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Lawrence D. Tarr

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Salvatore Lupica

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WORKERS' COMPENSATION

Lawrence D. Tarr *
Salvatore Lupica **

I. INTRODUCTION

This article provides an overview of important developments in workers' compensation law in Virginia during 2003 and the first part of 2004. It includes analyses of decisions by the Supreme Court of Virginia, the Court of Appeals of Virginia, and the Virginia Workers' Compensation Commission (the "Commission"), together with a review of relevant legislative changes made in the 2003 session of the Virginia General Assembly.¹

The overview is divided into four sections, each addressing a discrete set of issues. The first section discusses the scope and coverage of the Virginia Workers' Compensation Act (the "Act").² It addresses injuries by accident, occupational diseases, causation, and liable parties. The second section summarizes developments in benefits theory and eligibility and, the third, developments in practice and procedure. The final section provides a review of 2003 legislation.

* Commissioner, Virginia Workers' Compensation Commission, Richmond, Virginia. 1994–present, Chairman, 1994–July 1997, July 2003–present, Chief Deputy Commissioner/Executive Director, 1987–1994, Deputy Commissioner, 1982–1987. B.A., 1970, University of Pittsburgh; J.D., 1974 Washington College of Law, American University.

** Assistant to the Chairman, Virginia Workers' Compensation Commission, Richmond, Virginia. B.S., 1982, John Carroll University; J.D., 1986, *cum laude*, University of Richmond School of Law.

1. A similar piece was last published in 1999. See Daniel E. Lynch, *Annual Survey of Virginia Law: Workers' Compensation*, 33 U. RICH. L. REV. 1101 (1999).

2. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 2002 & Cum. Supp. 2004).

II. SCOPE AND COVERAGE OF WORKERS' COMPENSATION

The Virginia Workers' Compensation Act provides compensation to individuals who sustain a qualifying work-related "injury" whether "by accident," or as the result of an "occupational disease."³ To be compensable under the Act, the injury must be "by accident arising out of and in the course of the employment."⁴ Because a majority of claims processed by the Commission involve injuries by accident,⁵ this discussion will begin with a summary of some important recent cases involving the Commission's requirements for compensability.

A. Injury by Accident

In *Pro-Football, Inc. v. Uhlenhake*,⁶ the Court of Appeals of Virginia examined what constitutes an "accident" within the meaning of the Act.⁷ The claimant, an offensive lineman for the Washington Redskins, was awarded compensation for an injury found to have been sustained in his participation in a regularly scheduled game.⁸ The employer contested compensability, arguing that given the nature of professional football with its "high likelihood of injury,"⁹ and "where injuries are customary, foreseeable, and expected," the injuries cannot be deemed "accidental" under the Act.¹⁰ Both the Commission and the court of appeals rejected this argument.

3. *Id.* § 65.2-101 (Cum. Supp. 2004). The Act defines the pivotal concept of "injury" to include "occupational disease," thereby extending potential coverage to all work-related disabling conditions whether caused by accident or disease. *Id.* The effect, and apparent purpose of this draftsmanship, is to provide identical treatment regardless of the genesis of the injury, unless there is a statutory provision expressly indicating otherwise. *See id.* Also relevant is the fact that the Act did not originally provide coverage for diseases, but was subsequently amended in 1944 to do so. *Compare id.* § 16.76A-1887(2)(d) (1942), *with id.* § 16.76A-1887(2)(d) (Supp. 1944).

4. VA. CODE ANN. § 65.2-101 (Cum. Supp. 2004).

5. In 2002, about ninety-six percent of all claim files opened by the Commission are for injuries by accident. VA. WORKERS' COMP. COMM'N, STATISTICAL REPORT FOR THE CALENDAR YEAR OF 2002, *available at* <http://www.vwc.state.va.us/printable/2002stats.doc> (last visited Sept. 12, 2004).

6. 37 Va. App. 407, 558 S.E.2d 571 (Ct. App. 2002), *aff'd*, 265 Va. 1, 574 S.E.2d 288 (2003).

7. 37 Va. App. at 412-13, 558 S.E.2d at 572-74.

8. *Id.* at 409-10, 558 S.E.2d at 573.

9. *Id.* at 414, 558 S.E.2d at 575.

10. *Id.* at 412, 558 S.E.2d at 574.

The court of appeals began its analysis by recognizing the Act does not specifically delineate what constitutes an "accident," thus leaving the definition to judicial construction.¹¹ The court continued with the relevant standard:

[T]o establish an "injury by accident," a claimant must prove (1) that the injury appeared suddenly at a particular time and place and upon a particular occasion, (2) that it was caused by an identifiable incident or sudden precipitating event, and (3) that it resulted in an obvious mechanical or structural change in the human body.¹²

The court then discussed some nuances to this definition relevant to the case:

Although the burden is upon the employee "to prove how the injury occurred and that it is compensable," the principle is well established that "[t]o constitute injury by accident it is not necessary that there must be a . . . 'fortuitous circumstance' . . . [or] that there should be an extraordinary occurrence in or about the work engaged in."¹³ Moreover, even if an "injury was not accidental as to cause, [if] it was as to result [, . . .] this is sufficient under the [Act]."¹⁴

Finding Uhlenhake's claim compensable, the court distinguished between the general activity of Uhlenhake's employment—"to train, practice, and play in football games"—and the specific incident alleged to have caused the injury, finding the former to be determinative.¹⁵ It further reasoned that, if it were to focus on the latter, the effect would be an erroneous introduction of assumption of risk concepts to workers' compensation where traditional negligence theories are generally irrelevant.¹⁶ Likening Uhlenhake's situation to other high-risk professions traditionally covered by the Act, such as coal mining, steel work, fire-fighting, and law enforcement work, the court concluded that the Commission "properly rejected" the employer's contention that

11. *Id.* at 413, 558 S.E.2d at 574.

12. *Id.* at 413, 558 S.E.2d at 574 (quoting *Southern Express v. Green*, 257 Va. 181, 187, 509 S.E.2d 836, 839 (1999)).

13. *Id.* (quoting *Derby v. Swift & Co.*, 188 Va. App. 336, 344, 49 S.E.2d 417, 421 (Ct. App. 1984)).

14. *Id.* (quoting *Goodyear Tire & Rubber Co. v. Pierce*, 5 Va. App. 374, 387, 363 S.E.2d 433, 430 (Ct. App. 1987); *Derby v. Swift & Co.*, 188 Va. App. 336, 333-34, 49 S.E.2d at 417, 421 (Ct. App. 1984)).

15. *Id.* at 413, 558 S.E.2d at 574-75.

16. *Id.* at 416, 558 S.E.2d at 576.

the probability of injury inherent in this occupation precluded coverage.¹⁷

An injury by accident must also arise “out of and in the course of the employment” to be compensable.¹⁸ In *Lucas v. Federal Express Corp.*,¹⁹ the claimant, a delivery truck driver, appealed the Commission’s decision denying benefits for injuries she allegedly sustained when her truck was struck by lightning.²⁰ Applying the requirement that an injury be one “arising out of and in the course of the employment”²¹ to these facts, the Court of Appeals of Virginia reiterated that these two phrases are distinct and that the claimant must prove both elements with the requisite degree of certainty to establish compensability.²² Arising “out of” relates to “the origin or cause of the injury,” while “in the course of” refers to the “time, place, and circumstances under which the accident occurred.”²³ Because Lucas established “that the injuries she sustained were a result of a lightning strike while she was inside her Federal Express truck following a package pickup[,]” the court concluded that she had met the “in the course of” requirement.²⁴

The remaining issue was whether the injury arose out of her employment. In analyzing this issue, Virginia courts apply what is known as the “actual risk test,” which requires that the claimant establish that her employment exposed her to the danger that actually caused the injury.²⁵ The claimant must “prove that the employment activity in which she was engaged exposed her to the injurious risk to an extent to which people were not ordinarily exposed, and thus caused her injuries.”²⁶ Because Lucas failed to introduce evidence “that the particular electrical or structural

17. *Id.* at 417, 558 S.E.2d at 576.

18. VA. CODE ANN. § 65.2-101 (Cum. Supp. 2004).

19. 41 Va. App. 130, 583 S.E.2d 56 (Ct. App. 2003).

20. *Id.* at 131, 583 S.E.2d at 57.

21. VA. CODE ANN. § 65.2-101 (Cum. Supp. 2004).

22. 41 Va. App. at 133–34, 583 S.E.2d at 58 (citing *County of Chesterfield v. Johnson*, 237 Va. 180, 183, 376 S.E.2d 73, 74 (1989)).

23. *Id.*

24. *Id.* at 134, 583 S.E.2d at 59.

25. *Id.*, 583 S.E.2d at 58 (quoting *Lucas v. Lucas*, 212 Va. 561, 563, 186 S.E.2d 63, 64 (1972)).

26. *Id.*, 583 S.E.2d at 59.

characteristics" of her truck were the cause of her injury, she failed to satisfy this standard.²⁷

Perhaps the most frequently litigated scenarios implicating these aspects of the "arising out of" requirement involve slips, trips, or falls at work. For instance, in *Grayson County School Board v. Cornett*,²⁸ the claimant, a school bus driver, claimed benefits for injuries she sustained when she fell going down the steps of her bus.²⁹ Although the Commission's deputy commissioner³⁰ denied the claim finding that the alleged accident did not arise from the employment, the Commission reversed.³¹

On appeal, the employer argued that there was insufficient evidence that the claimant "sustain[ed] an injury by accident arising from her employment."³² The Court of Appeals of Virginia affirmed the Commission's award, finding persuasive the claimant's testimony about the peculiar nature of the bus steps, including their unusual height and angle which made them "different from normal bus steps."³³ This distinguished Cornett's accident from a simple "fall down [the] stairs [that] does not arise out of the employment without evidence of a defect in the stairs or evidence that a condition of the employment caused the fall."³⁴ The claimant's testimony as to idiosyncrasies in the steps' construction, together with the supporting medical documentation, provided an ample evidentiary basis supporting the award.³⁵

27. *Id.* at 136, 583 S.E.2d at 60.

28. 39 Va. App. 279, 572 S.E.2d 505 (Ct. App. 2002).

29. *Id.* at 281, 572 S.E.2d at 506.

30. "Deputy commissioner" is the Commission's designation for its hearing officers. VA. CODE ANN. § 65.2-203 (Repl. Vol. 2002).

31. *Cornett*, 39 Va. App. at 286, 572 S.E.2d at 508. The deputy commissioner's decision was apparently based on a credibility determination. *See id.* at 286, 572 S.E.2d at 508. This does not, however, affect the subsequent resolution of the core compensability holding. *See id.* at 288, 572 S.E.2d at 510.

32. *Id.* at 286, 572 S.E.2d at 509.

33. *Id.* at 287-88, 572 S.E.2d at 509.

34. *Id.* at 287, 572 S.E.2d at 509 (citing *Southside Va. Training Ctr. v. Shell*, 20 Va. App. 199, 203, 455 S.E.2d 761, 763 (Ct. App. 1995)).

35. *Id.* at 288, 572 S.E.2d at 510. The Commission's factual findings "that are supported by credible evidence are conclusive and binding . . . on appeal." *Southern Iron Works, Inc. v. Wallace*, 16 Va. App. 131, 134, 428 S.E.2d 32, 34 (Ct. App. 1993). The Commission's findings, if supported by credible evidence, or reasonable inferences drawn from the evidence, will not be disturbed on review, even though the record may contain evidence to support a contrary finding. *Morris v. Badger Powhatan/Figgie Int'l, Inc.*, 3 Va. App. 276, 279, 348 S.E.2d 876, 877 (Ct. App. 1986).

*K & G Abatement Co. v. Keil*³⁶ posed an interesting evidentiary issue as to whether a roofer's apparent fall was sufficiently shown to arise out of his employment.³⁷ The Court of Appeals of Virginia summarized the salient facts as follows:

Keil left the second story roof workstation to descend to the ground to place a telephone call. He climbed down a permanent ladder to the first story roof where he was then out of the other roofers' sight. In order to go from the first story roof to the ground, Keil had to lower a twenty-foot extension ladder to the ground. Several people inside the school heard the sound of the extension ladder being displaced and something striking the concrete pavement.

Shortly thereafter, Keil was found lying on the ground . . . with an open-head wound. Loose gravel from the roof was found on the ground around him.³⁸

No one saw Keil fall, nor was he able to provide information about the accident because he died shortly after being taken to the hospital.³⁹ The death certificate, however, stated that "death was caused by 'closed chest and head injuries.'"⁴⁰

Affirming the Commission's award of benefits to Keil's widow, the court of appeals rejected the employer's argument that the evidence was insufficient to establish that the fatal injuries arose out of the employment.⁴¹ The court reasoned that, although the Commission erroneously applied the unexplained death presumption found in *Southern Motor Lines Co. v. Alvis*⁴² because Keil was not dead when he was found at the jobsite,⁴³ the circumstances of the accident, together with the death certificate and testimony offered by the medical examiner, sufficiently established the requisite causal nexus.⁴⁴

36. 38 Va. App 744, 568 S.E.2d 416 (Ct. App. 2002).

37. *Id.* at 747, 568 S.E.2d at 417-18.

38. *Id.* at 748, 568 S.E.2d at 418.

39. *Id.*

40. *Id.*

41. *Id.* at 755, 568 S.E.2d at 421.

42. 200 Va. 168, 171-72, 104 S.E.2d 735, 738 (1958) ("[W]here an employee is found dead as the result of an accident at his place of work or nearby, . . . the court will indulge the presumption that the relation of master and servant existed at the time of the accident and that it arose out of and in the course of his employment.").

43. *Keil*, 38 Va. App. at 757, 568 S.E.2d at 422.

44. *Id.* at 759, 568 S.E.2d at 423 (citing *Smithfield Packing Co. v. Carlton*, 29 Va. App. 176, 181, 510 S.E.2d 740, 742 (Ct. App. 1999)).

B. *Disease Conditions*

Since 1944, the Virginia Workers' Compensation Act has covered disease conditions caused by employment.⁴⁵ It creates a distinction between an "occupational disease," defined as "a disease arising out of and in the course of employment,"⁴⁶ and an "ordinary disease of life," which is one "to which the general public is exposed outside of the employment."⁴⁷ This distinction is crucial because the claimant has a heavier "clear and convincing" evidentiary standard to meet in order to demonstrate that an "ordinary disease of life" should be treated as a compensable "occupational disease."⁴⁸

Fairfax County Fire & Rescue Department v. Mottram,⁴⁹ a case ultimately decided by the Supreme Court of Virginia, involved a condition implicating not only both categories of disease conditions, but also injuries by accident.⁵⁰ Mottram had worked as a paramedic and as a paramedic supervisor for nineteen years when he was diagnosed with post-traumatic stress disorder ("PTSD").⁵¹ He filed an initial claim for benefits alleging an injury by accident, and a subsequent claim alleging his condition was compensable as an occupational disease.⁵² No appeal was taken from the Commission's decision denying the first claim.⁵³ Thereafter, the Commission denied the second claim as well, "finding that Mottram's PTSD was not compensable because it was a condition resulting from cumulative or repetitive trauma, rather than a disease."⁵⁴ Mottram appealed the Commission's decision.⁵⁵

In its decision, the Court of Appeals of Virginia referred to prior precedent, "recogniz[ing] that, under appropriate circumstances, PTSD may be compensable as an injury by accident . . . because it resulted from 'an obvious sudden shock or fright aris-

45. See *supra* note 3 and accompanying text.

46.

47. VA. CODE ANN. § 65.2-400, -401 (Repl. Vol. 2002 & Cum. Supp. 2004).

48. See *id.* § 65.2-401 (Repl. Vol. 2002 & Cum. Supp. 2004).

49. 263 Va. 365, 559 S.E.2d 698 (2002).

50. *Id.* at 367, 559 S.E.2d at 699.

51. *Id.* at 368, 559 S.E.2d at 699.

52. *Id.* at 370, 559 S.E.2d at 700.

53. *Id.*

54. *Id.*, 559 S.E.2d at 700-01.

55. *Id.* at 371, 559 S.E.2d at 701.

ing in the course of employment”⁵⁶ The court also acknowledged that PTSD could, under other circumstances, be treated as a disease condition.⁵⁷ Because the medical evidence indicated that Mottram’s PTSD resulted from changes in his neurological chemistry brought about in response to repeated work-related external stimuli and was “suffered as a result of ongoing stress,” it was a potentially compensable disease condition rather than the non-compensable result of cumulative trauma.⁵⁸ However, “[b]ecause PTSD is a condition that may develop from the general stresses of life . . . it is an ordinary disease of life,” covered by Virginia Code section 65.2-401 rather than an occupational disease under section 65.2-400.⁵⁹ The court reversed the Commission’s denial of benefits and remanded the matter for a determination as to whether Mottram’s specific case was compensable under this rationale.⁶⁰

The Supreme Court of Virginia agreed that Mottram’s PTSD was properly viewed as a disease,⁶¹ but disagreed with the court of appeals as to whether it was an occupational disease or an ordinary disease of life.⁶² Although the supreme court acknowledged that it was “a medical issue to be decided by the trier of fact,”⁶³ the court ultimately concluded, as a matter of law, that Mottram’s PTSD was an occupational disease compensable under Virginia Code section 65.2-400.⁶⁴ The court found determinative medical evidence “that Mottram’s PTSD was ‘intimately related to his service-connected activities’” and that there was “no evi-

56. *Mottram v. Fairfax County Fire & Rescue Dep’t*, 35 Va. App. 85, 93, 542 S.E.2d 811, 814 (Ct. App. 2001), *aff’d in part and rev’d in part*, 263 Va. 365, 559 S.E.2d 698 (2002) (citing *Hercules v. Gunther*, 13 Va. App. 357, 362–63, 412 S.E.2d 185, 188 (Ct. App. 1991)).

57. *Id.* at 93–94, 542 S.E.2d at 814–15 (citing *Teasley v. Montgomery Ward & Co.*, 14 Va. App. 45, 415 S.E.2d 596 (Ct. App. 1992)).

58. *Id.* at 95–96, 542 S.E.2d at 815. The *Mottram* court applied *A New Leaf, Inc. v. Webb*, 257 Va. 190, 511 S.E.2d 102 (1999), which found that a flower shop employee’s allergic dermatitis, resulting from repeated exposure to plant chemicals, was a reaction of the immune system rather than impairment from cumulative trauma resulting from repetitive motion. Therefore, it was compensable as a disease condition. *Id.* at 197–98, 511 S.E.2d at 105.

59. *Mottram*, 35 Va. App. at 96, 542 S.E.2d at 816.

60. *Id.*

61. *Fairfax County Fire & Rescue Dep’t v. Mottram*, 263 Va. 365, 373, 559 S.E.2d 698, 702 (2002).

62. *Id.* at 373–74, 559 S.E.2d at 702.

63. *Id.* at 375, 559 S.E.2d at 703 (quoting *Knott v. Blue Bell, Inc.*, 7 Va. App. 335, 338, 373 S.E.2d 481, 483 (Ct. App. 1988)).

64. *Id.*

dence that Mottram was exposed to traumatic events outside his employment.”⁶⁵

The stringency of the “clear and convincing” evidentiary standard applied in ordinary diseases of life cases is frequently illustrated in claims for carpal tunnel syndrome (“CTS”).⁶⁶ In *Steadman v. Liberty Fabrics, Inc.*,⁶⁷ the claimant appealed the Commission’s determination denying her CTS claim based on its finding that she had not proved, by clear and convincing evidence, that her CTS was not caused by activities outside her work.⁶⁸ The Court of Appeals of Virginia began its analysis by summarizing the prerequisites for compensability applicable to ordinary diseases of life:

Before a claimant may be compensated for an ordinary disease of life, she must prove that the disease (1) arose out of and in the course of her employment, (2) did not result from causes outside of the employment, and (3) occurred incident to an occupational disease, an infectious or contagious disease contracted in the course of the employment listed in Code § 65.2-401(2)(b), or is characteristic of the employment and was caused by conditions peculiar to the employment.⁶⁹

The court of appeals defined the “clear and convincing” evidentiary standard applicable to each element as:

[t]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required

65. *Id.*

66. Ordinary diseases of life may be considered compensable occupational diseases, provided the claimant shows, through clear and convincing evidence, that certain conditions exist. VA. CODE ANN. § 65.2-401 (Repl. Vol. 2002 & Cum. Supp. 2004). Carpal tunnel syndrome was historically held to be the non-compensable result of cumulative trauma brought about by repetitive motion. See *Stenrich Group v. Jemmott*, 251 Va. 186, 199, 467 S.E.2d 795, 802 (1996). Effective July 1, 1997, however, Virginia Code section 65.2-400 was amended to provide that CTS was an ordinary disease of life covered by section 65.2-401. Act of Feb. 17, 1997, ch. 15, 1997 Va. Acts 40 (codified as amended at VA. CODE ANN. § 65.2-400(c) (Repl. Vol. 2002 & Cum. Supp. 2004)).

67. 41 Va. App. 796, 589 S.E.2d 465 (Ct. App. 2003).

68. *Id.* at 802, 589 S.E.2d at 468.

69. *Id.* at 803, 589 S.E.2d at 468 (citing *Lanning v. Va. Dep't of Transp.*, 37 Va. App. 701, 706, 561 S.E.2d 33, 36 (Ct. App. 2002)).

beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.⁷⁰

After noting that the Commission's determinations as to causation are findings of fact binding on appeal,⁷¹ the court affirmed the conclusion that the claimant's statement that she did not "do any activities outside of work" was insufficient to prove that her CTS did not result from causes other than her employment.⁷²

The court distinguished Steadman's evidence from that presented by the claimant in *Lee County School Board v. Miller*.⁷³ Importantly, in *Lee County School Board*, the "claimant testified that she engaged in no hobbies or other activities outside her work which involved . . . motion" thought to cause her condition.⁷⁴ The record in *Lee County School Board* included "statements from [the] claimant's doctors that [her] CTS did not result from any causes outside of the employment."⁷⁵ Although such statements are not always critical because "finding[s] of causation need not be based exclusively on medical evidence,"⁷⁶ the absence of such medical evidence in *Steadman* sufficiently supported the Commission's finding that the claimant's "testimony that she engaged in no activities outside of her employment fails to prove by clear and convincing evidence that the myriad of her life activities outside her employment were not the cause of her CTS."⁷⁷

In *Blue Ridge Market of Virginia, Inc. v. Patton*,⁷⁸ the court of appeals addressed the compensability of an exacerbation of a pre-existing disease condition by an accidental injury.⁷⁹ Philmon Patton injured his right arm in a compensable slip and fall.⁸⁰ The fall caused a tear in his right pectoral muscle for which he received a

70. *Id.*, 589 S.E.2d at 468–69 (quoting *Nat'l Fruit Prod. Co. v. Staton*, 28 Va. App. 650, 654, 507 S.E.2d 667, 669 (Ct. App. 1998)).

71. *Id.*, 589 S.E.2d at 469 (citing *Marcus v. Arlington County Bd. of Supervisors*, 15 Va. App. 544, 551, 425 S.E.2d 525, 530 (Ct. App. 1993)).

72. *Id.* at 804, 806, 589 S.E.2d at 469–70.

73. 38 Va. App. 253, 563 S.E.2d 374 (Ct. App. 2002).

74. *Id.* at 264, 563 S.E.2d at 379.

75. *Id.*

76. *Id.* at 260, 563 S.E.2d at 377 (citing *Dollar Gen'l Store v. Cridlin*, 22 Va. App. 171, 176, 468 S.E.2d 152, 154 (1996)).

77. *Steadman*, 41 Va. App. at 806, 589 S.E.2d at 470.

78. 39 Va. App. 592, 575 S.E.2d 574 (Ct. App. 2003).

79. *Id.* at 594–95, 575 S.E.2d at 575.

80. *Id.* at 595, 575 S.E.2d at 575.

permanent partial disability rating.⁸¹ Subsequently, a treating physician diagnosed Patton with bilateral CTS and opined "that 'the carpal tunnel on the right was secondary to his fall and the carpal tunnel on the left was not,'" and that the "underlying carpal tunnel disease' was 'aggravated' and 'exacerbated' by his accident."⁸² The rating was increased by the amount of disability attributable to the right-side CTS.⁸³ The Commission awarded the claim on the theory that the injury by accident aggravated the pre-existing CTS.⁸⁴

On the employer's appeal, the court of appeals asked whether "Virginia law allow[s] a claimant who sustains an initial compensable injury by accident to recover disability benefits for that portion of the disability resulting from aggravation, by the accident, of an ordinary disease of life?"⁸⁵ Answering this question in the affirmative,⁸⁶ the court of appeals expressly rejected the employer's argument, which relied on *Ashland Oil Co. v. Bean*.⁸⁷ In *Bean*, compensation was denied for the exacerbation of the claimant's bunions on her feet caused by her extensive standing, a condition of her work.⁸⁸ The court in *Blue Ridge Market* distinguished Patton's situation because the exacerbation of his disease was attributable to an intervening compensable accident rather than merely the conditions of his employment.⁸⁹ It thus came within "[t]he general rule . . . that [a] causal connection is established when it is shown that an employee has received a compensable injury which materially aggravates or accelerates a pre-existing latent disease."⁹⁰ The Commission's award was affirmed.⁹¹

81. *Id.*, 575 S.E.2d at 575-76.

82. *Id.*, 575 S.E.2d at 576.

83. *Id.* at 596, 575 S.E.2d at 576.

84. *Id.*

85. *Id.* at 597, 575 S.E.2d at 576.

86. *See id.* at 599, 575 S.E.2d at 578.

87. 225 Va. 1, 300 S.E.2d 739 (1983).

88. *Id.* at 3, 300 S.E.2d at 739; *see Blue Ridge Market*, 39 Va. App. at 597-98, 575 S.E.2d at 577.

89. *See Blue Ridge Market*, 39 Va. App. at 599, 575 S.E.2d at 577-78.

90. *Id.* at 598, 575 S.E.2d at 577 (quoting *Justice v. Panther Coal Co.*, 173 Va. 1, 6-7, 2 S.E.2d 333, 336 (1939)).

91. *Blue Ridge Market*, 39 Va. App. at 601, 575 S.E.2d at 578-79; *see also Yellow Freight Sys., Inc. v. Robinson*, 37 Va. App. 436, 442-43, 559 S.E.2d 381, 384 (Ct. App. 2002) (holding that an aggravation of a pre-existing emotional condition by a compensable accident is a compensable injury).

One of the more vexing issues in occupational disease cases is the application of the evidentiary presumption found in Virginia Code section 65.2-402. Certain respiratory conditions, coronary conditions, and specified forms of cancer, are "presumed to be occupational diseases, suffered in the line of duty" and are "covered by" the statute for identified law enforcement officers, emergency response personnel, and firefighters.⁹² The employer may rebut the presumption by introducing "a preponderance of competent [medical] evidence to the contrary" thereby requiring the claimant to prove causation in the standard manner.⁹³ This provision generates extensive litigation on questions regarding the proper allocation of the parties' respective burdens of proof, and their relative success in carrying those burdens.⁹⁴

The claimant in *Metropolitan Washington Airports Authority v. Lusby*⁹⁵ alleged that his coronary artery disease ("CAD") was a compensable occupational disease.⁹⁶ Lusby worked for the Metropolitan Washington Airports Authority ("MWAA") as a firefighter, and it was undisputed that he was among those workers who could invoke the Virginia Code section 65.2-402 presumption.⁹⁷ While he did not actually fight fires, his work included "training drills and exercises" and, on occasion, outdoor inspections.⁹⁸ He introduced evidence that he did not have CAD before his employment with MWAA, but "his medical history was significant for hypertension that was controlled by medication, high cholesterol, obesity, diabetes, and color blindness."⁹⁹

As is often true in cases of this type, there was conflicting medical evidence as to the etiology of Lusby's CAD. "Dr. Holland stated that non-work-related factors caused Lusby's coronary artery disease, specifically noting a 'combination of "bad genes" and lifestyle choices;" he discounted the contributing role of certain

92. VA. CODE ANN. § 65.2-402 (A)-(C) (Repl. Vol. 2002 & Cum. Supp. 2004).

93. *Id.* § 65.2-402(A) (Repl. Vol. 2002 & Cum. Supp. 2004).

94. *See, e.g., Bass v. City of Richmond Police Dep't*, 258 Va. 103, 112-15, 515 S.E.2d 557, 561-63 (1999) (discussing the "occupational disease" presumption and the evidence needed to overcome the presumption).

95. 41 Va. App. 300, 585 S.E.2d 318 (Ct. App. 2003).

96. *Id.* at 304, 585 S.E.2d at 319.

97. *Id.* at 305, 310-11, 585 S.E.2d at 320, 323.

98. *Id.* at 305, 585 S.E.2d at 320.

99. *Id.* at 306, 585 S.E.2d at 320.

cardiotoxic chemicals.¹⁰⁰ Dr. Israel contested the existence of a scientific basis for linking CAD and occupational stress generally, concluding that Lusby's CAD "would not be causally related to work activities as a firefighter, even if he were an active firefighter over the years."¹⁰¹ The record also included Dr. Shah's contrasting diagnosis of stress-induced ischemia and his recommendation that Lusby find other employment.¹⁰² Dr. Shah also observed that Lusby's work required "extreme exertion under extreme conditions."¹⁰³ Additionally, Dr. Schwartz stated that "one must conclude that it is at least as likely that [Lusby's] occupational stress contributed to his [CAD] as his hyperlipidemia."¹⁰⁴

The deputy commissioner denied the claim, finding that although Lusby could invoke the statutory presumption, MWAA had introduced sufficient evidence to overcome it.¹⁰⁵ The Commission reversed, holding that the evidence provided by Drs. Shah and Schwartz left the record in equipoise, requiring a finding that MWAA had failed to dispel the presumption.¹⁰⁶

The Court of Appeals of Virginia described the test for determining whether an employer has overcome the statutory presumption as follows:

[A]n employer overcomes the statutory presumption by showing "both that 1) claimant's disease was not caused by his employment, and 2) there was a non-work related cause of the disease. . . . [I]f the employer does not prove by a preponderance of the evidence both parts of this two-part test, the employer has failed to overcome the statutory presumption."¹⁰⁷

Acknowledging the limited scope of review applied to the Commission's findings of fact, the court concluded that there was an adequate evidentiary basis supporting the Commission's holding.¹⁰⁸ The court further noted that MWAA's evidence "constituted 'mere general denials' that coronary heart disease is work-

100. *Id.* at 308-09, 585 S.E.2d at 322.

101. *Id.* at 309-10, 585 S.E.2d at 322.

102. *Id.* at 308, 585 S.E.2d at 321.

103. *Id.* at 307, 585 S.E.2d at 321.

104. *Id.* at 310, 585 S.E.2d at 323.

105. *Id.* at 304, 585 S.E.2d at 319-20.

106. *Id.* at 311-12, 585 S.E.2d at 323.

107. *Id.* (quoting *Bass*, 258 Va. at 114, 515 S.E.2d at 562-563).

108. *Id.* at 312, 585 S.E.2d at 323.

related, . . . and did not rebut the 'positive opinions' regarding causation given by Drs. Schwartz and Shah.¹⁰⁹ Stressing that both prongs of the *Bass* test must be satisfied, the court of appeals rejected the employer's argument that its evidence of non-work-related causes for Lusby's CAD was sufficient to overcome the presumption.¹¹⁰ Finally, because the Commission sufficiently weighed the competing evidence, the court of appeals held that MWAA's reliance on *Henrico County Division of Fire v. Woody* was misplaced.¹¹¹

In *Clinchfield Coal Co. v. Reed*,¹¹² the employer appealed the award of medical benefits for pneumoconiosis ("CWP"), a pulmonary disease afflicting coal miners.¹¹³ The employer contested the award because the disease had not yet caused disability that would entitle Reed to weekly disability benefits.¹¹⁴ On appeal, the employer questioned the Commission's reliance on *Jones v. E.I. DuPont de Nemours & Co.*¹¹⁵ to support the award, arguing that *Jones* should be expressly overruled or, in the alternative, limited to cases involving asbestosis, the disease specifically at issue in that case.¹¹⁶ The Court of Appeals of Virginia declined to do either.

With regard to the invitation to overrule *Jones*, the court of appeals noted that, although *Jones* was a panel decision, it was nonetheless binding precedent that "cannot be overruled except by the Court of Appeals sitting *en banc* or by the Virginia Supreme Court."¹¹⁷ The court of appeals further concluded that the structure of the Act itself justified the Commission's application

109. *Id.* at 312, 585 S.E.2d at 324 (quoting *Madlin v. County of Henrico Police*, 34 Va. App. 396, 407, 542 S.E.2d 33, 39 (2001)).

110. *Id.* at 313-14, 585 S.E.2d at 324.

111. *Id.* at 314, 585 S.E.2d at 324-25; see *Henrico County Div. of Fire v. Woody*, 39 Va. App. 322, 327-29, 572 S.E.2d 526, 528-29 (Ct. App. 2002) (holding that the Commission's failure to address both prongs of the *Bass* test constituted reversible error requiring remand).

112. 40 Va. App. 69, 577 S.E.2d 538 (Ct. App. 2003).

113. *Id.* at 71-72, 577 S.E.2d at 539.

114. *Id.*

115. 24 Va. App. 36, 38, 480 S.E.2d 129, 130 (1997) (finding that, where the presence of asbestosis is established, an award of benefits is required even if the condition has not reached a ratable level or resulted in disability).

116. *Clinchfield Coal*, 40 Va. App. at 71, 577 S.E.2d at 539.

117. *Id.* at 73, 577 S.E.2d at 540 (quoting *Johnson v. Commonwealth*, 252 Va. 425, 430 470 S.E.2d 539, 541 (1996)).

of the *Jones* rationale in CWP cases as well as asbestosis cases.¹¹⁸ In reaching its decision, the court commented that the Act provides two distinct categories of benefits—wage loss payments and payment of related medical expenses—and that, generally, entitlement to medical benefits is not dependent upon wage loss or disability.¹¹⁹ Although the Act frequently draws distinctions between CWP and asbestosis, no distinction is made as to the availability of medical benefits.¹²⁰ Accordingly, since there was sufficient evidence to support the Commission's finding that Reed had CWP, the award of medical benefits was appropriate under *Jones*.¹²¹

C. Causation

Regardless of whether the initial compensable event is an injury by accident or occupational disease, there is the possibility that the connection between the condition for which the claimant seeks benefits and the compensable event is too attenuated to support an award of benefits. This was the issue in *Paul Johnson Plastering v. Johnson*.¹²²

Paul Johnson sustained a compensable injury on January 15, 1990 resulting in a fracture of his right wrist.¹²³ He later complained of "vision problems, headaches, and depression."¹²⁴ Johnson filed a claim for benefits in November 1990 alleging injury to his "[r]ight wrist, head, back, left leg and foot," for which he received both temporary total and temporary partial disability benefits.¹²⁵ He continued to receive treatment for depression, and for the "other neurological problems" diagnosed as "related to depression which 'could be triggered' by the head injury."¹²⁶

118. *Id.* at 76, 577 S.E.2d at 541.

119. *See id.* at 75, 577 S.E.2d at 541.

120. *Id.* at 76, 577 S.E.2d at 541.

121. *Id.* at 79, 577 S.E.2d at 543. The opinion includes a lengthy discussion about the rating system used to classify the stages of pneumoconiosis. *Id.* at 76–78, 577 S.E.2d at 541–42. A summary of this discussion, however, is not necessary to an understanding of the most important issues addressed in the case.

122. 265 Va. 237, 576 S.E.2d 447 (2003).

123. *Id.* at 239, 576 S.E.2d at 448.

124. *Id.*, 576 S.E.2d at 449.

125. *Id.* at 240, 576 S.E.2d at 449.

126. *Id.* at 239, 576 S.E.2d at 449.

In 1995, a specialist stated, "Johnson's cognitive defects were 'consistent with the diagnosis of a traumatic brain injury' sustained in the January 1990 industrial accident."¹²⁷ Further, in 1998, a rehabilitation counselor "concluded that Johnson was permanently and totally disabled because of his 'deficits due to the traumatic brain injury.'"¹²⁸

In May 1999 Johnson filed a new claim for permanent total disability benefits, alleging a brain injury compensable under Virginia Code section 65.2-503(C)(3).¹²⁹ He argued that the brain injury either was the direct result of the accident or developed from the depressive disorder that was caused by the compensable injury.¹³⁰ Johnson introduced medical evidence that "his disability resulted from a structural change in his brain or a brain injury that developed from his depression which in turn was caused by the injury to his wrist, or, alternatively, from a brain injury suffered when his head hit the ground in the 1990 fall."¹³¹ The Commission denied the claim, finding "that Johnson failed to timely file [a] claim for a brain injury" sustained at the time of the initial accident.¹³²

The Court of Appeals of Virginia affirmed this determination, reasoning that the initial claim for a head injury was not sufficient to state a claim for a brain injury and that no other claim for the latter was filed within the limitations period.¹³³ The court of appeals remanded the case for further findings, however, after it held, under the rationale of *Daniel Construction Co. v. Tolley*,¹³⁴ that the disabling brain injury may be covered as a compensable consequence of the depression that was shown to be related to the initial accident.¹³⁵ On subsequent appeal, the Supreme Court of Virginia agreed with the court of appeals' analysis of the statute

127. *Id.* at 240, 576 S.E.2d at 449.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 241, 576 S.E.2d at 450.

132. *Id.* at 242, 576 S.E.2d at 450.

133. *Johnson v. Paul Johnson Plastering & Nat'l Sur. Corp.*, 37 Va. App. 716, 723, 561 S.E.2d 40, 43 (Ct. App. 2002), *aff'd in part and rev'd in part*, 265 Va. 237, 576 S.E.2d 447 (2003) [hereinafter *Paul Johnson Plastering*].

134. 24 Va. App. 70, 76-78, 480 S.E.2d 145, 148-49 (Ct. App. 1997) (holding that a brain injury resulting from PTSD was compensable where PTSD was the direct result of an industrial accident).

135. *Paul Johnson Plastering*, 37 Va. App. at 726-27, 561 S.E.2d 45-46.

of limitations issue, but reversed the holding of possible compensability as a covered consequence of the initial accident.¹³⁶

The supreme court concluded that the court of appeals was correct in holding, under *Daniel Construction*, that Virginia Code section 65.2-503 can support an award for a brain injury developing after the compensable accident.¹³⁷ It determined, however, that the connection between the accident and the subsequent brain injury in Johnson's case was too attenuated to establish the requisite causation.¹³⁸ Relying on *Amoco Foam Products Co. v. Johnson*,¹³⁹ the supreme court concluded that "if the brain injury was caused by the depression which developed from the wrist injury, the brain injury is not compensable because . . . there is no direct causal link between that brain injury and the original industrial accident injury, the wrist injury."¹⁴⁰

D. *Liable Parties*

Generally, the Act applies only to those employers who have three or more employees regularly in service in Virginia.¹⁴¹ Whether the employer is properly subject to liability, based upon the number of its employees, is frequently litigated, as in *Mark Five Construction Co. v. Gonzalez*.¹⁴²

The Mark Five Construction Company ("Mark Five") was a general contractor incorporated in Maryland and authorized to do business in Virginia.¹⁴³ Mark Five contracted with insurance companies to make insured repairs and to inspect damaged properties.¹⁴⁴ It had "between thirty-five to fifty employees at various times, and it engage[d] various subcontractors to perform a significant amount of its restoration work."¹⁴⁵ The Virginia project

136. See *Paul Johnson Plastering*, 265 Va. at 244, 576 S.E.2d at 452.

137. *Id.* at 244, 576 S.E.2d at 451.

138. See *id.* at 244, 576 S.E.2d at 452.

139. 257 Va. 29, 510 S.E.2d 443 (1999). The supreme court stated that "[t]he link of causation must directly connect the original accidental injury with the additional injury for which compensation is sought." *Id.* at 33, 510 S.E.2d at 445.

140. *Paul Johnson Plastering*, 265 Va. at 244, 576 S.E.2d at 452.

141. See VA. CODE ANN. § 65.2-101 (Cum. Supp. 2004).

142. 42 Va. App. 59, 590 S.E.2d 81 (Ct. App. 2003).

143. *Id.* at 60-61, 590 S.E.2d at 82.

144. *Id.* at 61, 590 S.E.2d at 82.

145. *Id.*

on which the claimant was injured lasted eight months, greatly in excess of the average project duration of about one week.¹⁴⁶ The Court of Appeals of Virginia affirmed the Commission's determination that, given the nature of Mark Five's operations in Virginia, those individuals performing its work here were "regularly in service" and should be counted toward the jurisdictional number of employees.¹⁴⁷

As to the burden of proof on this issue, the court of appeals reiterated previous holdings that once the worker proves he was injured in Virginia the putative employer bears the burden of proving that it had fewer than three workers regularly in service in Virginia.¹⁴⁸ When weighing the evidence on this point, it is proper for the Commission to analyze

the statutory language "to apply not only to the number of employees engaged in performing the employer's established mode of work, but also, to require that the character of the business' 'contacts and activities' within the Commonwealth be more than 'irregular or merely occasional' to allow jurisdiction over the claim."¹⁴⁹

Mark Five's business sufficiently met these requirements because it had been "registered to do business in Virginia since 1996," and it accepted work "in Virginia when contracted to do so by various insurance companies."¹⁵⁰

The court also found important the fact that the project on which the claimant was injured lasted eight months and that during that time "Mark Five engaged the services of four subcontractors and regularly employed the requisite number of individuals."¹⁵¹ The relatively short duration of its other projects did not militate against a finding of liability as "the commission could

146. *Id.*

147. *Id.* at 64-65, 590 S.E.2d at 84.

148. *Id.* at 62, 590 S.E.2d at 83 (citing *Craddock Moving & Storage Co. v. Settles*, 16 Va. App. 1, 2, 427 S.E.2d 428, 429 (Ct. App. 1993), *aff'd per curiam*, 247 Va. 165, 440 S.E.2d 613 (1994)).

149. *Id.* at 63, 590 S.E.2d at 83 (quoting *Bois v. Blizzard*, 39 Va. App. 216, 222, 571 S.E.2d 924, 927 (Ct. App. 2002) (deeming a West Virginia hockey team's business not "regular" within the meaning of section 65.2-101 and, holding therefore, that the employer was not subject to Act)); *see also Pro-Football, Inc. v. Paul*, 39 Va. App. 1, 10, 569 S.E.2d 66, 71 (Ct. App. 2002) (finding a professional football team to be a liable employer and subject to the Act where the claimant's contract was completed in Virginia).

150. *Mark Five Constr. Co.*, 42 Va. App. at 64, 590 S.E.2d at 83.

151. *Id.*, 590 S.E.2d at 84.

reasonably infer that these short-term assignments resulted in” other, perhaps longer, projects in Virginia.¹⁵²

Another frequently litigated liability issue is a party's amenability to civil suit in negligence for injuries compensable under the Act. This was the pivotal issue in *Clean Sweep Professional Parking Lot Maintenance, Inc. v. Talley*.¹⁵³ Talley was employed by Coleman Trucking, a subcontractor of Virginia Paving, on a project for the Virginia Department of Transportation.¹⁵⁴ Talley was injured when a truck he was examining was struck by a vehicle owned by Clean Sweep, another of Virginia Paving's subcontractors.¹⁵⁵ Talley filed suit against Clean Sweep and the operator of its vehicle, each of whom filed a plea in bar asserting that the remedies provided in the Act were Talley's sole remedies, and that the civil suit against them was barred.¹⁵⁶ “The trial court overruled the pleas” and a verdict was returned for Talley.¹⁵⁷

The Supreme Court of Virginia began its review of the case by reiterating that, generally, “[t]he rights and remedies provided in the Act are exclusive of all other rights and remedies of an employee or his estate at common law or otherwise.”¹⁵⁸ Virginia Code section 65.2-309(A), however, does not bar suit against an “other party.”¹⁵⁹ An “other party” is “a stranger to the trade, occupation, or business in which the employee was engaged when he was injured.”¹⁶⁰ Stated alternatively, “an allegedly negligent employee of one contractor, engaged in the same business or project of an owner as an injured employee of another contractor, is not an ‘other party’ amenable to suit.”¹⁶¹

Applying these principles, the court found it important that Coleman Trucking was performing work of the same nature as that done by Virginia Paving, and that Coleman Trucking's work was an essential part of Virginia Paving's work under its contract

152. *Id.*, 590 S.E.2d at 83–84.

153. 267 Va. 210, 591 S.E.2d 79 (2004).

154. *Id.* at 212, 591 S.E.2d at 80.

155. *Id.*

156. *Id.*

157. *Id.* at 212–13, 591 S.E.2d at 80–81.

158. *Id.* at 213, 591 S.E.2d at 81.

159. *Id.*

160. *Id.* (quoting *Peck v. Safway Steel Prods., Inc.*, 262 Va. App. 522, 525, 551 S.E.2d 328, 329 (Ct. App. 2001)).

161. *Id.* (quoting *Evans v. Hook*, 239 Va. 127, 131, 387 S.E.2d 777, 779 (1990)).

with the Department of Transportation.¹⁶² These facts distinguish Talley's situation from those involving mere delivery functions held not to be in the allegedly shared trade or business.¹⁶³ The court concluded that, because Coleman Trucking was not simply delivering goods, and because it was engaged in the same work as was Virginia Paving, "Coleman trucking was not a stranger to the work of Virginia Paving, and its employee, Talley, was a statutory employee of Virginia Paving."¹⁶⁴ Therefore, because Talley was not contesting whether Clean Sweep was engaged in the same trade or business as Virginia Paving, he and the operator of Clean Sweep's vehicle were both statutory employees, and his civil suit was barred under the Act.¹⁶⁵

The Act's exclusive effect was also at issue in *Jones v. Commonwealth*.¹⁶⁶ In *Jones*, the supreme court identified the operative question as "whether the University of Virginia ["UVA"] is a governmental entity for the purposes of determining its status as a statutory employer."¹⁶⁷ The claimant was working for an independent contractor doing asbestos abatement work on the grounds of UVA when he received an electrical shock.¹⁶⁸ The circuit court dismissed his civil action against UVA, finding that it was his statutory employer and, therefore, suit was barred under Virginia Code section 65.2-307.¹⁶⁹ On appeal to the Supreme Court of Virginia, the claimant challenged the circuit court's determinations that UVA was a governmental entity capable of being a statutory employer, and that the activity giving rise to the claim was part of UVA's trade or business.¹⁷⁰

The court quoted the code provision that is the source of the statutory employer doctrine:

When any person (referred to in this section as "owner") undertakes to perform or execute any work *which is a part of his trade, business or occupation* and contracts with any other person (referred to in this

162. *Id.* at 216-17, 591 S.E.2d at 83.

163. *Id.* at 216, 591 S.E.2d at 83.

164. *Id.* at 217, 591 S.E.2d at 83.

165. *Id.* The court also rejected Talley's argument that his work examining the vehicle was a "discrete activity" taking it out of the shared "trade or business" at issue. *Id.*

166. 267 Va. 218, 591 S.E.2d 72 (2004).

167. *Id.* at 220, 591 S.E.2d at 73-74.

168. *Id.*, 591 S.E.2d at 74.

169. *Id.* at 222, 591 S.E.2d at 74.

170. *Id.* at 221, 591 S.E.2d at 74.

section as “subcontractor”) for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.¹⁷¹

“Once an owner is found to be a statutory employer, it is subject to all the mandates, duties, and rights” provided in the Act, including the exclusive remedy provision.¹⁷²

Jones’ first argument was that UVA was not a governmental entity capable of coming within the statutory employer doctrine.¹⁷³ In response, the court noted that “[i]t would challenge reason to suggest that an institution, subject at all times to the control of the legislature, is not a governmental entity.”¹⁷⁴ Applying the rationale in *Phillips v. University of Virginia*,¹⁷⁵ the court concluded that, because UVA is “established by statute, is governed and controlled solely by the General Assembly, owns property through money appropriated by the General Assembly,” and has as its “very essence . . . public use and service, . . . [it] is a governmental entity” that could be a statutory employer.¹⁷⁶ The remaining question was whether the claimant was engaged in the trade or business of UVA when he was injured.¹⁷⁷

The analysis to determine the “trade or business” of a governmental entity differs from that applied to private entities.¹⁷⁸ The “normal work test” applicable to private entities does not apply to governmental entities.¹⁷⁹ For governmental entities, the relevant inquiry is simply whether the activity in which the injured worker was engaged at the time of the accident is among those that the governmental entity may or must perform.¹⁸⁰ Because

171. *Id.* (quoting VA. CODE ANN. § 65.2-302(A) (Repl. Vol. 2002 & Cum. Supp. 2004) (emphasis added)).

172. *Id.* at 222, 591 S.E.2d at 74.

173. *Id.* at 221, 591 S.E.2d at 74.

174. *Id.* at 222, 591 S.E.2d at 74.

175. 97 Va. 472, 476, 34 S.E.2d 66, 68 (1899) (stating that because of the extent of control by the legislature, property of the University of Virginia should be treated as state property for determining the applicability of mechanics’ liens).

176. *Jones*, 267 Va. at 223, 591 S.E.2d at 75.

177. *Id.* at 223–24, 591 S.E.2d at 75.

178. *Id.* at 223, 591 S.E.2d at 75.

179. *Id.*

180. *Id.* (citing *Nichols v. VVKR, Inc.*, 241 Va. 516, 521, 403 S.E.2d 698, 701 (1991)).

the Board of UVA was required by statute to preserve and care for its property, and because asbestos abatement was in furtherance of that mandate, Jones was working in UVA's "trade or business" and was properly considered to be its statutory employee.¹⁸¹ Therefore, his civil suit was barred by the exclusive remedy provision of the Act.¹⁸²

III. BENEFITS: SELECT ELIGIBILITY CRITERIA

A. Wage Loss Benefits: Temporary Total and Temporary Partial

Calculation of the average weekly wage to determine a sole proprietor's temporary total benefit was the issue in *Brown v. Brown*.¹⁸³ The Commission concluded that the profit amount in the employer's profit and loss statement, reduced by certain expenses, more accurately reflected the claimant's earnings during the fifty-two-week period immediately preceding the injury than did the employer's Schedule C.¹⁸⁴ The two documents covered different fifty-two-week periods.¹⁸⁵ The Court of Appeals of Virginia affirmed, noting that the primary purpose of the average weekly wage calculation "is to approximate the [claimant's] economic loss,"¹⁸⁶ and that the Commission is required to best estimate the diminution in the claimant's earning capacity.¹⁸⁷

Eligibility for temporary partial disability benefits was the focus of *Clements v. Riverside Walter Reed Hospital*.¹⁸⁸ Brenda Clements appealed the Commission's decision terminating her outstanding award, which found that she failed to show sufficient justification for refusing selective employment, and that she sub-

181. *Id.* at 224–25, 591 S.E.2d at 76.

182. *Id.* at 225, 591 S.E.2d at 76. The court also rejected Jones' argument that the Virginia Tort Claims Act requires that the Commonwealth be treated as a private person for purposes of workers' compensation liability. *Id.*

183. 40 Va. App. 79, 577 S.E.2d 543 (Ct. App. 2003).

184. *Id.* at 83, 577 S.E.2d at 545.

185. *Id.*

186. *Id.* at 84, 577 S.E.2d at 545 (quoting *Bosworth v. 7-Up Distrib. Co.*, 4 Va. App. 161, 163, 355 S.E.2d 339, 340 (Ct. App. 1987)).

187. *Id.* (citing *Pilot Freight Carriers, Inc. v. Reeves*, 1 Va. App. 435, 441, 339 S.E.2d 570, 573 (Ct. App. 1986)).

188. 40 Va. App. 214, 578 S.E.2d 814 (Ct. App. 2003).

sequently failed to cure the refusal.¹⁸⁹ With respect to justification for the claimant's refusal, the court of appeals stated that once the employer shows that it procured and made an offer of suitable work which the claimant refused, "the burden then shifts to the claimant 'to show justification for refusing the offer.'"¹⁹⁰ In reversing the Commission's decision, the court noted that the Commission failed to examine the "totality of the evidence"¹⁹¹ when it did not give appropriate consideration to the claimant's testimony that she would have been forced to forfeit accrued benefit balances if she were to take the offered employment.¹⁹² The court affirmed the decision on the curing issue, however, because the claimant's attempted self-employment selling cosmetics was not comparable to her previous work as a registered nurse.¹⁹³

Marketing—the requirement that a partially disabled claimant seeking benefits make reasonable efforts to find work—was the issue in *Allen v. Southern Commercial Repair, Inc.*¹⁹⁴ Allen appealed the termination of his temporary partial benefits because he failed to make reasonable efforts to market his residual work capacity.¹⁹⁵ Allen was an electrician with a GED and held contractor and tradesman licenses.¹⁹⁶ He was restricted from lifting after his compensable injury.¹⁹⁷ The liable employer discharged him after the injury, and two subsequent employers laid him off.¹⁹⁸ Allen then started his own electrical business and "made a concerted effort to" make it viable.¹⁹⁹

The Court of Appeals of Virginia first noted that whether a claimant's marketing efforts are reasonable is a fact-based inquiry, and it listed some of the factors the Commission may consider.²⁰⁰ These factors include the claimant's training and experi-

189. *Id.* at 218, 578 S.E.2d at 815.

190. *Id.* at 222, 578 S.E.2d at 817 (quoting *Ballweg v. Crowder Contracting Co.*, 247 Va. 205, 209, 440 S.E.2d 613, 615 (1994)).

191. *Id.*, 578 S.E.2d at 817–18 (quoting *Newport News Shipbuilding & Dry Dock Co. v. Lawrence*, 38 Va. App. 656, 662, 568 S.E.2d 374, 377 (Ct. App. 2002)).

192. *Id.* at 223–24, 578 S.E.2d at 818.

193. *Id.* at 225–26, 578 S.E.2d at 819–20.

194. 40 Va. App. 116, 118, 578 S.E.2d 64, 65 (Ct. App. 2003).

195. *Id.*

196. *Id.* at 118–19, 578 S.E.2d at 65.

197. *Id.* at 119–20, 578 S.E.2d at 66.

198. *Id.* at 119, 578 S.E.2d at 65.

199. *Id.*

200. *Id.* at 120–21, 578 S.E.2d at 66 (citing *Greif Cos. v. Sipe*, 16 Va. App. 709, 715, 434

ence, the nature of his disability, and characteristics of the relevant labor market.²⁰¹ Applying these standards, the court concluded that Allen's limited efforts at finding employment after his discharge by the liable employer and before starting his own business were insufficient.²⁰² Although self-employment may constitute reasonable marketing efforts, it did not in this case, because Allen failed "to show that self-employment was [his] only remaining employment option or that he could not successfully obtain employment with other contractors that more fully reflect his residual earning capacity."²⁰³

B. *Twenty-Percent Penalty for Late Payments of Compensation*

An interesting procedural twist had profound ramifications for the employer's liability for penalty in *Washington v. United Parcel Service of America*.²⁰⁴ United Parcel Service ("UPS") suspended benefits under an open award, alleging that Washington was released to full-duty work.²⁰⁵ It did not file, however, an appropriate employer's application.²⁰⁶ The issue was consolidated with a causation issue, which was resolved in the employer's favor.²⁰⁷ As a result of the ruling on the causation issue, the Commission closed the open award and held that, because no compensation was due once the claimant was returned to work, the employer owed no penalty on unpaid benefits under Virginia Code section 65.2-524.²⁰⁸ The Court of Appeals of Virginia affirmed this determination, adopting a rationale substantially similar to the Commission's.²⁰⁹

The Supreme Court of Virginia reversed, finding that the notice of the deputy commissioner's hearing did not sufficiently

S.E.2d 314, 318 (Ct. App. 1993)).

201. *Id.* at 121, 578 S.E.2d at 66 (citing *Nat'l Linen Serv. v. McGuinn*, 8 Va. App. 267, 271-72, 380 S.E.2d 31, 34 (Ct. App. 1989)).

202. *Id.* at 121-22, 578 S.E.2d at 67.

203. *Id.* at 122-23, 578 S.E.2d at 67.

204. 267 Va. 539, 593 S.E.2d 229.

205. *Id.* at 542, 593 S.E.2d at 230.

206. *Id.* at 545, 593 S.E.2d at 232.

207. *See id.* at 543, 593 S.E.2d at 231.

208. *Id.* at 543-44, 593 S.E.2d at 231.

209. 39 Va. App. 772, 778-81, 576 S.E.2d 791, 794-95 (Ct. App. 2003), *rev'd*, 267 Va. 539, 593 S.E.2d. 229.

identify the causation issue relied upon by the Commission and the court of appeals to close the open award and to deny the penalty request.²¹⁰ That issue, however, was not properly before the Commission.²¹¹ Accordingly, there was no basis upon which to apply the doctrine of imposition to prevent the claimant's unjust enrichment, and benefits remained owing under the open award.²¹² Because the employer had not filed an appropriate application properly suspending benefits, the Commission and the court of appeals erred in not awarding the penalty.²¹³

The time within which the employer must pay settlement proceeds to avoid imposition of the twenty percent penalty was the sole issue in *Ratliff v. Carter Machinery Co.*²¹⁴ The parties settled the claim for a lump sum amount, and the Commission approved the settlement by order dated September 7, 2001, which provided that the amount of the settlement was "due within ten (10) days after entry of this Order."²¹⁵ Ratliff's attorney received the check on October 1, but Ratliff did not receive the check until October 2.²¹⁶ Upholding the Commission's denial of penalty, the court of appeals focused on the second sentence of Virginia Code section 65.2-524 providing that "[n]o penalty shall be added . . . to any payment made within two weeks after the expiration of (i) the period in which Commission review may be requested pursuant to § 65.2-705."²¹⁷ The plain meaning of this section "expressly prohibits the imposition of a twenty percent penalty . . . until fourteen days after the time for review has expired."²¹⁸ The court of appeals rejected the claimant's argument that Virginia Code section 65.2-524 did not apply to settlements where the parties expressly agreed on the date on which payment is to be made.²¹⁹

210. 267 Va. at 546-47, 593 S.E.2d at 233.

211. *Id.* at 546, 593 S.E.2d at 233.

212. *Id.*, 593 S.E.2d at 232-33.

213. *Id.*, 593 S.E.2d at 233.

214. 39 Va. App. 586, 575 S.E.2d 571 (Ct. App. 2003).

215. *Id.* at 588, 575 S.E.2d at 572.

216. *Id.* at 588-89, 575 S.E.2d at 573.

217. *Id.* at 590, 575 S.E.2d at 573 (quoting VA. CODE ANN. § 65.2-524 (Repl. Vol. 2002 & Cum. Supp. 2004)).

218. *Id.* at 592, 575 S.E.2d at 574.

219. *Id.* at 591, 575 S.E.2d at 574.

C. *Cost of Living Adjustment ("COLA")*

Adequacy of Commission findings on a COLA application was the crucial issue in *Powhatan Correctional Center v. Mitchell-Riggleman*.²²⁰ The deputy commissioner entered an award for COLA benefits for the period of October 1, 1992 through November 30, 1999, finding that the claimant's social security benefits made her ineligible for COLA after November 1999.²²¹ On review, the Commission affirmed the award, noting that verification from the Social Security Administration established that the "claimant began receiving retirement benefits in February 2000" and that the "Commission's calculations dated August 2001" were correct.²²² The employer appealed the COLA award, and the Court of Appeals of Virginia vacated the Commission's decision and remanded for further findings.²²³ The court reasoned that the Commission's review opinion appeared to award COLA benefits beginning February 2000, a period for which the deputy declined to make such an award.²²⁴ Because the Commission, on review, did not make factual findings supporting the additional award period, its opinion was deficient under Virginia Code section 65.2-705(A).²²⁵

D. *Employer's Credit for Benefits Paid*

In *McFadden v. Carpet House*,²²⁶ the employer requested a credit for benefits it paid to the claimant between the time he was released to return to his pre-injury work and the time it filed an application suspending benefits.²²⁷ The deputy commissioner awarded credit, finding that to do otherwise would "unjustly enrich the claimant,"²²⁸ and the Commission affirmed, finding that these were voluntary payments subject to credit.²²⁹ The Court of

220. 40 Va. App. 491, 579 S.E.2d 696 (Ct. App. 2003).

221. *Id.* at 494, 579 S.E.2d at 698.

222. *Id.* at 495, 579 S.E.2d at 698.

223. *Id.* at 492, 496, 579 S.E.2d at 697-98.

224. *Id.* at 495-96, 579 S.E.2d at 698.

225. *Id.*

226. 42 Va. App. 302, 591 S.E.2d 708 (Ct. App. 2004).

227. *Id.* at 304, 591 S.E.2d at 709.

228. *Id.* at 305, 591 S.E.2d at 710.

229. *Id.* at 305-06, 591 S.E.2d at 710.

Appeals of Virginia reversed, however, holding that the Commission's interpretation of Virginia Code section 65.2-520 to allow a credit in this case was so broad "as to nullify the provisions of Code §§ 65.2-708 and 65.2-712."²³⁰ Those sections provide that, generally, "an employer seeking to terminate an outstanding award may affect that award only prospectively."²³¹ Furthermore, the Commission's award of the credit was inconsistent with *Collins v. Department of Alcoholic Beverage Control*,²³² which held that benefits paid under an open award entered pursuant to the parties' "agreement were not 'voluntary payments' within the meaning of Code § 65.2-520."²³³ Absent circumstances justifying application of the equitable doctrine of imposition, the Commission was without authority to order the credit.²³⁴

IV. PRACTICE AND PROCEDURE

A. Assertion of Employer's Subrogation Interest

*Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc.*²³⁵ clarified the nature of employer's subrogation.²³⁶ The facts are relatively straightforward. On June 1, 2001, Milton Oakley, a Yellow Freight Systems driver, settled his third party suit against Courtaulds which stemmed from the accident that caused his compensable injuries during his employment with Yellow Freight.²³⁷ Previously, Yellow Freight sent letters to claimant's counsel asserting that it had a "lien" or "subrogation claim" in the amount of \$56,256.69 for benefits it paid to Oakley under the Act.²³⁸

On June 7, 2001, Yellow Freight filed a petition with the Circuit Court of Henry County requesting a determination of the

230. *Id.* at 309–11, 591 S.E.2d at 712.

231. *Id.* at 309, 591 S.E.2d at 712.

232. 21 Va. App. 671, 467 S.E.2d 279 (Ct. App. 1996), *aff'd on reh'g en banc*, 22 Va. App. 625, 472 S.E.2d 287 (Ct. App. 1996).

233. *McFadden*, 42 Va. App. at 308, 591 S.E.2d at 711 (quoting *Collins*, 21 Va. App. at 675–76, 467 S.E.2d at 281)).

234. *See id.* at 308–09, 591 S.E.2d at 711.

235. 266 Va. 57, 580 S.E.2d 812 (2003).

236. *Id.* at 63–65, 580 S.E.2d at 814–15.

237. *Id.* at 60–61, 580 S.E.2d at 813.

238. *Id.* at 60, 580 S.E.2d at 813.

amount of benefits paid to Oakley and asking the court to issue an order directing Courtaulds to pay that amount directly to Yellow Freight from the settlement proceeds.²³⁹ The circuit court denied the request, finding that the petition was not filed timely under Virginia Code section 65.2-310.²⁴⁰ It reasoned that the settlement before the date Yellow Freight filed its petition "extinguished Yellow Freight's unmaturing [sic] claim."²⁴¹

The Supreme Court of Virginia affirmed this decision, observing that Virginia Code section 65.2-310 protects "the employer by allowing recovery of compensation paid to its employee . . . when the employee files an independent action against the responsible third party."²⁴² The supreme court then attempted to clarify the nature of the employer's right as being one of subrogation rather than a lien.²⁴³ The supreme court distinguished *Liberty Mutual Insurance Co. v. Fisher*,²⁴⁴ because that case did not involve a timeliness issue, and because the third party suit there was a wrongful death action the settlement of which required approval of the circuit court under Virginia Code section 8.01-55.²⁴⁵ The supreme court, however, blurred the nature of the employer's interest at issue by stating that "the right of subrogation granted by this statute does not mature into an enforceable claim or lien unless, and until the right is perfected by the employer."²⁴⁶ The necessary perfecting act, in the context of a third party action brought by the employee, is the employer's filing of a petition or motion prior to verdict in the third party action as required by Virginia Code section 65.2-310.²⁴⁷ Because the petition constituting perfection in this case was filed after execution of the third party settlement by which the employee relinquished all his claims, no interest remained to which the employer could be sub-

239. *Id.* at 61, 580 S.E.2d at 813.

240. *Id.* at 61-62, 580 S.E.2d at 813.

241. *Id.* at 61, 580 S.E.2d at 813.

242. *Id.* at 62, 580 S.E.2d at 814.

243. *Id.* at 63, 580 S.E.2d at 814-15.

244. 263 Va. 78, 557 S.E.2d 209 (2002). In *Fisher* the Supreme Court of Virginia found that the trial court erred in barring an employer from recovering on a "lien" for benefits paid to the dependent of a deceased worker who renounced rights to any proceeds from the settlement of a resulting third party wrongful death action. *Id.* at 87, 557 S.E.2d at 213.

245. *Yellow Freight*, 266 Va. at 63, 580 S.E.2d at 814.

246. *Id.* at 64, 580 S.E.2d at 815.

247. *Id.* at 64-65, 580 S.E.2d at 815.

rogated,²⁴⁸ and the circuit court properly denied Yellow Freight's petition.²⁴⁹

B. Employers' Applications

In *Genesis Health Ventures, Inc. v. Pugh*,²⁵⁰ the claimant was awarded temporary total disability benefits for her July 20, 2000 injury.²⁵¹ The employer filed an application in August 2002 alleging that the claimant returned to work on July 31, 2000 and that compensation was last paid on July 30, 2000.²⁵² The Commission rejected the application, finding that it did not comply with Commission Rule 1.4, which required change-in-condition applications to be "filed within two years from the date compensation was last paid pursuant to an award."²⁵³ On appeal, the Court of Appeals of Virginia rejected the employer's argument that *Lam v. Kawneer Co.*²⁵⁴ militated against the Commission's decision.²⁵⁵ *Lam* was distinguishable because the evidence showed that the claimant failed to properly notify the employer of his return to work for another employer.²⁵⁶ There was no similar evidence that would provide a basis for applying the imposition doctrine to prevent Pugh's unjust enrichment.²⁵⁷

The employer in *Gallahan v. Free Lance Star Publishing Co.*²⁵⁸ filed an application to terminate an open award while the deputy commissioner's decision awarding benefits was pending review.²⁵⁹ The application alleged that the claimant had been released to re-

248. *Id.*

249. *Id.* at 65, 580 S.E.2d at 815. The effect of this holding was mollified at the 2004 session of the Virginia General Assembly with the passage of amendments to Virginia Code sections 65.2-309, -310, and -311. See Act of Apr. 15, 2004, ch. 914, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 65.2-309 to -311 (Cum. Supp. 2004)).

250. 42 Va. App. 297, 591 S.E.2d 706 (Ct. App. 2004).

251. *Id.* at 298-99, 591 S.E.2d at 706.

252. *Id.* at 299, 591 S.E.2d at 707.

253. *Id.* at 299-300, 591 S.E.2d at 707.

254. 38 Va. App. 515, 566 S.E.2d 874 (Ct. App. 2002). In *Lam*, the Court of Appeals of Virginia found that the Commission's decision denying a penalty request despite the employer's failure to timely file an application supported by evidence of the claimant's behavior justified the application of the imposition doctrine. *Id.* at 520, 566 S.E.2d at 876.

255. *Genesis Health Ventures*, 42 Va. App. at 300, 591 S.E.2d at 707.

256. *Id.*

257. *Id.* at 300-01, 591 S.E.2d at 707-08.

258. 41 Va. App. 694, 589 S.E.2d 12 (Ct. App. 2003).

259. *Id.* at 697, 589 S.E.2d at 14.

turn to her pre-injury employment; however, the employer did not pay benefits up to the date of the application.²⁶⁰ The Commission rejected the claimant's argument that the application was improperly filed for the employer's failure to pay benefits.²⁶¹ The Court of Appeals of Virginia affirmed, holding that, pursuant to Virginia Code sections 65.2-705 and 65.2-706(A) and (C), the deputy commissioner's decision was not final during the time the review was pending and finding that the award was suspended during the time an appeal is pending.²⁶² Moreover, Commission Rule 1.4(D) permits "employers to file applications when awards are suspended."²⁶³ Accordingly, the Commission did not err in finding that the application was properly filed despite the failure to pay compensation.²⁶⁴

C. De Facto Awards

*White v. Redman Corp.*²⁶⁵ addressed whether a *de facto* award can arise where the parties fail to reach agreement on the amount of compensation.²⁶⁶ The carrier sent the claimant an agreement form, but there was no evidence that the claimant ever signed it.²⁶⁷ The claimant contended that a *de facto* award resulted because the parties stipulated compensability and the employer made voluntary payments for several months.²⁶⁸ The Commission disagreed because there was no evidence that the parties had agreed on the amount of compensation.²⁶⁹ The Court of Appeals of Virginia affirmed, finding that the express language of Virginia Code section 65.2-701(C) "recognizes that the amount of compensation is a necessary part of the agreement,"²⁷⁰ and the

260. *Id.*

261. *See id.* at 697-98, 589 S.E.2d at 14.

262. *Id.* at 701, 589 S.E.2d at 16.

263. *Id.* at 700, 589 S.E.2d at 17.

264. *Id.* at 702, 589 S.E.2d at 17.

265. 41 Va. App. 287, 584 S.E.2d 462 (Ct. App. 2003).

266. *Id.* at 290, 584 S.E.2d at 463.

267. *Id.* at 289-90, 584 S.E.2d at 463.

268. *Id.* at 291, 584 S.E.2d at 464.

269. *Id.* at 290, 584 S.E.2d at 463.

270. *Id.* at 292, 584 S.E.2d at 464.

absence of agreement on that point precludes the entry of a *de facto* award.²⁷¹

D. *Evidentiary Matters*

The after-discovered evidence rule was the focus of *Estate of Kiser v. Pulaski Furniture Co.*²⁷² At the close of an initial hearing, the deputy commissioner left the record open for "additional medical evidence."²⁷³ While the record remained open, the deputy commissioner granted the employer's request to reconvene the hearing to take testimony from a new witness who had notified the employer after the first hearing that he had witnessed the employee's alleged accident.²⁷⁴ Both the Commission and the Court of Appeals of Virginia rejected the claimants' contention that Commission Rule 3.3 barred the testimony, reasoning that it applied only to attempts to introduce new evidence on review, and not to a reconvened hearing before a deputy commissioner while the record was held open.²⁷⁵ The court of appeals also determined that the Commission appropriately "applied the 'not reasonably available' standard in determining that the deputy commissioner had not abused his discretion" in accepting the witness's testimony.²⁷⁶

E. *Filing a Claim with the Commission*

*Fairfax County School Board v. Humphrey*²⁷⁷ examined what constitutes a proper claim for benefits under the Act.²⁷⁸ The parties fully executed a Memorandum of Agreement that the carrier forwarded to the Commission.²⁷⁹ The Court of Appeals of Virginia and the Commission both held that this was sufficient to constitute a claim even though the submission was made by the carrier,

271. *Id.*; accord, *Watts v. P & J Hauling, Inc.*, 41 Va. App. 278, 584 S.E.2d 457 (Ct. App. 2003).

272. 41 Va. App. 293, 295-96, 584 S.E.2d 464, 465-66 (Ct. App. 2003).

273. *Id.* at 296, 584 S.E.2d at 466.

274. *Id.*

275. *Id.* at 298, 584 S.E.2d at 467.

276. *Id.*

277. 41 Va. App. 147, 583 S.E.2d 65 (Ct. App. 2003).

278. *Id.* at 150, 583 S.E.2d at 66.

279. *Id.* at 151, 583 S.E.2d at 66.

noting that “[n]o statutory language delineates who must deliver the claim for benefits to the commission or how it should be filed.”²⁸⁰ Furthermore, the employer’s subsequent withdrawal of its consent to the agreement and resulting vacating of the award does not nullify the filing because these actions did not affect “[t]he information contained in the memorandum describing the parties, the claimant’s injuries and her request for benefits.”²⁸¹

The tolling provision of Virginia Code section 65.2-602 was the focus of *Hall v. Winn-Dixie Stores, Inc.*²⁸² Hall was injured on December 24, 1998 but did not file a claim until March 21, 2001.²⁸³ She alleged that the two-year statute of limitations period was tolled because the employer did not submit an Employer’s Accident Report as required by Virginia Code section 65.2-900.²⁸⁴ The Commission found that the employer’s failure to file the Employer’s Accident Report within two years of the accident tolled the statute of limitations.²⁸⁵ The Court of Appeals of Virginia reversed, rejecting that the Commission’s *per se* approach applied to the tolling of the statute of limitations where the employer failed to timely file the accident report.²⁸⁶ The court reasoned that such an approach is inconsistent with Virginia Code section 65.2-602 and that, instead, the claimant has the burden of proving actual prejudice resulting from the employer’s omission to justify tolling the statute of limitations.²⁸⁷

F. *Hearing Procedure: Contemporaneous Objection Rule*

In *Williams v. Gloucester Sheriff’s Department*,²⁸⁸ the deputy commissioner denied the claim and the Commission affirmed the denial, but on different grounds.²⁸⁹ The Court of Appeals of Virginia rejected Williams’s appeal, applying Court of Appeals Rule 5A:18 and “holding that [he] failed to preserve the issue for ap-

280. *Id.* at 154, 583 S.E.2d at 68.

281. *Id.* at 158, 583 S.E.2d at 70.

282. 41 Va. App. 835, 589 S.E.2d 484 (Ct. App. 2003).

283. *Id.* at 837, 589 S.E.2d at 485.

284. *Id.* at 838, 589 S.E.2d at 486.

285. *Id.*

286. *Id.* at 838–41, 589 S.E.2d at 486–87.

287. *Id.* at 841–42, 589 S.E.2d at 487–88.

288. 266 Va. 409, 587 S.E.2d 546 (2003).

289. *Id.* at 410, 587 S.E.2d at 547.

peal because he did not file a motion for reconsideration raising [the] issue before the Commission.”²⁹⁰ At the Supreme Court of Virginia, Williams argued that the contemporaneous objection rule should not apply because there is no formal process for obtaining reconsideration by the Commission.²⁹¹ The supreme court acknowledged this fact but affirmed the decision, stating that “nevertheless such motions are not uncommon, and the Commission may vacate the original decision pending consideration of such a motion.”²⁹²

V. 2003 LEGISLATIVE CHANGES RELEVANT TO WORKERS' COMPENSATION

During the 2003 General Assembly session, the definitional provisions of Virginia Code section 65.2-101 were amended to respond to questions about potential coverage for healthcare providers required to receive smallpox vaccines.²⁹³ The Act's definition of “injury” now includes “any injury, disease or condition . . . [a]rising out of and in the course of the employment of” healthcare providers and other listed individuals “[r]esulting from (a) the administration of vaccinia (smallpox) vaccine, Cidofivir and derivatives thereof, or Vaccinia Immune Globulin as part of federally initiated smallpox countermeasures, or (b) transmission of vaccinia in the course of employment from an employee participating in such countermeasures to a coemployee of the same employer.”²⁹⁴

Virginia Code section 65.2-402.1, added at the 2002 session of the General Assembly, provides a presumption that “[h]epatitis, meningococcal meningitis, tuberculosis, [and] HIV” are covered occupational diseases when contracted by certain law enforcement officers and other enumerated individuals.²⁹⁵ As it was originally enacted, the statute provided that the presumption was “not effective until six months following” certain examinations described in subsection E of the statute, which found the person

290. *Id.*, 587 S.E.2d at 547–48.

291. *Id.* at 411, 587 S.E.2d at 548.

292. *Id.*

293. VA. CODE ANN. § 65.2-101 (Cum. Supp. 2004).

294. *Id.*

295. *Id.* § 65.2-402.1 (Cum. Supp. 2004).

invoking the presumption to be free of the listed diseases.²⁹⁶ At the 2003 session, an exception was added to this waiting period provision where the individual invoking the presumption “can demonstrate a documented exposure [to the disease pathogen] during the six-month period.”²⁹⁷

Another amendment passed in 2003 changed the Commission’s procedures for sending copies of opinions to parties under Virginia Code sections 65.2-704, -705, and -706.²⁹⁸ In *Peacock v. Browning Ferris, Inc.*,²⁹⁹ the Court of Appeals of Virginia held that the Commission’s practice of sending a copy of an opinion only to counsel where a party is represented did not satisfy the requirement of Virginia Code section 65.2-704(A) that “[a] copy of the award or opinion . . . be sent . . . to the parties at issue by registered or certified mail.”³⁰⁰ In response, the statute was amended in 2003, adding that “[i]f any party at issue is represented by counsel, receipt of the award or opinion by counsel shall be deemed receipt by the party for purposes of subsection A of section 65.2-705.”³⁰¹ The amendments to Virginia Code section 65.2-704 also changed the acceptable mode for sending opinions from certified or registered mail to “priority mail with delivery confirmation or equivalent mailing option.”³⁰²

VI. CONCLUSION

Many of the principles regarding compensability and benefits discussed in this article have their genesis in statutory language substantially similar to that found in the original Workers’ Compensation Act dating back to 1918. These principles have proved to be sufficiently malleable over the years to accommodate a broad array of factual and procedural patterns. “Flexibility” and “creativity” will continue to be watchwords in applying workers’ compensation law as practitioners and adjudicators attempt to address the emergent and evolving properties of our social milieu.

296. *Id.* § 65.2-402.1(E) (Repl. Vol. 2004).

297. *See id.* § 65.2-402.1(E) (Cum. Supp. 2004).

298. *Id.* §§ 65.2-704 to -706 (Cum. Supp. 2004).

299. 38 Va. App. 241, 563 S.E.2d 368 (Ct. App. 2002).

300. *Id.* at 250–51, 563 S.E.2d at 373 (quoting VA. CODE ANN. § 65.2-704(A) (Repl. Vol. 2002)).

301. VA. CODE ANN. § 65.2-704(A) (Cum. Supp. 2004).

302. *Id.*

Perhaps the most immediate challenge for the workers' compensation system will come from the increase in alternative working arrangements in American businesses. Companies are augmenting traditional workplace models, where full-time employees work on the employer's premises, with new working arrangements such as contract and leased employees, outsourcing, and off-site workers. Shifts in commuting patterns and the advent of "telecommuting" will raise challenging questions in applying the "arising out of" and "in the course of" requirements. Distinctions between work-related and other activities can break down as workers perform more job functions at home and in their cars.

Developing trends in the structures of health care delivery systems will also play a pivotal role in shaping the future of workers' compensation. Increasing availability and use of acute care facilities and streamlining of medical practices will pose interesting questions in applying the concept of the "panel of physicians" the employer is required to provide to the worker at the time of the injury. Escalating costs and resulting cost-containment strategies will have an appreciable impact on many aspects of claim management, including vocational rehabilitation.

Catastrophic events, such as natural disasters and the tragic and unnerving events of September 11, 2001, have already catalyzed debate and change as seen in last year's legislation attempting to clarify murky issues as to coverage for some of those whose work puts them on the frontline in responding to potential acts of terrorism. It would be naïve to think that the deep societal change wrought by these events will not require correspondingly deep thought by legislators and adjudicators in compensating workers and their families, and in assigning resulting risk and liability, in the future.

Workers' compensation laws were enacted to balance the competing interests of injured workers in having a prompt remedy for their work-related injuries and illnesses against those of employers in having certainty and predictability in risk management. For almost ninety years, the Virginia Workers' Compensation Act has successfully met the challenge of providing reasonable wage loss benefits and medical care for injured workers, at reasonable costs to employers, in the face of change at an unprecedented rate. It will continue to grow and evolve to meet the needs of the Commonwealth and its citizens.
