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Annual Survey of Virginia Law: Workers' Compensation

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WORKERS' COMPENSATION

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The *Annual Survey* last addressed Virginia Workers' Compensation law in 1992.[1] The Virginia Workers' Compensation Commission [the Commission] decides almost 1500 decisions a year and, on average, 300 of these are appealed to the Court of Appeals of Virginia.[2] Consequently, this article discusses only the most significant developments in workers' compensation between January 1993 and June 1995. In doing so, the article attempts to highlight areas of controversy and inconsistency.

Part I discusses occupational disease claims, Part II discusses injury by accident claims, and Part III discusses coverage of the Virginia Workers' Compensation Act [the Act].[3] Part IV discusses defenses, benefits, and selective employment, Part V discusses procedure, and Part VI discusses legislation.

I. OCCUPATIONAL DISEASE CLAIMS

Although occupational disease claims constitute only three percent of all claims filed with the Commission,[4] the most hotly debated topic since November 5, 1993 has been the definition of

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1. Mary G. Commander, *Annual Survey of Virginia Law: Workers' Compensation*, 26 U. RICH. L. REV. 903 (1992).

2. VIRGINIA WORKERS' COMPENSATION COMMISSION, 1994 YEAR-END STATISTICAL REPORT (1995).

3. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1995).

4. VIRGINIA WORKERS' COMPENSATION COMMISSION, *supra* note 2, at 5.

disease. On that day, the Supreme Court of Virginia issued its decision in *Merillat Industries, Inc. v. Parks*.[5]

In *Merillat*, the employer appealed rulings by the Commission[6] and the Court of Appeals of Virginia[7] that the claimant's rotator cuff tear was a compensable occupational disease under Virginia Code section 65.1-46 (now section 65.2-400).[8] The *Merillat* court held that, for a condition to be an occupational disease covered by the Act, the claimant's condition must first and foremost be a "disease."[9] The court found that the medical evidence in the record classified the claimant's rotator cuff tear as an injury, not a disease.[10] Accordingly, because the injury occurred gradually, as the result of repetitive trauma, the court held that the claimant's injury was not compensable under the Act.[11]

Merillat created an uproar. The immediate question became whether repetitive trauma conditions such as carpal tunnel syndrome, epicondylitis (tennis elbow) and tenosynovitis (trigger thumb) were compensable occupational "diseases" or non-compensable repetitive trauma "injuries," like the rotator cuff tear.[12] Unfortunately, *Merillat* provided little guidance because the court failed to define the term "disease."

The court of appeals, however, quickly provided their answer to the question. In *Piedmont Manufacturing Co. v. East*,[13] the court considered whether de Quervain's tenosynovitis is a disease. Unlike the supreme court in *Merillat*, the *Piedmont* court offered a definition of disease: "any deviation from or interrup-

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5. 246 Va. 429, 436 S.E.2d 600 (1993).

6. Parks v. Merillat Indus., 70 O.I.C. 158 (1991), *aff'd*, 15 Va. App. 44, 421 S.E.2d 867 (1992), *rev'd*, 246 Va. 429, 436 S.E.2d 600 (1993).

7. Merillat Industries, Inc. v. Parks, 15 Va. App. 44, 421 S.E.2d 867 (1992), *rev'd*, 246 Va. 429, 436 S.E.2d 600 (1993).

8. *Merillat*, 246 Va. at 430-31, 436 S.E.2d at 600. Effective October 1, 1991, Title 65.1 was recodified as Title 65.2. *Id.* The Deputy Commissioner's decision was under the prior codification. *Id.*

9. *Id.* at 432, 436 S.E.2d at 601.

10. *Id.* at 433, 436 S.E.2d at 602.

11. *Id.* at 433-34, 436 S.E.2d at 602.

12. Goodyear Tire & Rubber Co. v. Jennings, No. 2459-93-3, 1994 Va. App. WL 594170 (Nov. 1, 1994). This discussion assumes that the evidence establishes that the condition is work-related.

13. 17 Va. App. 499, 438 S.E.2d 769 (1993).

tion of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown."[14] Using this standard as a guideline, the court found that the evidence established that de Quervain's tenosynovitis is a disease and, in this case, concluded that the condition was compensable as an occupational disease.[15]

Relying on the definition in *Piedmont*, the Commission and the court of appeals have concluded that varied conditions such as tendinitis[16] and coronary artery spasm[17] are diseases. Nevertheless, the debate over repetitive trauma conditions under the Act seems far from over. The 1995 General Assembly passed a bill which would have created a presumption that carpal tunnel syndrome and hearing loss were diseases.[18] Governor Allen, however, vetoed the bill.[19] Further, for more than a year after *Merillat*, Commissioner Tarr, the chairman of the Commission, consistently dissented from opinions relying on *Piedmont's* broad definition of disease.[20] Resolving these issues

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14. *Id.* at 503, 438 S.E.2d at 772 (quoting SLOANE-DORLAND ANN. MEDICAL-LEGAL DICTIONARY 209 (1987)). While the court of appeals was laudably attempting to provide further guidance, many practitioners would argue that the definition the court cited is so broad that it provides little guidance other than an expectation that the court of appeals could conclude that almost anything is a "disease." It could even be argued that the definition adopted by the *Piedmont* court is so broad as to effectively nullify the *Merillat* decision.

15. *Id.* at 504, 507, 438 S.E.2d at 772, 774.

16. Ferguson v. Harrington Corp., V.W.C. File No. 166-73-39 (Dec. 30, 1994).

17. Commonwealth, Dep't of State Police v. Haga, 18 Va. App. 162, 442 S.E.2d 424 (1994).

18. H.B. 2067, Va. Gen. Assembly (Reg. Sess. 1995). The Commission traditionally considered hearing loss an occupational disease. Collier v. Tara K. Coal, V.W.C. File No. 170-01-56 (June 6, 1995). After *Merillat*, however, the Commission requires that the evidence in the record support that alleged hearing loss is a disease. Napier v. English Constr. Co., V.W.C. File No. 164-06-19 (July 25, 1994). Claimants, however, can rely on the broad definition of disease in *Piedmont* to make this showing. *See Collier*, V.W.C. File No. 170-01-56.

19. *Important Bills in the General Assembly*, 9 V.L.W. 1197 (1995). Regardless, a claimant can satisfy *Merillat* by offering the opinion of a doctor that carpal tunnel syndrome is a disease under the definition announced in *Piedmont*.

20. *See, e.g.*, Bradfield v. Craig Mfg. Co., V.W.C. File No. 168-27-90 (Dec. 30, 1994) (Tarr, dissenting) (arguing that this broad definition conflicts with Supreme Court of Virginia decisions in *Merillat* and TAD Technical Servs. Corp. v. Fletcher, 438 S.E.2d 768 (Va. App. Ct. 1993)); Jennings v. Volvo, V.W.C. File No. 163-47-06 (Aug. 15, 1994) (Tarr, Comm'r, dissenting); Quinting v. Burger King, V.W.C. File No.

may require the Supreme Court of Virginia to address repetitive trauma conditions once again.

II. INJURY BY ACCIDENT

An overwhelming majority of claims filed with the Commission allege an injury by accident. It is well settled that to recover under the Act for a work related injury, the claimant must prove, by a preponderance of the evidence, three elements: (1) an injury by accident; (2) arising out of employment; and (3) in the course of employment.[21]

A. *Injury by Accident*

To establish an injury by accident, the claimant must prove: (1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily changes.[22] The test is easy to apply when an employee cuts a finger or sustains some other immediate trauma. The more difficult cases arise when the trauma does not immediately appear after the incident pointed to as the cause.

The Supreme Court of Virginia has made it clear in its recent decisions in *Merillat, Middlekauff v. Allstate Insurance Co.*,[23] and *Lichtman v. Knouf*,[24] that gradually occurring injuries are not compensable under the Act.

In *Middlekauff v. Allstate Insurance Co.*, the claimant sued her former employer and supervisor for intentional infliction of emotional distress. The employer argued that the exclusivity

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161-90-09 (Apr. 29, 1994) (Tarr, Comm'r, dissenting). *But see Collier*, V.W.C. File No. 170-01-56 (Tarr, Comm'r, concurring) (acknowledging that *Piedmont* is binding precedent on the commission).

21. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995) (defining "injury"); *see also*, Marketing Profiles, Inc. v. Hill, 17 Va. App. 431, 436, 437 S.E.2d 727, 730 (1993).

22. Teasley v. Montgomery Ward & Co., 14 Va. App. 45, 48, 415 S.E.2d 596, 597-98 (1992) (citing Chesterfield County Fire Dep't v. Dunn, 9 Va. App. 475, 476, 389 S.E.2d 180, 181 (1990)).

23. 247 Va. 150, 439 S.E.2d 394 (1994).

24. 248 Va. 138, 445 S.E.2d 114 (1994).

provision of the workers' compensation act barred the lawsuit because emotional distress qualified as an injury by accident.[25] The supreme court held that the claimant's emotional distress gradually occurred and hence did not meet the definition of injury by accident.[26]

This holding implicitly overruled the court's earlier decision in *Haddon v. Metropolitan Life Insurance Co.*[27] In *Haddon*, the plaintiff sued her former employer for harassment and gender discrimination. Ignoring the fact that the harassment that caused the plaintiff's injuries occurred over a period of months, the court found the injuries constituted injuries by accident under the Act.[28] Therefore, the Act was the exclusive remedy for the plaintiff's claims.[29]

If *Middlekauff* left any question as to the viability of *Haddon*, the court's decision in *Lichtman v. Knouf*[30] ended the controversy. In a five to two decision, the court overruled *Haddon* "to the extent that it placed gradually incurred injuries within the definition of 'injury by accident.'"[31] As in *Haddon* and *Middlekauff*, the plaintiff sued her former employer for harassment. The employer argued that the exclusivity provision of the Act barred the plaintiff's tort claim.[32] Because the harassment lasted approximately one year, the court found the injuries occurred gradually and fell outside the Act's definition of injury by accident.[33] Consequently, the Act did not bar the plaintiff's lawsuit.[34]

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25. *Middlekauff*, 247 Va. at 152, 439 S.E.2d at 395-96. Generally, in Virginia, the Act provides the exclusive remedy for occupational injuries by accident or occupational diseases. VA. CODE ANN. § 65.2-307 (Repl. Vol. 1995). As such, employees generally may not maintain a tort action against their employer when their injury is covered by the Act.

26. *Middlekauff*, 247 Va. at 153, 439 S.E.2d at 396.

27. 239 Va. 397, 389 S.E.2d 712 (1990), *overruled by* Lichtman v. Knouf, 248 Va. 138, 445 S.E.2d 114 (1994). Indeed, a plurality in *Middlekauff* voted to overrule *Haddon* explicitly. *Middlekauff*, 247 Va. at 150, 439 S.E.2d at 394.

28. *Haddon*, 239 Va. at 399, 389 S.E.2d at 714.

29. *Id.* at 400, 389 S.E.2d at 714.

30. 248 Va. 138, 445 S.E.2d 114 (1994).

31. *Id.* at 140, 445 S.E.2d at 115.

32. *Id.* at 139, 445 S.E.2d at 115.

33. *Id.* at 140, 445 S.E.2d at 115.

34. *Id.*

Although the supreme court has made its position clear, the Commission and the courts have struggled to define the parameters of gradually occurring injuries. In its 1989 decision in *Morris v. Morris*,[35] the supreme court rejected the position adopted by the Commission and the court of appeals that injuries resulting from work-related stress lasting less than three hours were compensable.[36] Nevertheless, shortly after *Morris*, in *Richard E. Brown, Inc. v. Caporaletti*,[37] the court of appeals held that an injury sustained while the claimant bent over a furnace for four or five minutes was compensable.[38]

Recently, in *Imperial Trash Service v. Dotson*,[39] the court of appeals found that an employee's death resulting from several hours of exertion was compensable. After collecting recyclable materials from over 700 houses in eighty-six degree heat, the employee suffered a heatstroke.[40] Seventeen days later, the employee died of a heart attack attributed to the heatstroke.[41] The court of appeals held that the claimant's heatstroke constituted a "sudden change in the body" sufficient to establish an injury by accident.[42]

Six months earlier, however, in *Wilhelm v. Rockydale Quarries*,[43] the court of appeals denied compensation for a claimant's heart attack which resulted from shoveling for fifteen minutes. Relying on *Morris*, the court held that the heart attack did not result from an "identifiable incident" or "sudden precipitating event" since it could have been caused by "several hours of physical exertion over the course of the day."[44]

The holding in *Imperial Trash* seemingly contravenes *Morris* and is irreconcilable with a decision only six months earlier. This is a stark example of the conflict between some the decisions from the court of appeals in this area, and it clearly dem-

35. 238 Va. 578, 385 S.E.2d 858 (1989).
36. *Id.* at 588, 385 S.E.2d at 864-65.
37. 12 Va. App. 242, 402 S.E.2d 709 (1991).
38. *Id.* at 245, 402 S.E.2d at 711.
39. 18 Va. App. 600, 445 S.E.2d 716 (1994).
40. *Id.* at 602, 445 S.E.2d at 717.
41. *Id.*
42. *Id.* at 605-06, 445 S.E.2d at 719.
43. No. 1306-93-3, 1993 Va. App. LEXIS 571 (Nov. 30, 1993).
44. *Id.* (quoting Morris v. Morris, 228 Va. 578, 589, 385 S.E.2d 858, 865 (1989)).

onstrates the current uncertainty of the parameters of what constitutes a gradually occurring injury.[45]

B. *Arising out of Employment*

An injury arises out of the employment when it is apparent to the rational mind, upon consideration of all the circumstances, that a causal connection exists between the conditions under which the work is required to be performed and the resulting injury, and that the employment involves a special degree of risk to which the general public would not be exposed.[46]

1. The Actual Risk Test

Virginia recognizes the "actual risk" test to establish that an injury arose out of the employment.[47] "[T]he 'actual risk' test . . . requires that the employment subject the employee to the particular danger that brought about his or her injury."[48] In contrast, many states utilize the positional risk test. Under the positional risk test, an employee is compensated for any injury that occurs in the course of employment.[49] The Supreme Court of Virginia repeatedly has rejected the positional risk test.[50] Two recent supreme court decisions reaffirmed Virginia's commitment to the actual risk test: *Lipsey v. Case*[51] and *Taylor v. Mobil Corp.*[52]

In *Lipsey*, the plaintiff sued her former employer and a co-employee for injuries resulting from a dog attack.[53] The em-

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45. The ease to which some repetitive trauma conditions are being turned into diseases only adds to the uncertainty in this area for the practitioner.

46. *See* Lipsey v. Case, 248 Va. 59, 445 S.E.2d 105 (1994).

47. *Id.* at 61, 445 S.E.2d at 106.

48. *Id.*

49. *See, e.g.*, Peterson v. RTM Mid-America, 209 Ga. App. 691, 434 S.E.2d 521 (1993).

50. *See, e.g.*, County of Chesterfield v. Johnson, 237 Va. 180, 185, 376 S.E.2d 73, 76 (1989); City of Richmond v. Braxton, 230 Va. 161, 164-65, 335 S.E.2d 259, 261-62 (1985).

51. 248 Va. 59, 445 S.E.2d 105 (1994).

52. 248 Va. 101, 444 S.E.2d 705 (1994).

53. *Lipsey*, 248 Va. at 60, 445 S.E.2d at 106.

ployer argued that the exclusivity provision of the Act barred the lawsuit. The court found that

> [n]othing about the nature or character of her work, i.e., the care and training of horses, reasonably could have exposed or subjected her to the danger of being bitten by a co-worker's pet dog. It simply is not apparent to a rational mind, in the circumstances of this case, that a causal connection exists between the conditions of Lipsey's required work and her injury.[54]

Because the employer could not establish the requisite nexus under the actual risk test, the Act did not bar Lipsey's tort action.[55]

In *Taylor v. Mobil Corp.*,[56] the supreme court held that a company doctor's negligent care of an employee did not arise out of employment. Mobil provided its employees with comprehensive medical care at an on-site clinic, but did not require employees to use the clinic.[57] The employee chose to use the clinic, but the company doctor failed to diagnose his eventually fatal heart condition.[58] The employee's widow sued Mobil and the company doctor for negligence. The court found that any cardiologist could have misdiagnosed the employee's condition.[59] Consequently, the employee's exposure to the risk of negligent treatment was not an actual risk of his employment and as such his death did not arise out of his employment.[60]

a. Bending and Crouching Cases

The courts and the Commission continue to wrestle with the application of *Plumb Rite Plumbing Service v. Barbour*.[61] In *Plumb Rite*, the court of appeals held that merely bending over was insufficient to establish a compensable injury. Instead, the

54. *Id.* at 61-62, 445 S.E.2d at 107.
55. *Id.* at 62, 445 S.E.2d at 107.
56. *Taylor*, 248 Va. at 101, 444 S.E.2d at 705.
57. *Id.* at 107, 444 S.E.2d at 708.
58. *Id.* at 105, 444 S.E.2d at 707.
59. *Id.* at 107, 444 S.E.2d at 708.
60. *Id.*
61. 8 Va. App. 482, 382 S.E.2d 305 (1989).

claimant must establish that "the conditions of the workplace or that some significant work related exertion caused the injury."[62]

While merely bending falls outside the scope of the Act, an "awkward" bend or movement appears to trigger compensability. In *Grove v. Allied Signal, Inc.*,[63] a pipe fitter injured his back reaching for a wrench while repairing pipe in a crouched position. The record contained evidence that the awkward position constituted a hazard unique to the claimant's work. The court of appeals held that the claimant satisfied the actual risk test and established proof of a compensable injury by accident.[64]

Since the *Grove* decision, the court of appeals has decided several awkward position cases. The consensus appears to be that if the awkward position which resulted in the injury is uniquely connected to the employment, the injury is compensable.[65] In contrast, if the employee injures himself while merely bending or squatting, risks to which the general public are exposed, the injury is not compensable.[66]

In *John Randolph Medical Center v. Bradley*,[67] the court of appeals found a nurse's injury sustained while squatting to place oxygen tanks on a cart compensable. The court reasoned that the employee's action was peculiar to her employment because to place the tanks on the cart, the employee had to awkwardly squat for four or five minutes in a confined space.[68]

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62. *Id.* at 484, 382 S.E.2d at 306.

63. 15 Va. App. 17, 421 S.E.2d 32 (1992).

64. *Id.* at 22, 421 S.E.2d at 35.

65. *See, e.g.*, John Randolph Medical Ctr. v. Bradley, No. 0324-94-2, 1994 Va. App. LEXIS 546 (Aug. 16, 1994); Ogden Allied Aviation Serv. v. Shuck, 18 Va. App. 756, 446 S.E.2d 898 (1994).

66. *See, e.g.*, *Plumb Rite*, 8 Va. App. 482, 382 S.E.2d 305. Of course, if the bending and squatting occur over a long period of time, the injury may not be compensable because it is gradually occurring. For example, an employee who squats once for five seconds may be denied compensation in accord with the actual risk test. An employee who squats once for 45 seconds may have suffered a compensable injury. An employee who squats nine times for five seconds each over the period of a few hours may have sustained a gradually occurring injury which is not compensable.

67. No. 0324-94-2, 1994 Va. App. LEXIS 546 (Aug. 16, 1994).

68. *Id.* at *1.

Likewise, in *Ogden Allied Aviation Services v. Shuck*,[69] the court of appeals held that a mechanic's injury resulting from looking directly overhead at fuel gauges was compensable, as looking overhead in that position was not common to the public.[70]

In contrast to the above cases, in *Cox v. Wade's Supermarket*,[71] the court of appeals held that an injury sustained when an employee bent down to retrieve a two pound bottle of oil was not compensable. The court concluded that the action causing the injury, merely bending, was common to the public.[72] Similarly, in *Conley v. Celanese*,[73] the court of appeals held not compensable an injury from merely squatting to retrieve items from a locker.[74]

b. Stair Cases[75]

Generally, an injury by accident involving steps is compensable if there is a defect in the steps or an abnormal condition of employment caused the accident.[76] Such an injury is not compensable merely because stairs on an employer's property expose the employee to an added risk.[77] Several recent cases demonstrate the application of the actual risk test in stair cases.

In *Southside Virginia Training Center v. Shell*,[78] the claimant fell down some steps on her way to retrieve a medical file. The steps had no defects or abnormalities.[79] The building the claimant exited, however, had one more step than the building

69. 18 Va. App. 756, 446 S.E.2d 898 (1994).

70. *Id.* at 758, 446 S.E.2d at 899-900.

71. No. 0312-94-3, 1994 Va. App. LEXIS 556 (Aug. 23, 1994).

72. *Id.*; *see also* Blackwell v. April Constr. Co., No. 1842-94-4, 1995 Va. App. LEXIS 500 (June 6, 1995).

73. No. 0117-94-3, 1994 Va. App. LEXIS 457 (Jul. 12, 1994).

74. *Id.* at *4.

75. "Stair cases" refers to cases involving injuries sustained from accidents involving stairs.

76. *See, e.g.*, County of Chesterfield v. Johnson, 237 Va. 180, 376 S.E.2d 73 (1989); Reserve Life Ins. Co. v. Hosey, 208 Va. 568, 159 S.E.2d 633 (1968).

77. *See, e.g.*, *Johnson*, 237 Va. at 185-86, 376 S.E.2d at 75-76.

78. 20 Va. App. 199, 455 S.E.2d 761 (1995).

79. *Id.* at 201, 455 S.E.2d at 762.

in which she usually worked.[80] Notwithstanding this difference, the court of appeals reversed the Commission and found that the claimant did not satisfy the actual risk test.[81]

In *Marion Correctional Treatment Center v. Henderson*,[82] Henderson, a correctional officer, slipped down several steps while performing rounds. At the time of the injury, Henderson had acknowledged one tower officer and was observing another tower while he descended the stairs.[83] Observing the towers was a part of Henderson's duties.[84] As he descended the stairs he slipped down a step and felt a pop in his knee.[85] The court held that the way Henderson performed his job "increased his risk of falling on this occasion and directly contributed to cause his fall and injury"[86] and that he would not have been exposed to this risk outside of this employment.[87] Because Henderson's claim met the actual risk test, the injury was compensable.[88]

In *People's Drug Stores, Inc. v. Austin*,[89] Austin, a security guard, slipped on some steps while rushing from her guard station to the restroom. Austin was rushing because she had to wait until a relief guard replaced her before she could leave her position, and the relief guard was delayed.[90] The court stated that while the "personal comfort" doctrine in Virginia recognizes that rest breaks occur in the course of employment, the claimant must still establish that an injury sustained on the break arose out of employment.[91] Austin could not explain exactly why she fell, and thus could not establish that her injury arose out of her employment.[92]

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80. *Id.*
81. *Id.* at 200, 455 S.E.2d at 762.
82. 20 Va. App. 477, 458 S.E.2d 301 (1995).
83. *Id.* at 479, 458 S.E.2d at 302.
84. *Id.*
85. *Id.*
86. *Id.* at 480-81, 458 S.E.2d at 303.
87. *Id.* at 481, 458 S.E.2d at 303.
88. *Id.*
89. No. 1267-92-4 (Va. Ct. App. Apr. 27, 1993).
90. *Id.*, slip op. at 1-2.
91. *Id.*, slip op. at 3-4.
92. *Id.*, slip op. at 5; *see also* Kraf Constr. Serv. v. Ingram, 17 Va. App. 295, 304, 437 S.E.2d 424, 430 (1993) (Koontz, J., dissenting) (stating that in applying the personal comfort doctrine, the majority "impermissibly blended together the distinct con-

In his dissent, Judge Benton argued that Austin's injury arose out of her employment, reasoning that "[t]he delay in relieving Austin coupled with the requirement that she remain at her post until relieved made her need to hurry to the restroom a risk of employment . . . Austin . . . was required to perform an act in great haste . . . greatly influenced by her work environment."[93]

c. Street Cases

For an injury to be compensable in street cases, the claimant generally does not have to prove that the public would not have been exposed to the same risk.[94] "[I]f the employment occasions the employee's use of the street, the risks of the street are the risks of the employment."[95]

In *Marketing Profiles, Inc. v. Hill*,[96] the claimant alleged injuries he sustained in a car accident were compensable. The claimant, a photographer, suffered memory loss and could not recall events three to four weeks before and after the accident.[97] However, the court determined that at the time of the accident, the claimant was on his way to an assignment to take photographs for a church directory.[98] The claimant took similar trips approximately once a week, and received compensation for mileage.[99] The employer supported the employee's use of his car to travel to these assignments.[100] As such, "[t]he hazards of highway travel . . . became necessary incidents of his employment."[101]

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cepts of 'in the course of' and 'arising out of' the employment . . . ").

93. *Peoples Drug Stores*, slip op. at 8.

94. *See, e.g.*, Immer & Co. v. Brosnahan, 207 Va. 720, 152 S.E.2d 254 (1967).

95. 1 ARTHUR LARSON, WORKMEN'S COMP. L. (MB) § 9.40 (release no. 74, May 1995).

96. 17 Va. App. 431, 437 S.E.2d 727 (1993).

97. *Id.* at 433, 437 S.E.2d at 728.

98. *Id.* at 432-33, 437 S.E.2d at 728.

99. *Id.*

100. *Id.*

101. *Id.* at 435, 437 S.E.2d at 730 (citing Immer & Co. v. Brosnahan, 207 Va. 720, 728, 152 S.E.2d 254, 259 (1967)).

In *Luskins, Inc. v. Neal*,[102] the claimant's employer required her to travel through the Hampton Roads tunnel to pick up paychecks. In the tunnel, the temperature light in her car came on and because she was in the tunnel, the claimant did not stop.[103] A defective part malfunctioned and hot steam severely burned the employee.[104] The employee went on this errand at the request of her employer, the employer paid her for her time while on the errand, and the employer could have reasonably expected the employee to be in the tunnel during the errand.[105] Consequently, the court held that the employee's injuries arose out of and in the course of her employment and that the injuries were compensable.[106]

d. Robbery

In *Southland Corp. v. Gray*,[107] the court found injuries sustained during a robbery compensable. Claimant's employer prohibited employees from making bank deposits after 3:00 p.m. unless approved by a supervisor.[108] The claimant was mugged and robbed when leaving to make a bank deposit.[109] The court found that Southland's policy prohibiting bank deposits after 3:00 p.m. demonstrated that it believed that when employees make bank deposits, they are exposed to risks to which the public is not equally exposed.[110] Therefore, the court found the injury compensable reasoning that the claimant met the actual risk test.[111]

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102. No. 0773-93-1, 1993 Va. App. LEXIS 526 (Nov. 11, 1993).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 527.

107. 18 Va. App. 366, 444 S.E.2d 19 (1994).

108. *Id.* at 367, 444 S.E.2d at 20.

109. *Id.* at 367-68, 444 S.E.2d at 20-21. The claimant left to make the deposit at 5:45 p.m., however, the Commission denied the employer's defense that the claim out violated a safety rule. *Id.* at 367, 444 S.E.2d at 20.

110. *Id.* at 368, 444 S.E.2d at 21.

111. *Id.* at 368-69, 444 S.E.2d at 21. The Court also relied on the fact that, according to the claimant, the robber expressed no interest in the claimant's purse or car keys saying "that's not what I want." *Id.* at 368, 444 S.E.2d at 21.

The court distinguished *Southland* from *Hill City Trucking, Inc. v. Christian*,[112] in which the court held that injuries suffered by a truck driver during a robbery were not compensable. In *Hill City*, nothing about claimant's employment as a truck driver caused him to have a greater risk of robbery than a member of the general public.[113] In contrast, because Southland required Gray to leave with the day's deposits, Gray's employment exposed her to a unique risk.[114]

C. *In the Course of Employment*

The third, and final, element of proof in "injury by accident" claims is that the injury by accident arose in the course of employment.[115] To establish this element, a claimant must prove that the injury occurred during employment, at a place the employee was reasonably expected to be, while reasonably fulfilling duties of employment or doing something reasonably incidental thereto.[116]

1. Going and Coming Rule

Generally, while traveling to or from work, an employee is not in the course and scope of his employment.[117] Exceptions to the going and coming rule fall into three categories:

> (1) where the means of transportation used to go to and from work is provided by the employer or the employee's travel time is paid for or included in wages; (2) where the way used is the sole means of ingress and egress or is constructed by the employer; and (3) where the employee is charged with some duty or task connected to his employment while on his way to or from work.[118]

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112. 238 Va. 735, 385 S.E.2d 377 (1989).

113. *Id.* at 739, 385 S.E.2d at 380.

114. *Gray*, 18 Va. App. at 368, 444 S.E.2d at 21.

115. *See, e.g.*, Lucas v. Lucas, 212 Va. 561, 562-63, 186 S.E.2d 63, 64 (1972).

116. *See, e.g.*, Conner v. Bragg, 203 Va. 204, 208, 123 S.E.2d 393, 396 (1962).

117. *See, e.g.*, Boyd's Roofing Co. v. Lewis, 1 Va. App. 93, 94, 335 S.E.2d 281, 282 (1985).

118. Sentara Leigh Hosp. v. Nichols, 13 Va. App. 630, 636, 414 S.E.2d 426, 429 (1992) (citing Kendrick v. Nationwide Homes, 4 Va. App. 189, 191, 355 S.E.2d 347,

The court of appeals recently addressed the second exception to the going and coming rule in *Wetzel's Painting and Wallpapering v. Price*.[119] In *Price*, the claimant reported to a site to paint the inside of a house.[120] While walking from his vehicle to the house, the claimant slipped on an icy concrete apron that had been poured as the entrance to the driveway, breaking his collar bone.[121] The court of appeals found that the concrete apron was tantamount to the employer's property and that it provided an "essential means of ingress and egress from the public street to the house where the work was to be performed."[122] Consequently, the court held that the apron constituted a hazard of Price's employment and, thus, the injury sustained in his fall was compensable.[123]

In interpreting the third exception, the Commission and courts have developed the "special errand" doctrine.[124] Under that doctrine, an employee's journey

> may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.[125]

In *Harbin v. Jamestown Village*,[126] an employee was struck by a car and killed while crossing the street. The employee was on his way to meet several co-workers and attend a meeting at the request of his employer.[127] Witnesses to the accident testified that the employee appeared distracted as he crossed the

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347-48 (1987)).

119. 19 Va. App. 158, 449 S.E.2d 500 (1994).

120. *Id.* at 159, 449 S.E.2d at 500.

121. The concrete apron was a standard concrete entrance to a driveway that would ultimately be connected on either side by a sidewalk.

122. *Price*, 19 Va. App. at 161, 449 S.E.2d at 502.

123. *Id.* at 162, 449 S.E.2d at 502.

124. *See, e.g.*, Harbin v. Jamestown Village Joint Venture, 16 Va. App. 190, 428 S.E.2d 754 (1993).

125. *Id.* at 193-94, 428 S.E.2d at 756 (quoting 1 Larson, *supra* note 95, at (MB) § 16.11 n.8.

126. *Id.* at 190, 428 S.E.2d at 754 (1993).

127. *Id.* at 192, 428 S.E.2d at 755.

street.[128] The employer argued that the death was not compensable because the employee was not in the course and scope of his employment at the time of the accident and that he engaged in willful misconduct by not paying attention when crossing the street.[129]

The court held that "[w]hen an employee is required by an employer to be away from the employer's place of employment, the employee is deemed to be in the course of employment because the employee is engaged in the direct performance of duties assigned by the employer."[130] Because the employer required the employee to attend the meeting, and because negligence does not bar compensation, the court held the death compensable.[131]

2. Personal Comfort Doctrine

Virginia recognizes the "personal comfort" doctrine to bring breaks and excursions for periodic rest and refreshment within the course of employment.[132]

In *Kraf Construction Services, Inc. v. Ingram*,[133] the employee, Ingram, left his employer's premises to get a soft drink from a store across the street. While crossing the street, the employee was struck by a car and killed.[134] While a factual dispute existed as to whether the day's work had ended at the time of the accident, the evidence established that the employee had to return to the employer's truck before leaving work.[135] The court held that where "an employee is required to go to outside places to work and to return to the employer's office to report, he is at all such time acting in the course of his employment, and is entitled to compensation if injured by accident at such time."[136] In the alternative, the court held that even if the

128. *Id.* at 193, 428 S.E.2d at 756.

129. *Id.*

130. *Id.* at 196, 428 S.E.2d at 757.

131. *Id.* at 196, 428 S.E.2d at 757-58.

132. Ablola v. Holland Rd. Auto Ctr. Ltd., 11 Va. App. 181, 183, 397 S.E.2d 541, 543 (1990).

133. 17 Va. App. 295, 437 S.E.2d 424 (1993).

134. *Id.* at 297-98, 437 S.E.2d at 426.

135. *Id.* at 298, 437 S.E.2d at 426-27.

136. *Id.* at 298, 437 S.E.2d at 426 (quoting Taylor v. Robertson Chevrolet Co., 177

employee had been on a rest break, his death occurred within the course of employment under the personal comfort doctrine.[137] The court concluded that the fact Ingram left his employer's premises for his break did not take his actions out of the course of employment.[138] Consequently, the court held that Ingram's death was compensable.[139]

III. COVERAGE BY THE ACT

It has been said that the Act covers every employer and every employee in Virginia.[140] The issue often becomes whether a worker qualifies as an employee or an entity as an employer under the Act.[141]

A. *Employee*

The Act defines an employee as any person under a contract of hire, express or implied, in the employer's usual course of trade, business, occupation, or profession.[142] If a worker does not fall under this definition, the Act does not cover him.[143]

The supreme court recently addressed the question of whether an inmate working on a road crew qualifies as an employee under the Act. In *Commonwealth v. Woodward*,[144] the supreme court held that because an inmate could not make a "true" contract of hire he was not an employee under the

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Va. 289, 293, 13 S.E.2d 326, 328 (1941)).

137. *Id.*

138. *Id.* at 299, 437 S.E.2d at 427.

139. *Id.* at 300, 437 S.E.2d at 427-28. Judge Koontz filed a lengthy dissent arguing that Ingram's injuries did not arise out of an actual risk of his employment and that the personal comfort doctrine did not extend compensability to his claim. *Id.* at 300-12, 437 S.E.2d at 427-34.

140. LAWRENCE J. PASCAL, VIRGINIA WORKERS' COMPENSATION: LAW AND PRACTICE § 2.1 (2d ed. 1993). There are, however, many exceptions to this general statement, the most general being that an employer must generally employ three or more employees to fall within the Act's coverage. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995).

141. PASCAL, *supra* note 140.

142. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995).

143. *Id.*

144. 249 Va. 21, 452 S.E.2d 656 (1995).

Act.[145] As such, the injuries an inmate sustained while trimming a tree were not compensable.[146]

The supreme court also addressed the issue of what constitutes a contract for hire in *Humphries v. Thomas*.[147] In *Humphries*, a carpet installer voluntarily went with a carpet store owner on a trip to purchase a trailer for the carpet store.[148] The installer worked independently and performed thirty percent to fifty percent of the owner's installation work.[149] The installer was driving when the two were involved in an accident.[150] The installer was killed and the owner filed a lawsuit against the installer's estate for injuries the owner sustained in the accident.[151]

The court found that the installer went on the trip voluntarily with no expectation of compensation or remuneration.[152] The installer was not an employee at the time of the trip because an implied or express contract of hire would exist only if intended and understood by the parties, or if a reasonable person would have expected compensation or remuneration.[153] Consequently, the Act did not bar the owner's tort claims against the installer's estate.[154]

B. *Statutory Employer*

An entity qualifies as a statutory employer under the Act if, at the time of the injury, the employee was performing work that was part of the entity's "trade, business, occupation or profession."[155]

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145. *Id.* at 24, 452 S.E.2d at 657.
146. *Id.* at 26, 452 S.E.2d at 658.
147. 244 Va. 571, 422 S.E.2d 755 (1992).
148. *Id.* at 573, 422 S.E.2d at 756.
149. *Id.*
150. *Id.*
151. *Id.* at 571, 422 S.E.2d at 755.
152. *Id.* at 573, 422 S.E.2d at 756.
153. *Id.* at 574, 422 S.E.2d at 756-57.
154. *Id.* at 575, 422 S.E.2d at 757.
155. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995) (defining "employee").

1. Governmental Entities

In *Roberts v. City of Alexandria*,[156] the supreme court addressed the statutory employer test as it applies to governmental entities. The Sheriff's department employed the plaintiff as a nurse at an adult detention center.[157] The plaintiff fell in a slippery parking lot owned by the City of Alexandria and subsequently sued the City and the Sheriff, for negligent maintenance of the premises.[158] The City argued that it was the plaintiff's statutory employer and, thus, the Act barred the plaintiff's action.[159]

The court found that "[t]he statutory-employer test applied to governmental entities differs from that usually applied to private business entities."[160] With governmental entities, one looks not only to what the entity does, but "what they are 'authorized and empowered by legislative mandate to perform'" that constitutes the trade, business, or occupation.[161]

The city was responsible for the costs of medical services at the facility where the plaintiff worked, paid the workers' compensation insurance for the jail's employees, and had the power and authority to operate the jail.[162] Moreover, the court found the fact that the Code of Virginia requires the city to insure the Sheriff's employees recognized that the employees "engaged in the city's trade, business, or occupation."[163] Accordingly, because the city was deemed the plaintiff's statutory employer, the Act barred the plaintiff from pursuing her negligence lawsuit.[164]

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156. 246 Va. 17, 431 S.E.2d 275 (1993).

157. *Id.*

158. *Id.*

159. *Id.* at 19, 431 S.E.2d at 276.

160. *Id.* (citing Ford v. City of Richmond, 239 Va. 664, 666, 391 S.E.2d 270, 271 (1990)).

161. *Id.* at 19, 431 S.E.2d at 276 (quoting *Ford*, 239 Va. at 669, 391 S.E.2d at 273).

162. *Id.* at 20, 431 S.E.2d at 277.

163. *Id.* at 21, 431 S.E.2d at 277.

164. *Id.*

2. Contractors

The supreme court addressed the issue of when businesses that hire independent contractors become statutory employers in *Johnson v. Jefferson National Bank*.[165] In *Johnson*, the bank contracted to have some painting work done.[166] An accident killed one individual and injured another when the scaffolding on which they worked fell fifty-six feet due to an electrical line burning the wire ropes holding up the scaffold.[167] The bank had agreed to have the electricity turned off or the electrical wires insulated, but failed to do so.[168]

When sued for negligence, the bank raised the workers' compensation bar.[169] The test applied in determining whether the painters' work was part of the bank's "trade, business, or occupation" was whether the painting was "'normally carried on by employees [of the bank] rather than independent contractors.'"[170] The court held that even though the bank's employees had the capacity to do the painting work, the bank's employees did not usually perform the work.[171] The bank's employees had never painted at the height and conditions under which the plaintiffs painted the building.[172] As such, the court held that the bank was not the painters' statutory employer since the painting was not a part of the bank's "trade, business, or occupation."[173]

The court of appeals addressed the issue of when a general contractor becomes liable for the injuries of a sub-contractor's employee in *C. Richard Bogese Builder, Inc. v. Robertson*.[174] The court held that the general contractor was the statutory

165. 244 Va. 482, 422 S.E.2d 778 (1992).
166. *Id.* at 483, 422 S.E.2d at 779.
167. *Id.* at 484, 422 S.E.2d at 779.
168. *Id.*
169. *Id.* at 483, 422 S.E.2d at 779.
170. *Id.* at 485, 422 S.E.2d at 780 (citing Shell Oil Co. v. Leftwich, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972)).
171. *Id.*
172. *Id.* at 484, 422 S.E.2d at 780.
173. *Id.* at 487, 422 S.E.2d at 781.
174. 17 Va. App. 700, 440 S.E.2d 622 (1994).

employer since he had contracted with the owner to deliver a completed home within a certain price range.[175] The court stated that the intent of Virginia Code section 65.2-302 is to keep contractors from avoiding liability by farming out jobs that are part of the contractors "trade, business, or occupation."[176]

In another sub-contractor case, *Sites Construction v. Harbeson*,[177] the court entered an award against the injured employees' immediate employer, the sub-contractor, instead of the contractor ultimately responsible for the completion of the project. Three employees suffered compensable injuries when a roof collapsed.[178] The Commission entered an award against the employees' "first statutory employer."[179] The "first statutory employer" argued that all statutory employers were jointly liable for the awards.[180] However, the court held that the claimants had a right to look first to their immediate employer (the sub-sub-contractor), then the next employer (sub-contractor), and then the next employer (contractor).[181] The court upheld the Commission's policy to enter an award against the *first* statutory employer with adequate coverage on this ascending ladder.[182]

C. *Agricultural Exemption*

The Act exempts agricultural employers from its provisions, unless the employer has more than two regular full-time employees.[183] However, the Act does not establish a criteria for determining what constitutes regular, full-time employees. Because agricultural employers often hire seasonal workers, the definition plays a key role in determining the employers' liability under the Act.

In *Lynch v. Lee*,[184] the claimant applied for compensation

175. *Id.* at 705, 440 S.E.2d at 625.
176. *Id.* at 704, 440 S.E.2d at 625.
177. 16 Va. App. 835, 434 S.E.2d 1 (1993).
178. *Id.* at 837, 434 S.E.2d at 2.
179. *Id.*
180. *Id.* at 838, 434 S.E.2d at 3.
181. *Id.* at 838-39, 434 S.E.2d at 3.
182. *Id.* at 839, 434 S.E.2d at 3.
183. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995) (defining "employee").
184. 19 Va. App. 230, 450 S.E.2d 391 (1994) (citing Ferguson v. Bowman, 57 O.I.C.

for a back injury sustained while he was picking fruit. The employer had two "full-time" employees, as well as several seasonal workers who worked as much or as little as they wanted.[185] The supreme court interpreted the phrase "full-time" employee as "import[ing] a sense of permanence" or being employed for "an indefinite amount of time to operate his business."[186] Consequently, the court held that the seasonal employees were not full-time employees and, thus, the agricultural exemption applied to the employer.[187]

IV. DEFENSES, BENEFITS, AND SELECTIVE EMPLOYMENT

A. *Willful Misconduct*

The Code of Virginia provides that an employee cannot recover compensation if his willful misconduct caused his injuries.[188] To successfully raise a defense of willful misconduct, the employer must establish that (1) the safety rule or other duty was reasonable, (2) the rule was known to the employee, (3) the rule was for the employee's benefit, and (4) the employee intentionally undertook the forbidden act.[189]

The court of appeals recently addressed the willful misconduct defense in *Buzzo v. Woolridge Trucking, Inc.*[190] An employee was killed when his truck rolled over from turning a curve too quickly.[191] The employer argued that the claimant's speeding constituted willful misconduct and that his death should not be compensable.[192] Evidence, however, indicated the truck's speedometer was broken and had not been fixed even after several requests for repairs.[193]

120, 121 (1976)).

185. *Id.* at 230-31, 450 S.E.2d at 391-92.

186. *Id.* at 233-34, 450 S.E.2d at 393.

187. *Id.* at 234-35, 450 S.E.2d at 393-94.

188. VA. CODE ANN. § 65.2-306 (Repl. Vol. 1995).

189. *Id.*

190. 17 Va. App. 327, 437 S.E.2d 205 (1993).

191. *Id.* at 329, 437 S.E.2d at 207.

192. *Id.* at 331, 437 S.E.2d at 208.

193. *Id.*

The court found that "[p]roof of negligence, even gross negligence, alone will not support the defense, for willful misconduct 'imports something more than a mere exercise of the will in doing the act. It imports a wrongful intention.'"[194] The court noted, though, that an employer need not prove an employee intentionally violated the rule, only that the employee intentionally performed an act he or she knew was prohibited.[195] The court held that the claimant did not violate a safety rule, since he could not have intentionally sped because his speedometer was broken.[196]

In another willful misconduct case, *Phipps v. Rann Industries*,[197] the claimant filed a claim for benefits after slipping and injuring himself on a slick ramp. The employer raised the willful misconduct defense.[198] The day before the claimant's injury, a woman slipped on the same ramp.[199] In response to the accident, the claimant prepared a sign to put on the door leading to the ramp stating "caution: ramp slick" with a picture of a lady falling down.[200] Nevertheless, the employer did not lock the door after the accident.[201] Moreover, instructions on whether employees could use the door were unclear.[202]

The court applied elements set forth in *Buzzo* to evaluate the willful misconduct defense. The court held that since the sign only cautioned employees to be careful and did not forbid use of the door, no safety rule barred use of the door.[203] Also, the evidence failed to indicate the claimant acted with wrongful intention.[204]

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194. *Id.* at 332, 437 S.E.2d at 208 (quoting Uninsured Employer's Fund v. Kemper, 1 Va. App. 162, 164, 335 S.E.2d 851, 852 (1985)).
195. *Id.* at 332, 437 S.E.2d at 208-09.
196. *Id.* at 334, 437 S.E.2d at 209-10.
197. 16 Va. App. 394, 429 S.E.2d 886 (1993).
198. *Id.* at 396, 429 S.E.2d at 887.
199. *Id.* at 395, 429 S.E.2d at 886.
200. *Id.*
201. *Id.*
202. *Id.* at 396-97, 429 S.E.2d at 887.
203. *Id* at 401, 429 S.E.2d at 889.
204. *Id.*

In a highly publicized case, *Shelton v. Brown Products*,[205] the full Commission held that an oral admonition in the course of training did not rise to the level of "an employer-adopted safety rule."[206] The claimant severed her hand when she reached into a machine to reposition a piece of cardboard.[207] No written rule forbade employees from placing hands inside machinery, but the claimant admitted that she had been warned orally several times by her trainer not to put her hand in the machine.[208]

The Commission held that the oral warnings were not a specific part of rules established by the employer, and that the employer did not enforce the warnings in the same manner as formal safety rules.[209] In addition, the Commission found that the claimant merely reacted when she placed her hand in the machine and accidentally turned the blade on.[210] As such, her actions could not be deemed "willful," and the Commission awarded temporary total benefits to the claimant.[211]

B. *Benefits for Permanent Loss Under Virginia Code Section 65.2-503*

Permanent loss is measured once the claimant has reached "maximum medical capacity."[212] Specific capacity ratings are essential in determining a partial permanent disability claim, as indicated in *Cafaro Construction Co. v. Strother*.[213]

In *Cafaro*, the claimant reached maximum medical capacity; however, a specific capacity rating had not been determined.[214]

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205. VWC File No. 157-90-31 (Aug. 27, 1993) (case on file with *University of Richmond Law Review*).

206. *Id.* at 6.

207. *Id.* at 3.

208. *Id.* at 2.

209. *Id.* at 6.

210. *Id.*

211. *Id.* at 7.

212. Kirk Plastering Co. v. Netherwood, 7 Va. App. 177, 179, 372 S.E.2d 192, 193 (1988); *see, e.g.*, County of Spotsylvania v. Hart, 218 Va. 565, 238 S.E.2d 813 (1977).

213. 15 Va. App. 656, 426 S.E.2d 489 (1993).

214. *Id.* at 659, 426 S.E.2d at 491.

The full Commission awarded permanent partial disability benefits because the medical evidence demonstrated that because of a compensable low back injury the claimant's legs could not be used in any substantial degree in any gainful employment.[215]

The court of appeals reversed and dismissed claimant's application, holding that a specific capacity rating was necessary before permanent partial or total loss benefits could be awarded under the Act.[216]

Another panel of the court of appeals in *Hill v. Woodford B. Davis General Contractor*[217] criticized the holding in *Cafaro*. The evidence in *Hill* established that the claimant had reached maximum medical improvement and "suffered permanent total loss" of use of his legs for any substantial gainful employment as a consequence of his compensable accident.[218] The court criticized the *Cafaro* court for requiring a specific capacity rating in cases where the medical evidence supported a total loss and, thus, an award of permanent total disability benefits.[219] Nevertheless, the court concluded it was bound by the doctrine of *stare decisis* and followed the holding in *Cafaro* in denying permanency benefits.[220]

C. *Dependents*

The Act entitles an employee's dependents to benefits when the employee's death results from a compensable accident.[221] If parents of an employee whose death is compensable under the Act are in "destitute circumstances" at the time of the employee's death, they are presumed to have been wholly dependent on the deceased employee.[222]

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215. *Id.* at 661, 426 S.E.2d at 492.

216. *Id.* at 662, 426 S.E.2d at 493.

217. 18 Va. App. 652, 447 S.E.2d 237 (1994), *reh'g granted en banc*, 1994 Va. App. LEXIS 538 (Jul. 29, 1994).

218. *Id.*

219. *Id.* at 654, 447 S.E.2d at 238.

220. *Id.*

221. VA. CODE ANN. § 65.2-512 (Repl. Vol. 1995).

222. *Id.* § 65.2-515(A)(4).

The court of appeals recently addressed this issue in *Roanoke Belt, Inc. v. Mroczkowski*.[223] When her son was killed in a compensable accident, Ms. Mroczkowski applied for benefits as a destitute parent or in the alternative as a partial dependent.[224] The Commission denied her claim.[225]

At the time of her son's death, Ms. Mroczkowski had an income of $1,200 a month and had $12,000 in an IRA. Family expenses were about $1,000 a month.[226] Prior to his death, the son paid room and board of $75 to $100 a week and acted as "man of the house."[227]

Ms. Mroczkowski argued that if not already, she may soon be destitute.[228] The court found, however, that an employer ought not be required "to await the possible destitution of a parent of a deceased employee."[229] Accordingly, Ms. Mroczkowski had to prove that at the time of her son's death a "definite future event or one reasonably predictable . . . would place [her] in destitute circumstances."[230] She was unable to do so. In addition, because at the time of her son's death Ms. Mroczkowski's assets exceeded her expenses, the court found she was not destitute.[231] Finally, she was not a partial dependent of her son because the money her son paid her was in return for room and board and not support.[232]

The court of appeals also recently addressed the issue of an estranged spouse as a dependent under the Act. In *Tharp v. City of Norfolk*,[233] the employee and his wife were separated at the time of his death. The wife filed a claim for benefits as her husband's dependent.[234] To establish her dependency, the wife had to prove that she relied on regular contributions from

223. 20 Va. App. 60, 455 S.E.2d 267 (1995).
224. *Id.* at 65, 455 S.E.2d at 269.
225. *Id.* at 67, 455 S.E.2d at 270.
226. *Id.* at 64-65, 455 S.E.2d at 269.
227. *Id.*
228. *Id.* at 71, 455 S.E.2d at 272.
229. *Id.* at 72, 455 S.E.2d at 273.
230. *Id.*
231. *Id.* at 74, 455 S.E.2d at 274.
232. *Id.* at 74-75, 455 S.E.2d at 273-74.
233. 19 Va. App. 653, 454 S.E.2d 13 (1995).
234. *Id.*

her husband for necessities "consistent with her station in life."[235] Because the two were financially independent—they had separate bank accounts and there was no proof that he paid any of her debts—she had not proven she was a dependent and was not entitled to benefits.[236]

D. *Selective Employment*

1. Unjustified Refusal

An employer can suspend workers' compensation benefits if a claimant unjustifiably refuses selective employment.[237] The employee, however, can "cure" this unjustified refusal by accepting the original offer of employment or by finding comparable employment.[238]

In *Ballweg v. Crowder Contracting Co.*,[239] the claimant refused to accept a light-duty position which would require him to work on Saturdays, a practice prohibited by his religion, Seventh-Day Adventist.[240] The supreme court noted a long history of opinions by the Commission recognizing that reasons unrelated to an employee's work injury can constitute adequate justification for refusing selective employment.[241] The supreme court held that religious reasons could constitute an adequate grounds for refusal.[242] In fact, the supreme court suggested that suspending Ballweg's benefits in this instance would be unconstitutional because such action would unduly burden Ballweg's right of free exercise of religion.[243]

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235. *Id.* at 656, 454 S.E.2d at 15.

236. *Id.* at 658, 454 S.E.2d at 16.

237. Timbrook v. O'Sullivan Corp., 17 Va. App. 594, 597, 439 S.E.2d 873, 875 (1994).

238. Virginia Wayside Furniture v. Burnette, 17 Va. App. 74, 76, 435 S.E.2d 156, 157 (1993); *see, e.g.*, *Timbrook*, 17 Va. App. at 599, 439 S.E.2d at 876-77.

239. 247 Va. 205, 440 S.E.2d 613 (1994).

240. *Id.* at 207-08, 440 S.E.2d at 614-15.

241. *Id.* at 209, 440 S.E.2d at 615.

242. *Id.*

243. *Id.* at 214, 440 S.E.2d at 619.

On a different issue, the court of appeals held in *Virginia Wayside Furniture, Inc. v. Burnette*[244] that an employee could cure an unjustified refusal of employment by obtaining a job paying wages comparable to the job originally offered to the claimant. The claimant refused selective employment that would have paid $5.00 to $5.50 an hour.[245] However, when the claimant obtained a position in another job that paid a comparable wage, the court of appeals held that he had cured his unjustified refusal and his benefits should be reinstated.[246]

2. Termination of Benefits

The Commission and courts continue to struggle with the application of the court of appeals decision in *Chesapeake and Potomac Telephone Co. v. Murphy*[247] which held "where a disabled employee is terminated for cause from selected employment procured or offered by his employer, any subsequent wage loss is properly attributable to wrongful act rather than his disability. The employee is responsible for that loss and not the employer."[248]

In subsequent opinions the court of appeals has sought to narrow the holding in *Murphy*. In *Timbrook v. O'Sullivan Corp.*,[249] the claimant was terminated from her selective employment for failing to show up or call in for three consecutive days. The employer argued that the reasoning in *Murphy* required the Commission to terminate the claimant's benefits.[250] The court of appeals, however, found that the employee had refused the selective employment and, thus, concluded that it would be unreasonable to expect the claimant to call in her absences for work she had refused.[251]

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244. 17 Va. App. 74, 435 S.E.2d 156 (1993).

245. *Id.* at 76, 435 S.E.2d at 158.

246. *Id.* at 79-80, 435 S.E.2d at 160.

247. 12 Va. App. 633, 406 S.E.2d 190, *aff'd en banc*, 13 Va. App. 304, 411 S.E.2d 444 (1991).

248. *Id.* at 639-40, 406 S.E.2d at 193.

249. 17 Va. App. 594, 439 S.E.2d 873 (1994).

250. *Id.* at 594, 439 S.E.2d at 874.

251. *Id.* at 598, 439 S.E.2d at 876.

The claimant refused to report for selective employment because she felt she had not sufficiently recovered to perform the work.[252] Even though her belief was without merit, the court found that she was discharged for a reason related to her injury.[253] The court held that the employee had unjustifiably refused employment; thus, the employee's benefits were suspended, not terminated, and she cured her refusal by accepting comparable employment.[254]

In *Eppling v. Schultz Dining Programs*,[255] the court of appeals distinguished *Murphy* when an employee was terminated from her selective employment because of excessive absenteeism, but was able to establish that non-work-related health problems caused the absences. The court found that wrongful conduct did not cause her termination.[256] Instead, the court compared her situation to that of the employee that is unable to return to work because of other reasons beyond her control.[257] Consequently, the court of appeals held that the claimant's benefits should have been suspended, not terminated.[258]

In *Tumlin v. Goodyear Tire & Rubber Co.*,[259] the court of appeals confirmed that the termination of benefits rule in *Murphy* did not apply to medical benefits and vocational benefits awarded under Virginia Code section 65.2-603. The court also held that the rule did not terminate permanent loss benefits awarded under Virginia Code section 65.2-503.[260] The rationale for the holding was that permanent loss benefits do not compensate a claimant for a wage loss, but instead compensate the claimant for permanent loss of a body part and the related

252. *Id.* at 596, 439 S.E.2d at 874.
253. *Id.*
254. *Id.* at 599, 439 S.E.2d 876-77.
255. 18 Va. App. 125, 442 S.E.2d 219 (1994).
256. *Id.* at 130, 442 S.E.2d at 222.
257. *Id.* at 129, 442 S.E.2d at 222.
258. *Id.* at 129-30, 442 S.E.2d at 222.
259. 18 Va. App. 375, 444 S.E.2d 22 (1994).
260. *Id.* at 381, 444 S.E.2d at 25 (citing VA. CODE ANN. § 65.2-503 (Repl. Vol. 1995)).

presumed economic loss.[261] As such, the termination for cause did not affect the benefits.[262]

Just when it appeared that the rule announced in *Murphy* would fade away, the court of appeals recently sustained a termination of benefits in *Richfood, Inc. v. Williams*.[263] In *Richfood*, the employer terminated the employee for cause when he tested positive for drugs in violation of a conditional reinstatement agreement between the employer and employee.[264] Although the claimant later obtained employment, the court held that since he was terminated for cause, he was responsible for the wage loss and "was not entitled to temporary partial disability benefits after discharge."[265]

V. PROCEDURE

Since June of 1992, there have been many significant developments regarding procedural issues before the Commission. The most significant change involved revision of the Commission's rules.[266] Now discovery before the Commission almost mirrors discovery in Virginia civil actions. No longer must a party obtain the permission of the Commission before propounding interrogatories or deposing doctors.[267]

Other significant new rules include, for example, Rule 1.3 which allows the Commission to dismiss a claim for the failure to file supporting medical evidence.[268] Further, Rules 2.2(B)3 & 4 require the parties to specifically designate the deposition and medical evidence upon which the party will rely at the

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261. *Id.* at 380-81, 444 S.E.2d at 25.

262. *Id.*

263. 20 Va. App. 404, 457 S.E.2d 417 (1995).

264. *Id.* at 404, 457 S.E.2d at 417.

265. *Id.* The court's emphasis on "wrongful conduct" suggests that it may be moving toward a standard similar to that utilized in cases in which unemployment compensation is denied due to an employee's willful violation of an employer's rules. While the court of appeals has not explicitly made this analogy, such a comparison would not be surprising, insofar as the court of appeals has jurisdiction over both workers' compensation and unemployment compensation cases.

266. VIRGINIA WORKERS' COMPENSATION COMMISSION, RULES OF THE VIRGINIA WORKERS' COMPENSATION COMMISSION (1994).

267. *Id.* Rule 1.7(G), (H).

268. *Id.* Rule 1.3.

hearing.[269] The rules also added some protection for a claimant under an award by including Rule 5 which provides that: "A claimant under an award shall not be liable for the cost of medical services payable under the Act."[270]

A. *Admissibility of Medical Histories*

Several court decisions have also had a procedural impact. The court of appeals has held that the Commission can use history given to a medical provider to determine how an accident occurred. In *McMurphy Coal Co. v. Miller*,[271] the court held that the claimant failed to establish a compensable injury by accident since he had not provided his doctors with accurate histories. The court found that the history was an "admission by a party, admissible when offered by an adverse party as an exception to the hearsay rule."[272]

B. *Filing of Medical Records Under Rule 17*

In *North v. Landmark Communications*,[273] the court of appeals held that a Rule 17 violation constitutes reversible error. The employer failed to immediately file a relevant medical report that showed the claimant was disabled and could not return to work.[274] Since the records were relevant to the case and were not available due to the failure of the employer to timely file the reports, the Rule 17 violation constituted reversible error and the case could be re-opened.[275]

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269. *Id.* Rule 2.2(B)3-4.

270. *Id.* Rule 5.

271. 20 Va. App. 57, 455 S.E.2d 265 (1995).

272. *Id.* at 59, 455 S.E.2d at 266; *see also* Pence Nissan Oldsmobile v. Oliver, 20 Va. App. 314, 456 S.E.2d 541 (1995). The court of appeals, however, clearly states that a claimant cannot rise above his or her own testimony at the hearing. *McMurphy Coal*, 20 Va. App. at 59, 455 S.E.2d at 266.

273. 17 Va. App. 639, 440 S.E.2d 156 (1994).

274. *Id.* at 640, 440 S.E.2d at 156.

275. *Id.* at 643, 440 S.E.2d at 158.

C. *Statute of Limitations*

In *Mayberry v. Alcoa Building Products*,[276] the court of appeals held that the entry of a medical only award does not toll the two year statute of limitations for compensation for work incapacity. Since no award was entered, the claimant could not file for a change in condition because a change in condition reviews an award.[277] "It is impossible to have a change in condition without a prior award."[278]

In *McCarthy Electric Co. v. Foster*,[279] the court of appeals held that parties are not entitled to notice of judgment from the Commission. Hence, the time to file for appeal begins from the date of the award regardless of whether the parties are notified.[280] In addition, the employer admitted having received a letter from the employee concerning the award, which was sufficient notice.[281]

VI. LEGISLATIVE DEVELOPMENTS

A. *New Acts in 1995*

The 1995 Session of the General Assembly passed five bills concerning workers' compensation that Governor Allen signed into law. First, the definition of injury was amended as it concerns recreational activities. Effective July 1, 1995, by explicit statutory language, the Act will not cover an employee's injury incurred during voluntary participation in an employer sponsored off-duty recreational activity.[282]

In addition, the Code of Virginia was revised so that an employee cannot cure his unjustified refusal of selective employ-

276. 18 Va. App. 18, 441 S.E.2d 349 (1994).

277. *Id.* at 20, 441 S.E.2d at 350.

278. *Id.* at 21, 441 S.E.2d at 350-51 (citing Allen v. Mottley Constr. Co., 160 Va. 875, 886, 170 S.E. 412, 416 (1933)).

279. 17 Va. App. 344, 437 S.E.2d 246 (1993).

280. *Id.* at 347-48, 437 S.E.2d at 248-49.

281. *Id.*

282. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995) (defining "injury").

ment if his unjustified refusal lasts longer than six months.[283] The six month period runs from the last day compensation was paid before payments were stopped due to the unjustified refusal.[284] Furthermore, once the employee unjustifiably refuses light-duty employment, he loses his temporary partial and vocational rehabilitation benefits.[285] Generally, an employee is entitled only to permanent benefits and medical benefits if he unjustifiably refuses suitable employment. If an employee cures his refusal by accepting employment, the employer is only liable for 66 2/3 percent of the difference between the employee's wages before the injury and the wages of the job originally offered to the employee.[286]

The 1995 Session of the General Assembly also passed legislation concerning the repayment of health care fees. While the Commission has had exclusive jurisdiction over all fee disputes, it now also has express authority to order health care providers to repay excessive fees.[287]

Additional legislation provided that the three year statute of limitations on Black Lung claims begins to run once a diagnosis of the disease is communicated to the administrator of the deceased's estate.[288]

Finally, an employer's right to subrogate for compensation payments from third-party recoveries under the employer's uninsured or underinsured motorists policy has been codified.[289]

B. *New Acts in 1994*

Several significant changes to the workers' compensation statute also were made in 1994. First, the Code of Virginia was amended to include a rebuttable presumption of intoxication in

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283. *Id* § 65.2-510(c).

284. *Id.*

285. *Id.* § 65.2-510(A).

286. *Id.* § 65.2-510(B).

287. *Id.* § 65.2-714(A).

288. *Id.* § 65.2-406(A)(1).

289. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1995); VA. CODE ANN. § 65.2-309.1 (Repl. Vol. 1995).

workers' compensation cases.[290] A rebuttable presumption of intoxication or use of a nonprescribed controlled substance exists if, at the time of his injury or death, the employee meets or exceeds the standard under section 18.2-266 of the Code of Virginia[291] or yields a positive test result for the use of a nonprescribed controlled substance from a laboratory certified by the National Institute on Drug Abuse.[292]

The 1994 Session also increased the penalty for making fraudulent statements to obtain compensation benefits. The penalty for making false, fictitious or fraudulent statements to obtain workers' compensation benefits has been increased from a Class 1 Misdemeanor[293] to a Class 6 Felony.[294]

Additionally, the 1994 Session corrected the long-standing problem of the payment of benefits during the time period to request review of an award. Under the new law, the penalty for late payment will not be imposed until two weeks after the time to request review (twenty days) or note appeal to the court of appeals (thirty days.)[295] Further, the General Assembly modified the means for establishing set-offs for third-party

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290. VA. CODE ANN. § 65.2-306(B) (Repl. Vol. 1995).

291. The code states:

> It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely.

VA. CODE ANN. § 18.2-266 (Cum. Supp. 1995).

292. VA. CODE ANN. § 65.2-306(B) (Repl. Vol. 1995).

293. A Class 1 misdemeanor is punishable by not more than one year in prison and/or a fine not to exceed $2,500. VA. CODE ANN. § 18.2-11(a) (Cum. Supp. 1995).

294. VA. CODE ANN. § 65.2-312(B) (Repl. Vol. 1995). A Class 6 Felony is punishable by one to five years in prison, or at the discretion of a jury (or by the court if there is no jury,) no more than one year in prison and/or a fine not to exceed $2,500. VA. CODE ANN. § 18.2-10(f) (Cum. Supp. 1995).

295. VA. CODE ANN. § 65.2-524 (Repl. Vol. 1995).

settlements. Under this section, an employer must pay a proportionate share of attorney's fees.[296]

Further, legislation affecting health care providers was enacted. Until an award is made, health care providers cannot pursue collection (call or write, threatening further action) for services rendered in connection with an alleged workers' compensation claim.[297] Neither can health care providers balance bill employees for the difference between the amount charged for services and the amount the insurance company paid.[298] Moreover, to prevent multiple diagnostic tests, in certain circumstances, a health care provider's records must be transferred to succeeding physicians, and no medical test can be repeated within sixty days unless its medical necessity is certified by a qualified physician.[299]

Finally, the Code of Virginia was amended as it concerns the licensing of vocational rehabilitation providers. Vocational rehabilitation services provided under the Act must now be performed by a certified provider or person certified by the Boards of Medicine, Nursing, Optometry, Professional Counselors, Psychology, or Social Work.[300]

C. *New Acts in 1993*

The most significant legislation passed by the 1993 Session of the General Assembly and signed into law involved independent medical exams. An employer cannot make an employee submit to more than one examination per medical specialty without prior approval by the Commission based on a showing of good cause.[301]

296. *Id.* § 65.2-313.
297. *Id.* § 65.2-601.1(A).
298. *Id.* § 65.2-714(D).
299. *Id.* § 65.2-604(B).
300. *Id.* § 65.2-603(A)(3).
301. *Id.* § 65.2-607(A).

VII. CONCLUSION

In the last three years, there have been significant developments in Virginia workers' compensation law. We have attempted to provide the practitioner with a helpful summary of the most significant and relevant developments during this period.