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## Recovery for Accidental Injuries Under the Virginia Workmen's Compensation Act

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RECOVERY FOR ACCIDENTAL INJURIES UNDER THE  
VIRGINIA WORKMEN'S COMPENSATION ACT

*Douglas E. Ray\**  
*R. Craig Evans\*\**  
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## I. INTRODUCTION

The Virginia Workmen's Compensation Act,<sup>1</sup> first enacted in 1918,<sup>2</sup> generally provides for case benefits<sup>3</sup> and medical care<sup>4</sup> to individuals injured in employment-related accidents. While the Act is neither tort law nor social insurance, it contains elements of both. As social legislation, the Act plays an important role in protecting citizens from loss of wages and provides an important supplement to protection available from the federal Old Age, Survivors' Disability and Health Insurance Program,<sup>5</sup> unemployment compensation and private health and accident insurance plans.<sup>6</sup> In 1979, more than 43,000 Virginia employees filed claims under the

1. VA. CODE ANN. §§ 65.1-1 through 65.1-163 (Repl. Vol. 1980).

2. 1918 Va. Acts, ch. 400 at 637. The Act was based on the Indiana act then in existence. For this reason, Indiana decisions have often been relied on in construing the Virginia statute. *See, e.g.,* Cohen v. Cohen's Dep't Store, Inc., 171 Va. 106, 198 S.E. 476 (1938); Hoffer Bros., Inc. v. Smith, 148 Va. 220, 138 S.E. 474 (1927). Both Virginia and Indiana borrowed from the English statute in order to avoid constitutional problems. *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 5.20 (1978).

3. The Act provides cash benefits for partial and total incapacity as well as limited death benefits and scheduled compensation for the loss of various bodily parts. Compensation for loss of earnings, based on average weekly wage calculations, is provided to a limited degree. VA. CODE ANN. §§ 65.1-54 to -82 (Repl. Vol. 1980).

4. Medical attention is provided free of charge to the claimant for as long as necessary. The term "medical attention" is used comprehensively and includes hospital services, surgery, psychiatric care, specialists, and prosthetic devices as well as reasonable and necessary vocational rehabilitation. VA. CODE ANN. §§ 65.1-85 to -91 (Repl. Vol. 1980).

5. Commonly referred to as Social Security.

6. *See generally* 4 A. LARSON, *supra* note 2, § 96. Because of the social policies served by the Act in protecting employees and their dependents, the Virginia Supreme Court has frequently stated that the Act is to be liberally construed. *See, e.g.,* Honaker & Feeney v. Hartley, 140 Va. 1, 13, 124 S.E. 220, 223 (1924).

Act.<sup>7</sup> Unlike other social insurance programs, however, workmen's compensation is funded by neither the employee nor the state. For a qualifying injury, death or disease, liability is borne by the employer and, presumably, passed on to the consumer.<sup>8</sup>

Unlike tort law, workmen's compensation is not founded on the concepts of fault and negligence.<sup>9</sup> With but few exceptions,<sup>10</sup> these concepts are not relevant in determining liability. Instead, the primary issue is whether a work-connected injury arises out of and in the course of employment.<sup>11</sup> Also unlike tort law, compensation is generally limited to a "disability" which impairs earning capacity. By statute, there are limitations on the amount of compensation that can be awarded<sup>12</sup> and, with certain exceptions, limitations on

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7. Telephone conversation with Ronald Umble, Virginia Industrial Commission, in Richmond, Virginia (October 23, 1980).

8. The employer can absorb the loss as a business deduction and pass that loss on to the consumer. See *Humphreys v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926); 1 A. LARSON, *supra* note 2, § 3.20.

9. See 1 A. LARSON, *supra* note 2, § 2.20. Claimant need not prove negligence or fault on the part of the employer. Similarly, an employer faced with a workmen's compensation claim may not raise the common law defenses otherwise available to him in a tort action. These defenses are often referred to as the "unholy trinity" consisting of the fellow servant rule, assumption of the risk, and contributory negligence. 1 A. LARSON, *supra* note 2, § 4.30.

10. Fault on the part of the employee is relevant where the employee's defense is based on VA. CODE ANN. § 65.1-38 (Repl. Vol. 1980) which provides:

No compensation shall be allowed for an injury or death:

- (1) Due to the employee's willful misconduct, including intentional self-inflicted injury,
- (2) Growing out of his attempt to injure another,
- (3) Due to intoxication, or
- (4) Due to willful failure or refusal to use a safety appliance or perform a duty required by statute or the willful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission and brought prior to the accident to the knowledge of the employee.

The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

11. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980).

12. The weekly compensation for total incapacity is set by statute at 66⅔% of the claimant's average weekly wage, not to exceed 100% of the average weekly wage of the Commonwealth (recomputed each year), nor to be less than 25% of that average. VA. CODE ANN. § 65.1-54 (Repl. Vol. 1980). In 1979, the maximum weekly cash benefit payable was \$220. Manpower Research Division of Virginia Employment Commission, Covered Employment and Wages, 2nd Quarter 1979 (1980).

In cases of partial incapacity, benefits are limited to 66 ⅔% of the difference between the average weekly wages prior to the accident and those wages after the accident, not to exceed 100% of the average weekly wage of the Commonwealth. VA. CODE ANN. § 65.1-55 (Repl.

the duration of benefits.<sup>13</sup>

The purpose of this article is to provide an overview of the scope and coverage of the Virginia Workmen's Compensation Act and the statutory criteria that must be satisfied before an employment-related injury or death is found compensable.<sup>14</sup> Because of the consequences flowing from a determination that workmen's compensation law applies, awareness of the basic parameters of the Act is important, not only to the practitioner specializing in the field,<sup>15</sup> but also to virtually every lawyer and individual concerned with personal injury cases. For an "employee"<sup>16</sup> injured "by accident arising out of and in the course of employment,"<sup>17</sup> workmen's compensation is the sole and exclusive remedy<sup>18</sup> available against an "employer."<sup>19</sup> If an injury is covered by the Act, the employer cannot be sued, even if its negligence caused or contributed to the employee's injury.<sup>20</sup> Not so obviously, a negligent fellow employee of

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Vol. 1980). Scheduled compensation for loss of a member is also computed as a percentage of the average weekly wage of the Commonwealth and is limited in duration, depending on the member lost. VA. CODE ANN. § 65.1-56 (Repl. Vol. 1980).

13. Compensation benefits for partial or total incapacity are limited to five-hundred weeks. VA. CODE ANN. §§ 65.1-54 to 65.1-64 (Repl. Vol. 1980). However in cases involving a single accident or injury and resulting in total paralysis, insanity, or the loss of both hands, feet, arms, legs, eyes, or combination of any two, benefits may be for a specified amount and an unlimited duration. VA. CODE ANN. § 65.1-56 (Repl. Vol. 1980).

14. This article is limited to a discussion of "injuries by accident" as that term is defined by statute. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980). The equally important area of occupational diseases is beyond the limited scope of this discussion.

15. Excellent references for the practitioner include: LARSON, *supra* note 2; JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE VIRGINIA STATE BAR AND THE VIRGINIA BAR ASSOCIATION, WORKMEN'S COMPENSATION FOR THE EMPLOYER'S ATTORNEY AND CLAIMANT'S ATTORNEY (1980).

16. For purposes of the Act, the term "employee" is defined in VA. CODE ANN. § 65.1-4 (Repl. Vol. 1980).

17. For purposes of the Act, the phrase is used as defined in VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980).

18. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1980).

19. For purposes of the Act, the term is used as defined in VA. CODE ANN. § 65.1-3 (Repl. Vol. 1980).

20. An exception to this rule arises if the employer, in contravention of §§ 65.1-104.1, .2, -105, fails to maintain workmen's compensation insurance or, in the alternative, fails to satisfy state requirements on achieving self-insurer status. In either case, a claimant may maintain a negligence action wherein the employer will be precluded from raising certain defenses. The Act provides that:

If such employer refuses and neglects to comply with the provisions of the preceding section (§ 65.1-105) he shall be punished by a fine of not less than fifty dollars nor

the injured party is immune from suit as well.<sup>21</sup>

## II. EMPLOYMENT STATUS

The threshold question for determining if the Act applies is whether the requisite employer-employee relationship exists. The Act defines "employer" to include:

the State and any municipal corporation therein or any political subdivision thereof and any individual, firm, association or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. . . . [I]t includes his insurer so far as applicable.<sup>22</sup>

The term "employee" is defined to include: "every person, including a minor, in the service of another under any contract of hire or apprenticeship, written or implied."<sup>23</sup> Omitted from coverage by the Act are employees within the following categories: those employed in a business having less than three regular employees, casual employees,<sup>24</sup> domestic servants, and farm and horticultural laborers employed by farmers employing less than four full-time employees and with an annual payroll of less than \$15,000.<sup>25</sup>

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more than one-thousand dollars, and he shall be liable during continuance of such refusal or neglect to any employee either for compensation under this Act or at law in a suit instituted by the employee against such employer to recover damages for personal injury or death by accident, and in any such suit such employer shall not be permitted to defend upon any of the following grounds:

- (1) That the employee was negligent;
- (2) That the injury was caused by the negligence of a fellow employee; or
- (3) That the employee had assumed the risk of the injury.

The fine herein provided may be assessed by the Commission in an open hearing with the right of review and appeal as in other cases.

VA. CODE ANN. § 65.1-106 (Repl. Vol. 1980).

21. See *Brown v. Reed*, 209 Va. 562, 165 S.E.2d 394 (1969); *Phillips v. Brinkley*, 194 Va. 62, 72 S.E.2d 339 (1952).

22. VA. CODE ANN. § 65.1-3 (Repl. Vol. 1980).

23. VA. CODE ANN. § 65.1-4 (Repl. Vol. 1980).

24. VA. CODE ANN. § 65.1-28 (Repl. Vol. 1980). The casual employee exclusion found in this section must be read together with § 65.1-4. An employment cannot be said to be casual if it is in the usual course of trade, business, occupation, or profession of the employer. See *Hoffer Bros., Inc. v. Smith*, 148 Va. 220, 138 S.E. 474 (1927).

25. VA. CODE ANN. § 65.1-28 (Repl. Vol. 1980). All employers excluded by this section, including farmers, may voluntarily elect to be bound by the Act by notifying their employees of such intention. Any employee may then reject the Act by so notifying the Indus-

### A. *Contract of Hire*

While the Act requires that some form of employment contract exist between the parties in order for the employment relationship to exist,<sup>26</sup> the Act does not specifically define the term "contract of hire." The Virginia Supreme Court has defined the term as: "an agreement in which an employee provides labor or personal services to an employer for wages or remuneration or other thing of value supplied by the employer."<sup>27</sup>

By statute, this contract may be express or implied.<sup>28</sup> If one party renders services or labor of value to another under circumstances which raise a presumption that the parties intended and understood that such services or labor were to be paid for, or where a reasonable person in the position of the person receiving the benefit of the services or labor would know that compensation of some kind was to be exchanged, then there is held to be a "contract of hire."<sup>29</sup>

When services or labor are provided voluntarily, with no express or implied promise of remuneration or compensation, the provider of such gratuitous service is excluded from coverage by the Act. In *Charlottesville Music Center, Inc. v. McCray*,<sup>30</sup> two teen-aged boys were installing shelving at a music store. The shelves had been purchased from the father of one of the boys. Another boy, a friend, came to help and was killed while operating a faulty cargo hoist belonging to the music store. Despite the fact that the decedent was working at the store with the knowledge, consent, and approval of the store manager, the court held that he was not an

trial Commission. In the absence of such notification, the employees are presumed to have elected to be bound by the Act. See *Dey v. Logan*, 175 Va. 68, 7 S.E.2d 102 (1940). By taking out a workmen's compensation insurance policy, an employer voluntarily subjects itself to all provisions of the Act during the period covered by the insurance. VA. CODE ANN. § 65.1-35 (Repl. Vol. 1980).

26. VA. CODE ANN. § 65.1-4 (Repl. Vol. 1980).

27. *Charlottesville Music Center, Inc. v. McCray*, 215 Va. 31, 35, 205 S.E.2d 674, 677 (1974).

28. VA. CODE ANN. § 65.1-4 (Repl. Vol. 1980).

29. 215 Va. at 35, 205 S.E.2d at 678. It should be noted that VA. CODE ANN. § 65.1-47.1 (Repl. Vol. 1980) provides that volunteer fire fighters, volunteer lifesaving and rescue squad members, and auxiliary and reserve police may be treated as employees provided the governing body of the political subdivision passes an appropriate resolution.

30. 215 Va. 31, 205 S.E.2d 674 (1974).

employee because there was no evidence that he expected or received any compensation or remuneration. Since the decedent was a non-employee, the administrator of his estate was allowed to maintain a suit for wrongful death. A jury verdict in the sum of \$25,500 was granted and affirmed by the Supreme Court of Virginia.

A similar problem arises where a bona fide employee retains another person to assist the employee in performing his or her duties. In such a case, the analysis turns on the consent and knowledge of the employer. In *Nolde Brothers, Inc. v. Chalkley*,<sup>31</sup> the court stated the test as follows: "Whether a person engaged by an employee to assist him in the performance of the duties of the employer is also an employee depends upon whether the principal employer has knowledge of such employment and consents thereto. This knowledge may be actual, or imputed."<sup>32</sup> In that case, an eleven-year-old boy was injured while helping the driver of a bread delivery truck. Although the practice of employing helpers violated the employer's posted rules, the drivers often did employ young boys as helpers on Saturdays and holiday mornings. The employer knew of this practice and failed to stop it. For this reason, the court ruled that the boy was an employee of the baking company and his exclusive remedy was workmen's compensation.

### B. *Master-Servant Relationship*

In order to determine whether the parties stand in the proper relationship necessary for the Act to apply, one must decide whether the injured party is an "employee" or "independent contractor." This frequently-litigated question becomes important in cases involving vicarious liability, unemployment compensation,<sup>33</sup> social security, and a myriad of fields<sup>34</sup> other than workmen's com-

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31. 184 Va. 553, 35 S.E.2d 827 (1945).

32. *Id.* at 563, 35 S.E.2d at 831 (1945).

33. *United States v. W.M. Webb, Inc.*, 397 U.S. 179 (1970) (certain captains and crewmen were determined to be employees under the federal unemployment insurance act); I.R.C. § 3306(i).

34. For example, federal income tax must be withheld from compensation of those persons deemed to be "employees." I.R.C. § 3402(a). While the Internal Revenue Code does not provide a consistently applicable definition of the term "employee" for purposes of the withholding requirement (see I.R.C. § 3401(c)), Treasury Regulations provide the following

pensation. Since the term "employee" is defined only generally by statute, the Virginia Supreme Court has applied common law principles in defining the term. The four factors most frequently applied by the court are: (1) the authority to select and engage, (2) the obligation to pay wages, (3) the power to dismiss, and (4) the power to control and direct the servant's actions.<sup>35</sup>

Of these four factors, it is the power to control that is the most significant. The first three elements are not absolutely essential but are merely indicia of possible employee status.<sup>36</sup> In *Baker v. Nussman*,<sup>37</sup> the decedent had contracted with a general contractor to remove walls and debris from a building damaged by fire. The decedent was paid a flat contract price, furnished his own tools and labor, and was not controlled as to the manner in which he was to remove such debris. In light of the general contractor's lack of control over the decedent, the court found him not to be an employee of the general contractor.

Because of the control retained by an owner, even a licensed contractor with a valid building permit may become an employee.

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general description of the factors to be considered in determining whether an individual is an employee or an independent contractor:

Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

Treas. Reg. § 31.3401(c)-1(b), T.D. 7068, 1970-2 C.B. 252.

35. See, e.g., *Phillips v. Brinkley*, 194 Va. 62, 72 S.E.2d 339 (1952); *Coker v. Gunter*, 191 Va. 747, 63 S.E.2d 15 (1951); *Brown v. Fox*, 189 Va. 509, 54 S.E.2d 109 (1949); *Crowder v. Haymaker*, 164 Va. 77, 178 S.E. 803 (1935). For a list of commonly accepted tests relevant to determining whether a person is an employee, see 1C A. LARSON, *supra* note 2, § 43.10; RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

36. *Brown v. Fox*, 189 Va. 509, 54 S.E.2d 109 (1949).

37. 152 Va. 293, 147 S.E. 246 (1929).

In *Craig v. Doyle*,<sup>38</sup> the residence owners retained total control over a licensed contractor. They secured workmen's compensation insurance, deducted taxes from his wages, and were constantly present at the site. The work was executed under a contract and rough estimate based on an hourly rate and under the direct supervision of the owner. The court, relying on a Vermont case,<sup>39</sup> made the following statement about the employer-employee test:

If under the contract the party for whom work is being done may prescribe not only what the result shall be, but also may direct the means and methods by which the other shall do the work, the former is an employer, and the latter an employee. But if the former may specify the result only, and the latter may adopt such means and methods as he chooses to accomplish that result, then the latter is not an employee, but an independent contractor.<sup>40</sup>

Under this test, the contractor was held to be an employee and his family allowed to recover under the Act for his death.

The power-of-control test has broad application, and the court has been willing to look closely at the realities of a transaction in determining employer-employee relationships. In one case,<sup>41</sup> the claimant wished to purchase a truck but had insufficient funds. The owner of the truck allowed him to use it when he could. Meanwhile, the claimant used the truck hauling lumber, wheat, and other items for the owner and at the owner's direction and convenience. The owner had indicated to claimant that another person was paid five dollars per thousand feet of lumber hauled, and this casual statement was the only evidence of any contractual arrangement. There was no agreement as to a set amount to be paid for the services, nor any agreement as to any specific amount of work to be done. The court found that, in reality, the claimant was an employee of the owner and, as such, was entitled to compensation for the loss of his leg due to an injury received while loading the truck for the owner. Since the claimant placed himself completely under the control of the owners and did only what they

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38. 179 Va. 526, 19 S.E.2d 675 (1942).

39. *Kelley v. Hoosac Lumber Co.*, 95 Vt. 50, 113 A. 818 (1921).

40. 179 Va. at 531, 19 S.E.2d at 677.

41. *Brown v. Fox*, 189 Va. 509, 54 S.E.2d 109 (1949).

directed him to do, the court found the requisite control necessary for employee status.

In *Phillips v. Brinkley*,<sup>42</sup> the court again looked beyond mere surface arrangements. There, a highway department employee was suing for negligence, contending that the defendant truck driver was an independent contractor and outside the protection of the Act. The defendant supplied his own truck to do hauling for the highway department at two dollars per hour. The state required him to be present by seven in the morning and to leave at five-thirty. Upon arrival at the required location, he was told what to do and where to go. His work included various jobs, such as hauling posts and picking up workmen. Because the state controlled the time and manner of the defendant's work performance, the court ruled that he was a fellow employee of claimant and was, therefore, immune from suit in a negligence action.<sup>43</sup> Since the Workmen's Compensation Act was found to be applicable, it provided the claimant's exclusive remedy.<sup>44</sup>

Conversely, where the power of control is lacking, an individual is held to be an independent contractor rather than an employee. In *Mims v. McCoy*,<sup>45</sup> a carpenter was injured when he fell from a scaffold while remodeling a riverfront cabin. Even though the owner of the cabin explained exactly what he wanted done, visited the site every day, and furnished money and supplies, he did not prescribe working hours or a particular manner for executing the work. The carpenter was held to be an independent contractor and not an employee and, thus, not entitled to workmen's compensation benefits.

A similar result was reached in *Crowder v. Haymaker*.<sup>46</sup> There, a miner was refused employment by a mine lessee but secured permission to operate a nearby mine. The lessee furnished the miner

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42. 194 Va. 62, 72 S.E.2d 339 (1952).

43. For other cases finding employee status, see *Nolde Bros., Inc. v. Chalkley*, 184 Va. 553, 35 S.E.2d 827 (1945); *Humphreys v. Boxley Bros. Co.*, 146 Va. 91, 135 S.E. 890 (1926).

44. VA. CODE ANN. § 65.1-40 (Repl. Vol. 1980).

45. 219 Va. 616, 249 S.E.2d 817 (1978).

46. 164 Va. 77, 178 S.E. 803 (1935). "The Workmen's Compensation Act does not undertake to change, as between themselves, the rights of owners and independent contractors. This statute leaves that relationship as it was at common law and we must look to it in determining who is master and who is servant." *Id.* at 79, 178 S.E. at 804.

with tools and bought the coal for a certain price per ton as it was mined. While the lessee visited the mine from time to time, he exercised no control over the operations thereof. The miner furnished his own explosives, fuses, and caps and determined the manner in which these should be used. Thus, he was judged not to be an employee and held not entitled to compensation for the loss of his eye in a mine explosion.<sup>47</sup>

### C. *Loaned Employees*

Where an employee is loaned to another employer, the borrowing employer may become liable for workmen's compensation if the employee is injured while under his direction.<sup>48</sup> The issue turns on the borrowing employer's right to control the employee. If the borrowing employer has the power to control and direct the employee in the performance of his work, it becomes the special master and is exclusively liable for injuries incurred by the person while in its employ.<sup>49</sup> This is so even though the general employer continues to pay wages and retains the power of dismissal.<sup>50</sup> If, however, the borrowing entity merely agrees that the general employer shall perform the work through employees of its own choosing and, thereby, retains direction and control over them, the general employer remains liable for workmen's compensation.<sup>51</sup> In such a case, the borrowing employer may be liable in tort if its negligence results in injury to the general employer's workman.<sup>52</sup>

In *Coker v. Gunter*,<sup>53</sup> the plaintiff was an employee of a pipe-laying company working under contract with the City of Norfolk. The driver of a truck removing dirt from the site allegedly failed to

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47. For other Virginia cases finding independent contractor status, see *Seals v. Tom-V Mining, Inc.*, 57 O.I.C. 315 (1977); *Hogge v. H. & S. Corp.*, 53 O.I.C. 139 (1971).

48. The loaned servant doctrine is often raised where an employer seeks to avoid tort liability by contending that he is a special master and that workmen's compensation is, therefore, the alleged employee's exclusive remedy. See *Tidewater Stevedoring Corp. v. McCormick*, 189 Va. 158, 52 S.E.2d 61 (1949).

49. However, control requires subordination to the special master. The mere fact that a loaned employee cooperates with employees of the borrowing employer does not establish the requisite control. *Id.*

50. *Ideal Steam Laundry v. Williams*, 153 Va. 176, 149 S.E. 479 (1929).

51. *Id.*

52. See notes 48-49 *supra*.

53. 191 Va. 747, 63 S.E.2d 15 (1951).

wait for a safe-passage signal and struck the plaintiff. Plaintiff sought to sue the driver and his trucking company employer. The problem addressed in the case was whether the driver of the truck was a loaned servant. If so, the driver, as a fellow employee of the plaintiff, could not be sued and the plaintiff's sole remedy would be workmen's compensation.

In determining that the driver was a loaned servant of the plaintiff's employer, the pipe company, the Virginia Supreme Court looked at the actual working relationship and determined that the driver had been instructed by the trucking company to report to the site and to do whatever work the pipe company directed. While on the site, he performed those functions requested of him, including hauling dirt, moving items, and flagging traffic. On these facts, he was held to be a loaned servant despite the fact that the trucking company paid his wages and retained the power to discharge him. Important to the decision was the fact that the driver was sent to the site to do the pipe company's bidding, "not only as to the work to be done, but as to the time and method of doing it."<sup>54</sup> The work he was performing was determined to be the work of the pipe company and not the work of his general employer.

Similarly, in *Ideal Steam Laundry v. Williams*,<sup>55</sup> the Virginia Supreme Court held that a person employed by a laundry and required to work one day a week at a private home doing gardening, domestic chores, and odd jobs was, at the time of his injury at the home, the servant of the private homeowner and not the laundry. Critical to the decision was the fact that the injured party was then under the control of the homeowner, both as to the work performed and the method of doing it. In reaching the decision that the injured party had no claim against the laundry, his general employer, the court found significant the fact that Virginia's compensation act contained no provision that a "general employer shall be deemed to continue to be the employer of the workman while he is working for that other person."<sup>56</sup> Since the English workmen's compensation act, on which the Virginia statute was based, contained such a provision, the court concluded that the omission in-

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54. *Id.* at 755, 63 S.E.2d at 18.

55. 153 Va. 176, 149 S.E. 479 (1929).

56. *Id.* at 181, 149 S.E. at 481.

licated a legislative intent to allow the common law rule of non-liability to apply.<sup>57</sup>

#### D. *Employees of Independent Contractors*

A section of the statute<sup>58</sup> provides that nothing contained in the Act "shall be construed to make . . . the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor." This section, however, must be read in conjunction with other sections of the Act establishing the "statutory employer" concept.<sup>59</sup> Although a direct employer-employee relationship may not exist, the employment relationship may be created by statute where certain conditions are satisfied and the relationship is one of owner to workmen of subcontractor, to workmen of sub-subcontractor, and so on.<sup>60</sup> Where statutory employer status is found, the statutory employer and its insurance carrier are liable for payment of com-

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57. *Id.* at 182, 149 S.E. at 481.

58. VA. CODE ANN. § 65.1-5 (Repl. Vol. 1980).

59. *See generally* 1C A. LARSON, *supra* note 2, § 49.

60. VA. CODE ANN. § 65.1-29 (Repl. Vol. 1980) provides that:

When any person (in this section and §§ 65.1-31 and 65.1-32 referred to 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 (in this section and §§ 65.1-31 to 65.1-34 referred to 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 workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him.

VA. CODE ANN. § 65.1-30 (Repl. Vol. 1980) provides that:

When any person (in this and the four succeeding sections (§§ 65.1-31 to 65.1-34) referred to as "contractor") contracts to perform or execute any work for another person which work or undertaking is not part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 65.1-31, 65.1-32, 65.1-33, and 65.1-34 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him.

VA. CODE ANN. § 65.1-31 (Repl. Vol. 1980) provides that:

When the subcontractor in turn contracts with still another person (in this section and §§ 65.1-32, 65.1-33, and 65.1-34 also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by the two preceding sections.

pensation benefits.<sup>61</sup> This is particularly important when the employee's immediate employer either does not have enough employees to come under the Act or is uninsured.<sup>62</sup> Statutory employer status also has the effect of shielding an employing entity from liability in tort for negligence toward any covered employee.<sup>63</sup> The issue of statutory employer status turns on whether the subcontracted work, no matter how far down the line, is part of the usual trade, business or occupation of the alleged statutory employer. In essence, the question is whether this is the type of work that would generally be carried out by the statutory employer's employees.<sup>64</sup>

Two recent cases involving oil companies, *Shell Oil Co. v. Leftwich*,<sup>65</sup> and *Sun Oil Co. v. Lawrence*,<sup>66</sup> demonstrate application of the usual trade, business, or occupation rule. In *Shell Oil*, the oil company owned a service station which it leased to a dealer. Two of the dealer's employees were struck by a train while on a service call in the dealer's truck. One was killed and the other seriously injured. The Industrial Commission held that both were statutory employees of Shell and entitled to workmen's compensation from Shell. On appeal, the Virginia Supreme Court held the issue to be: "whether the retailing of gasoline to the general public, admittedly an indispensable activity to the Shell Oil Company, is an activity normally carried on by Shell through its employees rather

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61. The statutory employer is entitled to indemnity from the immediate employer or an intermediate subcontractor, as provided in the Code:

When the principal contractor is liable to pay compensation under any of the four preceding sections (§§ 65.1-29 to 65.1-32), he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of such sections or from an intermediate contractor and shall have a cause of action therefor.

A principal contractor when sued by a workman of a subcontractor shall have the right to call in that subcontractor or any intermediate contractor or contractors as defendant or co-defendant.

VA. CODE ANN. § 65.1-33 (Repl. Vol. 1980).

62. If the immediate employer of the injured person has the required number of employees and can comply with the award for compensation, the immediate employer and not the statutory employer will be directed to make the payments. Under §§ 65.1-29 to -31, liability of persons other than the immediate employer is of a secondary nature only. *Possin v. Eubank*, 12 O.I.C. 444 (1930).

63. See *Sykes v. Stone & Webster Eng'r Corp.*, 186 Va. 116, 41 S.E.2d 469 (1947).

64. *Id.*

65. 212 Va. 715, 187 S.E.2d 162 (1972).

66. 213 Va. 596, 194 S.E.2d 687 (1973).

than through independent contractors."<sup>67</sup> The court determined that Shell's control over the gasoline terminated on its delivery to the dealer, and, therefore, sale to the consumer public was an activity which Shell did not normally carry on through its employees. Because Shell did not operate retail service stations or provide automotive services through its own employees, it was held that Shell was not a statutory employer and not liable under the Act.

Similarly in *Sun Oil*,<sup>68</sup> the claimant, an employee of a Sunoco service station operator, was injured while performing his duties. At the time of the injury, Sun Oil owned 255 service stations operated by dealer-lessees such as claimant's employer and operated four similar stations with its own employees. Since less than two percent of all Sunoco service stations in Virginia were operated by Sun Oil employees, the Court held that Sun Oil was not normally in the business of retailing gasoline and performing automotive services and was, therefore, not a statutory employer.<sup>69</sup>

The statutory employer sections of the Act contain no mention of the State, its political subdivisions, or municipal corporations. Consequently, it has been held that these sections are not applicable to such entities, and employees of independent contractors performing work for these entities cannot seek compensation from them.<sup>70</sup>

### III. INJURIES BY ACCIDENT

With the exception of certain occupational diseases,<sup>71</sup> the Act provides compensation only for "injuries by accident."<sup>72</sup> In meeting this standard, the claimant must establish that the circum-

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67. *Shell Oil Co. v. Leftwich*, 212 Va. 715, 722, 187 S.E.2d 162, 167 (1972).

68. 213 Va. 596, 194 S.E.2d 687 (1973).

69. *Id.* at 598, 194 S.E.2d at 688. On the issue of statutory employer status, see also *Hipp v. Sadler Materials Corp.*, 211 Va. 710, 180 S.E.2d 501 (1971); *Burroughs v. Walmart, Inc.*, 210 Va. 93, 168 S.E.2d 107 (1969).

70. *City of Portsmouth v. Daniels*, 157 Va. 614, 162 S.E. 324 (1932).

71. See VA. CODE ANN. §§ 65.1-46 to -53 (Repl. Vol. 1980).

72. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980) provides:

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

stances of his claim fit the definition of accident, that his injury is traceable to a particular time and place, and that there is a causal relationship between the accident or untoward event and the actual injury.<sup>73</sup>

### A. *Accident: Definition*

The Virginia Supreme Court has stated:

The definition of accident generally assented to is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual and not expected by the person to whom it happens.

. . . .  
. . . Where the effect was not the natural and probable consequence of the means employed, and was not intended or designed, the injury resulting was produced by accidental means.<sup>74</sup>

Thus, it is sufficient for purposes of fulfilling the "by accident" requirement that either the cause or the result be unexpected.<sup>75</sup> For example, in *Reserve Life Insurance Co. v. Hosey*,<sup>76</sup> the claimant's employment involved making a door-to-door survey. While ascending rock steps in order to conduct such a survey, her knee "caught and then it just snapped." Even though the claimant was not engaged in any unusual exertion and even though there was nothing unusual about her duties on the day of the injury, the employee was allowed to recover.

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73. *Virginia Elec. & Power Co. v. Quann*, 197 Va. 9, 87 S.E.2d 624 (1955).

74. *Reserve Life Ins. Co. v. Hosey*, 208 Va. 568, 570-71, 159 S.E.2d 633, 635 (1968); *Derby v. Swift & Co.*, 188 Va. 336, 342, 49 S.E.2d 417, 420 (1948); *Big Jack Overall Co. v. Bray*, 161 Va. 446, 451-52, 171 S.E. 686, 688 (1933).

75. 1B A. LARSON, *supra* note 2, §§ 37.00-38.00. Most states require an injury by accident, some unexpected mishap, or an untoward event. Larson breaks down the accident concept into two basic divisions with two sub-parts. The first is unexpectedness, either as to cause or as to result, and the second is a definite time, either as to cause or as to result. If both parts of the concept are satisfied, then clearly there has been an accidental injury. When neither is satisfied, it is equally clear that there has been no accident. Difficulty arises in those cases that lie somewhere in between. Some jurisdictions, unlike Virginia, require that the cause be unexpected and hold that the "by accident" requirement is not satisfied merely by an unexpected result.

76. 208 Va. 568, 159 S.E.2d 633 (1968).

Similarly in *Big Jack Overall Co. v. Bray*,<sup>77</sup> a woman in apparently good health attempted to lift a bundle of clothes and injured her back. She testified that something in her back had "snapped in two." In response to a contention by her employer that there was no external or violent cause of the injury, the court allowed recovery, holding that an accident need only be "a 'mishap,' or 'fortuitous' happening—an 'untoward event, which is not expected or designed.'"<sup>78</sup>

### B. *Establishing Time and Place*

The claimant must also establish that he was injured at a particular time, in a particular place, and by a particular accident.<sup>79</sup> In *Aistrop v. Blue Diamond Coal Co.*,<sup>80</sup> the plaintiff sought to maintain a wrongful death action for her husband's death, allegedly caused by inhalation of poisonous gases and fumes while working in the defendant's mine. The court held: if the death had been caused by inhalation of poisonous gases at a particular time and on a particular occasion which could be determined with reasonable certainty, then the event would be "injury by accident" and the Act would be plaintiff's exclusive remedy. Since under the allegations and pleadings of the case the decedent's death could have been the result of a gradual exposure rather than a particular incident, the court allowed plaintiff's action for wrongful death to proceed, holding that the defendant had failed to establish that the action was within the exclusive jurisdiction of the Industrial Commission.<sup>81</sup>

The Virginia Supreme Court seems most willing to find injury by accident when a claimant can point to a specific incident as the cause of injury and can support the assertion by prior consistent statements and actions. For example, in *Dixon v. Norfolk Ship-*

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77. 161 Va. 446, 171 S.E. 686 (1933).

78. *Id.* at 457, 171 S.E. at 690.

79. *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 24 S.E.2d 546 (1943).

80. *Id.*

81. At the time of the original action, occupational diseases were not within the purview of the Act. A verdict that death was caused by gradual exposure due to the negligence of the coal company was ultimately affirmed by the Virginia Supreme Court. *Blue Diamond Coal Co. v. Aistrop*, 183 Va. 23, 31 S.E.2d 297 (1944).

*building & Dry Dock Corp.*,<sup>82</sup> the claimant was lifting a heavy work bench when he felt a sharp pain in his side and grabbed his stomach. Co-workers testified as to his movements and statements at the time of the injury. Medical evidence established that the claimant, in fact, had suffered a hernia and had a predisposition for such an injury. The court found that such predisposition was not a bar to recovery and held there was a compensable injury by accident as evidenced by the testimony.

Similarly, in *Derby v. Swift & Co.*,<sup>83</sup> the court based its decision on a physician's statement and the statement of the claimant's wife. The employee was lifting a heavy table when he suffered a hernia and subsequently underwent corrective surgery from which he developed a pulmonary embolism and died. The physician testified that a strain caused his hernia, and the wife testified that the claimant told her the night of the incident that he had injured himself that day while lifting a table. Compensation was allowed.

### C. *Proof of Causal Relationship*

Once the occurrence of an accident has been established with sufficient definiteness, a claimant has the burden of establishing a medically factual causal relationship between his injury and his employment. Professor Larson has noted that probably the most common reason for defeated claims is "simply the general inadequacy of proof connecting the injury medically with the employment."<sup>84</sup>

Where proof of this causal relationship is lacking, compensation will be denied. For example, in *Bailey v. Stonega Coke & Coal Co.*,<sup>85</sup> an employee, seemingly in good health, dropped dead in the employer's mine. Medical evidence established that the decedent had a congenital heart disease causing an enlarged right auricle. Because there was no causal relationship between the death and any untoward event or accident, it was held that the disease had simply run its course and compensation denied.

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82. 182 Va. 185, 28 S.E.2d 617 (1943).

83. 188 Va. 336, 49 S.E.2d 417 (1948).

84. 1B A. LARSON, *supra* note 2, § 38.83.

85. 185 Va. 653, 40 S.E.2d 254 (1946).

The importance of medical testimony in proving causation and the scrutiny which the court will give to such testimony are made clear in *D. W. Mallory & Co. v. Phillips*.<sup>86</sup> In that case, the employee, a truck driver and helper in the employer's coal yard, suffered a fatal heart attack while unloading a railroad coal car on a cold winter day. A subsequent autopsy determined that the employee had been suffering from severe hardening of the arteries, hypertension causing an enlarged heart, and "a continual, on-going process of myocardial death."<sup>87</sup>

The Industrial Commission awarded compensation benefits to the widow and was reversed by the Virginia Supreme Court. Even though the "by accident" requirement of the statute is satisfied by a showing that an attack is accidental as to result, the court held that the "arising out of" requirement requires proof of causation. "The claimant must prove that the work activity caused or contributed to the cause of the heart attack" irrespective of any usual or unusual exertion.<sup>88</sup>

Where the employee suffered from a pre-existing heart disease, the court felt that the causation problem could not be resolved by common knowledge and experience. Further, the court made it clear that there is no presumption in favor of compensation for a heart attack following unusual occupational exertion. Thus, the court felt it was necessary to look to medical evidence in order to determine whether the necessary causal connection had been established.

In *Mallory*, the widow's medical witness testified that the existence of a causal relationship depended on whether there was a "sudden exertional stress" not related to the usual work pattern. This fixed the standard of proof for the case and required a showing of even more than unusual exertion. Since there was no proof of "sudden exertional stress," compensation was denied.<sup>89</sup>

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86. 219 Va. 845, 252 S.E.2d 319 (1979).

87. *Id.* at 847, 252 S.E.2d at 321.

88. *Id.* at 848, 252 S.E.2d at 321.

89. *Id.* at 850, 252 S.E.2d at 323. A substantial minority of jurisdictions require a showing of unusual exertion before an injury resulting from a heart attack, back injury, or hernia is compensable. The majority of jurisdictions require only a causal relationship between the actual exertion and the resultant injury. 1B A. LARSON, *supra* note 2, §§ 38.00 through 39.00. The majority rule is followed in Virginia. This rule is more in line with the beneficial pur-

#### IV. ARISING OUT OF AND IN THE COURSE OF

In order to be compensable, an employee's injury by accident must arise out of and in the course of employment.<sup>90</sup> The two phrases are used conjunctively and not synonymously, and both requirements must be satisfied in order to bring the case within the Act.<sup>91</sup> The phrase "arising out of" refers to the origin or cause of the injury, and the phrase "in the course of" refers to the time, place and circumstances of the injury.<sup>92</sup>

The Virginia Supreme Court has held that to determine whether an accident "arises out of" the employment it will apply the following definition and test from the Massachusetts case of *In re McNicol*:<sup>93</sup>

[A]n injury arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from

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pose of the Act and more equitable in application since the argument as to what is usual or unusual is eliminated.

90. VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980) provides:

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

91. *Lucas v. Lucas*, 212 Va. 561, 186 S.E.2d 63 (1972); *Bradshaw v. Aronovitch*, 170 Va. 329, 335, 196 S.E. 684, 686 (1938).

92. 170 Va. at 335, 196 S.E. at 686.

93. 215 Mass. 497, 102 N.E. 697 (1913).

that source as a rational consequence.<sup>94</sup>

One of the many cases in which the Supreme Court of Virginia has discussed the term "arising out of" is *Lucas v. Lucas*.<sup>95</sup> In that case, the claimant's decedent was employed to assist the employer in his cement finishing business. On the day of his death, the employee left the job site for a personal errand at 11:30 a.m. On his return at 2:00 p.m., he learned that his employer needed to pick up some payroll checks in another city. Since the employee was not qualified to finish the job his employer was engaged in, he volunteered to make the trip. The employer agreed and the employee drove the truck to his home, where he picked up his wife and nephew, and started on the trip. En route, an accident occurred, fatally injuring the employee. The court held that, even though the employee's work day had ended at 11:30 a.m.,<sup>96</sup> compensation should be awarded. While the employee acted voluntarily, the court held his trip to be obviously for the *benefit* of the regular employer. Had the employee not volunteered, the employer would have had to make the trip himself or release another employee from a job site to make the trip. Therefore, the court ruled that the death arose out of the employment.

As to the statutory term "course of employment," the court held in *Conner v. Bragg*<sup>97</sup> that an accident occurs in the "course of employment" when it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incident thereto.

In *Graybeal v. Board of Supervisors*,<sup>98</sup> the Supreme Court of Virginia took the opportunity to further explain and expand the concept of "course of employment." In *Graybeal*, the claimant was a Commonwealth's Attorney who was injured at his home by a

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94. *Conner v. Bragg*, 203 Va. 204, 208-09, 123 S.E.2d 393, 397 (1962).

95. 212 Va. 561, 186 S.E.2d 63 (1972).

96. Whether or not the injury occurred outside working hours is immaterial so long as it arose "out of and in the course of employment." *Ferrell v. Beddow*, 203 Va. 472, 125 S.E.2d 196 (1962) (carpenter, injured while unloading tools from the trunk of his car prior to beginning the workday, was held covered by Act).

97. 203 Va. 204, 123 S.E.2d 393 (1962).

98. 216 Va. 77, 216 S.E.2d 52 (1975).

bomb explosion. The bomb was placed on his automobile, allegedly by an individual he had successfully prosecuted for murder. The individual's conviction resulted in a five year prison term and he openly vowed revenge.

Were the court to have felt bound by the literal language of the *Conner* test set forth above, the claimant's case may have failed, since the injury did not necessarily occur within the time and space of employment while he was fulfilling the duties of employment. Rather than reject the claim however, the court chose to distinguish *Conner* and to "recognize the realities of the claimant's employment situation."<sup>99</sup> The court determined that the course of events leading to the claimant's injury was unbroken, beginning with the prosecution, continuing through the desire for revenge and ending with the bombing. This, the court held, constituted a single work-connected incident and was, thus, "in the course of" employment.<sup>100</sup>

The dual concepts of "arising out of" and "in the course of" employment are applied in diverse factual settings. The remainder of this article will discuss the more prevalent settings for application of these tests.

#### A. *Going To and Coming From Work*

As a general rule, an employee going to or from his place of employment is not engaged in any employment-related service and is not within the coverage of the Act for injuries incurred during such times.<sup>101</sup> Exceptions to this general rule include situations where: (1) the means of transportation is provided by the employer, or travel time is paid for or included in wages; (2) the route used is the sole and exclusive method of ingress and egress; or (3) the employee is still charged with a duty connected with employment when injured.

These exceptions were discussed in *Le White Construction Co.*

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99. *Id.* at 79, 216 S.E.2d at 54.

100. A person seeking to limit *Graybeal* to its facts might point out that a Commonwealth's Attorney is a public officer whose duties require him to work at various hours and at various places, including his home.

101. *Kent v. Virginia-Carolina Chem. Co.*, 143 Va. 62, 129 S.E. 330 (1925).

*v. Dunn*.<sup>102</sup> There, an employee was killed in a traffic accident while returning home from a job site in another state in his employer's truck. Usually the employer required its employees to travel to and from job sites by their own means of transportation and at their own expense; it was not customary for them to ride in the employer's truck.<sup>103</sup> During the week of his death, the decedent had paid to ride to the North Carolina job site in another employee's car. At the end of the work week the employer ordered the driver to drive a company truck back to the home office in Richmond. The decedent, along with another employee, elected to ride back to Richmond in the truck. The employer did not object. Although the truck had to be unloaded after arrival, it was not established that the decedent had been instructed to assist in this work. On these facts, the court concluded that the free transportation furnished to the employee was not an express or implied part of his employment contract and was not beneficial to the employer; thus, the employee's death was not covered by the Act.<sup>104</sup>

While technically not part of actual work, some activities at or near the place of employment preparatory to beginning or ending a work day are within the scope of the Act and are not automatically barred by the coming-and-going rule. For example, in *Brown v. Reed*,<sup>105</sup> an employee was struck and injured by a fellow employee's automobile while walking across the employer's parking lot on his way to begin work. The injured employee had parked in the lot, gone to the employer's locker room to change clothes, and started back across the parking lot en route to the machine shop to punch the time clock and begin his work day. The driver had just completed his work shift and was backing out of his parking space. The court held that the accident occurred at a place where both

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102. 211 Va. 279, 176 S.E.2d 809 (1970).

103. If it had been the custom to ride back in the employer's truck, the case for coverage would have been much stronger. See *Bristow v. Cross*, 210 Va. 718, 173 S.E.2d 815 (1970) (customary practice of providing employees rides to work held to benefit employer by insuring their presence on the job).

104. *Le White* demonstrates that it is not always the employee who seeks to establish application of the Act. Here the employer appealed the Commission's determination that the employee's death could not be traced to his employment. No doubt this was to avoid possible tort liability since the driver's blood alcohol count was 0.24%. 211 Va. at 283, 176 S.E.2d at 813.

105. 209 Va. 562, 165 S.E.2d 394 (1969).

the driver and injured party were expected to be and both were doing exactly what their employer had anticipated. Both had used the locker room and parking lot which were fringe benefits valuable to both employer and employee. In these circumstances, the court held that the injury "arose out of and in the course of employment," and the injured employee's exclusive rights and remedies were those provided by the Act. Consequently, the trial court's dismissal of the injured employee's action against his fellow employee, the driver of the vehicle, was sustained.<sup>106</sup>

### B. *Employees Injured While Residing on the Premises*

Where a resident employee is injured on the employer's premises, the rule in Virginia is that:

Employees required to live on the employment premises are entitled to be compensated for injuries received on the employment premises when the employee is continuously on call, or when the source of the injury was a risk distinctly associated with the conditions under which the employee lived because of the requirement of living on the premises.<sup>107</sup>

For example, in *Royster v. Madera School*,<sup>108</sup> the claimant was a housemother residing at a girls' school. She was injured in her room which she also used as an office so as to be continuously available to students. Relying on extensive case authority from

106. In contrast is the decision in *Fouts v. Anderson*, 219 Va. 666, 250 S.E.2d 746 (1979). There the plaintiff had completed his workday, departed from the company parking lot and shortly thereafter returned to the parking lot where he was struck by defendant's automobile. Since the plaintiff's return to the parking lot was for personal reasons rather than for work-related reasons, it was held that injuries sustained in the accident did not arise out of and in the course of his employment. Consequently, plaintiff was allowed to maintain his personal injury suit against defendant, a fellow employee. For other cases demonstrating exceptions to the going-and-coming rule, see *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923) (claimant had no choice in selecting route to work); *Lucas v. Biller*, 204 Va. 309, 130 S.E.2d 582 (1963) (transportation furnished by employer); *Hann v. Times Dispatch*, 166 Va. 102, 184 S.E. 183 (1936); *Tyrell v. City Bank & Trust*, 51 O.I.C. 279 (1969) (route was sole means of egress and ingress); *Mitchell v. Fieldcrest Mills, Inc.*, 37 O.I.C. 267 (1955) (employer constructed route used).

107. *Royster v. Madera School*, 36 O.I.C. 290, 294 (1954).

108. *Id.* See also *Moore v. Southern Seminary Junior College*, 46 O.I.C. 168 (1964) (compensation allowed for injury received by resident housemother who was readying school building one month before beginning of school term).

other jurisdictions, the Commission allowed compensation.

Establishing that the employee is required by the employer to live on the premises is very important to a claim of this nature. In *McCullum v. Virginia Home for Incurables*,<sup>109</sup> compensation was denied to a nurse injured in her room on the employer's premises because the decision to live on the premises had been optional on her part, and she had failed to show a lack of a reasonable alternative to living there.

### C. *Employees Injured by Hazards of the Street or Highway While in the Course of Employment*

Since 1925, the Virginia Supreme Court has recognized that there are classes of people, such as sales personnel, truck drivers, and messengers, whose jobs require them to be on the streets and that they frequently ought to be compensated for accidental injuries which may occur while they are performing these jobs.<sup>110</sup> Where an employee is injured because of the hazards of the street or highway, the court applies what is called the actual risk test.<sup>111</sup>

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109. 46 O.I.C. 148 (1964).

110. *Dreyfus & Co. v. Meade*, 142 Va. 567, 129 S.E. 336 (1925).

111. *Id.* See generally 1 A. LARSON, *supra* note 2, § 6.00. In progressive order, the five doctrines for interpreting "arising out of" are the proximate cause, peculiar risk, increased risk, actual risk, and positional risk. For the injury to be compensable proximate cause requires that the accident be foreseeable and the causal chain have no intervening causes. It is best represented by the old Massachusetts rule of *In re Madden*, 222 Mass. 487, 111 N.E. 379 (1916) wherein the court required claimant to show that her employment was the proximate cause of her heart attack.

Under the peculiar risk doctrine, the injured employee must establish that the risk which caused the injury was peculiar to his employment; that is, not a risk to which the general public was also subjected. Thus, when a laborer suffered from a frostbitten foot, the court denied compensation since this was a risk to which any ordinary person working outside in the cold would be exposed. *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935).

The increased risk test depends on an increased degree of exposure to a certain risk as opposed to what that risk may have been, almost as a matter of quantity over quality. For example, where an employee's job required him to be exposed on top of a hill, in wet clothes, next to electrical wiring, it increased the risk of being struck by lightning. *Bauer's Case*, 314 Mass. 4, 49 N.E.2d 118 (1943).

The actual risk test restricts the question to whether or not the risk is, in fact, a risk of that employment. If being struck by an automobile while carrying papers home for grading is an actual risk of teaching, then it is compensable. *English v. Indus. Comm.*, 125 Ohio 494, 182 N.E. 31 (1932).

The most progressive and all encompassing test is the positional risk doctrine. It employs the "but for" rationale of causation. A salesman killed while getting in his car to call on

In describing the test, the court stated: "The test, however, is not that other persons are exposed to similar risks, but rather that the employment exposes the workman to the particular danger in the streets."<sup>112</sup> Thus, the court has held that if an employee's duties require him to be on the street, he is covered from the hazards incident to such travel. This coverage applies even though the employee may have volunteered for the journey, so long as the trip is in the employer's interest.<sup>113</sup>

Such a test was applied in *Cohen v. Cohen's Dep't Store, Inc.*, where compensation was awarded to a store employee who tripped on a curb after being called out to the sidewalk by a customer.<sup>114</sup> Even though all people on the street are exposed to the risk of tripping on a curb, the court held: if a job required an employee to be on the sidewalk because of "some direct or indirect business mission connected therewith, or if he is upon the sidewalk for some incidental purpose indirectly connected with his employment and is injured," the injury is compensable.<sup>115</sup>

Similarly, in *Immer & Co. v. Brosnahan*,<sup>116</sup> the court awarded compensation to a claimant injured in a car accident while on his way to a follow-up medical examination for a compensable injury. The court specifically rejected the employer's contention that the claimant had to show that the employment placed him on the highway and that he was thereby exposed to a greater hazard than the general public. This, stated the court, would be inconsistent with the court's application of the actual risk test in street cases.<sup>117</sup>

In the recent case of *Baggett Transportation Co. v. Dillon*,<sup>118</sup> the court appears to have cut back the scope of its actual risk doctrine.

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customers would not have been there but for his employment, and, hence, the injury is compensable. *Corken v. Corken Steel Prod., Inc.*, 385 S.W.2d 949 (Ky. 1965).

112. 142 Va. at 574, 129 S.E.2d at 338. *Accord*, *Norfolk & Wash. Steamboat Co. v. Holladay*, 174 Va. 152, 5 S.E.2d 486 (1939).

113. *Lucas v. Lucas*, 212 Va. 561, 186 S.E.2d 63 (1972).

114. 171 Va. 106, 198 S.E. 476 (1938).

115. *Id.* at 109, 198 S.E. at 477.

116. 207 Va. 720, 152 S.E.2d 254 (1967).

117. *Id.* at 725, 152 S.E.2d at 257.

118. 219 Va. 633, 248 S.E.2d 819 (1978). The court also failed to recognize the presumption sometimes applied in unexplained death cases. See the discussion in Section M, *infra*, for a fuller treatment of this case.

In that case, a truck driver was found dead next to his truck parked near the exit ramp of a closed rest area along an interstate highway. Apparently, while adding oil to the truck's engine, the driver was struck and killed by a .22 caliber bullet. Evidence admitted into the record showed that five years earlier a .22 caliber bullet had been fired into the rest area. Also, on the weekend the driver was killed, another .22 caliber bullet had been fired into a building in the same rest area. While police suspected that the assailant was an area resident hunting in a nearby field, they did not have sufficient evidence to make an arrest.

In denying compensation, the court noted that there was no evidence the driver's death was related to his work. The evidence showed that the truck and its cargo had not been tampered with and, thus, the court dismissed any suggestion that death arose from a hijacking attempt. The prior random shootings in the area were held to "negate a work-related cause" because:

[T]he risk was not peculiar to the work. We cannot say that Dillon's occupation as a truck driver subjected him, to an abnormal degree, to being shot accidentally or intentionally alongside a public highway. Such a danger is one to which members of the general public who are not truck drivers are likewise exposed.<sup>119</sup>

Discussing the fact that the injury occurred along a public highway, the court stated:

[T]he fact that the accident happens along a public highway, and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, *unless the danger be one to which the employee, by reason of and in connection with his employment, is not subjected peculiarly or to an abnormal degree.*<sup>120</sup>

Since the danger was one to which other members of the public were likewise exposed, the court felt that this limitation was not

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119. *Id.* at 644, 248 S.E.2d at 825.

120. *Id.* at 638, 248 S.E.2d at 822 (emphasis added). For this distinction, the court relied on a case decided before Virginia adopted the actual risk test, *Honaker v. Hartley*, 140 Va. 1, 124 S.E. 220 (1924).

satisfied. "Such a result could have occurred whether [claimant] was a hitchhiker, a stranded motorist, or a truck driver."<sup>121</sup>

On its face, the court's apparent requirement that the danger be one to which the employee be "subjected peculiarly or to an abnormal degree" seems inconsistent with the holding in *Cohen* where tripping over a curb was a covered "street risk" or the holding in *Immer* allowing recovery by an employee injured while driving to a work-related medical appointment.<sup>122</sup> In part, the court denied coverage because it was unwilling to adopt the positional risk test as the law in Virginia and felt that to allow compensation would be to take such a position.<sup>123</sup> However, whether a decision granting compensation would have required taking such a position is not altogether clear.<sup>124</sup>

Rather than viewing the case as a rejection of the actual risk test previously applied, however, it may be appropriate to view it as a limitation on what constitutes a street risk case. In awarding compensation in *Immer*, the court said: "The hazards of highway travel thus became necessary incidents of his employment."<sup>125</sup>

121. 219 Va. 633, 644, 248 S.E.2d 819, 825 (1978).

122. See also *Lucas v. Lucas*, 212 Va. 561, 186 S.E.2d 63 (1972); *Eaddy v. Southeastern Tidewater Opportunity Proj.*, 56 O.I.C. 100 (1975) (social worker injured in car accident).

123. In *Baggett*, the court clearly rejected the positional risk test. 219 Va. at 640, 248 S.E.2d at 823 (1978). Prior to this decision, there had been room to argue that the *Cohen* and *Immer* decisions indicated a move toward a positional risk view. See *Broughman v. Fiber Salvage Co.*, 51 O.I.C. 26 (1969). In his dissent, Commissioner Evans asserts that the court had adopted the positional risk test in *Cohen* and *Immer*.

124. For example, in *Baran's Case*, 336 Mass. 342, 145 N.E.2d 726 (1957), an employee was shot on the employer's premises at the end of the work day. The bullet that struck him was fired by a teenager target-shooting nearby. The court, speaking in terms of the actual risk test, found that the employment brought the employee within the actual risk of being struck by that bullet and allowed recovery.

On the other hand, as Professor Larson states when speaking of hazards such as stray bullets for which compensation has been granted:

It will be observed that most of the hazards to which the street-risk category has thus been extended are "neutral" sources of harm. While in most cases the award has been nominally based on an extension of the street-risk classification, it is possible to argue that the end product of this extension process will be a realization that the positional-risk principle is really behind these holdings.

1 A. LARSON, *supra* note 2, § 9.50 (1978). Professor Larson goes on to point out by footnote that: "If a court suspects this, and at the same time is determined not to accept the positional-risk doctrine in any guise, the result may well be a denial of compensation." *Id.*, n.58.

125. 207 Va. at 728, 152 S.E.2d at 259 (1967). Of course, it could be argued that a truck driver, by the fact that his job keeps him on and beside the highway to a far greater extent

Likewise the *Baggett* decision may be read to say that compensation was denied because the stray bullet encountered there was not one of the "hazards of highway travel."

#### D. *Employees Injured While Attending to Personal Needs*

Employees injured at work while attending to purely personal needs have generally been compensated despite the personal nature of the activity. In *Bradshaw v. Aronovitch*,<sup>126</sup> an employee climbed out onto the back of a moving delivery truck to get a soft drink in spite of the driver's warning to wait until the next stop. After disregarding this advice, the employee fell to his death. The court held that acts of personal comfort and convenience contribute to the furtherance of work and are, therefore, incidental to work and ultimately contribute to the benefit of the employer. Noting that the employer had previously allowed employees to take drinks from the truck when they were thirsty and that the decedent's disregard of the driver's warning was not sufficient to place the decedent outside the scope of his employment, the court awarded compensation.

In a subsequent wrongful death case, *Ravan Red Ash Coal Co. v. Griffith*,<sup>127</sup> the Virginia Supreme Court reaffirmed its adherence to this personal needs doctrine by stating:

It is well settled that where an employee stops work for a short while to satisfy his physical needs—such as to take a drink of water or to go to a near-by toilet on the premises of the employer,—he is still in the master's employment and is entitled to all of the benefits of the Workmen's Compensation Act.<sup>128</sup>

Injuries sustained while fulfilling personal needs during lunch and approved work breaks may also be compensable if the em-

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than members of the general public, is exposed to the risk of gunfire in rural hunting areas to a far greater degree than are members of the general public. Truck drivers were expressly stated to be in the category of persons the court sought to protect when it first adopted the actual risk test in street cases. See *Dreyfus & Co. v. Meade*, 142 Va. 567, 576, 129 S.E.2d 336, 338 (1925).

126. 170 Va. 329, 196 S.E. 684 (1938).

127. 181 Va. 911, 27 S.E.2d 360 (1943).

128. *Id.* at 922, 27 S.E.2d at 365.

ployer is ultimately benefited. For example, in *Jenkins v. Marval Poultry Co.*,<sup>129</sup> an employee received compensation for injuries incurred while crossing the street to a company-operated cafeteria for an approved work break.<sup>130</sup> Even the activity of smoking has been recognized to be important to a claimant's personal needs, and compensation has been awarded to some employees injured while smoking at work.<sup>131</sup>

### E. *Employees Injured While Engaging in Social and Recreational Activities*

The rule pertaining to injuries received while involved in recreational activities on the employer's premises was stated by the Industrial Commission in *Shaffer v. Stephens*:<sup>132</sup> "Recreational activities on the premises at a time closely related to working hours and involving some concurrent benefit to the employer are incidents of the employment, and injuries while engaged therein arise out of and in the course of employment." In that case, a resort's summer employee was injured while using the swimming pool. The claimant recovered for his injuries because use of such facilities served as an inducement to attract summer help. Also, he was still on call at the time of his injury, and he was using the pool at a time when he was entitled to do so.

The most important aspect of analysis in this area seems to be the benefit derived by the employer and not whether the accident happened on the premises. For example, compensation has been allowed by the Commission for an injury received in an off-premises baseball game by an employee excused from work to play in

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129. 57 O.I.C. 192 (1977). See also *Giddens v. Van Kesteren*, 57 O.I.C. 131 (1976) (compensation allowed for accident on employer's premises during lunch or dinner break); *Washington v. Glisson Masonry Corp.*, 49 O.I.C. 329 (1967).

130. However, compensation will be denied if it is shown that the claimant abandoned his employment prior to his injury. In one case, compensation was denied to a workman who claimed he was injured while going to pick up mining parts for his employer. However, the Commission found evidence that the employee had been drinking and had left work with no contemplation of returning to work-related activities. *Fleming v. F & F Coal Co.*, 53 O.I.C. 95 (1971).

131. See *Price v. Miller*, 51 O.I.C. 221 (1969) (glove caught fire when claimant lit his cigarette); *Young v. Manpower, Inc.*, 50 O.I.C. 355 (1968) (claimant injured while searching for cigarette).

132. 36 O.I.C. 425, 426 (1954).

the game. Although the teams were organized by employees themselves, their uniforms were purchased by the employer's supplier and the company name displayed on the uniforms.<sup>133</sup>

Similarly, an employee's ability to obtain compensation for an injury received while going to or returning from a social function away from the employer's premises will depend on whether the employee's attendance is so work-related as to constitute a special errand for the employer. This position was taken by the Industrial Commission in *Rogers v. Beneficial Finance Co.*,<sup>134</sup> where the claimant was injured on his way home from a company-sponsored awards dinner. Although there was no evidence that employees were specifically told to attend the dinner, it was clear that they were expected to attend. Thus, the Commission found the dinner to be work-related and held that there was a connection between the employment and the motivation to attend the dinner.

[A]ttendance at the dinner party was tantamount to a special errand or special service and the journey from claimant's home to the dinner party and the return trip to his home, necessary in order to attend the function, was itself a part of the service or special errand and, therefore, is compensable.<sup>135</sup>

The Virginia rule is in accord with the position advocated by Professor Larson. "If the activity, although not an integral part of the job, is in effect required, it is clear enough that the employer has brought the activity within the employment."<sup>136</sup>

#### F. *Employees Injured by Fellow Workers' Acts of Play*

Injuries received as a result of horseplay at the workplace gener-

133. *Watson v. Giant Open Air Market*, 55 O.I.C. 368 (1972). It should be noted that the morale of employees, standing alone, has been held not to constitute sufficient benefit to the employer to warrant imposing workmen's compensation liability:

If indeed the employer received any benefit from the activity, it would be in the area of morale, which in our opinion is a passive benefit which could not be relied upon by the employer, since the employer exercised no control over who attended, who did not attend, or the conditions of attendance.

*Andrews v. Schoolfield Bank & Trust Co.*, 55 O.I.C. 9, 10-11 (1973).

134. 52 O.I.C. 216 (1970).

135. *Id.* at 218.

136. 1A A. LARSON, *supra* note 2, § 22.22 (1979).

ally fall within one of two categories. The first consists of injuries sustained by a person actively participating in the horseplay. The second consists of injuries sustained by a person not a participant in the horseplay. In Virginia, as in most jurisdictions, injuries in the second category are compensable while those in the first category are not.<sup>137</sup>

In *Henry v. Henry*,<sup>138</sup> several employees were on the roof of a house repairing a chimney. During a break, they began spraying each other with soft drinks and one fell to his death. The Commission held that the death did not arise from the employment even though it occurred during normal working hours. This holding denying compensation appears to be based in part on the theory that, by engaging in this activity, the employee had abandoned his employment. As stated by the Commission, "[t]he injuries arose from a voluntary act on the part of the deceased which was wholly unnecessary to his employment and was not in the advancement of the interest of the employer."<sup>139</sup> Using the same theory, the Commission has denied compensation for an arm injury caused by "Indian wrestling." Again, the Commission held that such activity was voluntary and not in the interests of the employer.<sup>140</sup>

The Commission earlier made its position clear in *Srickner v. Appalachian Wood Preservers*.<sup>141</sup> There, as a result of an employee being injured, the employer advised all plant employees that any further horseplay would result in dismissal. In spite of this directive, the claimant climbed a wall for the purpose of playing a practical joke. He fell and was injured. The Commission found: "The abandonment of the employment was extensive and complete, and must be treated in the same manner as an abandonment of the employment for any other personal purpose. . . ."<sup>142</sup> In another case where an employer had given orders to cease horseplay prior to the claimant's injury, the Commission denied compensation solely on the general rule that such injuries are not

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137. See generally 1A A. LARSON, *supra* note 2, §§ 23.00-.66.

138. 41 O.I.C. 74 (1959).

139. *Id.* at 75.

140. *Spitzer v. Intervestor's, Inc.*, 54 O.I.C. 354 (1972).

141. 35 O.I.C. 38 (1969).

142. *Id.* at 80.

compensable. Again, the claimant was a participant and instigator in the horseplay.<sup>143</sup>

When the claimant is not a participant in the activity, the Virginia position is that resulting injuries are compensable. In one case, a fellow employee struck the claimant on his side. Although there was no intent to injure the employee, serious injury resulted. The Commission found that the claimant was not a participant and that, even though the injury occurred in the spirit of play, it was accidental and compensable.<sup>144</sup> Similarly, compensation was awarded to a gas station attendant injured when a customer drove a car into him. The Commission found it was done in horseplay and that the claimant neither encouraged nor participated in it.<sup>145</sup>

There is one major exception to the rule that the instigator or participant in acts of horseplay may not recover. If it can be shown that horseplay had become an incident of the employment which the employer was aware of or acquiesced in, resulting injuries are compensable. In *Henry* the Commission stated: "If it were shown that the custom of engaging in horseplay was known to or indulged by the employer we might find an acquiescence on which to bottom an award."<sup>146</sup>

### G. *Employees Injured by Tortious Conduct by Third Parties*

When an employee is injured during the course of his employment from an assault or battery by a third party, the issue is whether such assault or battery arises out of the employment. For purposes of the Workmen's Compensation Act, both assault<sup>147</sup> and murder<sup>148</sup> have been held to be accidental in nature. In order for a claimant to be compensated, he must show that the assault or battery was directed towards him because of the employment or because he was an employee. Since the burden of proof is on the claimant, his case will fail if it is just as probable that the assault or battery resulted from a cause not arising out of the

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143. *Carr v. Sterling Development Corp.*, 51 O.I.C. 38 (1969).

144. *Miller v. Burger King*, 52 O.I.C. 175 (1970).

145. *Flournoy v. East Coast Oil Corp.*, 54 O.I.C. 125 (1972).

146. 41 O.I.C. 74, 75 (1959).

147. *Continental Life Ins. Co. v. Gough*, 161 Va. 755, 172 S.E. 264 (1934).

148. *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 46 S.E.2d 392 (1948).

employment.<sup>149</sup>

In one case,<sup>150</sup> the Commission denied compensation to a claimant who was severely injured by unknown assailants who fired on the claimant and a companion with a shotgun and a .38 caliber pistol. The claimant had just parked his car in front of a private residence where he had gone to recover goods previously stolen from his employer. The Commission held that the employee had failed to show a relationship between the assault and the employment, since both assailants and the purpose of the assault were unknown.

Compensation will be allowed, however, when the claimant can establish an appropriate causal relationship.<sup>151</sup> As in many other areas of workmen's compensation law, recovery hinges on the strength of the claimant's evidence. For example, in *Cunningham v. Commonwealth*,<sup>152</sup> a district court judge was slain by an insane man. The Commission held that the slaying arose out of the employment on the basis of evidence showing premeditated murder. The judge had convicted his slayer of speeding a month prior to the shooting.<sup>153</sup> Similarly, as discussed previously,<sup>154</sup> the Virginia Supreme Court awarded compensation in *Graybeal v. Board of Supervisors*<sup>155</sup> to a Commonwealth's Attorney who was injured by a bomb placed on his automobile, allegedly by a parolee whom Graybeal had successfully prosecuted years earlier.

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149. *Id.* at 306, 46 S.E.2d at 395.

150. *Freeman v. Standard Furniture Co.*, 57 O.I.C. 125 (1976).

151. Even mental problems resulting from an assault are sometimes compensable. A 52-year-old woman developed nervous disorders because of a holdup in the motel where she worked. The medical evidence showed she would be unable to return to work anywhere that a robbery might occur. *Huzzey v. Merrimac Motel Corp.*, 55 O.I.C. 187 (1973). *See Willier v. Arlington Trust Co.*, 55 O.I.C. 379 (1973) (traumatic neurosis brought on by head injury received during bank robbery).

152. 57 O.I.C. 92 (1976).

153. *See also Walters v. Safeway Stores, Inc.*, 56 O.I.C. 324 (1975) (store manager shot and killed by three men whom he had earlier told to be quiet while in store); *Alexander v. Frederick Place Apartments Management*, 56 O.I.C. 4 (1974) (groundskeeper assaulted after apprehending a youth who was vandalizing cars); *Perkins v. East End Cab Co.*, 55 O.I.C. 275 (1973) (cab driver shot while defending himself against a robber).

154. *See note 98 supra* and accompanying text.

155. 216 Va. 77, 216 S.E.2d 52 (1975).

#### H. *Employees Injured Through Aggravation or Acceleration of a Pre-Existing Condition*

If, in the course of his employment, a person suffers an accident which aggravates or accelerates a pre-existing condition personal to that employee, Virginia has long held that the resulting injury arises out of the employment and is compensable. As stated in *Liberty Mutual Insurance Co. v. Money*:<sup>156</sup>

As a general rule, the pre-existing physical condition is immaterial if the injury is proximately caused by an accident arising out of and in the course of the employment. The fact that the accident of itself would not have been sufficient to cause the injury in the absence of a pre-existing disease is no defense, for the employer takes the employee as he finds him, and if the accident accelerates or aggravates a pre-existing diseased condition, the injured party is entitled to compensation, while on the other hand an injury to the natural progress of the disease itself will not warrant a finding that the injuries were due to an accident.<sup>157</sup>

In *Lilly v. Shenandoah's Pride Dairy*,<sup>158</sup> the decedent, a milkman, suffering from a heart condition which may have been congenital, suffered a heart attack while lifting and unloading cases from his delivery truck. This precipitated a second and fatal heart attack more than nine months later. The court, after determining that death was caused by an accident covered by the statute, applied the *Liberty Mutual* test described above and awarded death benefits to the employee's dependents.

The compensability of these types of claims very often turns on the persuasiveness of the claimant's medical evidence. "Whether

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156. 174 Va. 50, 4 S.E.2d 739 (1939).

157. *Id.* at 55-56, 4 S.E.2d at 741 (quoting 1 SCHNEIDER'S WORKMEN'S COMPENSATION LAW 952 (1941)). Similarly, in *Rogers v. Williams*, 196 Va. 39, 42, 82 S.E.2d 601, 602-03 (1954) the court, quoting *Justice v. Panther Coal Co.*, 173 Va. 1, 6-7, 2 S.E.2d 333, 336 (1939), stated:

When it is established that an accident to an employee activates an undeveloped and dangerous physical condition with mortal consequences, such accident is properly considered the proximate cause of the fatality. Causal connection is established when it is shown that the employee has received a compensable injury which materially aggravates or accelerates a pre-existing latent disease which becomes the direct cause of death.

158. 218 Va. 481, 237 S.E.2d 786 (1977).

the employment aggravated, accelerated, or combined with the internal weakness or disease to produce the disability is a question of fact, not law. . . ."<sup>159</sup> Where the claimant can produce the necessary evidence as to causation, recovery is allowed.<sup>160</sup> Where a claimant cannot establish the necessary relationship between employment and his condition, compensation is denied.<sup>161</sup>

A major exception to this doctrine exists where the claimant misrepresents his pre-existing condition to the employer when the employment relation is established. In a well-reasoned opinion, where an employee had falsely stated on a job application that he had no previous back problems, the Commission made its position clear in holding:

Under the Virginia Workmen's Compensation Law, the employer takes the employee as he is and if the employee is suffering some physical infirmity, which is aggravated by an industrial accident, the employer is responsible for the end result of such accident. Under such circumstances, there is compelling reason for the employer to ascertain the physical condition of the prospective employee before entering into the employment contract. If material misrepresentations as to his physical condition are made by the prospective employee to the prospective employer and employment is afforded on

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159. 1 A. LARSON, *supra* note 2, § 12.20, at 3-316.

160. The cases are numerous. For example, a claimant suffering from multiple sclerosis was allowed compensation for a back injury he suffered while lifting a bag of groceries in *Bradshaw v. Giant Food, Inc.*, 57 O.I.C. 47 (1977). The medical evidence showed the claimant to have pre-existing weakness affected by the industrial accident. In *Cutler v. L.J. Hoy, Inc.*, 57 O.I.C. 98 (1976), the employer filed an action to cease payment of benefits to an employee whose continuing disability the employer claimed was due to a pre-existing arthritic condition. The employee had originally been injured when he fell thirty feet and landed on a hammer he was carrying in his pocket. The Commission held that: "It is clear from the evidence that if the effects of this injury alone are not disabling, then they have aggravated a pre-existing condition which now renders the claimant totally disabled." *Id.* at 99. Similarly, compensation was allowed a mechanic whose fall at work resulted in a relatively minor trauma. The claimant was able to show that this minor injury caused the acceleration of a serious hip disease and resulted in surgery. *Davis v. Glebe Auto Mkt.*, 55 O.I.C. 120 (1972).

161. Compensation was denied in *Piver v. City of Norfolk/Botanical Gardens*, 57 O.I.C. 293 (1976), because claimant's medical evidence was insufficient to show aggravation of the pre-existing condition by a minor trauma sustained at work. *See also* *Burger v. Emmett Memorial Hosp.*, 55 O.I.C. 49 (1973) (compensation denied for torn cartilage in knee where evidence showed the knee had been locking and giving way for some time previous to accident).

the basis of misrepresentations to the detriment of the employer it is only right and just that compensation benefits be denied.<sup>162</sup>

This rule was applied in *Alexander v. W. N. Jackson Co.*,<sup>163</sup> where a claimant was denied recovery in part because he had denied having any physical handicap or prior back problems on his application for employment. In fact, the claimant was actually receiving veteran's disability benefits for partial disability in his back and one leg.

### I. *Employees Injured Through Idiopathic Falls*

An idiopathic fall is one which is caused by some personal disease or weakness of the claimant. Although generally held to be non-compensable, an injury caused by this type of fall can be compensable if it is shown that the claimant's employment contributed to the risk or aggravated the fall.<sup>164</sup>

In *Immer & Co. v. Brosnahan*,<sup>165</sup> the claimant was injured while en route to a doctor for follow-up care of a compensable injury. A vascular condition caused him to black out while driving and an accident resulted. Analogizing this situation to an idiopathic fall, the court said: "An idiopathic fall injury generally is held compensable where the employee's physical condition unites with some hazard of his employment to cause the accident."<sup>166</sup> The court held that, because the claimant was under a statutory duty to accept the medical treatment,<sup>167</sup> the hazards were combined with the

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162. *Hawkins v. Lane Co.*, 49 O.I.C. 144, 147 (1967).

163. 55 O.I.C. 1 (1973).

164. See *Akers v. Virginia Maid Hosiery Mills, Inc.*, 57 O.I.C. 1 (1975); *Ashby v. Richmond Comm. Action Program, Inc.*, 52 O.I.C. 14 (1970).

165. 207 Va. 720, 152 S.E.2d 254 (1967).

166. *Id.* at 726, 152 S.E.2d at 258.

167. VA. CODE ANN. § 65.1-88 (Repl. Vol. 1980) provides:

As long as necessary after an accident the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention, and where such accident results in the amputation of an arm, hand, leg, or foot, or the enucleation of an eye, or the loss of any natural teeth or loss of hearing, the employer shall furnish prosthetic appliances, proper fitting thereof, and training in the use thereof, as the nature of the injury may require, and the employee shall accept the attending physician, unless otherwise ordered by the Industrial Commission, and in addition, such surgical and hospital

claimant's pre-existing physical condition, "there was established a causal connection between his employment and his additional injuries, and he was entitled to compensation."<sup>168</sup>

In *Eggleston v. Madison Transfer Co.*,<sup>169</sup> a laborer stacking lumber on a dolly blacked out, striking his jaw on the edge of a piece of lumber when he fell. In awarding compensation for the fractured jaw, the Commission stated: "The applicable law is that floor level idiopathic falls are not compensable. . . . But, where a condition of employment, such as the 2 x 4 which Eggleston struck causing a jaw injury, produces injury in an idiopathic fall, such injury is itself compensable."<sup>170</sup> These cases indicate that Virginia adheres to the majority position in awarding compensation for injuries caused by idiopathic falls, where "the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle."<sup>171</sup>

It is necessary to distinguish an idiopathic fall caused by a condition personal to the claimant and an unexplained fall. Where the cause of a fall is unexplained, resulting injury is compensable. For

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service and supplies as may be deemed necessary by the attending physician or the Industrial Commission.

The employer shall repair, if repairable, or replace dentures, artificial limbs or other prosthetic devices damaged in an accident otherwise compensable under workmen's compensation, and furnish proper fitting thereof.

The employer shall also furnish or cause to be furnished, at the direction of the Industrial Commission, reasonable and necessary vocational rehabilitation training services.

The unjustified refusal of the employee to accept such medical service or vocational rehabilitation training when provided by the employer shall bar the employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless, in the opinion of the Industrial Commission, the circumstances justified the refusal. In any such case the Industrial Commission may order a change in the medical or hospital service or vocational rehabilitation training.

If in an emergency or on account of the employer's failure to provide the medical care during the period herein specified, or for other good reasons, a physician other than provided by the employer is called to treat the injured employee, during said period, the reasonable cost of such service shall be paid by the employer if ordered so to do by the Industrial Commission.

168. 207 Va. at 728, 152 S.E.2d at 259.

169. 53 O.I.C. 89 (1971).

170. *Id.* at 90.

171. 1 A. LARSON, *supra* note 2, § 12.11 (1978).

example, in *Akers v. Virginia Maid Hosiery Mills, Inc.*,<sup>172</sup> a fifty-seven-year-old woman who fell face forward as she was walking towards her employer's plant was compensated for her injuries. There was no evidence as to the cause of the fall.<sup>173</sup>

#### J. *Employees Injured in a Second Accident*

If a claim is filed in a timely fashion, an injury due to a new and separate accident is compensable under Virginia law if the second accident is caused by a condition stemming from an earlier compensable accident. In *Reynolds v. Caton*,<sup>174</sup> the claimant suffered a compensable knee injury. While he was recuperating at home, the knee collapsed and he was injured further. The Commission held the second injury to be compensable. In another case, a claimant who had suffered a compensable knee injury climbed a cherry tree at his home in order to hang some plates for the purpose of scaring birds away. In the process, his injured knee gave way. To keep from falling, he grabbed a branch and dislocated his shoulder. The Commission determined that both the subsequent knee and shoulder injuries were the result of the original accident and awarded compensation.<sup>175</sup> Similarly, compensation was awarded in a case where the claimant's decedent died as the result of a fall caused by the leg brace and crutches being used because of his primary injury. The Commission held the employer liable for medical expenses accrued in the treatment of the injury caused by the fall, as well as for death benefits.<sup>176</sup>

As in other areas, a claimant's ability to recover for this type of injury often turns on the strength of the evidence establishing causation between the primary injury and the subsequent injury. In what appears to be a harsh decision, the Commission denied compensation to a sixty-year-old woman in *Jenkins v. Thalhimier Brothers, Inc.*,<sup>177</sup> because the majority felt she had not met the

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172. 57 O.I.C. 1 (1975).

173. See also *Ashby v. Richmond Comm. Action Program, Inc.*, 52 O.I.C. 14 (1970) (compensation allowed when the claimant fell without explanation while she was acting as an escort on a park walking tour).

174. 55 O.I.C. 293 (1973).

175. *Spratley v. Marlowe Tractor & Equip. Co.*, 54 O.I.C. 355 (1972).

176. *Glenn & Bostic v. Goodman Bros.*, 52 O.I.C. 110 (1970).

177. 57 O.I.C. 195 (1977).

burden of showing her fall was caused by her primary injury. The original injury was a broken hip which limited the use of the affected leg to fifty percent of its prior capability. The claimant was again injured while walking down a sidewalk when both her legs gave way, causing her to fall. The attending physician testified that he did not know why she fell but that it could have been caused by the prior injury. The majority of the Commission held the medical testimony to be no more than conjecture and denied compensation.

To summarize, a claimant must show that the second accident was caused by an earlier compensable injury. It should be emphasized that the claimant does not have to show that the second accident was in the course of and arose out of the employment. "This is so because the second injury is treated as if it occurred in the course of and arising out of the employee's employment."<sup>178</sup> When dealing with a claim of this type, it is important to clearly distinguish between a "change in condition" and a "new and separate accident." A "change in condition" is defined by statute as "a change in physical condition of the employee, as well as any change in the conditions under which compensation was awarded or terminated which would affect the right to, amount of, or duration of compensation."<sup>179</sup> With certain specified exceptions, the Industrial Commission, on its own motion or the motion of a party in interest, has twenty-four months within which to review an award concerning an employee's change in condition.<sup>180</sup> The time limit begins to run from the last day compensation was paid under the original award.

By contrast, a "new and separate accident" caused by the pri-

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178. *Leonard v. Arnold*, 218 Va. 210, 214, 237 S.E.2d 97, 100 (1977).

179. VA. CODE ANN. § 65.1-8 (Repl. Vol. 1980).

180. VA. CODE ANN. § 65.1-99 (Repl. Vol. 1980) provides:

Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Industrial Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Act, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid except pursuant to §§ 65.1-143, 65.1-144 and 65.1-151. No such review shall be made after twenty-four months from the last day for which compensation was paid, pursuant to an award under this Act, except thirty-six months from the last day for which compensation was paid shall be allowed for the filing of claims payable under § 65.1-56.

mary injury, although compensable, is one which does not "naturally flow from a progression, deterioration, or aggravation of the injury sustained in the original industrial accident."<sup>181</sup> Compensability of this type of injury is determined in an original hearing. Since the injury is the result of a new and separate accident, the employee must comply with provisions of the Act requiring written notice to be given to the employer as soon after the accident as possible.<sup>182</sup> In any case, no compensation will be paid if written notice is not given to the employer within thirty days of the accident, unless the Industrial Commission is satisfied that the claimant had a reasonable excuse for and the employer has not been prejudiced by the delay. Furthermore, the claimant has twenty-four months from the time of the accident (one year if death results) to file a claim with the Industrial Commission. Failure to do so will bar the right to compensation.<sup>183</sup>

Another important distinction between a "change in condition" and a "new accident" is that the filing provision governing changes in condition is not jurisdictional and, thus, principles of waiver and estoppel are applicable.<sup>184</sup> In marked contrast, the twenty-four month filing provision governing new and separate accidents is jurisdictional, and if claimant fails to file within the time limit, his claim will be barred.<sup>185</sup>

The importance of these procedural distinctions is demonstrated

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181. *Leonard v. Arnold*, 218 Va. 210, 214, 237 S.E.2d 97, 99 (1977).

182. VA. CODE ANN. § 65.1-85 (Repl. Vol. 1980) provides:

Every injured employee or his representative shall immediately on the occurrence of an accident or as soon thereafter as practicable give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Act prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. But no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

183. VA. CODE ANN. § 65.1-87 (Repl. Vol. 1980).

184. *Binswanger Glass Co. v. Wallace*, 214 Va. 70, 197 S.E.2d 191 (1973).

185. *Barksdale v. H.O. Engen, Inc.*, 218 Va. 496, 237 S.E.2d 794 (1977).

in the case of *Leonard v. Arnold*.<sup>186</sup> There, the claimant received a compensable injury which required him to wear a leg cast and use crutches. He later injured his back when the crutches caused him to fall on a restaurant stairway. The Industrial Commission found the claimant's subsequent injury to be a change in condition and held that the claim was timely filed. The Virginia Supreme Court reversed, holding that the claimant had suffered a new and separate accident. Thus, the claim was barred because the claimant had failed to comply with the time limitations set forth in the Act.

### *K. Employees Whose Injuries Are Aggravated by Medical Treatment*

Under the Act, an employee must accept medical treatment offered by his employer.<sup>187</sup> By statute, the employer must pay com-

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186. 218 Va. 210, 237 S.E.2d 97 (1977).

187. VA. CODE ANN. § 65.1-88 (Repl. Vol. 1980) (see note 167 *supra* for full text of the statute). The refusal to accept medical treatment will bar the employee from receiving compensation, unless the employee can show such refusal to be justified.

For example, refusal was deemed to be unjustified and the claimant's temporary award was suspended in a case where his sole reason for refusing surgery for a compensable back injury was that the surgeon could not guarantee a cure for the ailment. It was found that without surgery the claimant would probably be disabled for life and that the surgery itself was not inherently dangerous. *Horn v. Centennial Constructors, Inc.*, 57 O.I.C. 171 (1976). See also *Joyner v. Alexandria Scrap Corp.*, 54 O.I.C. 193 (1972) (refusal unjustified where only reason for refusing surgery was that the claimant just did not want it); *Boyd v. M & B of Norfolk, Inc.*, 54 O.I.C. 28 (1972) (citing *Stump v. Norfolk Shipbuilding Corp.*, 187 Va. 932, 48 S.E.2d 209 (1948)) (refusal unjustified where claimant refused surgery, failed to keep several appointments, and discharged himself from hospital).

For cases where refusal of surgery was found to be justified, see *Horn v. Buchanan-Dickenson Dev. Corp.*, 55 O.I.C. 178 (1973) (orthopedic surgeon felt injury had healed and that surgery recommended by attending physician unnecessary); *Thompson v. United Piece Dye Works*, 54 O.I.C. 379 (1972) (three major back operations had previously failed to correct problem and a zero percent chance of total recovery existed, even if additional surgery performed); *Tharpe v. Virginia Baptist Home, Inc.*, 54 O.I.C. 372 (1972) (three doctors advised against further surgery).

A failure to cooperate and follow doctor's instructions can be deemed to be a refusal of medical treatment. In *Ward v. Roses Stores, Inc.*, 51 O.I.C. 288, 289 (1969), the Commission said: "From the record a finding is made that the claimant without justification refused medical examination (i.e., did not fully cooperate) and also in effect refuses treatment (in continuing her obese condition) that necessarily precludes effective treatment."

A claimant must voluntarily refuse treatment in order for it to be unjustified. The Commission has awarded compensation to a claimant who was suffering from a compensable psychiatric disorder, refused further treatment and checked himself out of the hospital. The Commission reasoned:

The refusal of medical attention must be a voluntary action on the part of the claim-

pensation for any aggravation of a compensable injury brought about by that treatment although the employer is relieved of liability in damages. The relevant section of the Act reads in part:

[T]he employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of the preceding section (§ 65.1-88), but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.<sup>188</sup>

The statute adopts what had been the common law position in Virginia in cases where an injury is aggravated by medical treatment.<sup>189</sup>

#### L. *Employees Injured by Self-Inflicted Means*

By statute, an injury or death which is caused by an employee's willful misconduct or which is self-inflicted is explicitly noncompensable.<sup>190</sup> It appears from the opinions of the Industrial Com-

ant. We cannot hold a claimant who is suffering from a job-related emotional or mental disorder to the same standard to which a claimant not suffering from such a disorder would be held. The very illness for which the claimant is being treated removes, at least in part, the volition involved in refusing medical treatment.

Payne v. B & N Concrete Erectors, Inc., 55 O.I.C. 267, 268 (1973).

The Commission has, likewise, held that the failure to keep a medical appointment is not unjustified when the claimant had not received notice of the appointment even though her attorney had. *Hall v. Highlands Nursing Home, Inc.*, 57 O.I.C. 153 (1976). See also *McAdoo v. Meadowbrook Country Club*, 53 O.I.C. 175 (1971) (failure to keep appointment not unjustified where claimant who lived alone went to stay with mother in New York while recuperating).

The Virginia cases appear to agree with the position advanced by Professor Larson, although he uses different language in articulating that position:

The question whether refusal of treatment should be a bar to compensation turns on a determination whether the refusal is reasonable. Reasonableness in turn resolves itself into a weighing of the probability of the treatment's successfully reducing the disability by a significant amount, against the risk of the treatment to the claimant.

1 A. LARSON, *supra* note 2, § 13.22.

188. VA. CODE ANN. § 65.1-89 (Repl. Vol. 1980).

189. See *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). The statute does not, however, relieve from tort liability any physician or other third party wrongdoer who aggravates the injury.

190. VA. CODE ANN. § 65.1-38 (Repl. Vol. 1980) provides:

No compensation shall be allowed for an injury or death:

(1) Due to the employee's willful misconduct, including intentional self-inflicted injury,

mission, however, that even in the absence of this specific statute a self-inflicted injury or suicide would not be compensable under other provisions of the Act.<sup>191</sup> In one case,<sup>192</sup> an employee died in the course of his employment by participating in and losing a game of Russian Roulette. Although the employer relied on the specific statutory provision as a defense to a resulting claim for compensation, the Commission stated: "It is our opinion that even without this defense that this occurrence could not be held to have been an accident arising out of and in the course of the employment as defined in § 65.1-7, Code of Virginia, and the many cases which are annotated under this section."<sup>193</sup>

A similar but much more complicated problem arises where a compensable injury leads to a mental disorder in an employee who subsequently commits suicide. "The basic legal question seems to be agreed upon by almost all authorities: It is whether the act of suicide was an intervening cause breaking the chain of causation between the initial injury and the death."<sup>194</sup> In discussing the rules under which a suicide may be compensable, Professor Larson states:

Suicide under the majority rule is compensable if the injury produces mental derangement and the mental derangement produces suicide. The minority rule is that suicide is not compensable unless there has followed as the direct result of a work-connected injury an insanity of such severity as to cause the victim to take his own life

(2) Growing out of his attempt to injure another,

(3) Due to intoxication, or

(4) Due to willful failure or refusal to use a safety appliance or perform a duty required by statute or the willful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission and brought prior to the accident to the knowledge of the employee.

The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

191. See VA. CODE ANN. § 65.1-7 (Repl. Vol. 1980) which provides:

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

192. *Teller v. Campbell*, 54 O.I.C. 370 (1972).

193. *Id.* at 371. See also *Henley v. William King Elem. School*, 50 O.I.C. 184 (1968); *Henderson v. Basic Constr. Co.*, 47 O.I.C. 167 (1964).

194. 1 A. LARSON, *supra* note 2, § 36.10.

through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death.<sup>195</sup>

### M. *Unexplained Deaths*

When an employee is found dead in the course of his employment, and there is no evidence that the death arose out of the employment, the claimant's family and survivors would have an almost impossible task of proving a case for compensation but for the presumption established in *Sullivan v. Suffolk Peanut Co.*:<sup>196</sup>

Where an employee is found dead as the result of an accident at his place of work or near by, where his duties may have called him during the hours of his work, and there is no evidence offered to show what caused the death or to show that he was engaged in his master's business at the time, 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.

In *Sullivan*, a night watchman guarding the employer's premises was struck by a train and killed while on nearby property at a location affording a good vantage point from which to view his employer's plant. There were no witnesses and no other evidence linking his death to his job, nor was there any evidence that he was on a mission of his own. The Virginia Supreme Court, relying on substantial authority from other jurisdictions, applied the above presumption and awarded compensation.

As straightforward as the test for application of this presumption appears, it has been a fertile source of litigation before both the Virginia Supreme Court and the Industrial Commission. Ten years after *Sullivan*, the court denied compensation to a claimant by refusing to apply the presumption in *Hopson v. Hungerford Coal Co.*<sup>197</sup> In that case, the decedent was sent to cut corn on a company-owned farm. While there, he was murdered by an escapee from a nearby state hospital. After committing the murder, the escapee stole the company truck and hid it. The Industrial Commis-

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195. *Id.* at § 36.00.

196. 171 Va. 439, 444, 199 S.E. 504, 506 (1938).

197. 187 Va. 299, 46 S.E.2d 392 (1948).

sion found there was insufficient proof as to the murderer's motive and that it would be conjecture to conclude that it arose out of the employment. There were two possible theories as to the motive for murder. The first was that the mental patient wanted to steal the company truck. The truck, however, was not in the field with the decedent and could have been taken without resorting to murder. The second possible theory was that the motive for murder was unconnected to the employment. The Virginia Supreme Court held that the choice between conflicting inferences is to be drawn by the fact finder and refused to overturn the ruling of the Commission. The court distinguished *Sullivan* on the grounds that, in *Sullivan*, there was no evidence that the decedent was killed for a reason unconnected with his employment.

In *Southern Motor Lines v. Alvis*,<sup>198</sup> decided ten years after *Hopson*, the court applied the presumption in the case of a truck driver found dead under a window outside the hotel where his employment required him to stay. Applying the *Sullivan* presumption, the court relied on the absence of any evidence that the decedent had committed suicide or had been on a mission of his own when he fell from the window and awarded compensation.

The Commission also has applied the presumption in numerous cases. In *Glascok v. Nash Street Associates*,<sup>199</sup> the decedent was found dead from head injuries received when his head struck the pavement of his employer's driveway. The fall was unobserved and there was no evidence of a personal weakness. Compensation was awarded.

In what appears to be a conflicting decision with *Glascok*, the Commission refused to apply the presumption in *Burgess v. Cummins Diesel, Inc.*<sup>200</sup> There, the decedent and another employee were cutting brush when the fellow employee turned around to find the decedent lying unconscious on the ground. The employee died five days later of traumatic injury, but doctors were unable to determine the cause of this injury. The Commission held that before the presumption would arise the claimant had the burden of

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198. 200 Va. 168, 104 S.E.2d 735 (1958).

199. 49 O.I.C. 132 (1967).

200. 52 O.I.C. 48 (1970).

showing that the unwitnessed fall was the result of an accident. "In the present case there is no evidence beyond the realm of surmise and conjecture which supports the fact of accident."<sup>201</sup>

It may be possible to reconcile the two cases on the grounds that the claimant in *Glascock* presented evidence that the decedent's fall was not the result of a personal weakness, thereby indicating it was the result of an accident. In *Burgess*, apparently no such evidence was introduced.

The Commission again applied the presumption in a case where a service station attendant was found shot to death on the employer's premises.<sup>202</sup> A key taken from the body of the decedent was found, along with other evidence, in back of the station. The key was the only property taken. A suspect was subsequently arrested and pled guilty to second degree murder. Disregarding the suspect's statement of self-defense, the Commission held the evidence supported an inference that the decedent was killed while performing his duties.

Similarly, the presumption was applied in the case of a service station attendant found shot to death shortly after the station opened.<sup>203</sup> Evidence showed that the decedent had been making out a report prior to his death. The Commission thought it reasonable to believe a customer may have scared off the assailant who was never captured. In applying the presumption, the Commission made note of evidence supplied by a state police investigator that employment of this type exposed workers to a greater risk of robbery than that facing the general public.

The Virginia Supreme Court recently had the opportunity to rule again on the strength and application of this presumption in *Baggett Transportation Co. v. Dillon*,<sup>204</sup> where the presumption apparently came into conflict with the court's adherence to what it terms the "actual risk" test.<sup>205</sup> In *Baggett*, as discussed earlier in section C, a truck driver was found dead next to his employer's

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201. *Id.* at 51.

202. *Jenkins v. Houser*, 54 O.I.C. 185 (1972).

203. *Rasnake v. Kayo Oil Co.*, 57 O.I.C. 298 (1976).

204. 219 Va. 633, 248 S.E.2d 819 (1978).

205. *Id.* See the preceding discussion of *Baggett*, note 118 *supra* and accompanying text. See also the preceding discussion of actual risk test, note 111 *supra* and accompanying text.

truck by his co-driver who had been asleep in the cab of the truck. The cause of death was a chest wound caused by a .22 caliber bullet. The truck had been parked near the exit ramp of a temporarily closed rest area on an interstate highway. Evidence indicated that the driver may have been in the process of adding motor oil to the truck's engine. There was no evidence of attempted robbery or hijacking, and there was evidence indicating that two other shootings had occurred in the vicinity of the rest area prior to this incident.

The court held that, while the evidence was sufficient to establish that the decedent was in the course of his employment, the death did not arise out of the employment. In so holding, the court relied heavily on its holding in *Hopson*.<sup>206</sup> In both cases, the court seems to have placed great weight on the presence of evidence possibly indicating that the cause of death was unrelated to the decedent's employment. The court stated:

The same reason which prompted the court to hold the presumption was inapplicable in *Hopson* motivates us to decide that it is inappropriate here. In the present case, there is not an absence of contrary or conflicting evidence bearing on the question of causation. Here, inferences can be logically drawn from the circumstances that tend to support the conclusion that there was no causal connection between the death and the employment.<sup>207</sup>

For like reasons, the court distinguished *Alvis*.<sup>208</sup>

[T]he circumstances forming the basis of the presumption in *Alvis* were of sufficient strength from which the only rational inference to be drawn was that death arose out of the employment. There, the lack of evidence dictated employment of the presumption. But here the presence of evidence prevents use of the presumption.<sup>209</sup>

Thus, the *Baggett* case indicates that any evidence of a cause unrelated to employment may be sufficient to remove the case from the category where the presumption applies. Given the very

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206. 187 Va. 299, 46 S.E.2d 392 (1948).

207. 219 Va. at 643, 248 S.E.2d at 825.

208. 200 Va. 168, 104 S.E.2d 735 (1958).

209. 219 Va. at 644, 248 S.E.2d at 826.

broad rules enacted by the Commission concerning admissibility of evidence,<sup>210</sup> even remote evidence such as a report of a shooting five years earlier may be sufficient to undercut application of the presumption.

## V. CONCLUSION

The field of workmen's compensation law, with a vocabulary including the terms "statutory employer" and "actual risk" test, appears at first glance to be a specialty unto itself and a world set apart from traditional common law principles. While this area of the law does differ significantly from traditional tort concepts in its indifference to fault and negligence, it is not as alien as it might first appear. Workmen's compensation law draws upon many traditional common law areas for its analysis. For example, in determining employer status, traditional concepts of agency law control. Similarly, proof of causation, important in any negligence action, is equally important in a workmen's compensation proceeding.

Because workmen's compensation is generally the exclusive remedy for any work-connected injury, even where such injury is caused by a negligent employer or negligent fellow employee, the importance of its relationship to tort law cannot be overemphasized. Further, recoveries for claimants injured in work-related accidents can easily amount to thousands of dollars, and the prompt availability of paid medical care may be invaluable to an injured employee. For these reasons, we submit that the field is worthy of the continued interest and attention of all lawyers.

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210. Rule 1, Rules of the Industrial Commission, provides:

A hearing held by the full Commission, a Commissioner, or Deputy Commissioner shall be conducted as a judicial proceeding in that all witnesses shall testify under oath, and a record of the proceedings shall be made. The Commission will not be bound by statutory or common law rules of pleading or evidence, nor by any technical rules of practice in conducting hearings, but will conduct such hearings and make such investigations in reference to the questions at issue in such manner as in its judgment are held adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of the Workmen's Compensation Act; and to that end, hearsay evidence may be received.

