Maybe.

Q. Do you think your memory was better back when you gave this deposition or were you guessing then? You're not sure then and just put a number out?

A. I was just guessing then.

Q. What size were these beers?

A. Cans.

Q. Twelve ounce cans?

A. Yeah.

Q. After you got to the Presgraves, do you know how much more wine you drank?

A. No.

Q. I'm referring to the deposition page 20. In your deposition you had indicated that you thought you'd had about another half

bottle of wine. Does that sound correct as to how much more wine you might have drank while you were there?

A. Like I said, I don't know if I was right in that deposition so I'm not going to go back. I'm not sure.

Q. Did you consume any other type of alcohol while you were at the Presgraves other than beer or wine?

A. No.

Q. How about any drugs while you were at the Presgraves?

A. No.

Q. Did you use any marijuana on the date of the accident?

A. No.

Q. When was the last time you had used marijuana prior to the accident?

A. I went to a concert about a couple of weeks before that and smoked a joint there.

Q. Did you know most of the people at the Presgraves?

A. Yeah, I knew them all.

Q. Were these your friends?

A. Yes, some of them.

Q. And also Mr. Vaughan's friends?

A. Yes.

Q. Do you know approximately how long you were at the Presgraves?

A. No.

Q. In your deposition at page 21 you had indicated that you thought you were there approximately two hours. Does that sound right or were you all there a shorter amount of time?

A. I'm not sure.

MR. TALTON:

I was just looking for what reference you were...

MR. ROSE:

Let me see here.

MR. TALTON:

Okay. I think you are referring to line 18 where it says, I mean we were there for an hour or two, two hours I guess pitching horseshoes and drinking beer. I guess that is what you were referring to?

MR. ROSE:

That's correct. Right.

Q. But you are saying that you really aren't sure if it was an hour or two.

A. I'm not sure.

Q. What else were you all doing at the Presgraves? Were you all pitching horseshoes?

A. I probably pitched a game or two. I don't even remember. After the wreck it is hard to remember anything.

Q. But as best as you can recall there were people pitching horseshoes?

A. Yeah, there was people there pitching when we got there, yeah.

Q. And let's say other than drinking beer and wine and possibly pitching horseshoes, is there anything else that you were doing?

A. No.

Q. Is it correct to say that you didn't have any work to do at the Presgraves as far as mowing yards or anything like that.

A. No.

Q. No, you didn't have any work to do?

A. No. Not there.

Q. And you were asked to leave the Presgraves. Is that correct?

A. I think that is what people tell me. I don't remember that either.

Q. Do you recall getting in an argument with somebody?

A. I talked to the guy that I was supposed to have been arguing with and he said I was arguing with him over a girl or something. I don't remember that.

Q. Is that Jylene Presgraves?

A. (No audible response).

Q. Do you know whether Mr. Presgraves, did he take your bottle of wine from you?

A. Maybe. I'm not sure.

Q. Were you drunk when you left the Presgraves?

A. I would say so. I'm not sure on that either. If I could remember I'd tell you.

Q. Let me ask you this. Were you passed out?

MR. TALTON:

I'm going to object because if he was passed out---well, I guess he could ask him if there was any lapses in consciousness if he remembers, but if he's passed out he's probably unconscious.

DEPUTY COMMISSIONER CULBRETH:

I'll sustain that objection.

Q. Deposition page 23 and then page 66. In your deposition you indicated that you were pretty much passed out and I think you also said you were passing out. As best as you recall, I mean, were you close to the point of where probably a little more alcohol might have caused you to pass out, from what you can recall?

A. I would say so.

Q. Were you able to walk to Mr. Vaughan's truck?

A. I can't remember. I talked to another guy and he said...

MR. TALTON:

I'm going to object.

DEPUTY COMMISSIONER CULBRETH:

You can't testify as to what somebody who is not here told you.

Q. In your deposition, I'm going to go to page 23, down around line 13, the following question was asked of you. It said, so you had passed out, is that what you are saying. And your answer was, pretty much. I could not, you know, stand up and walk on my own. I was still functioning but I just could not move. I mean, is that

what you can recall as to what your state was at that time when you were leaving the party?

A. I don't know.

Q. Now, when you answered this back here, why did you give this answer in your deposition?

A. I don't know that either.

Q. Do you recall whether you could stand up on your own?

A. When I gave that deposition, like I said, I was going by what people told me and he just told me I couldn't do that in here.

Q. So that is what you are basing this on. Okay. How about, were you seeing double?

A. I don't think so.

Q. I'm going to go to the deposition, page 67, line 5. There was a question asked and I'll go ahead and read it out. It says, how about---where his it is referring to Mr. Vaughan. His eyes, did you notice his eyes, whether his eyes appeared to be bloodshot or whether they were normal or somewhere in between. And your answer was, I do not remember. I was seeing double myself. So are you saying now that you don't recall whether you were seeing double or not?

A. I don't know, sir. Like I said, I had some mistakes in that

deposition.

Q. Do you know whether the time you left the Presgraves, you were capable of, for example, operating a bush hog, or a lawn mower?

A. I don't know that either. After the wreck I can't really remember anything is what I'm trying to tell you. I was in the hospital for nine days on Morphine. I mean, if that tells you anything.

Q. So, is it correct that, I think in your deposition it stated that from the point and time you got in the truck and left, you don't remember anything until about a couple of days after you had been in the hospital?

A. Exactly, yes sir.

Q. So the next thing you remember you woke up in the hospital and you had been there a couple of days.

A. (Affirmative response).

Q. So I take it you don't remember throwing any bottles out of the window?

A. No, I'm just going by what people tell me.

Q. So you never told anyone that you were throwing bottles out of the window?

A. No.

Q. And you first saw your parents a couple of days after the accident. Is that correct?

A. They were there but I just didn't remember---they were there the whole time after the wreck but I don't remember seeing them for a couple of days after that.

Q. Do you know whether they had spoken with Mr. Vaughan?

A. I'm not sure on that either. I think they did. I'm not sure.

Q. Did they---did your parents tell you that you had been throwing bottles out of the window?

MR. TALTON:

I have to object. There is no adequate foundation laid to show that what his parents might have said would have been accurate. I think that is hearsay and clearly there was no testimony that they were at the scene of the accident.

MR. ROSE:

I will resign when I get this. I realize it is hearsay. It is

probably actually double hearsay. And, it is not for the truth of the matter that is being asserted as to whether he did, in fact, throw the bottles. I just wanted to get it in for notice purposes, that Mr. Dodson had been reporting to his parents that is how the accident happened. That this isn't something concocted up here the date of this trial. That is really the only purpose of this objection. I don't know whether that even---to be honest with you, I can't even tell you whether that overcomes both levels of hearsay. I know it will overcome one. So, I mean, you tell me.

MR. TALTON:

I've got to object your Honor.

DEPUTY COMMISSIONER CULBRETH:

For that purpose I will allow him to

testify as to where he heard it and not whether or not he did. He has already testified that he can't recall.

Q. So, do you recall your parents telling you that Mr. Vaughan had told them that you were throwing bottles out the window?

A. They said that is what Dave told them, but I don't know.

Q. And that was right there a couple of days after the accident when you were in the hospital.

A. Yeah.

Q. Do you know how your arm was injured? And I realize it was a result of the truck apparently hitting the tree, but where was your arm at that time when the truck hit the tree?

MR. TALTON:

I'm going to object because he has already testified he has no recollection. So, I think that question has been asked and answered. Unless further...

MR. ROSE:

Yes, okay. I've got some further follow ups. I saw that coming.

DEPUTY COMMISSIONER CULBRETH:

I'll have to sustain that objection.

Q. Do you know whether---I mean, after the accident, did your arm have any kind of signs on it that it had struck the tree or had been cut by the truck or anything like that. I mean, could you tell by the way---let me rephrase that. I guess what I am getting at, is based on the way your arm was injured, is there any way that you could tell how this accident happened?

A. No, not really. I mean, I don't know. You can look at it.

Q. Did you look at the truck after the accident happened? I mean, was there blood inside the truck? Blood outside?

A. I never seen the truck.

Q. Never seen it after the accident. I want to ask a couple of questions just briefly about those exhibits. Claimant's Exhibit 1 here, is this the truck that you were riding in at the time of the accident?

A. Yes, sir.

Q. And you were sitting on the passenger side?

A. Yes, sir.

Q. And you stated that following the accident you didn't see this truck in this condition here? You don't recall seeing it?

A. No, sir.

Q. This is Claimant's Exhibit 2. Off to the right there is a picture of a tree. Is this the tree you all ran into as best as ...

A. Yes, sir.

Q. And just for purposes of clarification, this is your arm, these other two pictures?

A. Yes.

Q. And that is your right arm. Is that correct?

A. Yes.

Q. And then Claimant's Exhibit 3, again, there is a picture off to the right of you standing next to a tree. Is that correct?

A. Yes, sir.

Q. And is that the tree that you all side swiped?

A. (Affirmative response).

Q. And, these other two pictures off to the left, they are taken from somebody standing back in the road and looking down the road?

A. Yes, sir.

Q. Is that the direction, to your understanding, that you all were headed at the time of the accident?

A. Yeah, we were headed this way.

Q. So this way, like up the picture. The same direction this car was headed right here that's in these two pictures?

A. Yes, sir.

Q. Did you drink any beer at the Presgraves that was furnished by someone other than Mr. Vaughan?

A. I don't remember.

MR. ROSE:

That is all the questions I have.

DEPUTY COMMISSIONER CULBRETH:

Any follow up Mr. Talton?

MR. TALTON:

Nothing further, Your Honor.

DEPUTY COMMISSIONER CULBRETH:

Thank you.

MR. ROSE:

Let me look. I might have a couple

VWC File No. 183-34-74

of follow up. Let me read through
this and see.

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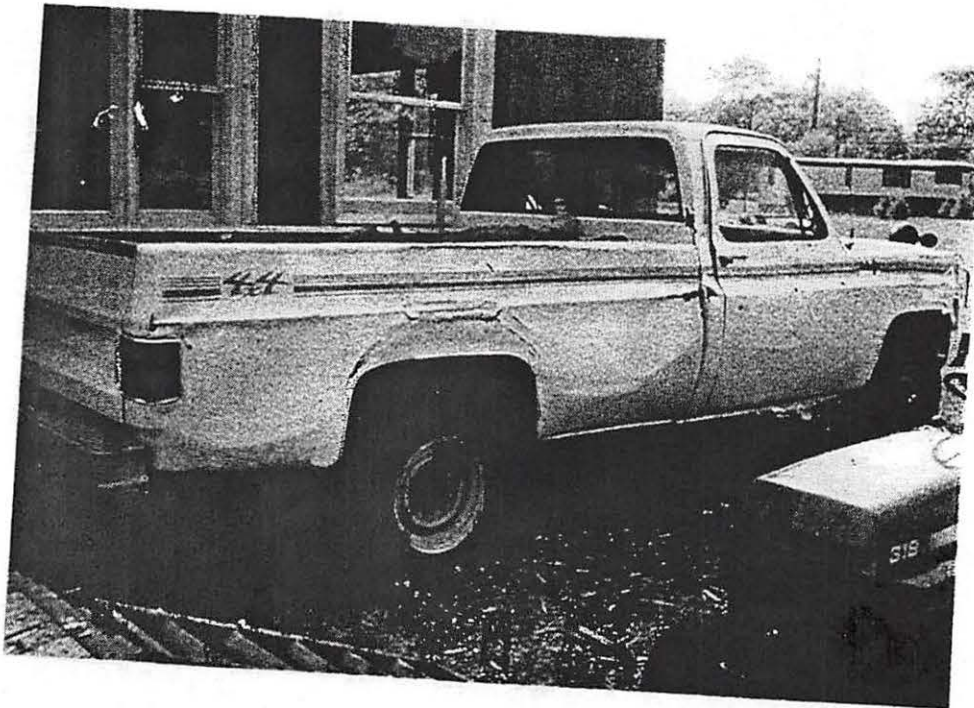
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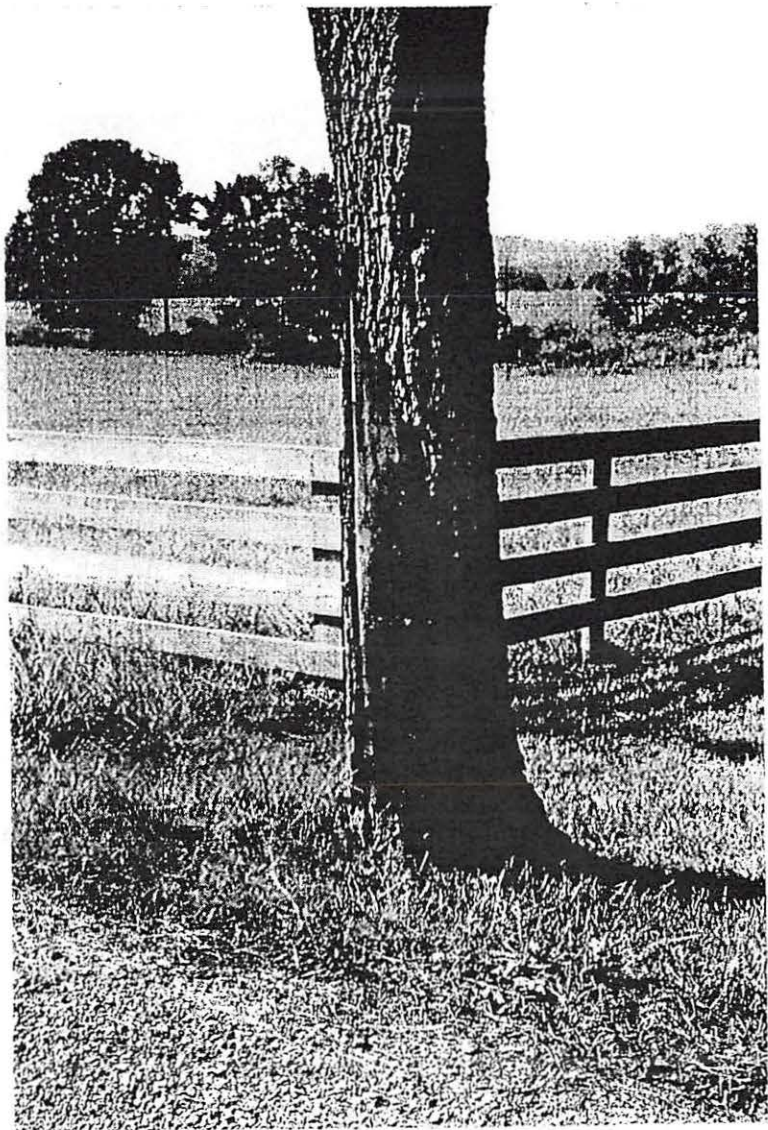
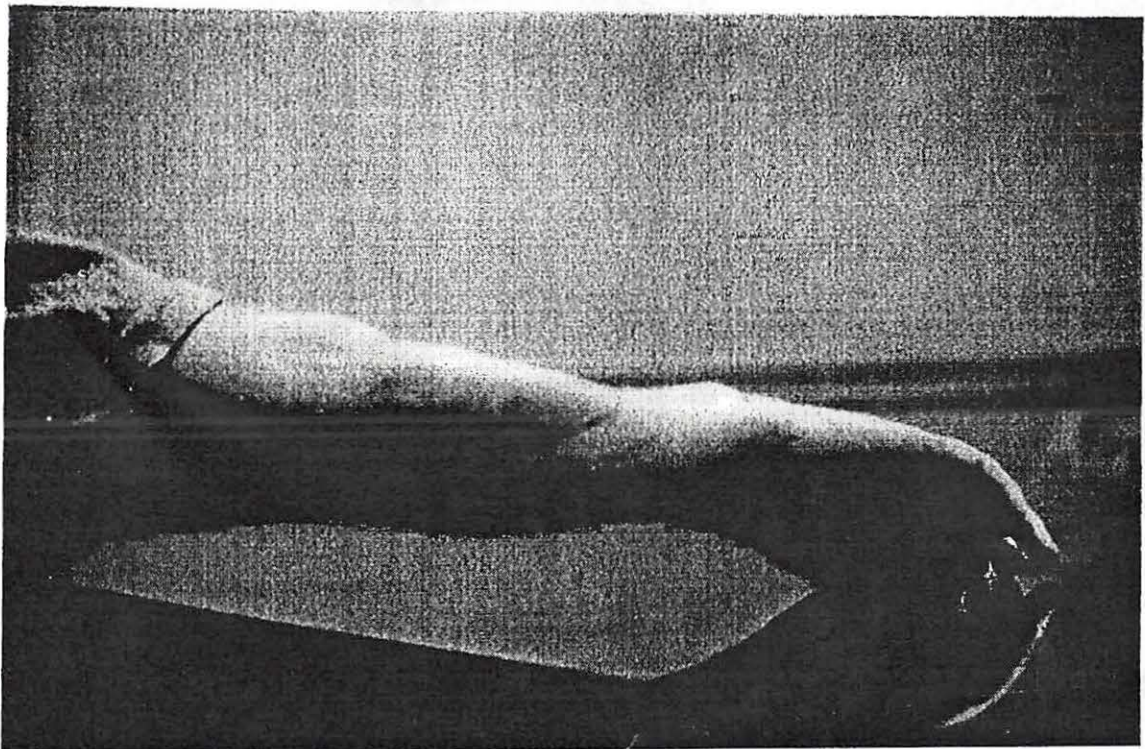
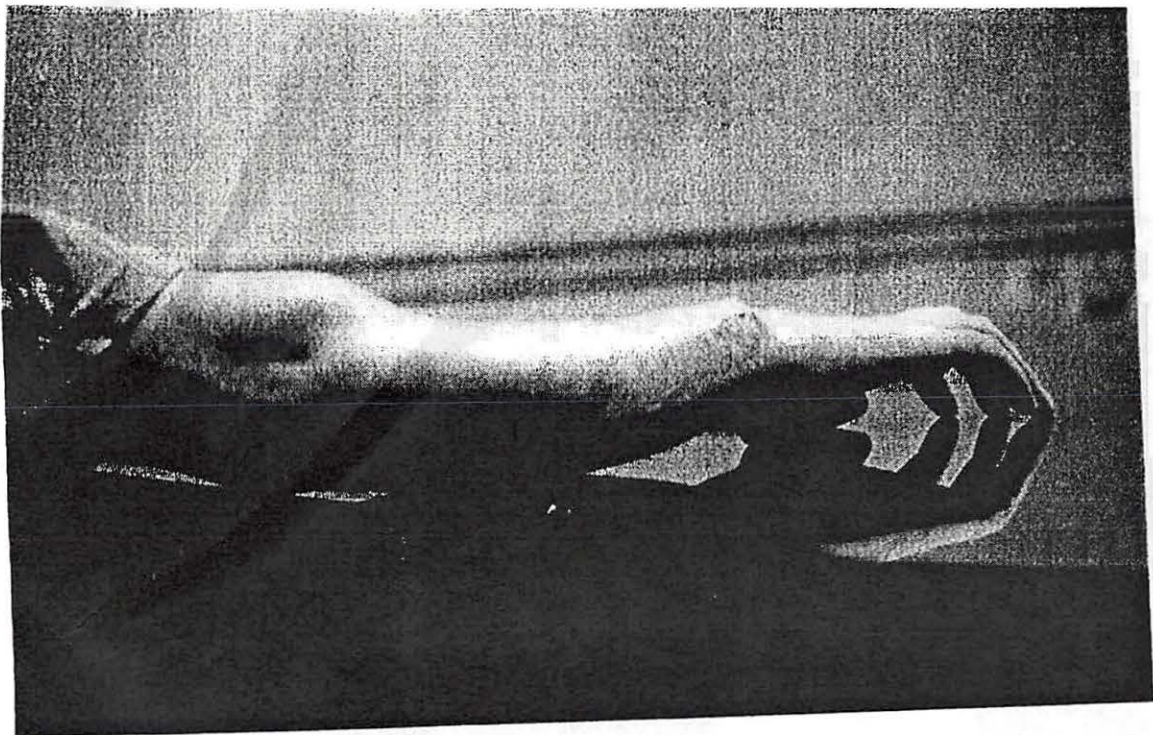
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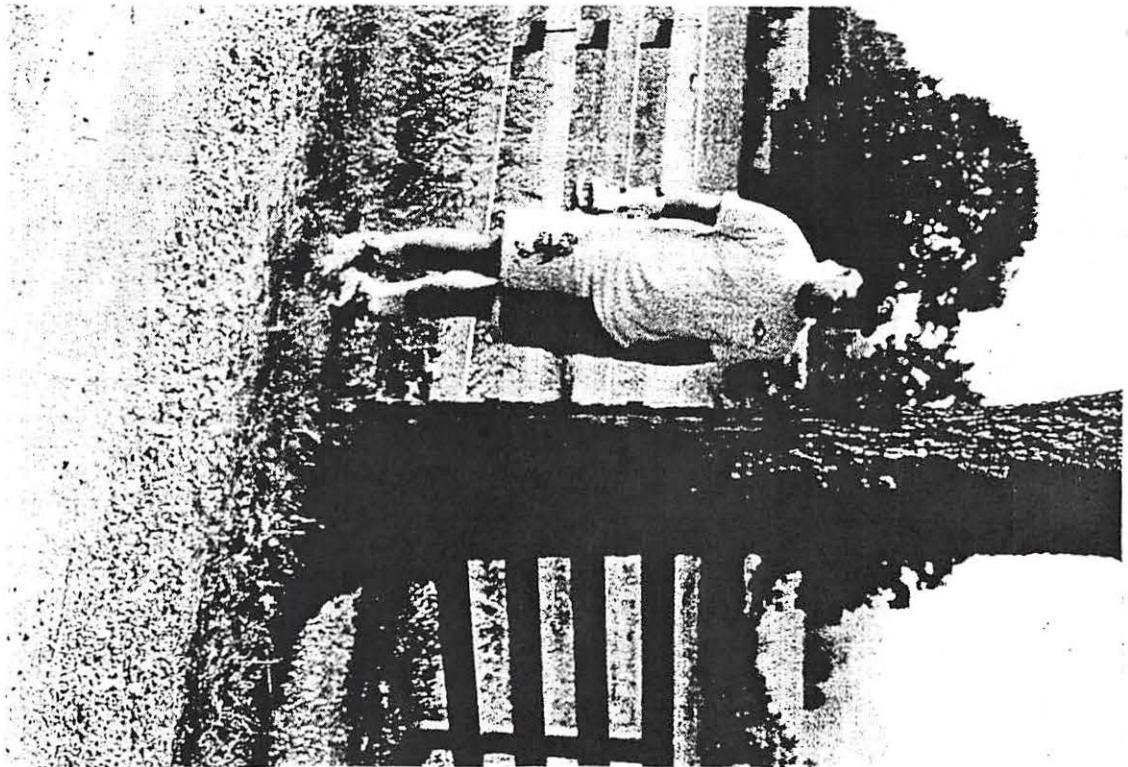
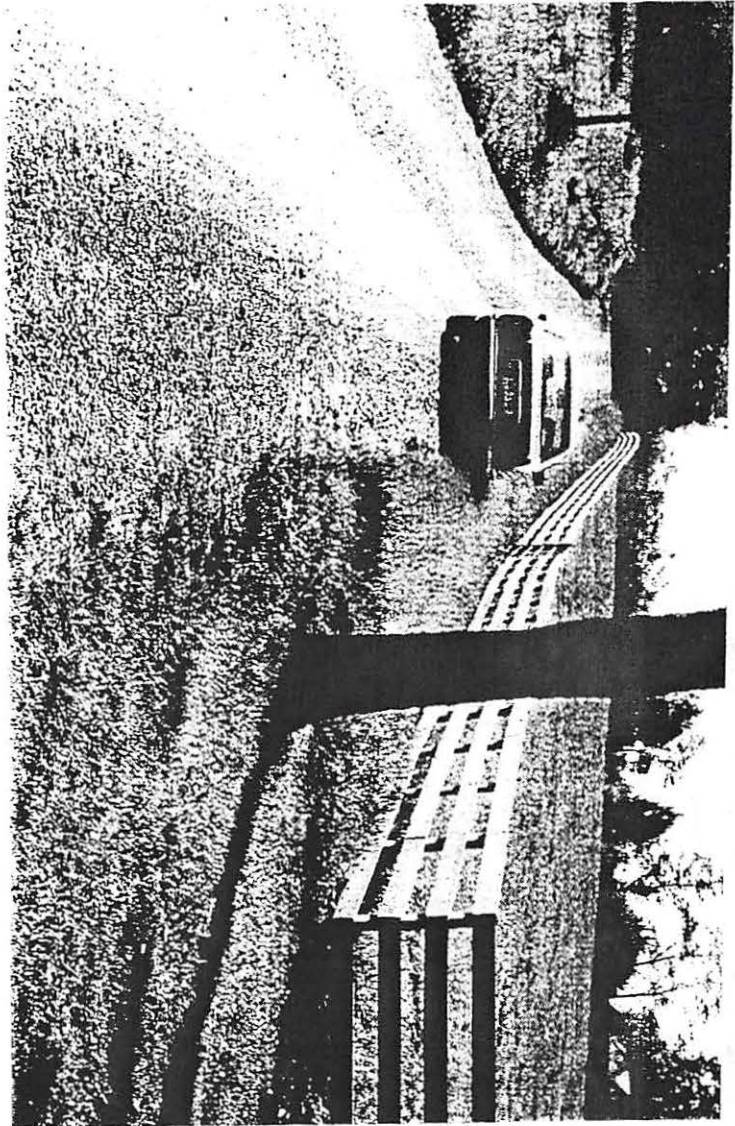
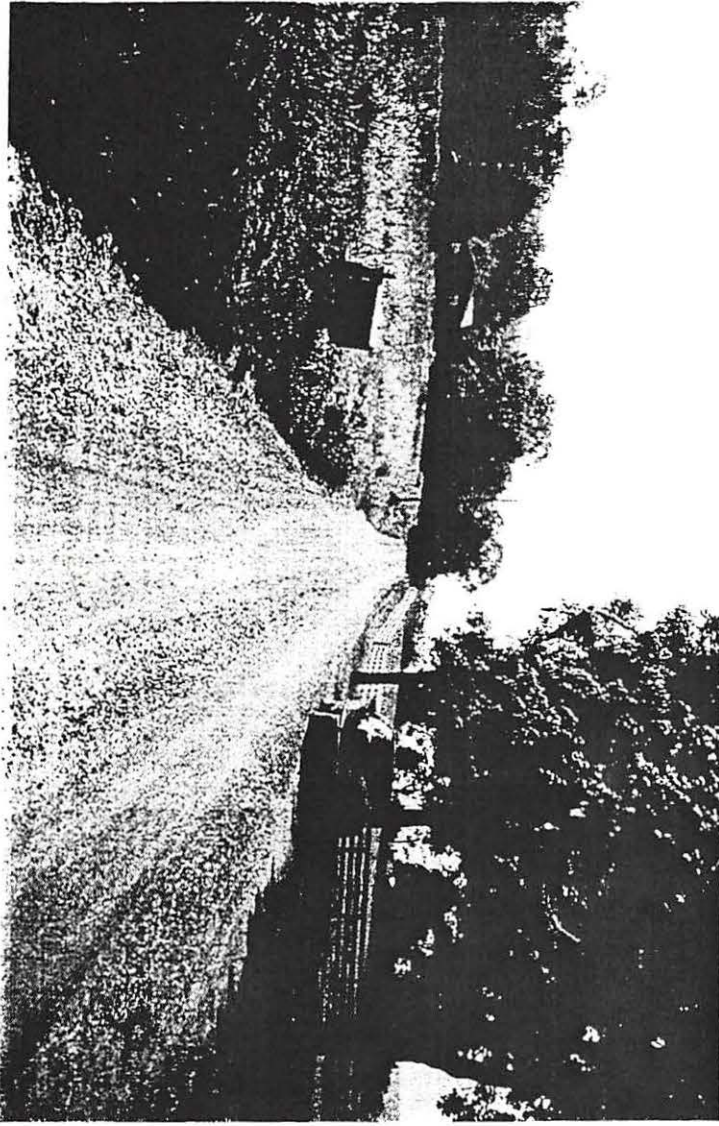
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Statements









UNIVERSITY OF VIRGINIA
HEALTH SCIENCES CENTER

Clinical Laboratories

* DENOTES NEW RESULT(S)

DODSON, TIMOTHY JASON

H #: 1165122

LOC: 7192A

AGE: 19Y

SEX: M

ADMIT: 06/24/95

DISCHARGE: 07/03/95

DR. WILLIAMS, GAYLORD S. (2713)

URINALYSIS - CHEMICAL RESULTS

TEST:

MYOGLOBIN
QUAL

UNITS:

LO-HI:

06/25/95

0850

0224

NEGATIVE

NEGATIVE

***** PERITONEAL LAVAGE ANALYSIS *****

TEST:

WBC

RBC

BANDS

SEGS

LYMPHS

MONOS

EOS

UNITS:

/UL

/UL

%

%

%

%

%

06/24/95

R1951

6

6

0

7

76

16

1

PERITONEAL LAVAGE ANALYSIS

TEST:

BASO

OTHERS

TOT CELLS

UNITS:

%

%

06/24/95

R1951

0

(b)

100

***** MISC FLUID ANALYSIS *****

TEST:

AMYLASE

UNITS:

U/L

LO-HI:

06/24/95

R1951

<5

***** ALCOHOLS *****

TEST:

ETHANOL

UNITS:

g/dL

LO-HI:

0.00-0.01

06/24/95

1935

0.21H

---FOOTNOTES---

(b) NO VEGETABLE MATTER SEEN

UNIVERSITY OF VIRGINIA
MEDICAL CENTER
Charlottesville, Virginia
Telephone (804) 924-0211
HOSPITAL DISCHARGE SUMMARY

NAME: DODSON, TIMOTHY
MED REC NO.: 1165122
SERVICE: PLASTIC SURG
ADMISSION DATE: 06/24/95
DISCHARGE DATE: 07/03/95
PAGE 2

distal right arm; no distal pulses; obvious radial and ulnar fractures; no way to evaluate neurological function. Neurologically, moved three extremities excluding the right arm, intubated.

Radiology studies: Head computerized tomography scan was negative and abdominal computerized tomography scan was negative. Pelvic computerized tomography scan was negative. Chest x-ray showed no pneumothorax, no hemothorax, no widened mediastinum. Pelvic x-ray was negative for fracture. C-spine was negative. Studies included DPL which was grossly negative.

LABORATORY DATA: Laboratory data on admission revealed arterial blood gasses showing pH of 7.34, pCO2 of 32, pO2 of 400, CO2 of 18, ethanol level 0.21, lactic acid 4.2, chem-7 showed a sodium of 137, potassium of 3.8, chloride 107, plasma CO2 of 24, BUN 10, creatinine 1.4, glucose 367, CBC showed a white blood count of 24.9, hemoglobin of 9.5 and hematocrit of 27.7 and a platelet count of 280. A PTT was 26.6 and the PT was 14.7.

COURSE IN HOSPITAL: The patient received multiple packed red blood cell transfusions in the Emergency Room and the computerized tomography scan. He was admitted to the Surgical Intensive Care Unit for stabilization and invasive monitoring including a Swan-Ganz catheter.

Soon after admission to the Surgical Intensive Care Unit and with the patient hemodynamically stable, he was taken to the operating room by Plastic Surgery and Orthopedic Surgery for repair of his right arm. In the operating room, the patient was found to have a grade 3-C open fracture of his proximal ulna and radius and a lateral radial head dislocation. HE underwent incision and drainage, open reduction internal fixation of the ulna, ulnar shortening osteotomy and excision of the proximal radius of 6 cm. Plastic Surgery team headed by Dr. Williams performed revascularization of the right forearm with the repair of the ulnar artery using a superficial vein, repair of the ulnar nerve, debridement of the skin and subcutaneous tissues. The patient's wounds were closed and the patient was returned to the Surgical Intensive Care Unit in stable condition.

1980 male from MVA ejected & found lying on
ground for unknown length of time. Admitted
to SICU 0205 s/p (2) forearm partial
reattachment. Placed on ventilator settings
of .40 / ^{SPV}10 / 800 / 10 / 15. ABG's 7.37 / 35 / 208 / 20 / 4.
Pt intubated \bar{c} #8.0 tube taped at 24 cm lip.
BS equal & clear bilaterally. CT was (-). Pt
was (+) ETOH + (+) Marijuana. Uses acid
on occasion per neighbor. Pt is sedated \bar{c}
fentanyl & also on pancuronium. Plan is
to maintain current settings for now & wean
per H.O. Pt had a total loss of 3000 cc
of blood. \bar{c} \downarrow BP systolic in the 60's in
ER. Monitor closely.

Care Harris RT

6/25/95 Extubation Note

Pt extubated prior to signing for small
amounts of clear secretions & placed on 4 LNC.
• SpO₂ 100%. NIF - 80. VC 4.82 L. Spont VE 22.
BS equal & clear bilaterally. Monitor closely
& wean FIO₂.

Care Harris RT

UNIVERSITY OF VIRGINIA
MEDICAL CENTER
Charlottesville, Virginia
Telephone (804) 924-0211
OPERATIVE REPORT

NAME: T, M9012846DODSON
MED REC NO.: 9012846
SERVICE: SURGERY
AGE:
NURSING UNIT: ER
DATE OF SURGERY: 06/24/95

SURGEON:

JEFFREY S. YOUNG, M.D.
SETH R. DIVACK, M.D.

ATTENDING:

JEFFREY S. YOUNG, M.D.

ASSISTANTS:

SETH R. DIVACK, M.D.

PREOPERATIVE DIAGNOSIS:

BLUNT TRAUMA, INTUBATED,
HYPOTENSIVE.

POSTOPERATIVE DIAGNOSIS:

BLUNT TRAUMA, INTUBATED,
HYPOTENSIVE.

OPERATION:

FORENSIC DIAGNOSTIC PERITONEAL
LAVAGE

ANESTHESIA:

ANESTHESIOLOGIST:

BRIEF HISTORY: The patient is a 19-year-old intoxicated white male who was ejected from a motor vehicle. He was found combative at the scene with an avulsed right lower arm. In the Emergency Room he was hypotensive and tachycardic, and a diagnostic peritoneal lavage was performed there.

PROCEDURE: The patient's belly was prepped in Betadine; an incision was made through the umbilicus. Some subcutaneous dissection was made using the hemostat and the diagnostic peritoneal lavage catheter was placed into the peritoneal cavity in standard fashion. No blood was obtained on aspiration, and 700 cc of normal saline was infused into the abdominal cavity without complications; approximately 500 cc of this was recovered. It was grossly negative, and the fluid was sent for a routine peritoneal study. The patient remains intubated; a further workup is in progress.



200 Memorial Drive
Luray, Virginia 22835

AMBULATORY CARE SERVICES • HOME HEALTH
RECORD

A HOSPITAL AND HEALTH CARE CENTER

NUMBER 23518	TYPE 2	PATIENT NAME DODSON TIMOTHY JASON	AGE 19	BIRTHDATE 12/27/1976	SEX M	RACE SC	DATE OF SERVICE 6/24/95	TIME 18:31	CLERK INTL LBE
ROUTE 1 BOX 140		MEDICAL RECORDS 13391	CITY LURAY		STATE VA		ZIP CODE 22835	TELEPHONE 703-743-3686	
NOTIFY IN CASE OF EMERGENCY - NAME DODSON TERRY		RELATIONSHIP FATHER	ADDRESS LURAY VA		STATE VA		ZIP CODE 22835	TELEPHONE 703-743-3686	

Auto accident

NAME ODSON TIMOTHY	QUARANTOR ADDRESS ROUTE 1 BOX 140	CITY LURAY	STATE VA	ZIP CODE 22835	QUAR. TELEPHONE 743-3686
EMPLOYER AVE'S LANDSCAPPING	LANDSCAPPING	QUAR. EMPLOYER ADDRESS LURAY VA	QUAR. EMP. TELEPHONE 743-4160		
SERVICE 97735	PREV. SERVICE DATE 12/15/93	RELATIVE, FRIEND, PARENT, OR GUARDIAN - IF A MINOR	PHONE NUMBER	FAMILY PHYSICIAN DALE J	ATTENDING PHYSICIAN THIES S

TETANUS STATUS	ALLERGIES: unknown	MEDICATIONS GIVEN	CURRENT MEDICATIONS unknown
MODE OF ARRIVAL stretcher	TIME: V.S. T	P 62	R 24
ARRIVED WITH: CVPS	V.S. T	P	R

mva - Severe (R) arm below elbow -
Squad members stated. Severe laceration of
(L) hand. (R) arm Abrasion Driver - who started
to CVPS fell asleep. unknown if seatbelted

NURSE SIGNATURE Kathy Clark	CONTINUATION SHEET YES NO
-----------------------------	---------------------------

LABORATORY	CBG	DIFF	UA	BP	SMA	QUICK STREP	CRP
PLATELETS							

DISPOSITION OF CASE	CONDITION ON DISCHARGE
---------------------	------------------------

<input type="checkbox"/> BACK PAIN	<input type="checkbox"/> WOUND CARE	<input type="checkbox"/> HEAD INJURY	<input type="checkbox"/> SPRAIN	<input type="checkbox"/> UTI
<input type="checkbox"/> GASTROENTERITIS	<input type="checkbox"/> ELEV. TEMP.	<input type="checkbox"/> MEDICATIONS	<input type="checkbox"/> FRACTURE	<input type="checkbox"/> URI

PATIENT'S SIGNATURE ON DISCHARGE
BY SIGNING HERE I CERTIFY THAT I UNDERSTAND THE FOLLOW-UP
INSTRUCTIONS RECEIVED BY ME IN WRITING, WHICH WERE EXPLAINED TO ME

PHYSICIAN'S SIGNATURE _____ DATE _____ PATIENT SIGNATURE _____ DATE _____

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

TIMOTHY JASON DODSON, Claimant

Opinion by CULBRETH
Deputy Commissioner

v. VWC File No. 183-34-74

VAUGHANS LANDSCAPING & MAINTENANCE, Employer
VIRGINIA FARM BUREAU FIRE & CASUALTY INS. CO., Insurer

FEB 13 1998

Jerry O. Talton, Esquire
118 East Main Street
Front Royal, Virginia 22630
Counsel for Claimant

✓ Kevin M. Rose, Esquire
Wharton, Aldhizer & Weaver
P.O. Box 20028
Harrisonburg, Virginia 22801
Counsel for Employer and Insurer

Hearing before Deputy Commissioner Culbreth in Harrisonburg, Virginia, on November 13, 1997.

PRESENT PROCEEDINGS

This matter is before the Commission on the claimant's claim filed December 9, 1996, alleging multiple injuries from an automobile accident on June 24, 1995. The claimant is seeking temporary total disability benefits from June 25, 1995 through March 11, 1996, as well as a permanent partial disability rating of 75% to his right upper extremity.

STIPULATIONS

The parties have stipulated to an average weekly wage of \$260.00.

DEFENSES

The defendants assert the following defenses:

1. No injury by accident arising out of or in the course of employment;

2. Willful misconduct, specifically that the claimant was engaged in horseplay, and was in violation of a statute when he was injured.

PRE AND POST HEARING EVIDENCE

The parties submitted Designations of Medical Reports pursuant to Rule 2.2(b)(3) of the Rules of the Workers' Compensation Commission.

ISSUES

1. Whether the claimant suffered an injury by accident arising out of and in the course of his employment; and
2. Whether the claimant was guilty of willful misconduct.

SUMMARY OF THE EVIDENCE

The claimant called David Vaughan, the owner of Vaughans Landscaping & Maintenance, as an adverse witness. Vaughan is the sole owner of his landscaping business and confirmed that the claimant was an employee on the date of the accident. Prior to the accident, Vaughan was aware that the claimant had no driver's license, so Vaughan transported the claimant to and from jobs. To do so, Vaughan used the company truck with the equipment in the back of the truck or on a trailer pulled behind the truck. After jobs, Vaughan would occasionally take the claimant home with him to help unload equipment and then would feed the claimant dinner. The unloading time generally was 3:00 p.m. to 5:00 p.m. The claimant was paid through the time he helped unload equipment.

On the date of the accident, the last job before the accident was in Compton, Virginia. When

he and the claimant completed the Compton job, they drove to Bentonville, where they stopped at a store and Vaughan bought beer and wine. Vaughan bought the beer and wine and, after leaving the store in Bentonville, drove the back roads to Luray, although Route 340 is the quickest route. Vaughan stated that both consumed beer and that there were no rules posted regarding not drinking on the job.

On the way back from Bentonville to Luray, Vaughan stopped to visit some friends, the Presgraves, when he saw them playing horseshoes. Vaughan was uncertain whether or not the claimant drank at the Presgraves, although Vaughan had another beer. While at the Presgraves, Vaughan spoke to the Presgraves about various issues and the claimant apparently got into an altercation and was asked to leave. After leaving the Presgraves, they began returning to Luray to Vaughan's house. Vaughan stated that, after returning to Luray, he alone would have gone to Potomac Edison to mow had he decided to perform the job, and would have taken the claimant home or wherever he desired to go.

After they left the Presgraves and as they were driving down a back road, the claimant threw a bottle out of the window of the truck. This startled Vaughan who swerved and "skinned" a tree, subsequently striking the claimant's right arm. Claimant's Exhibits 1, 2 and 3, are photos of the truck and the tree. Vaughan stated that, at the time of the accident, it was a sunny, hot day. Vaughan does not know whether the bottle was empty and does not recall the type of bottle that was thrown out of the truck. Following the accident, Vaughan left the scene before police could arrive, although he states that he first made sure that someone was there with the claimant.

Vaughan acknowledged that, prior to the accident, he had passed the turnoff to the claimant's

home. Vaughan stated that he was uncertain whether the claimant expressed his desire to go to town or just acquiesced in Vaughan's decision to drive to Luray. Vaughan also acknowledged that he was driving to Luray because he had decided to go there and not because the claimant asked to go to Luray.

On direct examination, Vaughan stated that the claimant's hours on a Saturday, the day the accident happened, were usually dependent on the workload. After the Compton job that Saturday, however, there was nothing left for the claimant to do and nothing more required of the claimant once Vaughan had dropped the claimant in Luray. Vaughan stated that the stop at the Presgraves had no connection with work, although Vaughan acknowledged that, while at the Presgraves, he did discuss some potential work projects. When they left the Presgraves, Vaughan stated that the claimant was "pretty drunk" and was arguing with someone at the Presgraves. Vaughan does not recall whether or not he assisted the claimant to the truck, but assumed the claimant was quite intoxicated by his gait.

When the claimant threw the bottle from the truck, Vaughan asked the claimant what he was doing, but does not recall how the claimant responded. Vaughan went off the road because he took his eyes off the road when the bottle was thrown and looked back to see where the bottle went. At the time, Vaughan states that he was only traveling approximately 25 m.p.h. The road, a one-lane, narrow, gravel road is depicted in Claimant's Exhibits 1, 2 and 3. Vaughan left the scene because he was "in shock."

On the date of the accident, after they finished their job at Compton, the claimant confirmed that they stopped in Bentonville for beer and wine, which Vaughan bought. The claimant first drank

wine but does not recall how much wine he had before he got to the Presgraves and states that he had no part in the decision to stop at the Presgraves. The claimant drank more wine at the Presgraves. The claimant recalls little about the accident. He recalls that he had already passed the turnoff to his home at the time of the accident and, but for the accident, he would have been willing to work the Potomac Edison job or to assist in unloading equipment following the Presgraves.

On cross-examination, the claimant acknowledged that his Saturday hours varied, but he generally worked from 8 to 12 or 8 to 5. By the time of the accident, he had not yet decided how long to work. The claimant did not ask Vaughan to take him home after the Compton job and he had not yet decided if he was going to continue to work or "go to town." The claimant did not object to Vaughan picking up beer and wine in Bentonville and had no objection to stopping at the Presgraves.

The claimant recalled his earlier deposition given on August 8, 1996, regarding the automobile accident. In his deposition, he indicated that he and Vaughan "had been just driving around killing time." At the hearing, he stated that he was incorrect in his deposition testimony and that they went straight to the Presgraves from Bentonville. At the Presgraves, the claimant apparently had a couple of beers and a bottle of wine. After he left the Presgraves, the claimant does not know whether he was even capable of working and does not recall anything after the Presgraves until waking up in the hospital. The claimant could not say how the accident happened or whether or not Vaughan's recollection of the bottle incident is accurate or inaccurate.

The medical records themselves are not in dispute nor is the reasonableness and necessity of the treatment or the period of disability, subject to the employer's defenses. The medical records

from the University of Virginia Medical Center on June 24 and 25, 1995, indicate that the claimant was brought to the hospital with a .21 blood alcohol level several hours after the accident. The notes indicate that the claimant was intoxicated and combative at the scene. Dr. Gaylord Williams, who treated the claimant, stated in response to questions from claimant's attorney, that the claimant was totally disabled from all work from June 24, 1995 until March 11, 1996. Dr. Williams also indicated the claimant suffered a 75% permanent impairment to the right arm as a result of the accident and that the claimant's medical expenses were reasonable and necessary. This evidence was un rebutted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issue of the claimant's severe intoxication will be addressed first. Although the claimant's memory of the amount of alcohol he consumed is sketchy, what is not disputed is the fact that, at least seven hours post-accident, his blood alcohol level was .21, over two and one-half times the legal limit for driving in the Commonwealth of Virginia. High blood alcohol level alone is not sufficient to prove that a resultant injury is due to intoxication. American Safety Razor Co. v. Hunter, 2 Va. App. 258, 343 S.E.2d 461 (1986). Virginia Code § 65.2-306, and cases interpreting that statute, states that "No compensation shall be awarded to an employee or his dependents for an injury or death caused by...the employee's intoxication." However, the person asserting the defense has the burden of proof. If the employer raises, as a defense, the employee's intoxication and there was, at the time of injury or death, an amount of alcohol which is equal to or greater than the standard set forth in 18.2-266, there shall be a rebuttable presumption that the employee was intoxicated at the time of the injury or death. Even with the presumption, however, the employer bears the burden of

proving whether or not the intoxication was a proximate cause of the accident. To establish its affirmative defense, the employer must prove, by a preponderance of the evidence, that the intoxication proximally caused the injury.

However,

An employee may abandon his employment by reaching an advanced stage of intoxication which renders the employee incapable of engaging in his duties. This result is not based on a special statutory defense of intoxication. Rather, a severely intoxicated employee has removed himself from the scope of his employment. Any injuries thereafter suffered are not 'in the course of' the employment....This rule does not apply, however, where an intoxicated employee continues actively to perform his duties. (emphasis added)

American Safety Razor v. Hunter, 2 Va. App. 258, 343 S.E.2d 461 (1986). This view is based upon "sound workman's compensation principles." Hopkins v. City of Richmond, 58 O.I.C. 187 (1979). See, also, 1A, Larson, The Law of Workman's Compensation, Section 34.21 (1985). The Commission in Hopkins, supra, found that the claimant, "through his own misconduct...rendered himself incapable of performing" his duties. 58 O.I.C. at 188. By contrast, the claimant in American Safety Razor, reported for work and began his tasks before suffering an injury. Thus, the claimant in Hopkins was denied benefits while the American Safety Razor claimant was not.

Under the law of Hopkins and American Safety Razor, this claimant's current claim must be barred. A blood alcohol level, five hours post-incident at two and one-half times the legal level of intoxication in Virginia, is clearly severe intoxication. Both the claimant and Vaughan testified at the hearing and in prior depositions, that the claimant was staggering, involved in an altercation and close to losing consciousness. Furthermore, the fact that the claimant recalls very little of the Presgraves' party and shortly thereafter, belies his level of intoxication. The claimant, so severely intoxicated as

to have a .21 blood alcohol level five hours later, has clearly taken himself out of the course of his employment in that he would be of no use to his employer. Given that level of intoxication, the claimant could not operate a motor vehicle and he would not be able to operate heavy machinery for his employer.

As in Hopkins, supra, the claimant had an elevated blood alcohol content when admitted to the hospital. The Commission held that "while it is clear that the claimant's state of intoxication did not contribute directly to the industrial accident," the Commission noted that Professor Larson and numerous states "have held that a claimant, by his intoxication, may remove himself from the scope of his employment and deny compensation even though the intoxication itself was not the direct cause of the claimant's injury." The Commission went on to state "here the claimant is being paid to perform certain services for his employer....since the claimant was incapable of performing any services on his employer's behalf at the time of his injury would find that he removed himself from the scope of his employment and that his claim for workman's compensation benefits should, therefore, be denied." The same rationale is directly applicable in the present case. Therefore, given this finding, the defenses of horseplay and violation of statute need not be addressed. Consequently, the following award shall enter:

AWARD

The claimant's Claim for Benefits is DENIED.

This matter is ORDERED removed from the hearing docket.

REVIEW

You may appeal this decision by filing a Request for Review with the Commission within twenty (20) days from the date of this Opinion.

cc: Timothy Jason Dodson
314 Cloud Street
Front Royal, Virginia 22630

Virginia Farm Bureau Fire & Casualty Ins. Co.
P.O. Box 27552
Richmond, Virginia 23261

JERRY O. TALTON

ATTORNEY AT LAW

118 East Main Street
Front Royal, Virginia 22630

(540) 636-7040

COPY

February 17, 1998

Certified Mail: P342448123

Lou-Ann D. Joyner
Clerk
Virginia Workers' Compensation Commission
1000 DMV Drive
Richmond, Virginia 23220

Re: Timothy Jason Dodson v. Vaughan's Landscaping & Maintenance
VWC File No: 183-34-74
Date of Accident: June 24, 1995

Dear Ms. Joyner,

Please accept this letter as a request for review of the February 13, 1998 Opinion of Deputy Commissioner Culbreth denying compensation in the above case.

The ground of this review request are that the Deputy Commissioner erred in finding that the claimant's injury was noncompensable, and particularly in finding that the employee could not perform his work duties or operate a motor vehicle or heavy machinery for the employer and was intoxicated.

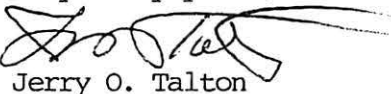
The Deputy further erred in failing to reach the other issues in the case, and failing to find for the claimant on the defenses of horseplay, violation of statute, injury by accident arising out of and in the course of the employment, with compensable disability and medical expenses.

The claimant in this case had no work duties to perform, and was in a travel mode at the time of the accident. If he had been sleeping he would have been still entitled to compensation. It was raw speculation for the Deputy to conclude that the employee would have been of no benefit to the employer at a later time. There was no expert testimony to that effect and this is not a drunk driving case from the employee's standpoint, although the employer left the scene of the accident.

Since my client suffered an incomplete amputation of his arm and this is a most serious injury with extensive permanent consequences, we request the opportunity to file written brief and **request oral argument.**

I also request a copy of the transcript of the hearing.

Very truly yours,


Jerry O. Talton

cc: Kevin M. Rose, Esq. ✓

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

TIMOTHY JASON DODSON, Claimant

Opinion by the
FULL COMMISSION

v. VWC File No. 183-34-74

JUL 1 1998

VAUGHAN'S LANDSCAPING & MAINTENANCE, Employer
VIRGINIA FARM BUREAU
FIRE & CASUALTY INSURANCE COMPANY, Insurer

Jerry O. Talton, Esquire
118 East Main Street
Front Royal, Virginia 22630
For the Claimant.

Kevin M. Rose, Esquire
Post Office Box 20028
Harrisonburg, Virginia 22801-7528
For the Defendants.

REVIEW on the record before Commissioner Diamond, Commissioner Tarr, and Deputy Commissioner C. E. Mercer at Richmond, Virginia.

Timothy Jason Dodson, the employee, requests review of the February 13, 1998, Opinion of a Deputy Commissioner, denying his accidental injury claim. The Deputy Commissioner found that the claimant, due to his intoxication, had removed himself from the scope of the employment.¹

The employer contends in its written statement that (1) the claimant had removed himself from the course of employment due to his severe level of intoxication; (2) at the time of the accident, the transportation provided by the employer was not related to

¹The employee has requested oral argument, but in light of the issues presented and the record developed, we do not deem oral argument necessary or beneficial. Barnes v. Wise Fashions, 16 Va. App. 108, 428 S.E.2d 301 (1993); VWC Rule 3.4.

work, or travel to and from work; and (3) the claimant was engaged in horseplay which was the proximate cause of the accident.

The evidence has been accurately summarized by the Deputy Commissioner, and will not be repeated here in detail. From a careful review of the record, we observe that both the employer, David Vaughan, and the claimant had limited memories as to the events which led up to the accident. Based upon the testimony of these witnesses, the documentary evidence, and the reasonable inferences which can be drawn therefrom, we find that the employer operated a landscaping business. Vaughan was aware that Dodson did not have a driver's license, and therefore agreed to provide the claimant transportation to and from work. Dodson lived in Kendall, Virginia, and Vaughan lived in Luray, Virginia. At the end of the workday, instead of taking the claimant home, Vaughan would frequently take Dodson to Vaughan's home (and place of business) located in Luray, Virginia. Dodson would help unload and service the lawn equipment, and Vaughan would often provide an evening meal for Dodson. Vaughan would then drive the claimant home. Vaughan testified that he would pay the claimant for the entire period until they left Vaughan's house, with the exception of approximately one-half hour for lunch, and one-half hour for dinner.

On June 24, 1995, the date of the accident, Vaughan picked up the claimant at his home, and drove the company truck and equipment

Whi pr
this n
L
consume
supplied
alcohol o
bring any
occurrence,
was aware of t

Vaughan was
also the owner and
Vaughan bought wine
thereby illegally pro
consumption of alcohol
the employer obvious
conduct, and will not
intoxication as a defense

From the medical records, we determined that on December 27, 1975, making him 19.

2 From the medical report, it was determined that the accident occurred on December 27, 1975, and that the victim had not consumed any alcohol before reporting to work on the morning of the accident. The victim had drunk no alcohol which had been purchased and supplied by the company.

5

later, we find that Dodson was significantly injured at the time they left the Presgraves' home in Los Angeles. After leaving the Presgraves' home, Dodson was determined whether or not he was injured while working that day.

VWC File No. 183-34

VWC File No. 183-34-74

incredible Vaughan's assertion that he had a rule against drinking on the job.

HORSEPLAY

We reach a similar result regarding the defense of horseplay. The employer facilitated and condoned the consumption of alcohol by the underage employee. Although unfortunate, it is certainly foreseeable that a passenger who is consuming alcoholic beverages might dispose of empty bottles by tossing them from a window. By condoning Dodson's consumption of alcohol, we find that the employer also condoned the natural and foreseeable consequences thereof.

Moreover, we find that Dodson's act of throwing the bottle out of the window was not the proximate cause of his injury. We find that it is not reasonably foreseeable that a passenger's act of littering would result in the driver's losing control of the vehicle and running off the road under the facts of this case. Vaughan testified that he was driving slowly. From viewing the photographs, it appears that the tree was at least a car-width off the traveled portion of the road. The road was straight, and the day was sunny. Vaughan had difficulty remembering details of the events of the day, and his testimony regarding the happening of the accident was tentative. He prefaced his testimony regarding the accident with the words "from what I remember." He had also consumed an unknown quantity of alcohol, and left the scene of the

trailer to Compton, Virginia, where they both performed landscaping services. Upon completion of that job, Vaughan drove to Bentonville, where he stopped at a store and purchased beer and wine. Vaughan was aware that the claimant was 19 or 20 years old at that time.² Vaughan then drove towards his home in Luray, following back roads, which was not unusual. During that time, both Vaughan and Dodson drank some of the alcoholic beverages which Vaughan had purchased.³ While en route, Vaughan and Dodson saw mutual friends playing horseshoes at the side of the road, and Vaughan therefore stopped the truck at the Presgraves' house. Vaughan did not know whether Dodson continued to drink at the Presgraves', but Vaughan admitted that he had opened one beer which he did not finish. The weight of the evidence would indicate that Dodson continued drinking while at the Presgraves'. While at the Presgraves', Vaughan discussed performing some landscaping work for one of the Presgraves. Dodson ultimately became engaged in an argument with someone at the Presgraves', and Vaughan and Dodson were asked to leave. Based upon the claimant's admissions, and based upon a blood alcohol level of .21% approximately five hours

²From the medical records, we determine that Dodson's birth date was December 27, 1975, making him 19 years old on the date of the accident.

³Dodson had not consumed any alcoholic beverages or drugs before reporting to work on the morning of the accident. While en route to Luray, he drank no alcoholic beverages other than those which had been purchased and supplied by Vaughan.

later, we find that Dodson was significantly intoxicated at the time they left the Presgraves'.

After leaving the Presgraves', Vaughan continued driving towards his home in Luray. At that time, Vaughan had not determined whether or not he or Dodson would perform any additional work that day. It was Vaughan's intent to either take Dodson to Vaughan's home, or drop him off wherever he wanted to go. Vaughan admitted, and we find, that Dodson was still under his control at the time of the accident, and that Vaughan anticipated that Dodson would have remained under his control at least until the time they arrived at Luray.

Vaughan continued driving towards Luray, and passed the turnoff to the claimant's home in Kendall. Vaughan testified that Dodson threw some type of bottle out of the window of the truck. Vaughan testified that he took his eyes off the road and looked to see where the bottle went, causing him to veer off the side of the road. At that time, the right-hand side of the pickup truck grazed a tree, causing severe injury to the claimant's right arm. After summoning assistance, Vaughan left the scene of the accident, and walked to his home approximately one mile away. Dodson could not refute Vaughan's testimony as to these events, because he had no memory of what happened after they left the Presgraves'.

DID INTOXICATION REMOVE DODSON FROM THE SCOPE OF HIS EMPLOYMENT?

In American Safety Razor Co. v. Hunter, 2 Va. App. 258, 261, 343 S.E.2d 461, 463 (1986), the Court of Appeals held,

[A]n employee may abandon his employment by reaching an advanced state of intoxication which renders the employee incapable of engaging in his duties....[A] severely intoxicated employee has removed himself from the scope of his employment....

While we obviously agree with that statement of the law, we find this principle has no application to the present case.

Based upon the evidence presented, we find that Dodson consumed only those alcoholic beverages which were purchased and supplied by Vaughan. We find that Dodson had not consumed any alcohol or drugs prior to the start of the work day, nor did he bring any alcohol or drugs to work. At the time of this occurrence, Dodson was below the legal drinking age, and Vaughan was aware of that fact.

Vaughan was not only the claimant's direct supervisor, but was also the owner and sole proprietor of the business. We find that Vaughan bought wine and beer, and gave it to Dodson to consume. He thereby illegally promoted and facilitated the under age claimant's consumption of alcoholic beverages. Having provided the alcohol, the employer obviously encouraged and condoned the claimant's conduct, and will not now be heard to assert the claimant's intoxication as a defense to his claim for benefits. We find

incredible Vaughan's assertion that he had a rule against drinking on the job.

HORSEPLAY

We reach a similar result regarding the defense of horseplay. The employer facilitated and condoned the consumption of alcohol by the underage employee. Although unfortunate, it is certainly foreseeable that a passenger who is consuming alcoholic beverages might dispose of empty bottles by tossing them from a window. By condoning Dodson's consumption of alcohol, we find that the employer also condoned the natural and foreseeable consequences thereof.

Moreover, we find that Dodson's act of throwing the bottle out of the window was not the proximate cause of his injury. We find that it is not reasonably foreseeable that a passenger's act of littering would result in the driver's losing control of the vehicle and running off the road under the facts of this case. Vaughan testified that he was driving slowly. From viewing the photographs, it appears that the tree was at least a car-width off the traveled portion of the road. The road was straight, and the day was sunny. Vaughan had difficulty remembering details of the events of the day, and his testimony regarding the happening of the accident was tentative. He prefaced his testimony regarding the accident with the words "from what I remember." He had also consumed an unknown quantity of alcohol, and left the scene of the

accident before the police arrived. Based upon the entire record, we find his testimony unpersuasive that the accident was proximately caused by Dodson's act of throwing the bottle from a window.

WAS THE TRANSPORTATION IN THE COURSE OF THE CLAIMANT'S EMPLOYMENT?

An injury occurs in the course of employment when it takes place within the period of employment, at a place where the employee is reasonably expected to be, and while he is fulfilling some duty of his employment or doing something reasonably incident thereto. Baggett Transportation Company v. Dillon, 219 Va. 633, 248 S.E.2d 819 (1978). Generally, injuries received while going to or from work are not compensable. The employee is not engaged in performing any service growing out of and incidental to his employment. Kendrick v. Nationwide Homes, Inc., 4 Va. App. 189, 355 S.E.2d 347 (1987). However, there are three exceptions to this general rule. An injury incurred while going to or from work may be compensable:

- 1) Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages.
- 2) Where the way used is the sole and exclusive way of ingress and egress with no other way, or where the way of ingress and egress is constructed by the employer.
- 3) Where the employee on his way to or from work is still charged with some duty or task in connection with his employment.

GATX Tank Erection Company v. Gnewuch, 221 Va. 600, 272 S.E.2d 200 (1980).

From the evidence presented, we find that the employer agreed to provide Dodson transportation to and from work. The employer also customarily paid the claimant for the time spent in transit until the parties arrived at Vaughan's house in Luray.

On the day of the accident, Vaughan solely controlled the itinerary of the work day, including the drive home. It is clear that the employer made all the decisions regarding the route and stops. There is no precise evidence regarding the length of the stop at the Presgraves' home. Based upon Vaughan's testimony, we find this stop lasted only a few minutes. During that time, Vaughan discussed some future business.

We find that any deviation from the direct trip home was directed, sponsored and condoned by the employer. Although the claimant did not protest the employer's actions, he remained subject to the vicissitudes of the employer until he was ultimately transported home or to an agreed location.

More importantly, before the accident happened, Vaughan had resumed driving the normal route to his home in Luray. He testified that Dodson was still under his control, and would have remained under his control until they reached Luray. Vaughan had not then made a final determination whether he or Dodson would perform any additional work that day. Under the totality of these

circumstances, we conclude that Dodson remained within the course and scope of his employment at the time of the accident.

The requested period of total disability, June 25, 1995, through March 11, 1996, is supported by the entire medical record and specifically the November 10, 1997, affirmative response of the treating physician, Dr. Gaylord Williams, to the following question posed by the claimant's attorney:

Question 1. Within a reasonable degree of medical certainty was Tim Dodson totally disabled for all work from June 24, 1995, (the date of the automobile accident in which his right arm was severely severed) until March 11, 1996 (the date of your residual functional capacity evaluation)?

Further, Dr. Williams' March 12, 1996, letter assigns a 75% permanent impairment to the claimant's right upper extremity. Dr. Williams stated that he does not anticipate any future medical treatment for Mr. Dodson's hand or arm. He also opined that the impairment was permanent. Therefore, we find that the claimant has reached maximum medical improvement, and has suffered a 75% loss of use of the right arm.

For the reasons stated, the decision of the Deputy Commissioner is REVERSED, and an appropriate award shall enter.

AWARD

An award is hereby entered in favor of Timothy Jason Dodson, employee, against Vaughan's Landscaping & Maintenance, employer, and Virginia Farm Bureau Fire & Casualty Insurance Company, insurer, for the payment of compensation as follows: \$173.33 per week during temporary total disability, based upon a pre-injury average weekly wage of \$260.00, payable weekly beginning June 25, 1995, through March 11, 1996, inclusive; and beginning March 12, 1996, and continuing for a total of 150 weeks, representing a 75% loss of use of his right arm.

Medical benefits are awarded pursuant to §65.2-603 for as long as necessary.

From the accrued compensation, a fee in the amount of \$5,200.00 shall be deducted and paid directly to Jerry O. Talton, Esquire, claimant's attorney, for legal services rendered.⁴

⁴Regarding request for fees pursuant to §65.2-714, in order to comply with the holding in Danville Radiologists, Inc. v. Perkins, 22 Va. App. 454, 470 S.E.2d 602 (1996), the Commission will no longer be referring attorney requests for fees under Code §65.2-714 to the docket prior to payment. Once the amount has been settled and the charge recovered, then claimant's counsel may come forth and file an application for fees. The application must include the statement required by Rule 6.2(a), Rules of the Virginia Workers' Compensation Commission and set out the name and address of each carrier and medical provider from whom a fee is requested, the amount of the charge recovered, and the amount of the fee requested.

The Commission continues, however, to encourage agreements among the parties. The Commission will enter Orders endorsed by all parties, including the employer, setting out the specific

This matter is hereby removed from the Review docket.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days.

c: Timothy Jason Dodson
314 Cloud Street
Front Royal, Virginia 22630

Virginia Farm Bureau Fire &
Casualty Insurance Company
Post Office Box 27552
Richmond, Virginia 23261

amounts and the fee agreed upon.

This procedure will then eliminate the premature entry of orders for fees where the underlying charge is still in some dispute.

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

TIMOTHY JASON DODSON, Claimant

v.

VWC FILE NO. 183-34-74

VAUGHAN'S LANDSCAPING
& MAINTENANCE, Employer
and
VIRGINIA FARM BUREAU FIRE
& CASUALTY INSURANCE
COMPANY, Insurer.

NOTICE OF APPEAL

Employer, Vaughan's Landscaping & Maintenance, and Insurer, Virginia Farm Bureau Fire & Casualty Insurance Company, hereby appeal to the Court of Appeals of Virginia the decision herein of the Virginia Workers' Compensation Commission dated July 1, 1998. Employer and Insurer challenge the sufficiency of the evidence to support the findings of the Commission.

The undersigned certifies as follows:

1. The names and addresses of the appellants are:

Vaughan's Landscaping & Maintenance
18 Hites Spring Road
Luray, Virginia 22835

Virginia Farm Bureau Fire & Casualty Insurance Company
Post Office Box 27552
Richmond, Virginia 23261

2. The name and address of the appellee is:

Timothy Jason Dodson
314 Cloud Street
Front Royal, Virginia 22630

3. The name, address and telephone number of counsel for the appellants is:

Kevin M. Rose, Esquire
Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
P. O. Box 20028
Harrisonburg, Virginia 22801-7528
(540) 434-0316

4. The name, address and telephone number of counsel for the appellee is:

Jerry O. Talton, Esquire
118 East Main Street
Front Royal, Virginia 22630
(540) 636-7040

VAUGHAN'S LANDSCAPING &
MAINTENANCE, Employer, and
VIRGINIA FARM BUREAU FIRE &
CASUALTY INSURANCE COMPANY,
Insurer

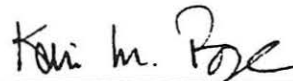
By Counsel

Kevin M. Rose

KEVIN M. ROSE (VSB # 35930)
Of Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
P.O. Box 20028
Harrisonburg, Virginia 22801-7528
(540) 434-0316
Counsel for Employer and Insurer

CERTIFICATE

I hereby certify that the original of the foregoing Notice of Appeal was mailed first-class certified mail, return receipt requested, this 21st day of July, 1998 to the Virginia Workers' Compensation Commission; and that on this same day, a true copy of the foregoing Notice of Appeal was mailed to Jerry O. Talton, Esquire, 118 East Main Street, Front Royal, Virginia 22630; and that on this same day, a true copy was mailed first-class certified mail, return receipt requested, to the Clerk of the Court of Appeals of Virginia.



Counsel for Employer and Insurer

48800/59/130801

COURT OF APPEALS OF VIRGINIA

Present: Judge Bray, Senior Judges Duff and Overton
Argued at Alexandria, Virginia

VAUGHAN'S LANDSCAPING & MAINTENANCE
AND VIRGINIA FARM BUREAU FIRE &
CASUALTY INSURANCE COMPANY

v. Record No. 1667-98-4

TIMOTHY JASON DODSON

OPINION BY
JUDGE NELSON T. OVERTON
JUNE 29, 1999

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

Kevin M. Rose (Wharton, Aldhizer & Weaver,
P.L.C., on brief), for appellants.

Jerry O. Talton for appellee.

Vaughan's Landscaping & Maintenance and its insurer (hereinafter referred to as "employer") appeal a decision of the Workers' Compensation Commission ("commission") awarding benefits to Timothy Jason Dodson ("claimant"). Employer contends the commission erred in finding that claimant proved he sustained an injury by accident while in the course of his employment. Specifically, employer argues that at the time of claimant's accident (1) his transportation was neither "employer-provided" nor incidental to his employment; and (2) his severe intoxication removed him from the course of his employment. Because we find that claimant's severe intoxication had removed him from the course of his employment at the time of his accident, we reverse the commission's decision awarding benefits.

On appeal, we view the evidence in the light most favorable to the prevailing party below. See R.G. Moore Bldg. Corp. v. Mullins, 10 Va. App. 211, 212, 390 S.E.2d 788, 788 (1990). "A finding by the commission that an injury arose out of and in the course of employment is a mixed finding of law and fact and is properly reviewable on appeal." Dublin Garment Co. v. Jones, 2 Va. App. 165, 167, 342 S.E.2d 638, 638 (1986).

Claimant worked for employer as a laborer in its landscaping business, operated by David Vaughan as a sole proprietor. Claimant, then nineteen years old, did not possess a driver's license, and Vaughan agreed to transport him to and from work. Claimant lived in Kendall, Virginia, and Vaughan's home, which served as employer's place of business, was located in Luray, Virginia. At the end of the workday, Vaughan frequently transported claimant to employer's place of business in Luray, rather than taking him directly home. Claimant frequently assisted Vaughan in unloading and servicing employer's lawn equipment, and Vaughan sometimes provided claimant with dinner, after which Vaughan would drive claimant home. Vaughan paid claimant for the entire period of time until they left employer's place of business, with the exception of approximately one-half hour for lunch and one-half hour for dinner.

On Saturday, June 24, 1995, Vaughan picked up claimant at his home. Claimant's normal Saturday work hours were either 8:00 a.m. to noon or 8:00 a.m. to 5:00 p.m. Vaughan drove the company truck

and equipment trailer to Compton, Virginia, where he and claimant performed landscaping services. Vaughan testified that after he and claimant completed the Compton job, claimant's work was done for that day. Vaughan and claimant left Compton in Vaughan's truck and traveled to Bentonville, where Vaughan stopped at a store and purchased beer and wine. Vaughan knew that claimant was under the legal drinking age.

After purchasing the beer and wine, Vaughan drove toward his home in Luray. En route, Vaughan and claimant consumed some of the beer and wine and came upon some mutual friends playing horseshoes on the roadside near the Presgraves' home. They decided to stop, and Vaughan and claimant exited the truck and joined their friends. Vaughan admitted opening another beer at the Presgraves', but he did not know whether claimant continued drinking. Vaughan testified that his stop at the Presgraves' was not work-related but, while there, one of the Presgraves asked him about taking a tree down in the future. Shortly after the two men arrived, claimant argued with someone, and he and Vaughan were asked to leave. Vaughan stated that claimant was then "pretty drunk."

After leaving the Presgraves' home, Vaughan drove toward his home in Luray. Vaughan testified that he intended to either take claimant home or drop him off where he wanted to go. Vaughan did not intend to unload the equipment from his truck when he arrived home, because he intended to perform another job later that day by

himself. As Vaughan drove along Route 611 toward Luray, claimant threw a bottle from the car window. Vaughan asked claimant what he was doing and momentarily took his eyes off the road, causing the vehicle to leave the roadway and the passenger side of the vehicle to sideswipe a tree. As a result of the accident, claimant sustained a severe injury to his right arm.

Claimant admitted that he did not ask Vaughan to take him home after completing the Compton job, did not object to Vaughan purchasing the beer and wine and did not object to the stop at the Presgraves' home. Claimant testified that he and Vaughan drank some of the beer and wine, acknowledging that he consumed at least "a couple of beers" and "a bottle of wine" before they arrived at the Presgraves' home. Claimant recalled that he and Vaughan had not then decided whether they were going to continue to work or whether claimant was "going to town."

Claimant testified that he and Vaughan consumed more alcohol at the Presgraves', and he may have "pitched a game or two" of horseshoes. Although claimant learned after the accident that he had engaged in an argument and had been asked to leave the Presgraves', he did not remember these events. He also could not remember whether he walked to Vaughan's truck, although others had told him he was unable to stand or walk unassisted when he left the Presgraves' home. Claimant did not recall throwing a bottle from the truck window or other events between the time they left the Presgraves' home and the time of

the accident and was uncertain whether he would have then been able to operate a lawn mower or bush hog. When asked whether he was then "drunk," claimant responded, "I would say so . . .," admitting intoxication to near unconsciousness.

The medical records revealed that claimant was "intoxicated . . . [and] found combative at the scene" His blood alcohol level was .21 several hours after the accident.¹

[A]n employee may abandon his employment by reaching an advanced state of intoxication which renders the employee incapable of engaging in his duties. This result is not based upon a special statutory defense of intoxication. Rather, a severely intoxicated employee has removed himself from the scope of his employment. Any injuries thereafter suffered are not "in the course of" the employment.

American Safety Razor Co. v. Hunter, 2 Va. App. 258, 261, 343 S.E.2d 461, 463 (1986) (citing 1A A. Larson, The Law of Workmen's Compensation § 34.21 (1985)).

Here, the commission ruled as follows:

[claimant] consumed only those alcoholic beverages which were purchased and supplied by Vaughan. We find that [claimant] had not consumed any alcohol or drugs prior to the start of the work day, nor did he bring any alcohol or drugs to work. At the time of this occurrence, [claimant] was below the legal drinking age, and Vaughan was aware of that fact.

Vaughan was not only the claimant's direct supervisor, but was also the owner and sole proprietor of the business. We

¹ Claimant's blood alcohol level of .21 was over two and one-half times the legal limit (0.08) for driving in the Commonwealth of Virginia. See Code § 18.2-266.

find that Vaughan bought wine and beer, and gave it to [claimant] to consume. He thereby illegally promoted and facilitated the under age claimant's consumption of alcoholic beverages. Having provided the alcohol, the employer obviously encouraged and condoned the claimant's conduct, and will not now be heard to assert the claimant's intoxication as a defense to his claim for benefits. We find incredible Vaughan's assertion that he had a rule against drinking on the job.

The commission apparently analyzed the intoxication issue in terms of whether employer met its burden of proving a "willful misconduct" defense. However, the rule cited in American Razor is not based upon a "special statutory defense." Rather, under that rule, a claimant's voluntary intoxication may remove the claimant from the scope of his or her employment at the time of the accident when such condition renders the claimant incapable of performing his or her job duties. Stated differently, although a claimant's state of intoxication might not have contributed directly to an accident, the claimant may remove himself or herself from the course of employment by his or her self-induced intoxication. Although the commission made a factual finding that claimant was significantly intoxicated at the time he and Vaughan left the Presgraves' home, the commission failed to address the issue of whether claimant's level of intoxication prevented him from being in the course of his employment at the time of the accident.

Based upon the testimony of Vaughan and claimant and the evidence of claimant's .21 blood alcohol level at 7:30 p.m., approximately five to six hours after he began drinking and approximately two hours after the accident, we find as a matter of law that at the time of the accident, claimant's intoxication rendered him incapable of performing his job duties, assuming he had any duties remaining that day.

Claimant's job required that he operate a bush hog, a weed eater, and mowing equipment, and that he perform other strenuous activities. Claimant admitted that he was drunk when he left the Presgraves' home, acknowledging that he was then on the verge of unconsciousness. Claimant could not walk or stand on his own, and could not remember the argument at the Presgraves' home or any subsequent events until he regained consciousness in the hospital several days later.

The totality of the evidence proved that claimant's severe intoxication, resulting from the willing consumption of alcohol while not engaged in any work-related duty or function, effectively removed him from the scope of his employment hours before the accident. Accordingly, the injury he sustained as a result did not occur in the course of his employment, and therefore, is not compensable.

Because our ruling is dispositive of this appeal, we need not address the remaining issue raised by employer. For the reasons stated, we reverse the commission's decision.

Reversed.

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the 24th*
day of August, 1999.

Vaughan's Landscaping & Maintenance and
Virginia Farm Bureau Fire & Casualty
Insurance Company,

Appellants,

against Record No. 1667-98-4
 Claim No. 183-34-74

Timothy Jason Dodson,

Appellee.

Upon a Petition for Rehearing
Before Judge Bray, Senior Judges Duff and Overton

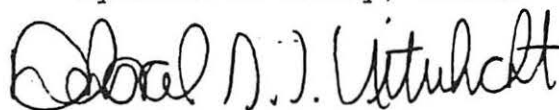
On consideration of the petition of the appellee to set
aside the judgment rendered herein on the 29th day of June, 1999 and
grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:


Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 20th
day of June, 2000.

Vaughan's Landscaping & Maintenance and
Virginia Farm Bureau Fire & Casualty
Insurance Company,

Appellants,

against Record No. 1667-98-4
 Claim No. 183-34-74

Timothy Jason Dodson,

Appellee.

Upon a Rehearing En Banc

Before Chief Judge Fitzpatrick, Judges Benton, Coleman, Elder,
Bray, Annunziata, Bumgardner and Senior Judge Overton

Kevin M. Rose (Wharton, Aldhizer & Weaver,
P.L.C., on brief), for appellants.

Jerry O. Talton for appellee.

On June 29, 1999, a panel of this Court reversed the
decision of the Workers' Compensation Commission awarding benefits to
Timothy Jason Dodson. See Vaughan's Landscaping & Maintenance v.
Dodson, 30 Va. App. 135, 515 S.E.2d 800 (1999). We stayed the
mandate of that decision and granted a rehearing en banc, which was
heard on March 30, 2000.

Upon rehearing en banc, the judgment of the commission is
affirmed without opinion by an evenly divided Court. Accordingly,
the opinion previously rendered by a panel of this Court on

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 24th
day of August, 1999.

Vaughan's Landscaping & Maintenance and
Virginia Farm Bureau Fire & Casualty
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against Record No. 1667-98-4
 Claim No. 183-34-74

Timothy Jason Dodson,

Appellee.

Upon a Petition for Rehearing
Before Judge Bray, Senior Judges Duff and Overton

On consideration of the petition of the appellee to set
aside the judgment rendered herein on the 29th day of June, 1999 and
grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:


Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 24th
day of August, 1999.

Vaughan's Landscaping & Maintenance and
Virginia Farm Bureau Fire & Casualty
Insurance Company,

Appellants,

against Record No. 1667-98-4
 Claim No. 183-34-74

Timothy Jason Dodson,

Appellee.

Upon a Rehearing En Banc

Before Chief Judge Fitzpatrick, Judges Benton, Coleman, Willis,
Elder, Bray, Annunziata, Bumgardner, Lemons and Frank

On July 16, 1999 came the appellee, by counsel, and filed a petition praying that the Court set aside the judgment rendered herein on June 29, 1999, and grant a rehearing en banc thereof.

On consideration whereof, the petition for rehearing en banc is granted, the mandate entered herein on June 29, 1999 is stayed pending the decision of the Court en banc, and the appeal is reinstated on the docket of this Court.

The parties shall file briefs in compliance with Rule 5A:35. The appellee shall attach as an addendum to the opening brief upon rehearing en banc a copy of the opinion previously rendered by

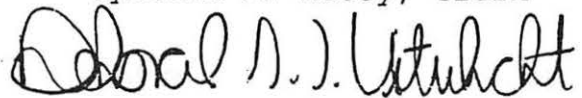
the Court in this matter. It is further ordered that the appellee shall file with the clerk of this Court ten additional copies of the appendix previously filed in this case.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:



Deputy Clerk

RECEIVED AUG 25 1999

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday the 20th
day of June, 2000.

Vaughan's Landscaping & Maintenance and
 Virginia Farm Bureau Fire & Casualty
 Insurance Company,

Appellants,

against Record No. 1667-98-4
 Claim No. 183-34-74

Timothy Jason Dodson,

Appellee.

Upon a Rehearing En Banc

Before Chief Judge Fitzpatrick, Judges Benton, Coleman, Elder,
 Bray, Annunziata, Bumgardner and Senior Judge Overton

Kevin M. Rose (Wharton, Aldhizer & Weaver,
 P.L.C., on brief), for appellants.

Jerry O. Talton for appellee.

On June 29, 1999, a panel of this Court reversed the
 decision of the Workers' Compensation Commission awarding benefits to
 Timothy Jason Dodson. See Vaughan's Landscaping & Maintenance v.
Dodson, 30 Va. App. 135, 515 S.E.2d 800 (1999). We stayed the
 mandate of that decision and granted a rehearing en banc, which was
 heard on March 30, 2000.

Upon rehearing en banc, the judgment of the commission is
 affirmed without opinion by an evenly divided Court. Accordingly,
 the opinion previously rendered by a panel of this Court on

June 29, 1999 is withdrawn, and the mandate entered on that date is vacated.

Chief Judge Fitzpatrick, Judges Benton, Elder and Annunziata voted to affirm the judgment of the commission.

Judges Coleman, Bray, Bumgardner and Overton voted to reverse the judgment of the commission.

This order shall be published and certified to the Virginia Workers' Compensation Commission.

A Copy,

Teste:


Clerk

**IN THE
COURT OF APPEALS OF VIRGINIA**

RECORD NO. 1667-98-4

VAUGHAN'S LANDSCAPING AND MAINTENANCE

AND

VIRGINIA FARM BUREAU FIRE AND CASUALTY

INSURANCE COMPANY

Appellants,

v.

TIMOTHY JASON DODSON

Appellee.

NOTICE OF APPEAL

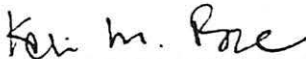
Appellants, Vaughan's Landscaping and Maintenance and Virginia Farm Bureau Fire and Casualty Insurance Company, pursuant to Rule 5:14(a) of the Rules of the Supreme Court of Virginia, hereby notes their appeal to the Supreme Court of Virginia from the Final Order of this Court entered on the 20th day of June, 2000 upon a rehearing *en banc*. The record on appeal from the Court of Appeal's decision shall consist of the record as filed in the office of the Clerk of the Court of Appeals, and, in addition, all other papers relating to this case which have been filed in the office of the Clerk of the Court of Appeals, including any opinion or memorandum decision in cases

decided by the Court of Appeals, all of which are to be transmitted by the Clerk of the Court of Appeals to the Clerk of the Supreme Court of Virginia, pursuant to Rule 5:15 of the Rules of the Supreme Court of Virginia.

Respectfully submitted,

VAUGHAN'S LANDSCAPING AND
MAINTENANCE
and
VIRGINIA FARM BUREAU FIRE AND
CASUALTY INSURANCE COMPANY

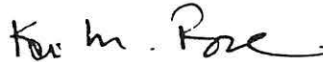
By Counsel



KEVIN M. ROSE (VSB # 35930)
Of Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
Post Office Box 20028
Harrisonburg, Virginia 22803-7528
(540) 434-0316
Counsel for Appellants

CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed first class certified mail, return receipt requested, this 7th day of July, 2000 to the Office of the Clerk of the Court of Appeals of Virginia, 109 North Eighth Street, 4th Floor, Richmond, Virginia 23219-2305 and by first class mail to Jerry O. Talton, Esquire, 118 East Main Street, Front Royal, Virginia 22630, counsel for Appellee.



Counsel for Appellants

48800/59/mga1817

ASSIGNMENTS OF ERROR

1. THE COURT OF APPEALS ERRED IN HOLDING THAT THE EMPLOYEE'S SEVERE INTOXICATION ACHIEVED DURING A THREE TO FOUR HOUR POST-WORK FROLIC DID NOT REMOVE HIM FROM THE COURSE OF HIS EMPLOYMENT AND THAT HE OTHERWISE SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

2. THE COURT OF APPEALS ERRED IN HOLDING THAT THE EMPLOYEE'S THREE TO FOUR HOUR POST-WORK FROLIC DID NOT REMOVE HIM FROM THE COURSE OF HIS EMPLOYMENT AND THAT HE OTHERWISE SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.