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Section 65.1-7 of the Virginia Workers' Compensation Act: Do Recent Virginia Supreme Court Decisions Leave the Claimant in No-Man's Land?

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SECTION 65.1-7 OF THE VIRGINIA WORKERS' COMPENSATION ACT: DO RECENT VIRGINIA SUPREME COURT DECISIONS LEAVE THE CLAIMANT IN NO-MAN'S LAND?

The Virginia Workers' Compensation Act[1] provides compensation for employees injured by accident[2] or as a result of occupational disease.[3] An employee who claims an "injury by accident" need not show negligence or fault on the employer's part,[4] but only that the injury was caused by an accident "arising out of and in the course of the employment."[5]

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1. VA. CODE ANN. §§ 65.1-1 to -163 (Repl. Vol. 1980 & Cum. Supp. 1985).

2. *Id.* § 65.1-7; *see infra* note 15.

3. VA. CODE ANN. §§ 65.1-46 to -53 (Repl. Vol. 1980 & Cum. Supp. 1985). Occupational disease statutes were originally codified separately from "injury by accident" statutes because diseases such as benzol poisoning and silicosis were not compensable injuries "by accident." S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 84 (1944). Section 65.1-46 outlines six requirements that must be satisfied before a disease is considered occupational in nature: (1) There is a direct causal connection between work conditions and the disease; (2) it followed naturally from the work as a result of exposure occasioned by the employment; (3) it can be fairly traced to the employment as a proximate cause; (4) it does not come from a hazard to which workmen would have been equally exposed outside of employment; (5) it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence though it need not have been foreseen or expected before its contraction. VA. CODE ANN. § 65.1-46 (Repl. Vol. 1980). Occupational disease is beyond the limited scope of this comment. For a current analysis of the occupational disease field, see Comment, *The Ordinary Disease Exclusion in Virginia's Workers' Compensation Act: Where Is It Going After* Ashland Oil Co. v. Bean?, 18 U. RICH. L. REV. 161 (1983).

4. *See generally* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.10 (1985). Work injuries are compensated on the basis of their relation to the job. Before such a no-fault system was in operation, the injured employee's only recourse was a common law suit. Employers characteristically invoked what Professor Prosser labelled " 'the unholy trinity' of common law defenses—contributory negligence, assumption of risk, and the fellow servant rule." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526-27 (4th ed. 1971). "The fellow-servant defense was particularly harmful to workers. In huge factories and work places it was usually the fellow worker, not the boss himself, who caused the accident. By staying out of the factory the employer usually could avoid liability for all injuries to his men." S. HOROVITZ, *supra* note 3, at 3.

5. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980). Claims for workers' compensation frequently turn on whether the "arising out of and in the course of employment" requirements are met. In Conner v. Bragg, 203 Va. 204, 123 S.E.2d 393 (1962), the court overruled the commission's award to the claimant. The employee failed to show that the accident had occurred at a place where he was reasonably expected to be. The accident therefore did not occur "in the course of employment." Because the employee had taken the employer's front-end loader for personal use, incurring a risk that was not incident to his employment, the accident was not "arising out of employment." *Id.* at 209, 123 S.E.2d at 397-98; *cf.* Graybeal v. Board of Supervisors, 216 Va. 77, 216 S.E.2d 52 (1975) (*Conner* interpretation of "arising out of and in the course of employment" is modified to apply to commonwealth's attorney

Injuries resulting from "collisions, explosions, slips, falls, and the like"[6] are clearly within the coverage of section 65.1-7 of the Virginia Code. However, gradually incurred, cumulative injuries,[7] sustained as the result of repeated trauma over a period of time, are not so easily classified as "injury by accident."

Since 1980, the Virginia Supreme Court has handed down a number of decisions applying section 65.1-7 to such cumulative injury claims.[8] This comment will analyze those recent decisions in light of Virginia's historical treatment of cumulative injuries to determine the present state of Virginia law. This comment also will predict what impact those decisions will have on future workers' compensation claims involving cumulative injuries. Finally, this comment will conclude that the Virginia Supreme Court's interpretation of section 65.1-7 does not effectuate the purposes of the Virginia Workers' Compensation Act and that therefore legislative guidance is needed.

I. Workers' Compensation: An Overview

In 1884, Bismarck's Germany became the first nation to adopt workers' compensation legislation.[9] After this breakthrough in Germany, pressure for change mounted in other industrial nations. England and the United States adopted workers' compensation statutes in 1897 and 1908, respectively.[10]

The Virginia Workers' Compensation Act was enacted in 1918.[11] Not

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who was injured by a bomb planted at his residence).

"Arising out of" generally refers to the origin or cause of the injury. "In the course of" refers to the time, place, and circumstances under which the accident occurred. *Id.* at 79, 216 S.E.2d at 53. The "arising out of and in the course of employment" requirement is beyond the scope of this comment, but for an analysis of that topic, see Evans, Ray & Steele, *Recovery for Accidental Injuries Under the Virginia Workmen's Compensation Act*, 14 U. Rich. L. Rev. 659, 678 (1980).

6. 1B A. Larson, *supra* note 4, § 37.20.

7. For the purposes of this comment, the terms "cumulative injury" and "gradually incurred injury" will be regarded synonymously. These terms are commonly used to refer to an injury sustained over a period of time due to constant repetition of work-required movements, the combined effect of which causes disability or need for medical treatment.

8. Kraft Dairy Group, Inc. v. Bernardini, 229 Va. 253, 329 S.E.2d 46 (1985); Lane Co. v. Saunders, 229 Va. 196, 326 S.E.2d 702 (1985); VEPCO v. Cogbill, 223 Va. 354, 288 S.E.2d 485 (1982); Badische Corp. v. Starks, 221 Va. 910, 275 S.E.2d 604 (1981).

9. W. Prosser, *supra* note 4, § 80.

10. *Id.* Because English and American courts were reluctant to modify common law rules, the change had to be accomplished by legislation. *Id.*

11. 1918 Va. Acts 400. Passed by the General Assembly on March 21, 1918, the Act became effective on January 1, 1919. This culminated five years of attempts to legislate such an act in Virginia. Joint Committee on Continuing Legal Education of the Virginia State Bar Association, Workmen's Compensation for the Employer's Attorney and Claimant's Attorney (1980) [hereinafter cited as Joint Committee]. The Virginia act as

long after its enactment, the Virginia Supreme Court held that workers' compensation was a compromise between the employer and employee which greatly favored the employee.[12] The court held that the goal of the workers' compensation statute was to afford the employee prompt, certain, and inexpensive relief at a time when it was most needed.[13] In order to achieve this beneficent purpose, Virginia courts were to "always endeavor to construe the compensation statute liberally."[14]

II. "Injury by Accident": Component Elements

Virginia's statutory requirement of "injury by accident" was taken from the original 1897 British Act.[15] As the phrase has most often been interpreted by commentators and judges over the years, "injury by accident" consists of two elements. The basic element in identifying an "injury by accident" has always been "unexpectedness."[16] Most jurisdictions

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originally passed was based upon Indiana's act. Indiana decisions continue to be useful as precedent. *See* Cohen v. Cohen's Dep't Store, Inc., 171 Va. 106, 110, 198 S.E. 476, 477 (1938); Hoffer Bros., Inc. v. Smith, 148 Va. 220, 226, 138 S.E. 474, 476 (1927).

By 1921, all but a few of the American states had enacted workers' compensation legislation, and Hawaii became the last state to follow suit in 1973. W. Prosser, *supra* note 4, § 80.

12. Humphrees v. Boxley Bros. Co., 146 Va. 91, 135 S.E. 890 (1926). This compromise automatically entitles the employee to certain benefits whenever he suffers a personal injury in exchange for the forfeiture of his common law right to sue the employer for damages for that injury. 1 A. Larson, *supra* note 4, § 1.10. *See generally supra* note 4 and accompanying text. "The damage resulting from an accident is treated as a part of the expense of the business and to be borne as such, as much as the expense of repairing a piece of machinery which has broken down." *Humphrees*, 146 Va. at 96, 135 S.E. at 891. The court in *Humphrees* further noted that "the blood of the workman was the cost of production, that the industry should bear the charge." *Id.*

13. *Humphrees*, 146 Va. at 95-96, 135 S.E. at 891.

14. Crews v. Moseley Bros., 148 Va. 125, 128, 138 S.E. 494, 495 (1927). The court in *Crews* cautioned, though, that "liability cannot rest upon imagination, speculation, or conjecture, but must be based upon facts established by the evidence." *Id.*

15. *See generally* 1B A. Larson, *supra* note 4, § 37.10. In addition to Virginia, 25 other states employ the same "injury by accident" language. All but nine of the American states presently have made judicial or legislative determinations that an injury must be accidental in character in order to be compensable. *Id.*

Section 65.1-7 of the Virginia Code provides that:

> Unless the context otherwise requires, "injury" and "personal injury" mean only injury by accident, or occupational disease as hereinafter defined, arising out of and in the course of the employment and do not include a disease in any form, except when it results naturally and unavoidably from either of the foregoing causes.

Va. Code Ann. § 65.1-7 (Repl. Vol. 1980).

16. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 Harv. L. Rev. 328, 338 (1912). *See generally* 1B A. Larson, *supra* note 4, § 37.20. Most commentators discussing the "injury by accident" language refer to the English case of Fenton v. Thorley & Co., 1903 A.C. 443. In *Fenton*, the leading case on "unexpectedness," the lower court held that no accident occurred where the employee was injured while acting deliberately and in the ordinary course of work. The House of Lords reversed, defining an accident as "an un-

also require "definiteness" as to when the injury occurred.[17]

These two elements suffer from vexing ambiguities which plague both the jurist and the practitioner. The language of section 65.1-7 does not make clear whether "unexpectedness" must be shown in the accident's *cause*, in its *effect*, or in both.[18] Likewise, section 65.1-7 does not clarify whether "definiteness" must be shown in the accident's *cause*, in its *effect*, or in both.[19] Developments in the Virginia Supreme Court's interpretation of "injury by accident" can best be identified and analyzed in light of how the court has resolved these ambiguities.

III. Historical Interpretation of "Injury by Accident" in Virginia

A. *Unexpectedness*

In *Big Jack Overall Co. v. Bray*,[20] the seminal Virginia case on "unexpectedness," the claimant sustained a back injury while engaged in ordinary lifting required by her job.[21] The court held that an injury may satisfy the "unexpectedness" element of "injury by accident" even though

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looked for mishap or an untoward event which is not expected or designed." *Fenton*, 1903 A.C. at 448.

17. 1B A. Larson, *supra* note 4, § 37.20. "Definiteness" requires that an injury be "traceable, within reasonable [certainty], to a definite time, place, and occasion." *Id.* It should be noted, however, that the element of "definiteness" is a creature of judicial construction. In a statute such as Virginia's with the language, "personal injury by accident arising out of and in the course of employment," the phrase "by accident" clearly is a modifier meaning the same as "accidental." However, courts construe the phrase to mean "by *an* accident" and look for a single incident or event. *Id.* (emphasis in original); *see also infra* note 56. It is this "definiteness" element which usually is found to be absent in gradually incurred, cumulative injuries. Courts vary from jurisdiction to jurisdiction as to the degree of "definiteness" required. *See generally infra* notes 29-39 and accompanying text.

18. 1B A. Larson, *supra* note 4, § 37.20 (emphasis added). A typical case in which the "unexpectedness" question arises involves an employee engaged in his usual work pattern when he suffers a heart attack. The *result*, i.e., the heart attack, was certainly unexpected. However, with regard to the *cause* of the heart attack, a question exists as to whether the employee's usual work pattern caused or was merely coincidental with the injury. Such causal questions are commonly answered by medical evidence. *See generally infra* note 28 and accompanying text.

19. 1B A. Larson, *supra* note 4, § 37.20. In a typical "definiteness" case, a millworker cut his finger while on the job. Infection developed, the employee was confined to bed, and he died of pneumonia a month later. The cut which caused the injury satisfied the "definiteness" element, but the resultant bout with pneumonia did not. A causal question existed, and the court looked to medical evidence for the answer. Since medical testimony was unanimous in linking the pneumonia to the work-related injury, the court affirmed the award. Bristol Builders' Supply Co. v. McReynolds, 157 Va. 468, 162 S.E. 8 (1932).

20. 161 Va. 446, 171 S.E. 686 (1933).

21. *Id.* at 448, 171 S.E. at 686. Ella Bray, a healthy woman, had been lifting a 40 to 50 pound bundle of clothes in the usual course of her employment when she felt a sudden snap or tear in her back. The court affirmed the Industrial Commission's award. *Id.* at 459, 171 S.E. at 690.

the cause (the employee's activity precipitating the injury) was intentional and usual.[22] A contrary holding would be inequitable, awarding compensation to an employee who "injures himself by doing some stupid thing" which constitutes an accident, while denying recovery to a man who throws all his might, strength and energy into his work "because he exerted himself deliberately."[23]

Although the court's holding was clear, employers continued to contest claims made by workers injured during their usual job activities. In the 1968 case of *Reserve Life Insurance Co. v. Hosey*,[24] the court affirmed an award to a door-to-door survey taker who was injured while merely walking up steps.[25] The fact that the employee was engaged in her usual, nonstrenuous work activity and sustained an injury that no one else would have sustained was of no consequence:

> An accident may be said to arise . . . if the exertion producing the accident is too great for the [person] undertaking the work; even though the degree of exertion is usual and ordinary and "the workmen had some predisposing physical weakness . . . ." The question is not whether it would affect the ordinary man, but whether it affected the [claimant].[26]

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22. *Id.* at 454, 171 S.E. at 688. Even though the claimant hurt herself while doing what she intended to do, her "miscalculation of forces, or inadvertence about them [involved] the element of mischance, mishap, or misadventure." *Id.* at 454, 171 S.E. at 688 (quoting *Fenton*, 1903 A.C. at 452).

23. *Fenton*, 1903 A.C. at 447. Where an employee is injured while performing usual work duties, no extraordinary event has to occur in order to constitute an accident. *See* Derby v. Swift & Co., 188 Va. 336, 49 S.E.2d 417 (1948). Derby felt something pull loose in his side while performing his usual work. Within two months he was operated on for a hernia, but did not survive the convalescence. The employer argued that the hernia was not produced by an accident, but was the result of normal abdominal muscle tension arising in the performance of Derby's duties. *Id.* at 337, 49 S.E.2d at 418. The court disagreed, stating that "unexpectedness" does not require a fall, slip or other fortuitous circumstance.

> If this were true, an employee who is injured and who slipped or fell would be allowed compensation while one who did not slip or fall would not be allowed compensation through [sic] he may have broken an arm or a leg while performing his work in the usual way. This result would be illogical and against the purpose and spirit of the Workmen's Compensation Law.

Id. at 344, 49 S.E.2d at 421; *cf.* VEPCO v. Quann, 197 Va. 9, 87 S.E.2d 624 (1955). For purposes of the "unexpectedness" element of "injury by accident," *Quann* affirms the majority rule that injury sustained during usual, intentional, and non-accidental work activity may be compensable. However, *Quann's* major impact has been on the "definiteness" element. *See generally infra* notes 34-36 and accompanying text.

24. 208 Va. 568, 159 S.E.2d 633 (1968).

25. *Id.* at 572, 159 S.E.2d at 636. Mrs. Hosey testified that the rock steps were somewhat higher than usual steps. She suffered a cartilage tear. She had no pre-existing conditions which precipitated the injury. All medical evidence attested to the causal relationship between the injury and ascending the steps in the course of employment. *Id.*

26. *Derby*, 188 Va. at 343, 49 S.E.2d at 420 (quoting Guay v. Brown Co.,,83 N.H. 392, 395, 142 A. 697, 699 (1928)).

Hosey is significant because the Virginia Supreme Court reiterated its position that the "unexpectedness" element may be satisfied where the *cause* is usual and routine, but the *result* is unexpected.[27] This interpretation of "unexpectedness" generally persists to this day.[28] Because most workers' compensation claims clearly meet this "unexpectedness" element, "unexpectedness" is not often a contested issue. Rather, the defect in most unsuccessful claims—and particularly in cumulative injury claims—is a failure to satisfy the second element, "definiteness."

B. *Definiteness*

In addition to "unexpectedness," an employee filing a claim under sec-

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27. *See Hosey*, 208 Va. at 571, 159 S.E.2d at 635; *accord* Indian Creek Coal & Mining Co. v. Calvert, 68 Ind. App. 474, ___, 119 N.E. 519, 524 (1918) ("It is no longer required that the causes external to the plaintiff . . . be unusual; it is enough that the causes, themselves known and usual, should produce a result which . . . is [not] expected . . . .") (quoting Bohlen, *supra* note 16, at 340). This Indiana holding conforms well to the holding of *Hosey* on the "unexpectedness" element. For the precedential value which Indiana decisions have in Virginia, see *supra* note 11.

28. It should be noted that exceptions do exist to the *Hosey* rule. *See* D.W. Mallory & Co. v. Phillips, 219 Va. 845, 252 S.E.2d 319 (1979). Phillips suffered a heart attack while performing his usual duties. The supreme court held that, in order for an employee with hardened arteries, such as Phillips, to recover compensation, he had to show that there had been "sudden exertional stress not related to [the] usual work pattern." *Id.* at 849, 252 S.E.2d at 322.

The court's rationale for its ruling was that a causal question existed as to whether the heart attack was merely a natural coincidence of hardened arteries or actually a result of Phillips' work activity. A medical examiner testified at trial that a positive causal correlation between employment and the heart attack of an employee in Phillips' condition could only be drawn upon a showing of such "sudden exertional stress." *Id.*

A very difficult question of causation is presented where a claimant's pre-existing condition is such that it might have caused a heart attack even if the claimant had not been actively engaged in work activity at the time. In such a case, the separate "injury by accident" and "arising out of employment" requirements of a workers' compensation claim become almost indistinguishable. *See* Bailey v. Stonega Coke & Coal Co., 185 Va. 653, 40 S.E.2d 254 (1946). Where a coal miner collapsed of a heart attack in the mine, the court denied compensation because the "antecedent condition [of the decedent's heart] had long existed and might have at any moment and under normal conditions reached a crisis with fatal results." *Id.* at 661, 40 S.E.2d at 258.

However, the widely accepted general rule regarding an employee with a pre-existing disease is that the employer takes the employee as he finds him. *See* Dixon v. Norfolk Shipbuilding & Dry Dock Corp., 182 Va. 185, 28 S.E.2d 617 (1944) (where obese employee with bad heart condition and asthma suffered a hernia during work, court awarded compensation); Liberty Mut. Ins. Co. v. Money, 174 Va. 50, 4 S.E.2d 739 (1939) (Where employee died from work-related injury, his recovery was not defeated by either his general toxemia or the fact that the accident itself would not have caused the injury in a person without toxemia.). The injured employee has the burden of showing a causal connection between his employment activities and his injury. This connection is established by proving that a work-related circumstance (usual or unusual) materially aggravated or accelerated the pre-existing disease and became the direct and immediate cause of injury. *Money*, 174 Va. at 57, 4 S.E.2d at 741.

tion 65.1-7 must show "definiteness" as to when the injury occurred. This element has long presented great difficulty to claimants in Virginia.[29] The standard required in order to meet the "definiteness" element was originally defined in *Aistrop v. Blue Diamond Coal Co.*[30] The *Aistrop* court held:

> "[T]he injury, to be regarded as 'by accident,' must be received . . . at a particular time and in a particular place and by a particular accident. And the accident must be something the date of which can be fixed. It is not enough that the injury shall make its appearance suddenly at a particular time and upon a particular occasion." In other words, the "incident," the act done or condition encountered, "must be shown to have occurred at some *reasonably definite time.*"[31]

There are two major practical reasons for a "definiteness" requirement in "injury by accident" claims. When a definite time and place of injury are identified, the employer has a greater chance to investigate and verify claims, protecting himself against fraud.[32] Also, to allow compensation for gradually incurred injuries would impose upon employers of older workers the duty of compensating those workers as their bodies begin to manifest the wear and tear of decades of work.[33]

The Virginia Supreme Court refined the "definiteness" standard in *VEPCO v. Quann.*[34] In *Quann*, as the claimant was helping to lift a coil of wire from the ground, the weight of the coil shifted and the claimant felt a definite pop or snap in his back. The court held that an employee who was engaged in usual work activity satisfied the "definiteness" element

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29. *See, e.g.*, Hurd v. Hesse & Hurt, 161 Va. 800, 172 S.E. 289 (1934) (where the employee bruised his thumb by applying constant pressure over a period of several hours, court denied compensation).

30. 181 Va. 287, 24 S.E.2d 546 (1943), *aff'd*, 183 Va. 23, 31 S.E.2d 297 (1944). Decedent coal miner died of asphyxiation in a mine, and his administratrix sued to recover workers' compensation. The court denied the award. However, the court referred with approval to a past Industrial Commission award where the decedent had died of a *particular occurrence* of poisonous fume inhalation. *See* Embrey v. Southern Chem. Corp., 13 O.I.C. 87 (1931), *cited with approval in Aistrop*, 181 Va. at 295, 24 S.E.2d at 549. There was no award in the *Aistrop* case because the claimant had made no allegation as to the duration of the continued exposure and hence failed to satisfy the "definiteness" element. *Aistrop*, 181 Va. at 295, 24 S.E.2d at 549.

31. *Aistrop*, 181 Va. at 292-93, 24 S.E.2d at 548 (quoting Bohlen, *supra* note 16, at 342-43) (emphasis added). The *Aistrop* court further held that:

> [I]njury of gradual growth, . . . not the result of some particular piece of work done or condition encountered on a definite occasion, but caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm, is definitely excluded from compensation.

Id.

32. *Id.* at 293, 24 S.E.2d at 548; *see also infra* note 110 and accompanying text.

33. *Aistrop*, 181 Va. at 293, 24 S.E.2d at 548.

34. 197 Va. 9, 87 S.E.2d 624 (1955).

only when he had experienced actual "breaking, herniating, or letting go with an obvious sudden mechanical or structural change in the body, whether external or internal."[35] The award to Quann was affirmed.[36]

The court synthesized the *Aistrop* and *Quann* "definiteness" standards in *Tomko v. Michael's Plastering Co.*[37] Where a carpenter claimed that he was injured during a specific week of unusually strenuous lifting, the court held that the *cause* of the injury had to be shown to have occurred at a "reasonably definite time" (the *Aistrop* standard), while the *result* had to be an "obvious sudden mechanical or structural change" (the

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35. *Id.* at 12, 87 S.E.2d at 626.

36. Immediately following the incident, Quann complained to his fellow workers about his hurt back. The court affirmed the commission's award because of medical evidence and the testimony of Quann's fellow employees that Quann had suffered an "obvious sudden mechanical or structural change" in his body. *Id.*

Quann's hernia and ruptured disc were no less compensable because their occurrence was not visible.

> Men, like machines, may suddenly break down. Logically there should be no difference whether the breakdown occurs internally or externally. If strain causes a broken wrist, nobody questions the accidental nature of the injury. If instead of the wrist it is an artery that breaks, the occurrence is just as clearly an accident.

Id. at 13, 87 S.E.2d at 627 (quoting Derby v. Swift & Co., 188 Va. 336, 343, 49 S.E.2d 417, 420 (1948)).

This line of reasoning served as a point of departure for the court in awarding compensation for traumatic neurosis resulting from a sudden shock on the job. *See* Burlington Mills v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941). The commission awarded compensation to employee Inez Hagood, who was in close proximity to an explosion at work. She fainted at the time and continued to suffer from fainting spells. Her disability, diagnosed as traumatic neurosis, caused her to leave her employment. The court affirmed claimant's award, noting that traumatic neurosis is a medically recognized ailment which is known to laymen as "shell shock." Mrs. Hagood's incapacity was "as effectual as if it had been caused by a visible lesion." *Id.* at 211, 13 S.E.2d at 294.

The majority of jurisdictions award compensation to an employee who, in the course of employment, receives a sudden shock or fright, involving no physical impact, which results in disability. *Id.* at 209-10, 13 S.E.2d at 295; *see also* 1B A. LARSON, *supra* note 4, § 38.65(a); Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions and a Perspective*, 36 VAND. L. REV. 263 (1983).

Although the "by accident" requirement of § 65.1-7 would appear to exclude pneumonia or other exposure injuries, the court does indeed classify such injuries as accidental. *See generally* Robinette v. Kayo Oil Co., 210 Va. 376, 171 S.E.2d 172 (1969). In dicta, the *Robinette* court attributed the compensability of exposure injuries to their suddenness of approach and catastrophic nature. *See id.* at 378-81, 171 S.E.2d at 174-76. Accordingly, pneumonia resulting from exposure *in the ordinary course of the employee's work* is not "by accident." *Id.* at 381, 171 S.E.2d at 176. Some jurisdictions require the injury to be from unusual exposure under emergency conditions. *Id.* at 380, 171 S.E.2d at 175.

37. 210 Va. 697, 173 S.E.2d 833 (1970). Tomko had been engaged in carpentry work for many years. For a week, he had been installing 150-pound pieces of sheetrock when he began to feel soreness in his back. He continued working until the job was finished a few days later. The next day, an orthopedic surgeon diagnosed the herniated disc. After that, Tomko could only work part time and was required to wear a brace.

Quann standard).[38] Although Tomko suffered the same injury as Quann (a herniated disc), the court found that the *Quann* facts relating to "definiteness" were distinguishable. The *Quann* claimant had shown that, while working, he "felt something pop or make a definite snap in [his] back," while Tomko could not relate his condition to any specific work event or time. Because Tomko did not satisfy the "definiteness" element, the court denied his "injury by accident" claim.[39]

IV. Recent Interpretations of "Injury by Accident" in Virginia

A. *Badische Corp. v. Starks*[40]

In the 1981 case of *Badische Corp. v. Starks*, Starks sought compensation for a herniated disc. Starks's duties required her to lift, push and pull heavy cans all day. She told the Industrial Commission that she had been injured "sometime during the morning" of May 24, 1977, and that the pain intensified on May 25. She conceded that nothing unusual had occurred at her job on either day.[41]

The Virginia Supreme Court reversed the Industrial Commission's award to Starks.[42] The court found that the claimant had failed to satisfy the "definiteness" element of "injury by accident" because she could not show that the result of the injury was an "obvious sudden mechanical or structural change,"[43] as required by *Quann*. With regard to the cause of the injury, the court denied the claim because Starks "could not attribute

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38. *Id.* at 699, 173 S.E.2d at 835. For the purposes of this comment, the "cause" of an injury is comprised of those circumstances which precipitated the injury. The "result" is comprised of the physical manifestation and effect of that injury. For example, consider a construction worker who tripped and broke a leg on the job site. The "cause" of the injury was the act of tripping. The "result" was a broken leg.

The *Aistrop* and *Quann* standards of "definiteness" are often-quoted, well-settled rules used in cases involving § 65.1-7 "injury by accident" claims. For the purposes of this comment, the *Aistrop* and *Quann* language will be treated as phrases of general usage.

39. *Id.* at 700, 173 S.E.2d at 835. The court held that claimant's evidence failed to show "injury by accident." Because no definite time of injury could be shown, no causal connection had been established between his work-induced exertion and his physical change. The court concluded, therefore, that the herniated disc was of gradual growth and not compensable. *Id.* at 700, 173 S.E.2d at 835-36.

40. 221 Va. 910, 275 S.E.2d 605 (1981).

41. *Id.* at 911-12, 275 S.E.2d at 606. Starks told the company nurse that she believed her back problems came from constantly working on her feet on concrete floors. However, Starks also told the nurse that she did not have an "injury" to report. *Id.*

42. *Id.* at 914, 275 S.E.2d at 607-08. Typically, a workers' compensation claim will be heard first by a commissioner or deputy commissioner at a hearing. Appeals from hearings are heard by the full commission at a review. Appeals of review decisions are heard by the Supreme Court of Virginia. *See, e.g., id.* at 911, 275 S.E.2d at 605-06.

43. *Id.* at 913, 275 S.E.2d at 607 (quoting *Quann*, 197 Va. at 12, 87 S.E.2d at 626).

[her injury] to any identifiable movement, incident, or event on either day."[44]

The *Badische* ruling has been criticized as an assault by the supreme court and Industrial Commission on the seventy-year-old "established principle that workers who are injured on the job cannot simply be discarded with no compensation for their loss."[45] Critics contend that *Badische* derogates from the well-settled rule that a slip or fall is not necessary in order for an injury to be compensable[46] and from the *Hosey* rule[47] that even accidents suffered in the usual course of work are compensable.

Before *Badische*, the claimant had to pinpoint the cause of an "injury by accident" to a "reasonably definite time" in order to satisfy the "definiteness" element. Critics maintain that the claimant in *Badische* did identify a two-day period during which her injury was caused and that this showing should have met the "reasonably definite" standard.[48] However, *Badische* indicates that a new standard is being imposed.

The *Badische* opinion contains language requiring the cause of an "injury by accident" to be "an identified incident,"[49] "movement made or action taken at a particular time at work,"[50] and "an identifiable movement, incident, or event."[51] Although the significance of this language cannot be known until the court applies it in subsequent cases, *Badische* appears to impose a new standard for "definiteness" of cause which is stricter than the previous *Aistrop* "reasonably definite" standard.

Critics further attack the *Badische* court's strict requirement of "definiteness" both in the injury's cause *and* in its result.[52] The critics admit

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44. *Id.* at 914, 275 S.E.2d at 607.

45. REPORT OF THE JOINT SUBCOMM. STUDYING THE FEASIBILITY OF COMPENSATING GRADUALLY-INCURRED, WORK-RELATED INJURIES UNDER THE VIRGINIA WORKMEN'S COMPENSATION ACT, H. Doc. No. 20, Virginia Gen. Assembly app. 1 (1983) [hereinafter cited as REPORT]. Julian F. Carper, then President of the Virginia State AFL-CIO, laments that the Workers' Compensation Act will no longer be construed broadly for the benefit of disabled workers. *Id.* at 2.

46. *See* Derby v. Swift & Co., 188 Va. 336, 344, 49 S.E.2d 417, 421 (1948); *see also supra* note 23 and accompanying text.

47. 208 Va. 568, 159 S.E.2d 633 (1968); *see supra* notes 24-27 and accompanying text.

48. REPORT, *supra* note 45, at app. 2.

49. *Badische*, 221 Va. at 912, 275 S.E.2d at 606. "*Hosey* is consistent with the established principle that an injury by accident arises from *an identified incident* . . . ." *Id.* (emphasis added).

50. *Id.* at 913, 275 S.E.2d at 607. The court made reference to the *Bray*, *Derby*, *Quann*, and *Hosey* cases as being compensable because "the employee in each case identified the injury with a *movement made* or action taken at a particular time at work." *Id.* (emphasis added).

51. *Id.* at 914, 275 S.E.2d at 607. Starks was denied compensation because "she could not attribute [her injury] to any *identifiable movement, incident, or event.*" *Id.* (emphasis added).

52. REPORT, *supra* note 45, at app. 5.

that requiring a certain degree of "definiteness" in both cause and result is essential in establishing causation and in preventing workers' compensation from becoming a general health insurance policy for employees who make claims for gradual injuries which are not linked to employment.[53] However, these critics go on to argue that where an employee's injury is clearly a result of job activity,[54] but the employee cannot show "definiteness" as to both cause *and* result, liberal construction[55] of section 65.1-7 requires an award.[56] Some jurisdictions which liberally construe "injury by accident" statutes regard each tiny bump, scratch, jar or strain to be a definite occurrence.[57] Other jurisdictions view the mere occurrence of pain as meeting the "definiteness" element.[58] Virginia, however, in requiring such a high degree of "definiteness" as to both cause *and* result, has adopted a minority view.[59]

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53. *Id.*

54. In an opinion written one year after *Badische*, the supreme court acknowledged that "Starks' normal [work] activities caused her injuries." VEPCO v. Cogbill, 223 Va. 354, 357, 288 S.E.2d 485, 486 (1982) (analyzing *Badische*, 221 Va. 910, 275 S.E.2d 605).

55. The Virginia Workers' Compensation Act is to be construed liberally in order to accomplish its beneficent purpose. Crews v. Moseley Bros., 148 Va. 125, 128, 138 S.E. 494, 495 (1927); *see supra* note 14 and accompanying text.

56. Professor Larson notes with disfavor that courts sometimes require too high a degree of "definiteness."

> It has generally been assumed that the accident concept includes an element of reasonable definiteness in time, as distinguished from gradual disintegration or deterioration. In statutes whose coverage formula speaks of "an accident," the reason for this requirement is understandable; but in those which speak of . . . "injury by accident," the necessity for definite time rests on more questionable grounds.

1B A. LARSON, *supra* note 4, § 39.10; *see also supra* note 17. Such denial of the "definiteness" requirement altogether is one rationale employed by courts in awarding compensation to a claimant whose injury has neither a definite cause nor result. 1B A. LARSON, *supra* note 4, § 39.40; *see* Victory Sparkler & Specialty Co. v. Franks, 147 Md. 368, 128 A. 635 (1925) (under phrase "accidental injury" there need not be "an accident" where the employee is injured while working in a fireworks plant).

57. *See* Scanlan v. Bernard Lumber Co., 365 So. 2d 39 (La. Ct. App. 1978) (where supervisor in lumber mill was engaged in unusually strenuous lifting and several days later experienced back pain, court ignored the lack of a sudden, definite cause and held that claimant was subjected to a series of minor painful encounters cumulatively producing injury).

58. *See* Armstrong v. Munchies Caterers, Inc., 377 So. 2d 748 (Fla. Dist. Ct. App. 1979) (where over five months of work claimant had increasingly severe shoulder pain caused by a slow separation of the fibers, the court awarded compensation since it was within the realm of medical probability that claimant had sustained the injury on a definite date during her last month of employment).

59. 1B A. LARSON, *supra* note 4, § 39.10.

> It is safe to say . . . that . . . most jurisdictions have at some time awarded compensation for conditions that have developed, not instantaneously, but gradually over periods ranging from a few hours to several decades, culminating in disability from . . . back injury . . . . [T]he majority of jurisdictions appear to be satisfied on the time-definiteness issue if either the precipitating incident or the manifestation of the disability itself was of a sudden or reasonably brief character.

Id.

Those who defend the *Badische* ruling insist that it is perfectly consistent with past Virginia Supreme Court rulings. Defenders contend that, since *Aistrop*, the court has found cumulative injuries to be noncompensable for lack of "definiteness" as to the injury's cause.[60] Similarly, the "obvious sudden . . . change" standard of *Quann* has long required an employee engaged in usual work activity to show a high degree of "definiteness" as to the injury's result. When the Virginia Supreme Court decided *Badische* in 1981, it interpreted section 65.1-7 just as it had in *Tomko*[61] more than a decade earlier.[62] Defenders of *Badische* assert that *Badische* and *Aistrop* and all cases in between have "utiliz[ed] the identical legal standards pursuant to which the Act has been interpreted for over forty years."[63]

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60. *See supra* note 31; Aistrop v. Blue Diamond Coal Co., 181 Va. 287, 287, 24 S.E.2d 546, 546 (1943).

61. Tomko v. Michael's Plastering Co., 210 Va. 697, 699, 173 S.E.2d 833, 835; *see supra* notes 37-39 and accompanying text.

62. REPORT, *supra* note 45, at app. 6. In both *Tomko* and *Badische*, the court denied compensation for cumulative diseases to claimants who had pre-existing ailments. Both Tomko's and Starks's jobs involved pushing, pulling and lifting on a regular basis. Neither claimant testified as to an unusual occurrence on the job. *Id.*

In defense of *Badische*, Chief Deputy Commissioner Hiner of the Industrial Commission of Virginia notes that the claimants in both *Badische* and *Tomko* testified that nothing unusual had happened at work on the day of their injuries. Had either claimant been able to point to a general activity in which they were involved as the precipitating cause, the court would have awarded compensation. Historically, claimants have recovered compensation for injuries resulting from such minor activities as bending over to tie a shoe or squatting down where some general work activity was identified as the cause. *See, e.g.*, Hall's Bakery v. Kendrick, 176 Va. 346, 11 S.E.2d 582 (1940) (compensation awarded to office worker who squatted in an unusual position to look for an item in a closet). However, because claimants Starks and Tomko offered no such evidence, the court did not find that there had been an accident on the job. Commissioner Hiner contends that the supreme court merely requires "a specific event ascertainable as to time and place" in order to satisfy the *Aistrop* "reasonable definiteness" of cause standard. Interview with Lucian W. Hiner, Chief Deputy Commissioner of the Industrial Commission of Virginia, in Richmond, Virginia (October 3, 1985) [hereinafter cited as Hiner].

63. REPORT, *supra* note 45, at app. 6. Defenders assert that, even if *Badische* were the first case in which a high degree of "definiteness" as to cause was required *by the supreme court*, such "definiteness" had long before been required by the Industrial Commission. In Hensley v. Morton Frozen Foods Div., 46 O.I.C. 107 (1964), the commission held that a truck driver who developed a lumbar back strain over a period of several months of driving was not entitled to compensation. *Id.* at 109. The commission held that a back strain was compensable only if it was "the result of a *specific act of the employment*." *Id.* (emphasis added).

The Industrial Commission's language in *Hensley* is ambiguous. Had the commission referred to "a specific act of the *employee*," a future claimant would clearly need to identify his definite movement which caused the injury. But a "specific act of *the employment*" can be construed merely to require the claimant to identify a specific duty or aspect of his job description during the performance of which he was injured. For example, if the latter, more liberal interpretation were adopted, the following hypothetical claim would be compensable: "Every Wednesday my job requires me to unload a truck shipment of boxes, and while I was doing that last week I strained my back."

Cumulative injuries by definition are incurred over a period of time. The resultant injury often manifests itself in gradually increasing pain, as was the case in *Badische* and *Tomko*, as opposed to the "definite pop" which the claimant experienced in *Quann*. Ever since *Quann* first required "obvious sudden . . . change," employees suffering from cumulative injuries have practically been precluded from showing "definiteness" as to result.[64] Now though, with *Badische's* apparent heightened "definiteness" of *cause* standard, the cumulative injury victim often is *completely* precluded from relief. The injured employee who formerly could satisfy the "definiteness" of cause element by identifying a particular chore, job, or piece of work[65] is now required by *Badische* to identify an actual, specific movement.[66]

B. *VEPCO v. Cogbill*[67]

VEPCO v. Cogbill was the Virginia Supreme Court's first post-*Badische* cumulative injury decision. Employee Cogbill alleged injury as a result of being required to sit in an uncomfortable and unfamiliar chair for an entire morning. Her back pain worsened that evening, and the next day an orthopedic doctor diagnosed lumbar strain resulting from prolonged sitting.[68]

The full commission ruled that the claimant had suffered a compensable "injury by accident" under section 65.1-7.[69] The supreme court re-

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While previous cases (such as *Hensley*) *may* have presaged the trend toward a stricter "definiteness" of cause requirement, *Badische* was the first time the Virginia Supreme Court embraced that trend. Accordingly, this comment focuses on *Badische* and the line of supreme court cases which follows *Badische*.

64. *See, e.g., Tomko*, 210 Va. at 699, 173 S.E.2d at 835. "The evidence submitted by Tomko . . . did not show that there was an 'obvious sudden mechanical or structural change . . . .'" *Id.*

65. *See* Harpine v. Mason & Dixon Lines, 44 O.I.C. 109, 115 (1962) (Where employee strained his back while shoveling snow on the job, the commission awarded compensation because "to point to a particular shovelful . . . is not necessary [when] [t]he evidence establishes that the injury was received at a particular time in a particular place by a particular piece of work done."); Lynchburg Foundry Co. v. Irvin, 178 Va. 265, 271-72, 16 S.E.2d 646, 649 (1941) (Where a workboot worn by employee caused an injury and eventual loss of the foot, the court awarded compensation because the injury's cause was generally "traceable to his employment as a result of an exposure occasioned by the nature of that employment . . . [which] was a hazard or risk to which he was not equally exposed apart from his employment.").

66. *See supra* notes 49-51 and accompanying text.

67. 223 Va. 354, 288 S.E.2d 485 (1982).

68. *Id.* at 356, 288 S.E.2d at 486. Claimant had many previous back-related absences from work prior to her alleged day of injury. Nevertheless, the doctor was able to identify the cause of her injury.

69. *Id.* As it had done in *Badische*, the Industrial Commission relied on the definition of "accident" found in *Hosey*. *Id.* In *Hosey*, the court stated that: "the definition of accident generally assented to is . . . an event which, under the circumstances, is unusual and not

versed the commission, as it had done in *Badische*, holding that the claimant had not met the *Quann* standard of "obvious sudden . . . change" as to "definiteness" of result. Significantly, in the discussion of "definiteness" of cause, the court omitted any reference to the *Aistrop* "reasonably definite" standard. Instead, the court cited the new standard enunciated in *Badische*, which required the claimant to prove that the injury arose "from an *identified incident* that arose at some reasonably definite time."[70] The *Cogbill* case is significant, not because of its outcome,[71] but because the opinion sheds light on the changes wrought by *Badische* with regard to the supreme court's interpretation of section 65.1-7.

The court in *Badische* paid lip service to the *Aistrop* "definiteness" of cause standard,[72] while at the same time formulating a new, stricter standard. In *Cogbill*, the court dispensed with the formality of looking to *Aistrop*. The court instead relied on *Badische*[73] and established the "identified incident" standard[74] as the rule of law for future "injury by accident" cases.

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expected by the person to whom it happens." *Hosey*, 208 Va. at 570-71, 159 S.E.2d at 635 (quoting Newsoms v. Commercial Casualty Ins. Co., 147 Va. 471, 474, 137 S.E. 456, 456-57 (1927)).

The supreme court rejected application of this definition in both *Badische* and *Cogbill*, noting that *Hosey* was factually distinguishable. In *Hosey*, the claimant's injury resulted from unusual exertion in climbing exceptionally steep steps. Her injury was sudden and severe. Sarah Cogbill, however, was engaged in normal activities, and her injury developed slowly, not suddenly. Cogbill asserted that her injury was due to prolonged sitting in a bent-over posture. However, Cogbill could not point to anything unusual which had happened during the alleged day of injury, and the court held that an injury stemming from mere sitting was not an accidental injury. Both "definiteness" of cause and result were missing. *Cogbill*, 223 Va. at 356-57, 288 S.E.2d at 486.

Commissioner Hiner stated that "if it appeared . . . clear that the injury was a result of work activity that occurred over a reasonably definite but short period of time, we would construe that as an accident." Hiner, *supra* note 62. Claimant Cogbill pointed to a short three-and-one-half-hour period of time, but she failed to show that the work activity of sitting caused the injury.

70. *Cogbill*, 223 Va. at 356, 288 S.E.2d at 486 (quoting *Badische*, 221 Va. at 912, 275 S.E.2d at 606) (emphasis added); *see supra* notes 49-51 and accompanying text.

71. Indeed, a decade earlier, the Industrial Commission disposed of an identical claim in the same manner. *See* Blevins v. Newport News Shipbuilding & Dry Dock Co., 54 O.I.C. 13 (1972). In *Blevins*, an employee claimed injury as a result of sitting in a new and different office chair. The commission denied compensation because there was no particular circumstance or work activity that was an "accident" and which constituted the proximate cause of the condition. *Id.* at 14.

72. *See Badische*, 221 Va. at 912, 275 S.E.2d at 606-07. "[A]n injury by accident arises . . . at some reasonably definite time." *Id.*

73. *Cogbill*, 223 Va. at 356, 288 S.E.2d at 486; *see supra* note 70 and accompanying text.

74. *Id.*

C. *Lane Co. v. Saunders*[75]

With each succeeding cumulative injury case, the trend begun by *Badische* becomes clearer. The facts of *Lane* are similar to those in *Badische* and *Cogbill.* Employee Saunders was assigned for one day to help two co-employees at their jobs. Saunders alleged that he suffered an injury while working on that unusual assignment. Saunders was unable to point to any unusual incident which occurred on that day and could only offer that he experienced back pain at an undetermined time during the morning.

The commission, in approving an award, drew a distinction between injuries suffered during usual work circumstances[76] and unusual work circumstances, holding that "in the latter class, the unusual nature of the work, the contemporaneous onset of pain, and medical opinion as to causal relationship would be sufficient."[77]

In reversing the commission, the supreme court voiced the fear that such a rule would open the floodgates, allowing workers injured during unusually strenuous activity to recover compensation without having to prove a particular incident or event.[78] Thus, in *Lane*, the court held that although the claimant had pointed to a relatively short period of time (one day) and an unusual work activity, the standard as to "definiteness" of cause had not been met. The court held the claimant had to identify an *"accident, identifiable incident, or sudden precipitating event."*[79] Whereas the standard required to prove "definiteness" of cause previously had been a general work activity or event which could vary in "definiteness" from two and one-half hours[80] to some time during the course of a morning,[81] the *Lane* court established the requirement that the cause

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75. 229 Va. 196, 326 S.E.2d 702 (1985).

76. *Id.* at 198, 326 S.E.2d at 703. The commission held that injuries incurred during usual job exertion required the claimant to "identify a specific *incident* or *motion* which has caused his injury." *Id.* (emphasis added). Here again, the *Aistrop* standard is replaced by *Badische* language. *See supra* notes 49-51 and accompanying text. The supreme court did not disapprove of the commission's analysis of the "definiteness" of cause required in a *usual* exertion case.

77. 229 Va. at 198, 326 S.E.2d at 703.

78. *Id.* at 198-99, 326 S.E.2d at 703.

79. *Id.* at 199, 326 S.E.2d at 704 (emphasis added). The court approvingly cited Norfolk Dep't of Fire v. Lassiter, 228 Va. 603, 324 S.E.2d 656 (1985). In *Lassiter*, a fireman felt back pain while climbing down from a fire truck. The court required a "sudden precipitating event" because the claimant had offered conflicting evidence in his attempt to show that the injury arose out of employment. *Id.* at 605, 324 S.E.2d at 658.

80. *See* Harpine v. Mason & Dixon Lines, 44 O.I.C. 109, 110-11 (1962) (employee shoveling snow experienced back pain between 11:30 p.m. and 2:00 a.m.); *see also supra* note 65 and accompanying text.

81. *See* Lynchburg Foundry Co. v. Irvin, 178 Va. 265, 268, 16 S.E.2d 646, 649 (1941) (employee had been wearing a boot all morning before he noticed the injury which caused a toe irritation and eventual loss of the foot); *see also supra* note 65 and accompanying text.

be a *sudden* event.

D. *Kraft Dairy Group, Inc. v. Bernardini*[82]

The most recent supreme court decision applying section 65.1-7 to a cumulative injury claim is the *Kraft* case. Employee Bernardini's job involved lifting containers of ice cream and stacking them on a wooden pallet.[83] One day while routinely stacking containers, Bernardini felt "a strong pull pain" in her arm.[84] Her physician diagnosed that "[w]ithout a doubt, her heavy lifting at work caused the problems in her shoulder."[85]

The Virginia Supreme Court found an absence of proof of an "injury by accident" and reversed the commission's award of compensation.[86] The court examined Bernardini's claim under the *Quann* "obvious sudden . . . change" standard as to "definiteness" of result and the new *Lane* "accident, identifiable incident, or sudden precipitating event" standard as to "definiteness" of cause.[87] The court found that the claimant had only shown the occurrence of a strain which resulted from repetitive lifting. Such a result did not meet the *Quann* standard of "definiteness" of result, and the court stated that it would continue to deny compensation for cumulative trauma cases until the Virginia General Assembly provided otherwise.[88] The court also held that the claimant had failed to show "definiteness" as to cause.[89] The "definiteness" of cause standard that *Kraft* established left little doubt that an injury's precipitation must be identifiable to a specific moment in time, instead of merely to a "reasonably definite time," as had traditionally been required by *Aistrop*.

V. The Efficacy of Section 65.1-7

A. *The Virginia Supreme Court's Consistency of Interpretation*

The standard of "definiteness" required to show a compensable "injury by accident" under section 65.1-7 has become ever stricter. In the light of the four recent Virginia Supreme Court cases, the "definiteness" of *cause*

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82. 229 Va. 253, 329 S.E.2d 46 (1985).

83. *Id.* Bernardini had begun her present job assignment in April, 1983. On the day of the injury, June 6, 1983, Bernardini estimated that she had filled 18 to 20 pallets with over six thousand half-gallon containers of ice cream. Each pallet which she had to lift, with the help of her foreman, weighed between 75 and 100 pounds. *Id.* at 254, 329 S.E.2d at 47.

84. *Id.* Her physician diagnosed a "chronic musculoligamentous strain" in her shoulder and arm. *Id.* at 255, 329 S.E.2d at 48.

85. *Id.* An orthopedic surgeon who examined Bernardini reported that she "sustained a strain of the muscles . . . *as a result of repetitive heavy lifting* . . . occurring June 6, 1983." *Id.* (emphasis added).

86. *Id.*

87. *Id.* at 256, 329 S.E.2d at 48.

88. *Id.*

89. *Id.* at 256, 329 S.E.2d at 47.

standard currently requires an "accident, identifiable incident, or sudden precipitating event."[90] This *Kraft* requirement directly contravenes the well-settled rule that "[t]o constitute an injury by accident it is not necessary that there must be a 'fall, slip, or other fortuitous circumstance.' "[91] However, both of these diametrically opposed rules are presently good law in Virginia because the supreme court has failed to reconcile its own inconsistent interpretations.[92] Despite clear case law to the contrary,[93] future cumulative injury claimants will have to point to the motion or definite set of motions which caused the injury in order to satisfy the "definiteness" element as to the cause of their injury.[94]

In addition to the new *Kraft* standard, claimants will continue to face the stiff *Quann* standard in showing "definiteness" as to *result*. Claimants must show "an obvious sudden mechanical or structural change in the body."[95] To be sure, this *Quann* standard has, from the outset, all but prohibited cumulative injury claims. Strains and other injuries resulting from the cumulative trauma caused by repeated physical exertions on the job rarely culminate in the kind of sudden manifestation which will meet the *Quann* standard.

B. *Calls for Amendment*

1. Alternative Statutory Language

Opponents of the "injury by accident" requirement in section 65.1-7 assert that the clause prevents workers injured on the job from being compensated, thus defeating the beneficent purpose of the Virginia Workers' Compensation Act.[96] These opponents urge the General Assembly to follow the lead of other states by deleting "injury by accident" or

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90. *Id.*

91. Derby v. Swift & Co., 188 Va. 336, 344, 49 S.E.2d 417, 421; *see supra* note 23 and accompanying text.

92. Virginia case law as to the "definiteness" of cause requirement clearly has been in a state of flux over the past four years. Because of these recent developments and the small number of cases on point, it is impossible to know how the court will reconcile apparent inconsistencies with earlier case law.

93. *See Derby*, 188 Va. at 344, 49 S.E.2d at 421; *see also Harpine*, 44 O.I.C. at 115 ("It is true that Harpine was unable to point to a particular shovelful of snow as producing his injury; however, this is not necessary. The evidence establishes that the injury was received at a particular time in a particular place by a particular piece of work done.").

94. " 'Coal miners almost have to pinpoint which shovelful' caused the injury." *Compensation rules hit on gradual back injuries*, Richmond Times-Dispatch, Jan. 6, 1985, at D-1, col. 4. Commissioner Hiner states that, based on what is known today, the worker who suffers injury while lifting objects should be able to point to the specific object which he was lifting at the time of injury. Hiner, *supra* note 62.

95. *Quann*, 197 Va. at 12, 87 S.E.2d at 626; *see supra* text accompanying notes 34-35.

96. Crews v. Moseley Bros., 148 Va. 128, 138 S.E. 494 (1927); *see supra* notes 11-14 and accompanying text.

by enlarging upon the meaning of that phrase in the statute. In recent cumulative injury cases before the Virginia Supreme Court, the court itself has implicitly invited the General Assembly to amend section 65.1-7:

> [While awarding] compensation benefits to many workers who develop physical or mental impairment while engaged in unusually strenuous, repetitive, or stressful work, without the necessity of proving any particular causative incident or event . . . may be highly desirable from the standpoint of social policy, . . . it would represent a marked change from the settled rule in Virginia. Policy determinations of this nature are peculiarly within the province of the General Assembly.[97]

Virginia could choose to follow the lead of a number of other states which have no "accident" requirement or have one which is substantially modified. Among states with more liberal workers' compensation statutes, only California expressly designates as compensable injuries which are either "specific" (resulting from one incident) or "cumulative."[98] Michigan awards compensation for disabilities "due to causes and conditions . . . peculiar to the business of the employer and which [arise] out of and in the course of employment."[99] The Ohio Code's "injury by accident" statute expressly applies to "any injury," whether it be accidental in *cause* or merely "accidental in character and *result*."[100] The Kentucky statute defines "injury" as "any work related harmful change in the body."[101] Nine

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97. *Lane*, 229 Va. at 198-99, 326 S.E.2d at 703; *see infra* note 115 and accompanying text; *see also Kraft*, 229 Va. at 256, 329 S.E.2d at 48 (similar language).

98. CAL. LAB. CODE § 3208.1 (West Cum. Supp. 1986) states:

> An injury may be either (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment; provided, however, that the date of cumulative injury shall be the date of disability caused thereby . . . .

Id.

99. MICH. COMP. LAWS ANN. § 418.401(2)(b) (West 1985). " 'Personal injury' shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment." *Id.*

100. OHIO REV. CODE ANN. § 4123.01(C) (Baldwin 1982) (emphasis added). The Ohio Code introduces the accidental requirement by defining injury to include "any injury, whether caused by external accidental means or accidental in character and result." *Id.* Although Ohio cases are somewhat inconclusive, the Ohio Supreme Court has held that an injury may be caused by external circumstances *or* may be accidental in result. *See* Village v. General Motors Corp., G.M.A.D., 15 Ohio St. 3d 129, 472 N.E.2d 1079 (1984).

101. KY. REV. STAT. ANN. § 342.620(1) (Baldwin 1985). Other statutes with unique elements include the Montana Code, which requires a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm. MONT. CODE ANN. § 39-71-119(1) (1985). The words "unusual strain" merely require that the result and effect of the strain be unusual. *See* Love v. Ralph's Food Store, Inc., 163 Mont. 234, 516 P.2d 598 (1973) (compensation was awarded for a back injury resulting from continuous heavy lifting). Delaware defines "injury" as any "violence to the

states have deleted from their statutes any "accidental" requirement.[102] Many state statutes which do require an injury which is "accidental" or "by accident" proceed to enlarge upon or define such language.[103]

2. Economic Considerations and Ramifications

Most of the arguments *for* retaining the "injury by accident" language in section 65.1-7 refer to the increased operating costs that businesses would incur as a result of broadened coverage. The increased cost of administering the Virginia Workers' Compensation Act would be passed on to the taxpayer, and the cost of insurance purchased by the employer would rise.[104] As workers' compensation laws are liberalized, the incidence of cumulative injury claims will increase.[105] The resulting cost increases invariably will be passed on to the consumer in the form of higher-priced goods and services.[106]

It is argued that the price increases concomitant with liberalized workers' compensation laws will handicap Virginia's economy. In order to attract new industry to the commonwealth, Virginia must remain competitive with surrounding states. It is noted that, "[o]f our immediate neighboring states, who are our most direct competitors for new industry, only Kentucky has made awards for gradually-incurred injuries."[107] The

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physical structure of the body." DEL. CODE ANN. tit. 19, § 2301(12) (Repl. Vol. 1985).

102. 1B A. LARSON, *supra* note 4, § 37.10; *see, e.g.*, COLO. REV. STAT. § 8-52-102 (Cum. Supp. 1985).

103. For a comprehensive list of statutory definitions of "injury" and "accident" from all 50 states, see 4 A. LARSON, *supra* note 4, at app. A, Table 2.

The Virginia State AFL-CIO proposes that statutory language be drafted to define "accident" as "an event occurring during a *reasonably specific* period of time." REPORT, *supra* note 45, at app. 2. It is contended that such a change would not open the floodgates to a wave of compensation of non-meritorious claims because claimants would still have to bear the burden of proving a causal link between the gradual injury and the employment environment. *Id.* at app. 5. "This requirement eliminates the fear that compensation would become a general health insurance for employees claiming gradual injuries which cannot be linked to the employment." *Id.*

104. Shortly after the Kentucky Supreme Court ruled in favor of a gradually incurred injury case, insurance companies filed a rate increase of 8.1%. REPORT, *supra* note 45, at app. 13.

105. *Id.* at app. 8. In Michigan, 50% or more of compensation dollars paid out were to retirees in the auto industry, a relatively high percentage of which was for cumulative injuries. "There may be a definite connection here between the availability of benefits and the severe economic crisis in that state, and that industry . . . ." *Id.*

Cumulative injury became a part of the California workers' compensation system in 1959. Insurers estimated that between 1977 and 1978 cumulative injury claims increased 30%. Cumulative injury losses cost insured California employers $137 million in 1976. In 1977, the cost was $166 million. Projections for 1978 predicted cumulative injury losses in excess of $200 million, or a 45% increase in two years. *Id.* at app. 7.

106. *Id.*

107. *Id.* at app. 13.

implication is that a liberalized statute would create an unfavorable business climate in Virginia, thereby causing prospective industries to flock to neighboring states which have more agreeable laws.

Defenders of Virginia's present strict interpretation of "injury by accident" also assert that the majority of cumulative injuries can be attributed to the aging process and the wear and tear of daily life.[108] The most common cumulative injuries—back injuries, heart and vascular conditions, and loss of hearing—all are closely associated with a person's normal aging process.[109] The "by accident" requirement is essential in providing for verification of cumulative injuries and in establishing a causal link between the injury and the workplace. Absent such language, defenders of section 65.1-7 argue that the workers' compensation system will be stripped of a valuable safeguard against fraudulent claims.[110] Employers will be forced to pension workers who are "invalided by unhealthful exposure on the part of former employers"[111] or who are worn out by a history of imprudent lifestyles. It is contended that "[s]uch cases are properly placed under the Social Security Laws or health insurance policies and [should not] be taxed against the employer under the Workmen's Compensation Act."[112]

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108. It is argued that no compensation should be awarded for "inevitably degenerative conditions which affect the population as a whole and the specific claimants in particular." *Id.* at app. 6.

109. *Id.* Such injuries were at issue in seven out of every ten cases in a 1978 California study and accounted for 80% of all cumulative injury payouts. *Id.*

> [T]he cause of these "injuries" will be difficult, if not impossible, to determine . . . . Circumstances off the job, hobbies, life style, drinking and health habits, and the like, will frequently be the real cause of these aging related problems. Hobbies such as weight lifting, gardening, wood working, auto repair and the like can easily have more impact on a person's health than the routine physical work required by their job.

Id. at app. 2; *see also supra* note 33 and accompanying text.

110. REPORT, *supra* note 45, at app. 3.

111. *Aistrop*, 181 Va. at 293, 24 S.E.2d at 548 (citing Bohlen, *supra* note 16, at 348).

> Under any of the proposed amendments an employer would be subject to great financial loss if an employee becomes disabled for work by virtue of an inherent physical weakness or an acquired disease after being employed. For example, let us assume that the employee [sic] hires an employee who has or acquires arthritis, rheumatism or a degenerative disc disease. The employee reaches a point where he can no longer work because of one of these diseases and makes claim for workers' compensation benefits on the basis that the unusual exertion of his regular employment, the dampness of the environment in his employment or the posture that he was forced to assume in his employment, caused him to become disabled. [If the "injury by accident" language were deleted] compensation benefits would be awarded if the trier of the facts determined that the conditions . . . at any reasonable period of time prior [to the claim] brought on the work disability . . . .

Id. at app. 12.

112. *Id.*

C. *Recommendations*

A worker always must be required to show that his injury did indeed arise out of and in the course of his employment. Once the claimant makes this showing, the Virginia Workers' Compensation Act must be liberally construed in favor of the employee.[113] The expense involved in compensating the injured worker must be viewed as a cost of production which is to be borne by the industry.[114] Nowhere does case law or statutory law indicate that these principles are contingent upon whether the economic prosperity of the industry or the commonwealth might be affected. If economic considerations are afforded preeminence over the venerable workers' compensation compromise[115] between employer and employee, the result will invariably be a "race to the bottom" in which states vie for new industry by relaxing costly employee benefit requirements.

In Virginia, an injured employee can recover workers' compensation if his injury is either an occupational disease or an "injury by accident." Like most gradually incurred, trauma-related conditions, back strains are not compensable as occupational diseases because "back injuries are injuries, not diseases."[116] However, neither is such a cumulative injury compensable as an "injury by accident." "The well-settled law in Virginia . . . [is that] an injury resulting from the cumulative trauma caused by the physical exertions inherent in an employee's normal work is not an 'injury by accident' compensable under the Workers' Compensation Act."[117] Cumulative injury victims are thus caught in a "no-man's land" between occupational disease and "injury by accident" claims and are left with no recourse.[118]

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113. Crews v. Moseley Bros., 148 Va. 125, 128, 138 S.E. 494, 495 (1927); *see supra* note 14 and accompanying text.

114. *See supra* note 12 and accompanying text.

115. *Id.*

116. Holly Farms v. Yancey, 228 Va. 337, 340, 321 S.E.2d 298, 300 (1984). In *Yancey*, an employee's job required her to lift and inspect packages of chicken parts and place them on racks. The court held that her lumbosacral strain was not an occupational disease, but a noncompensable injury by accident. Even if it were an occupational disease, it would not be compensable because it would qualify as an excepted ordinary disease of life. *Id.* at 341, 321 S.E.2d at 300. For a discussion of the distinction between "injury by accident" and "occupational diseases," see *supra* note 3 and accompanying text.

117. *Kraft*, 229 Va. at 256, 329 S.E.2d at 48.

118. Commissioner Hiner states that "cumulative trauma generically is not compensable. That's the only conclusion I can reach, now, based on these decisions, and I don't really think that's new." Hiner goes on to say that the reason for the present predicament of cumulative trauma victims is that, whereas such injuries used to be compensable as occupational diseases, legislation has now eliminated that alternative. He cites a case in 1971-72 where he denied a cumulative strain and says he would do so again today. The only difference is that, in 1971-72, that case was compensable as an occupational disease, whereas today it would not be. Hiner, *supra* note 62.

Because of the lack of express statutory provisions as to the definition of "injury by accident," the determinative factor in recent supreme court cumulative injury cases has been the philosophical and economic predispositions of the Virginia Supreme Court. The General Assembly should heed the calls of both the public and the Virginia Supreme Court[119] and provide much-needed guidance regarding interpretation of the section 65.1-7 "injury by accident" language. By codifying the *Aistrop* "reasonably definite" and *Quann* "obvious sudden mechanical or structural change" standards, the legislature would require the claimant to show that the injury was caused by work-related activities. At the same time, however, the victim of a cumulative injury traceable to his job would be relieved of the onerous burden of pinpointing the exact sudden incident or event which caused the injury.

VI. Conclusion

The cumulative injury victim's claims have a decidedly smaller chance of success than they did before the *Badische* line of cases. The Virginia Supreme Court has arrested any pro-claimant trend which may have existed before *Badische*.[120] The recent interpretations of section 65.1-7 are very clear signals as to the posture that will be assumed by the court in future cumulative injury cases, absent intervening action by the General Assembly.[121]

P. Fritz Kling

119. *See supra* text accompanying note 97.

120. Commissioner Hiner opines that, before *Badische*, there existed a trend towards increasing relaxation of the "definiteness" standards. The "relatively definite time" and "obvious sudden . . . change" standards were broadly construed by the commission to award compensation for accidents identifiable to longer and longer periods of time. In *Badische*, "the supreme court was saying the law hasn't changed, but maybe the commission has gone a little bit too far in its interpretation of the term 'accident.' " Hiner, *supra* note 62.

121. Both *Lane* and *Kraft* deferred to the Virginia General Assembly as the appropriate body to forge new policy. *See Lane*, 229 Va. at 198-99, 326 S.E.2d at 703; *Kraft*, 229 Va. at 256, 329 S.E.2d at 48.